Neutral Citation Number: [2018] EWHC 807 (Admin)

Case No: CO/4519/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/04/2018

Before:

MR JUSTICE GARNHAM

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Between:

The Queen (on the application of Andrew Birks)	**Claimant**
- and –	
(1) Commissioner of Police of the Metropolis **(2) The Independent Police Complaints Commission**	**Defendants**
- and –	
Marcia Rigg-Samuel	**Interested Party**

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Hugo Keith QC and Clair Dobbin (instructed by **Reynolds Dawson**) for the **Claimant**
Clive Sheldon QC (instructed by **Metropolitan Police Solicitors**) for the **First Defendant**
Guy Ladenburg (instructed by **Independent Office for Police Conduct)** for the **Second Defendant**
Jude Bunting (instructed by **Hickman & Rose**) for the **Interested Party**

Hearing date: 22nd & 23rd February 2018

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Judgment Approved

Mr Justice Garnham:

Introduction

1. On 21 August 2008, Mr Sean Rigg died following his arrest and restraint by four officers of the Metropolitan Police Service (the "MPS") and his transport by them to Brixton Police Station. PC Andrew Birks was the most senior of those officers. On 29 May 2014, DAC Simmons of the MPS suspended the Claimant from duty, following notification by the Independent Police Complaints Commission (the "IPCC") that it intended to serve notices of investigation on him and the other officers in relation to their conduct at the time of Mr Rigg's death.

2. The present judicial review, which is the second challenge by Mr Birks to his suspension, is directed against a decision dated 19 July 2017 taken by Assistant Commissioner Taylor to maintain a refusal to permit him to resign from the MPS. At the heart of his case is Mr Birks' assertion that the refusal of the Metropolitan Police Commissioner to allow him to resign from the police, so that he can then pursue his calling as a priest in the Church of England, is unjustifiable interference with his rights under Articles 8 and 9 of the ECHR.

3. The lifting of his suspension is opposed by the Commissioner of Police of the Metropolis ("the Commissioner"), by the Independent Office for Police Conduct (the IOPC), the successor of the IPCC, and by Marcia Rigg-Samuel, the oldest sister of Sean Rigg.

The History

4. It is convenient to divide the relevant history into three parts; events prior to the handing down of the judgment of Mrs Justice Lang DBE in the first judicial review in September 2014; events between that judgment and the decision of 19 July 2017 maintaining the refusal to permit the Claimant to resign; and events thereafter.

Events before 25 September 2014

5. The first judicial review brought by the Claimant, Mr Birks, sought similar relief to that sought now, namely the quashing of a decision to refuse to lift his suspension. That case was heard by Lang J on the 18 & 19 September 2014. It is common ground, between the parties before me, that Lang J accurately set out in her judgment the history of the case until then. The judgment is reported at *R (oao Birks) v Commissioner of Police of the Metropolis* [2014] EWHC 3041 (Admin). I gratefully adopt, and do not repeat, the detail of that history. However, the following elements of the early history of this case, taken from that judgment, are particularly significant in the present context.

6. First, the Claimant first considered joining the priesthood in 2001. Second, the IPCC began an investigation into the death of Mr Rigg immediately after it was reported, but in February 2010 concluded that there was no case for the officers to answer. Third, in August 2012, an inquest jury handed down a narrative verdict in the case of Mr Rigg, which was critical of the manner in which the police restrained him and, given his history of mental illness and his declining physical condition, the care the officers showed to him. Unlawful killing and neglect had not been left to the jury.

7. Fourth, on 16 May 2013 an external review was published by a Dr Casale which recommended that the IPCC re-consider the case. Having consented to the quashing of the first investigation by this Court, the IPCC did so. Fifth, on 1 April 2014, the Claimant gave notice of his resignation from the MPS so as to enable him to take up a position as curate in the parish of Portslade. That was the culmination of a process to enable him to become a priest that Mr Birks had begun in 2009. That resignation was accepted by the Commissioner and it was agreed that the Claimant's last day of service would be 31 May 2014.

8. Sixth, on 29 May 2014, DAC Simmons suspended the Claimant under Regulation 4 of the Police (Conduct) Regulations 2004 (hereafter "the 2004 Conduct Regulations"). Regulation 4 provides:

> "*Where it appears to the appropriate authority, on receiving a report, complaint or allegation which indicates that the*

> *conduct of a police officer does not meet the appropriate standard, that the officer concerned ought to be suspended from his office as constable and (in the case of a member of a force) from membership of the force, the appropriate authority may, subject to the following provisions of this regulation, so suspend him.*
>
> *The appropriate authority shall not so suspend a police officer unless it appears to it that either of the following conditions ('the suspension conditions') is satisfied— (a) that the effective investigation of the matter may be prejudiced unless the officer concerned is so suspended; (b) that the public interest, having regard to the nature of the report, complaint or allegation, and any other relevant considerations, requires that he should be so suspended*" (emphasis added).

9. The decision to suspend him followed notification by the IPCC that it intended to serve notices of investigation under Regulation 9 of the 2004 Conduct Regulations on the Claimant and the other officers, and the filing of judicial review proceedings by Ms Rigg-Samuel challenging the Defendants' decision to accept the Claimant's resignation.

10. Seventh, on 14 August 2014 AC Hewitt decided that the suspension of the Claimant should be maintained and consent to his resignation refused. It was that decision which was the subject of a challenge before Lang J.

Events between 15 September 2014 and 19 July 2017

11. It is to be noted that Lang J's judgment was handed down on 25 September 2014, 2 years 10 months before the decision of AC Taylor, of 19 July 2017 and more than 3 ½ years before this judgment. Throughout that period, the Claimant has remained suspended from duties in the MPS. He has continued to be paid by the MPS but has been unable to work as a police officer. It is also worthy of note that an appeal from Lang J's judgment, which dismissed his claim, was not pursued by the Claimant and that, subject to one qualification relating to Art.2 ECHR, no challenge is mounted in these proceedings to Lang J's analysis of the applicable law.

12. The Claimant had been due to be ordained a deacon in the diocese of Chichester on 28 June 2014 but that ordination was cancelled as a result of his suspension. A new date for his ordination was set in June 2015 but that too had to be cancelled pending the resolution of the police disciplinary process. On 2 December 2016, the Claimant was ordained deacon and on 10 June 2017 ordained priest by the Bishop of Chichester.

13. In July 2017, the Claimant completed a degree in theology at Durham University. His further training, however, has been delayed. Even when it has been completed, in June 2018, he will not be able to apply for a stipendiary post whilst he remains employed by the MPS. He is presently only licensed to work in his parish 2 ½ days a week because of the restrictions that his non-stipendiary post places on him.

14. Progress by the IPCC in considering the case against Mr Birks has been slow in the extreme. At the time when Lang J considered this case, the Claimant had been suspended for less than 4 months. At the time I heard the case, he had been suspended for almost 4 years. It is necessary to consider with a little care the progress

of the IPCC's investigation during the period since the judgment of Lang J was handed down.

15. In October 2014, the CPS informed the Claimant's solicitors that neither PC White nor PC Harratt, two of the other officers concerned in the detention of Mr Rigg, would be prosecuted. Remarkably, given what was to follow, on 29 January 2015, the IPCC informed the Claimant's solicitors that "*We are nearing the end of our investigative actions in the case concerning the death of Sean Rigg*". On 1 April 2015, the IPCC informed the Claimant's solicitors that "*We have commenced writing the final report*". It is to be noted that, nearly three years later, the disciplinary case remains extant.

16. Mr Steven Noonan, now an Acting Deputy Director with the IOPC, sets out the history of the case in a witness statement prepared for these proceedings. He describes the chronology of the investigation which was conducted by the IPCC in accordance with the provisions of Schedule 3 to the Police Reform Act 2002. He explains that, as part of a review of the evidence in the case, the attention of investigators was drawn to the question as to how Mr Rigg had suffered certain injuries in the back of the police van on its way to Brixton police station. It was noted in November 2014, he says, that "*the issue of whether Sean Rigg was 'spinning' on his back/backside at the rear of the police van was unresolved*."

17. A further pathologist's report was sought to address that issue and further notices of investigation were served on the three officers who had been present in the back of the van with Mr Rigg (a group which did not include the Claimant, who had driven the van). They were re-interviewed. In the light of these interviews, Mr Noonan considered that it might be necessary to instruct a "body mapping expert" to prepare a report. However, it was determined that the decision whether or not to commission such evidence would be put off until a decision had been made whether the case should be referred to the CPS.

18. The process mandated by Schedule 3 to the 2002 Act required the IPCC to provide a copy of its report to the "appropriate authority", here the MPS. On 17 February 2016, the IPCC sent a final Addendum Report to the MPS. The case was also referred to the CPS. Between March 2016 and August 2017 the IPCC and the MPS engaged in a lengthy disclosure process by which the MPS would request, and the IPCC would supply, documentation which the MPS had identified as being relevant to the latter's investigation. In a review of the Claimant's suspension, dated 18 October 2016, the MPS indicated that work on its response to the IPCC report, required by Paragraph 23 (7) of Schedule 3, was continuing.

19. Meanwhile, on 15 September 2016, the CPS confirmed that no charges would be brought against any individual in relation to events surrounding the death of Mr Rigg. On 21 September 2016, the Rigg family exercised their right to a review of the CPS decision not to bring charges in respect of the detention of Mr Rigg. The decision not to bring criminal proceedings was maintained and has not been further challenged.

20. On 31 October 2016, the trial of PC White, on perjury charges arising out of the inquest into Mr Rigg's death, commenced. The Claimant was called as a witness by the Crown. On 8 November 2016 the jury returned a not-guilty verdict. Also on 31 October 2016, the Claimant was informed that the Rigg family were exercising their "Victims Right to Review".

21. On 21 December 2016, the IPCC wrote to the Claimant's solicitor indicating that the addendum report had been provided to the IPCC's deputy chair for her consideration. That letter indicated that an expert in body mechanics had been instructed. A subsequent letter, dated 20 January 2017, confirmed that the line of investigation to which the body mechanics expert's evidence related concerned those officers who were present in the back of the police van on 21 August 2008 and, accordingly, not the Claimant. Further correspondence in February, March and April demonstrated that there was a further delay in the provision of that expert's report.

22. On 2 February 2017, the Claimant's solicitors submitted a lengthy set of representations, inviting the First Defendant to allow the Claimant to resign. On 14 May 2017, a review of the Claimant's suspension referred to the fact that a final version of the body mapping expert's report was still awaited. On 23 June 2017, the IPCC wrote to the Claimant's solicitors indicating that the report had been received and further statements needed to be obtained.

23. Finally, as regards this part of the history, on 19 July 2017, AC Taylor issued the decision letter that is under challenge in these proceedings.

Events since 19 July 2017

24. Set out above is the history up to the time of the decision under challenge. It is material to note what has happened since.

25. This judicial review was lodged on 26 September 2017. On 6 November 2017, the MPS submitted its memorandum to the IPCC pursuant to paragraph 23(7) of Schedule 3 to the 2002 Act indicating that there was no case to answer against the Claimant. On 7 December 2017, the First Defendant informed the Claimant that new regulations (which enable police officers to resign and still be subject to misconduct proceedings) did not apply to him. On 7 December 2017, Assistant Commissioner Helen Ball wrote to the Deputy Chair of the IOPC asking that they "reconsider" allowing the Claimant to resign.

26. The Claimant's suspension was regularly reviewed by the MPS. In a review of the Claimant's suspension dated 5 January 2018, the First Defendant noted that the Second Defendant had made representations for the Claimant to remain suspended. In a review dated 1 February 2018, the First Defendant indicated that the Second Defendant was continuing to consider the MPS's paragraph 23(7) memorandum. On 9 February 2018, the Claimant's solicitors asked the IOPC to confirm when it would make the decision on its review on the First Defendant's memorandum. On 14 February 2018, the IOPC made its recommendation that the Claimant's conduct would amount to gross misconduct if proven.

27. On 29 March 2018, when the drafting of this judgment was at a very advanced stage, I received a Note from the Interested Party, Ms Rigg-Samuel, indicating that on 28 March 2018, the Second Defendant had directed the MPS to give effect to its recommendation, pursuant to paragraph 27(4) of Schedule 3 to the Police Reform Act 2002, and to bring disciplinary proceedings against the Claimant for gross misconduct. The Claimant's solicitors wrote to the Court to similar effect, although indicating they had not seen the terms of the direction.

28. As explained by the Interested Party, the allegations of gross misconduct are as follows:

"*a. Failure to identify Sean Rigg as a person with mental health problems and failure to ensure he was unharmed whilst he was under arrest;*

b. Failure to ensure that Sean Rigg received proper medical attention as soon as it became apparent that he was seriously ill;

c. Failure to inform the custody sergeant of information in his possession which would have informed the sergeant so that he could conduct a risk assessment whilst the detainee was waiting outside in the police van."

29. Neither the MPS nor the IOPC have contacted the Court about this development.

The Decision under Challenge

29. The Claimant's primary challenge in these proceedings was to the rationality of the decision letter of 19 July 2017. It is convenient to set out at a little length the material parts of that letter.

"*Taking each of your representations in turn my views are as follows:*

Delay and the Public Interest:

…The position in the current case is that your client has been suspended since 29th May 2014. He has therefore been suspended from duty and unable to retire for a period of just over 3 years. I accept that this is a significant period, which is ongoing without an indication of when it may be expected to end. I am also aware of the impact this is having on your client's life. However, this period has to be assessed in the context of the complexity of the matter such as disclosure problems and decisions on the part of the IPCC to conduct further enquiries at a late stage, both of which are beyond the appropriate authority's [AA] control.

I agree that the judgement in the Birks JR does not give either the IPCC or the MPS authority to act without due diligence in the progression of this misconduct matter. However, I consider that the MPS has worked hard to progress the matter and as AA I have pressed the IPCC for a determination in respect of your client's position on a number of occasions. In these circumstances I consider the MPS has acted with due diligence in this matter. The delays you have identified that are within the remit of the IPCC are beyond the control of the AA.

In order to consider the extent to which delay may have impacted on the public interest considerations relied upon as justification for your client's suspension I have considered AC Hewitt's suspension review rationale dated 14th August 2014. This was approved by the Court in the judgement in the Birks JR. My views are as follows:

As a starting point is it is generally accepted that there is a real importance in disciplinary proceedings against police officers being fully pursued and not avoided by the early resignation of officers. In my view this is an important public interest point because it has real potential to impact on public confidence in the police service and its ability to deal robustly and fairly with officers facing allegations of misconduct. I fully accept that your client's wish to resign has nothing to do with the misconduct allegations against him. He has a new career to pursue which he has been working towards for some years. However, it is the public perception that is significant here. In a society where policing is by consent public confidence is a significant issue. The importance of this consideration is reflected in the introduction of amendments to the current Police Conduct Regulations which introduced a prohibition to officers retiring or resigning whilst subject to gross misconduct allegations (regulation 10A Police (Conduct) Regulations 2012). This is an issue which is also to be developed by further amendments due towards the end of this year arising from the Policing and Crime Act 2017. In my view this highly important public interest consideration is unchanged by the period of time for which your client has been suspended.

AC Hewitt considered that the investigations into this matter and the inquest process attracted considerable interest and comment. He also assessed the case as having an "iconic status" in terms of the relationship between the black communities of London and the MPS. I agree with that assessment of the position as it was in August 2014. Furthermore, although the passage of time may have reduced the active interest in this case, I have little doubt that if it became known that one of the officers concerned was about to have his suspension lifted so that he could resign from the MPS whilst still subject to serious conduct allegations that would rekindle significant interest in this case. Such interest could adversely impact on community relations and black communities in particular.

AC Hewitt also considered that there was a public interest consideration regarding the maintenance of public order and the prevention of crime. I understand AC Hewitt's assessment to be that there was no apparent real risk of disorder or crime in the event of PC Birks' suspension being lifted at that time. That being the case I cannot see that there would be a real risk of disorder or crime now. However, he also considered there to be a persuasive argument that public confidence in the police service could be damaged by the lifting of the suspension. Again, I find myself in agreement with this for the reasons set out above in my first bullet point.

AC Hewitt was of the opinion that the police service in 2014 was operating in an environment where the accountability and integrity of the service was under considerable challenge. He also considered that the public perception of any decision to lift

PC Birks' suspension would undoubtedly fuel that challenge. In my view this challenge to the police service continues. I am therefore of the opinion that the risk of adverse public perception regarding police accountability and integrity also remains and has the potential to undermine the ability of the MPS to fight crime and maintain order.

AC Hewitt was particularly concerned that confidence amongst the black communities of London would be adversely impacted by a decision to lift the suspension in this matter. He considered this had implications far beyond this case. He considered it essential that the MPS continued to be regarded as legitimate in the eyes of every community in London. In my opinion these factors continue to be relevant despite the passage of time.

I note your reference to the case of R (Rhodes) –v- Police and Crime Commissioner for Lincolnshire [2013]. It is common ground that an officer can only be suspended in the public interest if this course is "required", which carries the implication that the public interest leaves no other course open. Bearing in mind my observations set out in the above bullet points I consider that in this case there was no other option but to suspend PC Birks. If the suspension were to be lifted there would be no means of preventing his retirement or ensuring that he faced a misconduct hearing if necessary, which could bring into play the above public interest issues.

You have asserted that your client's suspension is a device to keep the prospect of a disciplinary hearing at some unspecified point in the future alive. In broad terms this is correct. As you will be aware, this approach was supported in the judgement in the Birks JR. However, you also contend that the value of this prospect should be balanced against the delay and impact on your client's life. I will deal with the latter point at paragraph 5 below as part of the Article 8 considerations. Regarding the former, bearing in mind that your client could only be suspended on public interest grounds and my views regarding how public interest considerations have been impacted by delay (as set out in the bullet points above) I consider the balance to fall in favour of the need to keep the possibility of a misconduct hearing alive.

<u>Your client's position:</u>

(i) I am aware of the level of your client's involvement in this matter. However, how the IPCC deal with officers concerned in independent investigations is a matter for them and is not something that I have any control over.

I have noted your representations summarised at 2(ii). However, again this is a matter within the IPCC's remit and is not something that I have any control over……

Article 8:

It is common ground that Article 8 is engaged in the circumstances of this case. I am fully aware of and understand the impact that suspension has had on your client's personal life, including the inability to pursue his vocation with the Church and the effect on his health, including his mental health. Regarding his new career I understand that this is no longer completely on hold in that your client has now been ordained as a Deacon and is working in a non-stipendiary capacity. However, I have to say that I remain very sympathetic to his position.

It is also accepted that the decision to suspend PC Birks has interfered with this Article 8 rights. However, as Article 8 is a qualified right I understand that interference can be justified in certain circumstances. Those circumstances in this instance appear to be:

(a) interference for the prevention of crime or disorder; and

(b) interference for the protection of the rights and freedoms of others.

I accept that the significant length of time for which PC Birks has been suspended has the potential to impact on the Article 8 consideration. The longer the suspension goes on for the greater the impact on Article 8 will be. For example, the stress of living with the uncertainty regarding the future is likely to increase over time, as will the damage to PC Birks' new career. I have therefore carefully considered the justification for this interference.

In my view the justification under option (a) has diminished with time. This is on the basis that the potential for actual disorder or crime arising from the possible lifting of the suspension was not considered high in 2014 and is likely to be lower still in 2017. However, bearing in mind the seriousness of this case, I do consider that the risk of adverse public perception regarding police accountability and integrity remains high. This being the case the potential to damage public confidence and thereby undermine the ability of the MPS to fight crime and maintain order also remains high in my view. If public confidence is damaged then effective community policing is also likely to be damaged.

In my view option (b) will apply to the Article 2 rights of the Rigg family. The family have not made any representations regarding the suspension issue. However, they have not had sight of your client's representations and it is known that they wish to see all officers concerned face misconduct proceedings.

I have noted your reference to the case of AB (a child, suing by her litigation friend, BB) –v- Commissioner of Police of the Metropolis and (1) FE16 and (2) IPCC [2016]……

Article 2:

This was fully considered in the judgement in the Birks JR. At the time of the judgement in that case it was not known if there would be criminal proceedings and the IPCC re-investigation had yet to complete. In these circumstances the Honourable Mrs Justice Lang indicated that misconduct proceedings may be necessary to meet the Article 2 investigative requirements. I understand this to be because if there was no trial the only means of achieving the "punishment of those responsible" for the death would be through misconduct proceedings.

The situation is therefore complex. You have referred to the limitations of the misconduct proceedings, but in my view these may well be addressed if the misconduct proceedings and the inquest are taken together to satisfy the Article 2 investigative requirements.

I have noted your detailed representations regarding whether misconduct proceedings could satisfy the Article 2 requirements, including the case law referred to. I note that most, but not all, of the case law was considered in the Birks JR. It is noted in particular that the case of Da Silva –v- United Kingdom post-dates the JR hearing. On balance I consider the arguments that misconduct proceedings may be required carry most weight. This is on the basis that they will, if appropriate, be capable of dealing with the punishment of officers concerned in the absence of any criminal culpability.

I accept that the most severe punishment would be dismissal and that your client wishes to leave the MPS in any event, but dismissal is non-the-less a form of punishment that would otherwise be lacking from an Article 2 perspective. When the misconduct proceedings are taken together with the inquest, in which the family were fully involved, the Article 2 requirements may therefore arguably be met. It is clear from the Birks JR proceedings and your representations that there are contrary arguments, but this is my view in the circumstances of the case as they currently stand…

The IPCC view:

The IPCC have been provided with a copy of your representations and have confirmed that their views regarding your client's suspension remain unchanged. They are firmly of the opinion that the suspension should continue in the public interest.

Conclusion:

I have carefully considered your representations and weighed up the competing interests and convention rights in this matter. I have considerable sympathy for PC Birks' position and the significant impact that delays in this case are having on his life. However, the circumstances of this case are extremely serious and, taking into account the gravity of the situation and the public interest issues identified above, my view is that the balance continues to fall in favour of maintaining your client's suspension. Accordingly my decision is that the suspension will not be lifted at this time."

The Issues

30. I have the benefit of the detailed and helpful skeleton arguments from Hugo Keith QC and Clair Dobbin on the behalf of the Claimant, Clive Sheldon QC on behalf of the Commissioner, Guy Ladenburg on behalf of the IOPC and Jude Bunting on behalf of the Interested Party, Marcia Rigg-Samuel. I am grateful for their assistance.

31. Those skeleton arguments set out in detail the nature of the arguments advanced and developed orally at the hearing. It is not necessary to repeat that detail here. It suffices to observe that the following five issues emerged as crucial to the resolution of this case:

    (i) Delay;

    (ii) Art. 2 ECHR;

    (iii) The Rationality of the First Defendant's Approach;

    (iv) The Competing Public Interests; and

    (v) The free-standing breaches of Art. 8 and 9.

Discussion

Delay

32. The delay in determining whether or not the Claimant should face disciplinary charges has been extraordinary and indefensible. In the witness evidence served on behalf of the Second Defendant, there was an attempt to explain and excuse the delay. But once its nature and extent were exposed during Mr Keith QC's submissions, the Second Defendant no longer attempted to suggest that the delay was defensible. On the contrary, Mr Ladenburg, for the Second Defendant, conceded that his clients were plainly in breach of their duty contained in Section 10 of the Police Reform Act 2002 to be both effective and efficient. He acknowledged that, on this occasion, the Second Defendant was very far from efficient.

33. The total time that passed between the judgment of Lang J and the taking of the decision under challenge itself speaks volumes about the IPCC's efficiency. Even allowing for the complex arrangements provided for by Schedule 3 to the 2002 Act, and the fact that another body, the MPS, had a significant part to play in the process, the IPCC's conduct of these proceedings was grossly inefficient.

34. The fact that the first IPCC investigation had been quashed by consent because it was inadequate, plainly underscored the need for the second to be effective. But that could not possibly justify the delay in this case. The fact that Lang J said at paragraph 53 of her judgment, that she "*recognised that the Claimant could be required to remain suspended for an indefinite period (which I accept could be as long as 2-3 years if the IPCC finds that there is a case to answer)*" did not mean that the IPCC was entitled to take 2-3 years to get to the point where it could decide whether there was a case to answer.

35. The whole character of the process carried on by the IPCC as described by Mr Noonan in his witness statements appears one-dimensional. Although Mr Ladenburg sought to argue that this was not the case, the impression left by the evidence suggests that the investigation was conducted in a linear fashion, one line of enquiry commencing when another had been completed. The worst example of that was provided by his evidence as to the commissioning of the body map expert to deal with evidence as to what happened in the back of the police van. Nine months had passed since the investigators had noted in November 2014 that the issue of whether Mr Rigg was 'spinning' before Mr Noonan suggested that body mapping experts might be needed. Despite the fact that that serious delay had already occurred, the IPCC decided to defer the decision as to whether or not to commission body mapping experts until the rest of the investigation was completed and a referral was made to the CPS. No adequate explanation has been given for that.

36. A further indefensible source of delay was the implicit decision that Mr Birks' case could only be dealt with along with those of the other three officers. At first blush, that might appear entirely sensible, and if the whole investigation had been conducted in a timely manner such a course would have been reasonable. But the investigation into the spinning evidence did not concern Mr Birks and I can see no justification, once it was appreciated how much that was going to delay the process, for the IPCC not severing Mr Birks' case from that of the other officers. Had it done so, I have little doubt that a decision could have been taken whether or not disciplinary charges could be proffered against Mr Birks by sometime in 2016, if not before.

37. I note in this regard that new notices of investigation were served on the officers concerned with events in the back of the van in the first half of 2015 and interviews with them were concluded on 16 July 2015. It is true there was an element of alleged misconduct common to all four officers but I reject Mr Ladenburg's submission that it was "not appropriate" to sever the cases given the very substantial delay occasioned by the need to investigate events in the back of the van.

38. Delay of this nature would be unacceptable in any circumstance. But it was particularly so given that the first investigation had to be quashed and that the delay served to prolong the Claimant's suspension and lengthen the period of interference with his Article 8 and 9 rights.

39. I turn at paragraph 70 below to consider the significance of this delay in the legal analysis.

Article 2

40. I heard detailed submissions from all counsel as to the requirements imposed by Art. 2 ECHR in circumstances such as the present. I was taken to numerous domestic and Strasbourg authorities. The following propositions can be drawn from the case law as

to the obligations imposed on a contracting state where an individual dies as a result of the use of force by agents of the state; (in each case the emphasis is mine).

i) The state must secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions; (see for example *Mastromatteo v Italy*, October 24, 2002 at [67] and [89]; and *Menson v United Kingdom* (2003) 37 E.H.R.R. CD220*)* .

ii) The judicial system required by Article 2 may, and under certain circumstances must, include recourse to the criminal law. (*Calvelli v Italy* (32967/9) 17 January 2002 at [51]); and the domestic legal system must have the capacity to enforce criminal law against those who have unlawfully taken the life of another (*Nikolova v Bulgaria).*

iii) There must be proper procedures for ensuring the accountability of agents of the State, so that the state can maintain public confidence and allay legitimate concerns which arise from the use of force, (*Jordan v UK* [144], *Amin* [75]);

iv) Art. 2 does not entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence (*Oneryildiz v Turkey* (2005) 41 EHRR 20).

v) The criminal proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law; the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts (*Öneryildiz v Turkey* (2005) 41 E.H.R.R. 20 [96]).

vi) Public scrutiny of police investigations is not an automatic requirement, but there must be a sufficient element of public scrutiny of the results of the investigation to secure accountability in practice (*Jordan v UK* [121] and [109]).

vii) Where the infringement of the right to life is not caused intentionally, a criminal law remedy may not be necessary; civil law or disciplinary measures may be sufficient If the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation to set up an effective judicial system does not necessarily require criminal proceedings to be brought in every case (*Vo v France* (2005) 40 EHRR 12 at [90]). In certain circumstances, such as medical negligence cases, it may be satisfied if civil, administrative or even disciplinary remedies were available to the victims (*Vo* and *Calvelli and Ciglio* [2001 ECHR 3, at [51])

viii) Art. 2 requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by agents of the State (*McCann v UK* (1995) 21 EHRR 97 [161]; *Çakici v Turkey* (2001) 31 E.H.R.R. 5 at [86]; *R v SSHD ex p Amin* [2003] UKHL 51[2004] 1 A.C. 653).

ix) Investigation is required in order to secure the effective implementation of the domestic laws which protect the right to life and, in cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility (*Anguelova v Bulgaria:* (2004) 38 E.H.R.R. 31 , at [137 Jordan v UK [2001] 37 EHRR 52).

x) The investigation must be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible, but this is not an obligation of result but of means. *Nachova v Bulgaria* (2006) 42 E.H.R.R. 43 at [113] *Ramsahai v Netherlands* [2008] 46 EHRR 43 at [321

41. It is beyond dispute that there are in place in this country effective criminal law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery. In my judgment, it is plain that the machinery of police investigation and the work of the criminal courts have, at the very least, the capacity to enforce criminal law against those who have unlawfully taken the life of another. None of this was in issue. Furthermore, it was common ground before me that, in England and Wales, an inquest is the means by which the state ordinarily discharges the procedural obligation under Article 2 to investigate deaths (see *R v Middleton* [2004] UKHL 10 at [20]).

42. There was substantial debate, however, as to whether Art. 2 also required the institution of disciplinary proceedings in fatal cases involving state agents, to ensure their accountability, even where there had been a *Middleton* inquest and an adequate criminal investigation. Mr Bunting and Mr Sheldon QC submit that, on facts such as the present, it does; Mr Keith QC says it does not.

43. Mr Bunting, in particular, placed reliance on *Vo v France* and *Janowiec v Russia* (2014) 58 EHRR 30. *Vo* concerned allegations of medical negligence against a doctor which led to damage to the applicant's amniotic sac leading in turn to the termination of her pregnancy. The doctor was charged with causing unintentional injury but was acquitted on the grounds that the foetus was not, at that stage, a human person. The acquittal was ultimately upheld by the Court of Cassation. The applicant claimed that Art. 2 had been violated and claimed just satisfaction. At paragraph 90 the court held:

> *"Although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently, the Court has stated on a number of occasions that an effective judicial system, as required by Art.2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Art.2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence, "the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged".*

44. *Janowiec* concerned the murder in the Katyn Forest of Polish soldiers by Soviet troops during World War 2. At paragraphs 142 – 143, the Court said:

> "*142 ...The alleged violation of the procedural obligation consists in the lack of an effective investigation; the procedural obligation has its own distinct scope of application and operates independently from the substantive limb of art.2..."*
>
> *143 The Court further considers that the reference to "procedural acts" must be understood in the sense inherent in the procedural obligation under art.2…namely acts undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party ..."*

45. In neither of these authorities, however, is there expressed to be a requirement on contracting states to maintain an additional, secondary, mechanism for holding agents of the state to account where, following a proper investigation, criminal sanctions are not found to be justified. In *Vo,* where criminal remedies were not relevant, the existence of a civil remedy sufficed; in *Janowiec* criminal, civil, administrative or disciplinary proceedings were regarded as potentially sufficient.

46. In fact, there is nothing in the Strasbourg authorities to which I was taken, to support the proposition that where there is a *Middleton* inquest, a proper criminal investigation and an unchallenged decision by an independent prosecuting authority not to prosecute, that there still needs to be disciplinary proceedings in order to meet the requirements of Art. 2.

47. In my judgment, the critical issue is whether there has been proper and careful scrutiny of the circumstances of the case, scrutiny of a type which was capable of holding those responsible for the death to account. Here there has been such scrutiny by means of the police investigation, the inquest and the CPS review which led to the decision not to prosecute. There is nothing on the facts of the present case to suggest that there was a failure to investigate. Nor can it realistically be said that there was here tolerance of, or collusion in, unlawful acts, or the appearance of the same.

48. It is plainly necessary that there should be in place procedures for ensuring the accountability of state agents. But in my judgment, it is implicit in the case-law that what is required in circumstances such as the present is accountability for criminal conduct potentially causative of a death, rather than for breaches of domestic regulations directed at maintaining higher level professional standards. The position might be different if there was no applicable criminal law provision or no proper criminal investigation. But that is not the present case.

49. In my judgment, an inquest that complied with the requirements of *R v Middleton*, and which was conducted as was the inquest into Mr Rigg's death, provided the necessary degree of public scrutiny and met the State's investigative obligation into the circumstances of the case. There is no challenge here to the adequacy of the police inquiry or the justification for the CPS decision that there were no grounds for a prosecution. Together, in my view, that met the requirements that the investigation was effective. It seems to me plain that criminal investigation and proceedings were *capable* of identifying and, if appropriate, punishing those responsible. The offences potentially available included murder, wrongful act manslaughter and gross

negligence manslaughter. Given that the case law establishes that Article 2 does not entail the right to have third parties prosecuted or convicted for a criminal offence, I would hold that that is sufficient.

50. I am confirmed in these views by the most recent ECHR case on this subject. In *Da Silva v UK* (2016) 63 EHRR 12, the Court was concerned with the shooting dead by police officers of Jean Charles De Menezes on 22 July 2005. At paragraph 257, the Court said:

> *"Although the authorities should not, under any circumstances, be prepared to allow life-endangering offences to go unpunished, the Court has repeatedly stated that the investigative obligation under art.2 of the Convention is one of means and not result. In older cases, the Court stated that "the investigation should be capable of leading to the identification and punishment of those responsible". However, in more recent case-law this requirement has been further refined so as to require that the investigation be "capable of leading to a determination of whether the force used was or was not justified in the circumstances ... and of identifying and – if appropriate – punishing those responsible". It therefore follows that art.2 does not entail the right to have third parties prosecuted—or convicted—for a criminal offence. Rather, the Court's task, having regard to the proceedings as a whole, is to review whether and to what extent the domestic authorities submitted the case to the careful scrutiny required by art.2 of the Convention."*

51. The Court reached its conclusion at paragraph 284-287. It said at 284:

> *"The decision to prosecute the [Office of the Commissioner of the Metropolis] as an employer of police officers did not have the consequence, either in law or in practice, of excluding the prosecution of individual police officers as well. Neither was the decision not to prosecute any individual officer due to any failings in the investigation or the state's tolerance of or collusion in unlawful acts; rather, it was due to the fact that, following a thorough investigation, a prosecutor considered all the facts of the case and concluded that there was insufficient evidence against any individual officer to meet the threshold evidential test in respect of any criminal offence"* (my emphasis).

52. Then at paragraph 286, the Court said:

> *"Consequently, having regard to the proceedings as a whole, it cannot be said that the domestic authorities have failed to discharge the procedural obligation under art.2 of the Convention to conduct an effective investigation into the shooting of Mr de Menezes which was capable of leading to the establishment of the facts, a determination of whether the force used was or was not justified in the circumstances and of*

> *identifying and—if appropriate —punishing those responsible. In light of this conclusion, it is not necessary for the Court to consider the role of private prosecutions or disciplinary proceedings in fulfilling the state's procedural obligations under art.2 of the Convention"* (emphasis added*).*

53. It seems to me that that decision supports the analysis set out above. In *Da Silva,* there had been a thorough investigation, a prosecutor had considered the facts and decided there was insufficient evidence to justify a charge. In those circumstances the Court did not regard it as necessary to consider the role of disciplinary proceedings. Similarly, in the present case, there was an effective investigation into the death of Mr Rigg which was capable of leading to the establishment of the facts, determining whether the force used was or was not justified in the circumstances, and of identifying and- if appropriate -punishing those responsible. In my judgment, the analysis adopted by the ECHR in *Da Silva* applies equally here.

54. Certainly, I would reject Mr Bunting's submission that because the applicant in *Da Silva* was not expressly challenging the adequacy of disciplinary processes in that case, what the court said in the underlined passage of [286] is of no relevance.

55. However, it was suggested by Mr Sheldon QC and Mr Bunting that there were domestic authorities to contrary effect. I consider each in chronological order.

56. First, I was taken to the speech of Lord Brown in *Van Colle v Chief Constable of Hertfordshire Police* [2009] 1AC 225 at 286 C. That case concerned the circumstances in which the state owed a positive duty under Art. 2 to protect an individual from a risk to life; it was not directed to the circumstances in which a breach of the procedural duty might be shown. Lord Brown said at [139]:

> *"Clearly the violation of a fundamental right is a very serious thing and, happily, since the Human Rights Act 1998 , it gives rise to a cause of action in domestic law. I see no sound reason, however, for matching this with a common law claim also. That to my mind would neither add to the vindication of the right nor be likely to deter the police from the action or inaction which risks violating it in the first place. Such deterrence must lie rather in the police's own disciplinary sanctions (as, indeed, were applied in Van Colle) and, in a wholly exceptional case like R v Dytham, in criminal liability"* (emphasis added).

57. Plainly, disciplinary proceedings serve to deter police officers from action that risks violation of the positive duty under Art. 2, but that case says nothing about whether disciplinary proceedings are an essential part of the procedural duty under Art. 2.

58. Second, in her judgment in Mr Birks case in 2014, Lang J said at [52]:

> *"I accept that the full and independent inquest into the death of Mr Rigg complied with the Article 2 requirements identified in Middleton as a vehicle for determining by what means and in what circumstances the deceased came by his death. The Rigg family were represented and participated fully. However, the inquest did not, and by law could not, fulfil the Article 2 requirement that those guilty of wrongdoing are identified and brought to account. An effective criminal trial would meet this*

> *requirement, but it is impossible to say at this stage whether there will be criminal charges or a criminal trial. I accept that there is an ongoing criminal investigation, since IPCC investigators have the powers of a constable in an independent investigation, and where criminal conduct may be established the evidence will be referred to the Crown Prosecution Service. However, in this case the evidence may not justify criminal charges, only lesser charges of misconduct. In those circumstances, I consider that misconduct proceedings may be required to fulfil the requirements of Article 2; it is not possible to say definitively one way or the other at this stage. The possibility that the family could bring a civil claim against the Claimant would not be sufficient to discharge the State's obligations under Article 2, in the absence of any criminal or misconduct proceedings."*

59. That analysis was conducted at a much earlier stage of the investigatory process than is mine; in particular, the investigations were not completed and the CPS had made no decision as to whether there should be prosecutions. Lang J could not say whether those investigations would be adequate. Accordingly, her conclusion is not necessarily at variance with mine.

60. Third, in *AB v Commissioner of Police for the Metropolis* [2016] EWHC 2714, Mitting J held at [10], when refusing permission to apply for JR:

> *"10 The foundation of the claimant's claim is that Article 2 of the European Convention on Human Rights and the Strasbourg case law which expands upon it requires a state responsible by one of its agents, for example a police officer, which has taken action which has resulted in the death of a citizen, to investigate it and, where appropriate, to punish, or at the very least hold accountable, those responsible for the death. The case law establishes that that duty can be discharged in a variety of ways. The primary way in English law is by an inquest. But that, I accept, will not invariably be a sufficient remedy, where criminal conduct resulting in death is reasonably thought to have occurred, then criminal proceedings may be required. Where serious misconduct on the part of those taking the action which results in death has occurred, falling short of criminal conduct, then disciplinary proceedings may be required. Where individual responsibility cannot be attributed to any individual, then proceedings against their employer, for example, the Metropolitan Police Service, may be required for the state to fulfil its duty: see Da Silva v United Kingdom (2016) 63 EHRR 12 ."*

61. It is of note that Mitting J was only indicating that in certain cases disciplinary proceedings *may* be required; he was not purporting to lay down a rule that they would be required. Further, and with respect, the one authority on which Mitting J relies in this context is *Da Silva*, the case which I have addressed above. Furthermore, this was only a permission application and it is not apparent to what extent the issue that arises in the present case was explored there.

62. The Defendants are perhaps on rather stronger ground, however, when they rely on the final domestic case. In *R (Long) v Secretary of State for Defence* [2014] EWHC 2391 (Admin), the Divisional Court was concerned with a claim by the mother of a British soldier killed in Iraq when his patrol was attacked by an angry mob of civilians. Leggatt J (as he then was) said at [96]

> *"Although an inquest is the principal means by which the circumstances of an unnatural death are investigated in the UK, it is not the function of an inquest to consider issues of culpability. Indeed, the coroner is specifically prohibited from framing a determination in such a way as may appear to determine any question of criminal liability (including, in the case of a member of the armed services, liability in respect of a service offence) or civil liability: see section 10 of the Coroners and Justice Act 2009. Thus, although an inquest can serve to bring out relevant facts and identify lessons to be learned, it is not a mechanism by which individuals can be held to account. That part of the investigative duty is fulfilled by making appropriate provision for: (1) criminal prosecution; (2) disciplinary action; and (3) a civil claim" (emphasis added).*

63. That passage in the judgment of Leggatt J was expressly approved by the Court of Appeal at [2015] EWCA Civ 770 at paragraph 53.

64. Leggatt J went on to consider why, on the facts of that case, there had been no criminal prosecution and no misconduct proceedings. He noted that the Claimant did make a civil claim. In those circumstances, he concluded at paragraph 101:

> *"the procedures adopted in this case, viewed in their totality, were in our opinion adequate to discharge the state's duty of investigation if and in so far as such a duty was owed under article 2."*

65. It seems to me clear from these passages that the Divisional Court was not finding that disciplinary action is always a necessary element of the satisfaction of the obligations imposed on the state by Art. 2. In my view, it was instead holding that the state must make provision for disciplinary proceedings if they are the appropriate means of satisfying the investigative obligation in a given case. Where for example, no criminal investigation was conducted and civil proceedings do not provide proper scrutiny of the circumstances, disciplinary proceedings may well be required. In my judgment that analysis is entirely consistent with ECHR cases like *Vo v France* and *Calvelli and Ciglio* to which I have referred above.

66. Furthermore, it cannot properly be said, in my view, that the fact a disciplinary process is available in the police service means that its deployment is necessarily required by Art. 2. As it is commonly expressed, the Convention provides a floor not a ceiling. In other words, it is open to the UK to provide greater remedies for police misconduct than is mandated by Art. 2.

67. Accordingly, in my judgment, Art. 2 was satisfied in this case without a disciplinary hearing. Furthermore, a decision of the MPS, or of this court, which meant that Mr Birks could resign from the police and thereby avoid police disciplinary proceedings would not involve any breach by the UK of its obligations under Art. 2. It follows that what would otherwise have constituted a highly relevant countervailing factor in

the balancing exercise required by Art. 8 and 9, falls out of account. That is a matter to which I return below.

The Rationality of the First Defendant's Approach

68. Both as a matter of public law, and under Articles 8 & 9 of the Convention, it is necessary to consider the competing public interests and private rights.

69. As a matter of public law, the Claimant contends that the First Defendant failed properly to identify and take into account the public interests in favour of lifting the suspension. Mr Sheldon QC for the MPS says the relevant factors were considered.

70. In my view, the Claimant's argument as to the First Defendant's approach to the identification and weighing of the factors favouring the lifting of the suspension as a matter of domestic law, has real force. AC Taylor acknowledges, at paragraph 1(1) of her decision letter, the need to avoid delay and the impact of the delay on the Claimant's life. But then she says that the effect of the delay has to be assessed in the context of the complexity of the case and in the light of the fact that the delay is beyond the control of the MPS. She takes account of what she regards as the "*due diligence*" of the MPS. In my judgment, this analysis takes an entirely irrelevant consideration into account, namely, which body, the MPS or the IPCC, is responsible for the delay.

71. Furthermore, the decision letter fails to address what, in my judgment, is a significant public interest, namely the public interest in the prompt determination of police disciplinary cases. The incident in question took place in 2008; by July 2017 no disciplinary charges had been laid against the Claimant. In the meantime, he was compelled to remain a member of the police force. He has continued to be paid out of public funds. Even today, the case remains outstanding. The need to bring the matter promptly to a close is a matter of significant public interest and one which the decision letter leaves out of account.

72. Art. 8 prohibits interference by a public authority with the exercise of the right to respect for the Claimant's private and family life "*except such as is in accordance with the law and is necessary in a democratic society … for the prevention of disorder or crime…or for the protection of the rights and freedoms of others".* AC Taylor addressed the balance inherent in Art. 8 in paragraph 3 of the decision letter. She said that "*option (b)"*, by which, it is apparent, she meant the protection of the rights and freedoms of others *"will apply to the Article 2 rights of the Rigg family".* In paragraph 6 of the letter Ms Taylor says "*When the misconduct proceedings are taken together with the inquest in which the family were fully involved, the Art 2 requirements may therefore arguably be met*."

73. In my judgment, for the reasons set out above, AC Taylor erred as a matter of law in taking into account the fact, as she found it to be, that a disciplinary process was required by Art. 2.

74. For each of those reasons, in my judgment, the decision cannot stand. The question for the Court, in those circumstances, is whether, on a reconsideration, the First Defendant would be bound to come to the same conclusion.

The Competing Public Interests

75. In the leading extradition case of *Polish Judicial Authorities* v *Celinski & Ors* [2015] EWHC 1274 (Admin) Lord Thomas, then the LCJ, spoke of the "*necessity*" of setting

out "*the "pros" and "cons" and adopting a "balance sheet" approach*" in considering an appeal against a decision to order extradition. In my view, there is much to be said for adopting a "balance sheet" approach whenever it is necessary to weigh up competing public interests in Art. 8 (and Art. 9) cases.

76. In the scales in favour of maintaining the suspension, in my view, are the following: First, and regardless of Art. 2, there is a very considerable public interest in police officers being held accountable for possible misconduct when it is said that that misconduct played a part in the death of an individual in detention. Second, there is a significant public interest in avoiding the impression that a police officer can escape censure by resigning. In paragraph 1(2), the decision letter expresses these two interests in a number of different ways, each of which are to similar effect.

77. In paragraph 69 of her judgment in September 2014, Lang J noted the conclusion of the then Assistant Commissioner of the MPS. She said:

> *"The death of Mr Rigg, and death in custody generally, were significant events that had the potential to impact on public confidence, especially in black communities. Public confidence could be further eroded by the perception that police officers involved in such incidents are able effectively to escape without being held accountable for their actions."*

If I may say so, that passage neatly sums up the essence of the public interest in favour of maintaining the suspension in the present case.

78. In my judgment, however, lengthy delays in bringing disciplinary proceedings has a capacity to reduce these public interests. AC Taylor acknowledges that in the decision letter, in the context of Art. 8 and the potential for crime or disorder. Whether or not the passage of a given period of time reduces the significance of an apparent lack of accountability will depend on the detailed facts of the case. In my view, that is a matter upon which an Assistant Commissioner of the MPS is in a better position to reach a judgement than is the Court. It is apparent from the decision letter that it is AC Taylor's view that that public interest remains a highly significant one.

79. On the other side of the scales are the significant public interests and personal rights to which I have referred. They can be itemised as follows: the first is the substantial public interest in the prompt determination of police disciplinary cases. The second, and a corollary of the first point, is the cessation of the interference in the Claimant's private life caused by the continued refusal to allow him to resign from the police. The third is the Claimant's Art. 9 right to practice his religious calling without interference from the state.

80. As regards the latter of those factors, it has to be acknowledged that the interference in the Claimant's private or religious life has been mitigated, to some extent, in that he has been ordained and has been able, with the assistance of his Bishop, to engage part time in the work of a priest.

81. In my judgment, given the significance of the factors AC Taylor wrongly took into account, and of the factors which she failed to take into account, it cannot be said that she is bound to come to the same conclusion on a reconsideration, conducted in the light of the judgment of the court.

82. But nor can it be said, in my view, that it is inevitable that the Assistant Commissioner would come to the opposite conclusion and agree to lift the Claimant's

suspension. Even without the Art. 2 factor, the public interest in favour of maintaining the suspension is substantial. Given that Reg. 4 gives the decision whether to impose or lift a suspension to the MPS, the weight to be attached to the competing considerations is, at least in the first instance, a matter for her, not the court.

83. In those circumstances, the proper remedy is to remit the matter to the MPS for their reconsideration.

84. In my view, however, fairness dictates that the disciplinary process must be stayed until the Assistant Commissioner has made a decision on the reconsideration. It would plainly be wrong to allow the process to continue so as to make one of the options available to the Assistant Commissioner valueless.

The free-standing breaches of Art. 8 and 9.

85. Mr Keith QC argued that the delay in processing the disciplinary case, and the refusal to lift the suspension, constituted a breach of Art. 8 and 9 by both Defendants; that that conduct grounded a cause of action independent of the judicial review of the decision to maintain the suspension; and that potentially sounded in damages.

86. In my judgment, it is impossible to reach a conclusion on that in the abstract, without knowing the outcome of the Commissioner's reconsideration. If the outcome remains unaltered, it is difficult to see how any claim could be advanced. If the outcome is different, the issue will need to be reconsidered. In that event, however, the fact that the Claimant has secured his principal objective will plainly be a significant factor in deciding whether or not any further relief is appropriate.

Conclusion

87. For those reasons, the decision of 19 July 2017 is quashed and the matter remitted to the Assistant Commissioner of the Metropolitan Police for reconsideration, in the light of the judgment of the Court.

88. The disciplinary process will be stayed pending the completion of that reconsideration.