**COURT OF APPEAL OVERTURNS POLICE OMBUDSMAN FUNDING DECISION**

Summary of Judgment

The Court of Appeal today reversed a decision of the High Court that the Department of Justice had failed to provide sufficient funding to the Offic e of the Police Ombudsman for Northern Ireland..

On 24 March 2017,, the High Court declared that the Departm ent of Justice (““tthe Department “)) acted unlawfully by failing to provide a sufficient level of funding to the Police Ombudsman for Northern Ireland ( “PPONI””)) to enable it to carry out its statutor y obligation to investigate a complaint Patricia Bell (““tthe applicant””)) , within a reasonable period of time.. The applicant is the daughter of Patrick Joseph Murphy who was murdered by an unknown gunman whilst working at his shop at Mount Merrion Avenue,, Belfast on 16 November 1982..

The Historical Enquiries Team published a report into his death in November 2009.. The applicant’s sister made a complaint to PONI the following month but has been advised on a nu mber of occasions that the complaint cannot be investigated due to a lack of funding.. The applicant sought a judicial review of the decision.. The trial judge concluded that underfunding of the PONI was “mmost directly”” the result of a failure by the Depar tment to provide adequate resources..

**Legal Principles Relevant to this case**

*The definition of “AAs appear to be appropriate* “

Schedule 3 to the Police (NNI)) Act 1998 provides that the Department shall pay to the PONI such sums as appear to the Department to be appropriate for defraying the expenses of the office.. The Court of Appeal construed the meaning of the phrase “ssuch sums as appear to be appropriate““ as giving considerable scope to the decision maker..

*The Duty owed by the Department to fund the P ONI under the 1998 Act*

In construing the duty of the Department to fund the PONI under the 1998 Act the Court of Appeal held that normally , the question whether the Government allocates sufficient resources to any particular area of state activity is not justiciable.. A

decision as to what resources are to be made available often involves questions of policy,, and certainly involves questions of discreti on :

“ It is almost invariably a complex area of specialized budgetary arrangements taking place in the c ontext of a challenging economic environment and major cutbacks on public spending.. There should be little scope or necessity for the Court to engage in microscopic examination of the respective merits of competing macroeconomic evaluations of a decision i nvolving the allocation of (ddiminishing)) resources . These are matters for policy makers rather than judges:: for the execu tive rather than the judiciary.. ”

The Court of Appeal further stated that t he greater the policy content of a decision,, and the more r emote the subject matter of a decision from ordinary judicial experience,, the more hesitant the Court must necessarily be in holding a decision to be irrational.. Provided the relevant government department has taken the impugned decision in good faith,, ra tionally,, compatibly with the express or implied statutory purpose((ss)),, following a process of sufficient inquiry and in the absence of any other pleaded public law failing,, such a decision will usually be unimpeachable.. However,, w hen issues are raised und er Articles 5 and 6 of the E CHR as to the guarantee of a speedy hearing or of a hearing within a reasonable time,, the Court may be required to assess the adequacy of resources,, as well as the effectiveness of administration .

**The Role of Judicial Review an d of the Appellate Court**

The Court of Appeal summarised the role of judicial review and the Appellate Court as follows::

• T he burden of proof to establish unlawful conduct rests with the applicant ;

• The role of the court in judicial review is supervisory o nly ;

• T he court is not concerned with the merits of the decision or decisions at issue ;

• The court will not intervene unless a public law wrong has been established ;

• Issues which concern the weight to be attributed to various factors in the decision - making p rocess will generally be for the decision maker and not the court subject only to a rationality challenge;;

• A n appellate court should be slow to second guess the approach of a first instance judge in such matters..

**Consideration**

The Court of Appeal recog nised that in the hearing before the trial judge,, the burden of proof rested on the applicant to establish both the unlawful conduct on the part of the Departm ent and that a public law wrong had been committed.. Secondly as a

general proposition,, it is und esirable for the courts to get involved in questions of how either financial priorities are accord ed or allocation of resources are de termined by governmental departments :

“ Whilst the effective operation of the police complaints system to ensure investig ations occur within a reasonable time is an extremely important as pect of the Department’s duties , nonetheless it cannot be overlooked that the Department is not the source of budgetary restraints - that being the responsibility of the Executive or of th e Tr easury or of the Secretary of State for Northern Ireland who provide a block grant to the Executive and who arguably might also have been responden ts in the original application . The Department has financial responsibilities for and duties owed to bod ies as disparate as the PONI,, the PSNI,, the prison service , youth justice,, family justice etc . Presumably if it provided all the money required by the PONI that would entail taking funds away from some other body or bodies f or which it has responsibility.. It would be to shut one’s eyes to the rea l world if it was to be asserted that in a period of unprecedented economic difficulties the Department was not to be permitted to play its part in the be lt tightening exercises through - out government . It would o f course be laudable if all the needs of the Departmental responsibilities could be met but such hopes are simply not realistic . ”

The Court of Appeal said it must also be recognised that there will be cases where a decision maker has a duty to abide by a standard that d oes not depend on its resources . Impoverishment may not be treated as a relevant reason for failing to perform a statutory duty expressed in objective terms which allows for no discretion.. Counsel for the applicant contended that a change of legislation is the avenue for change if P arliament wishes resources to be a factor.. The Court of Appeal said that s uch a situation has to be contrasted with circumstances where the decision maker has a wide discretion that includes responsibility to d ecide how to distribute resources among competing needs *.*

It said that the duty contained in Schedule 3 to the 1998 Act clearly imposes a statutory duty on the Department which must be discharged.. It does not have an unfettered discretion to frustrate th at duty.. If the Department refused to make any payment or made a patently derisory payment - because for example government had decided that it preferred to spend all its money on some other purpose such as education or health - it would be in breach of that duty in all but the most strait ened or emergency circumstances . The Department could not exercise its discretion in that manner.. To do so would inev itably incur judicial reproach but the courts should only intervene if there was clear ev idence that t he PONI was being starved of funds s o as to deliberately frustrate Parliament’s intention to establish that important office and to implement the duties arising therefrom.. The Court of Appeal stated that there is not a scintilla of evidence that this case falls within the category r eferred to in the p aragraph above . It referred to a table of payments made by the Departmen t

to the PONI between 2012 and 2017 which shows that significant sums were allocated every year albeit there have been reductions since 2012 .

The Court of Appeal said that cl ose perusal of the wording of the duty is therefore crucial because the extent to which the duty precludes government d epartments from ordering its expenditure prior ities for itself may vary from one duty to another . In this case,, the Court was satisfied that Parliament did not intend that the Department had to provide whatever sums were requested by the PONI for every activ ity of the PONI or which appeared or were considered necessary or reasonable by the PONI to pe rform all its duties.. Had this been the intention of Parliament , wording to this effect in the legislation would have been comparatively simple to draft :

“ Parliament has vested in the Department a wide discretion “tto pay such sums as *appear to the Depar tment appropriate* ” ( *our emphasis))* for defraying the expenses of the PONI *.* It is not a specific and precise duty to provide the necessary requirements o f the PONI which would impose more readily an obligation of an absolute character irrespective of whethe r or not the Depa rtment has the funding available in its budget . ”

The Court said that the phrase “aas appears appropriate”” is the language of discretion and it confers a very broad latitude and discretion in the relevant statute . It gives considerable sco pe to the decision maker to make such sums available to the PONI as it deems appropriate having taken into account for example various resource based issues or co mpeting claims within its remit . I t cannot be sensibly suggest ed that , potentially,, the enti re or the greater part of the Departmental budget would have to be assigned to the PONI if that was what was needed to fulfil his tasks :

“ Cast as it is in broad and general terms the duty contained in the statute can readily be construed as affo rding scop e for the Department to take into account m atters such as budgetary policy , macroeconomic constraints,, the availabilit y of funding within its budget and its responsibilities to other bodies within its remit when deciding how best to perform the duty in its own area.. In such a case we consider the Department has a wide measure of freedom over what steps to take in pursuance of its duty.. Not only is the responsibility to make the payment placed solely in the hands of the Department but significantly it is o nly such sums as appear to the Department to be *appropriate* as opposed to such sums as are “nnecessary “ or ”rrequired”” . We are satisfied this selection of wording reflects Par liamentary intent and has been deliberately and carefully chosen.. ”

The Court of Appeal recognised that d ifficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of bodies for w hom a Department is responsible . It said that this is not a judgment which the court can make :

“ Specialized budgetary arrangements taking place in the context of a challenging economic environment and major cutbacks in public spending are an area too complex for this Court.. It should not engage in microscopic examination of the respective merits of competing macroeconomic evaluations of a decision involving the alloca tion of (ddiminishing)) resources . A court is ill - equipped to determine such general questions as to the efficiency of administration,, the sufficiency of staff levels and the adequacy of resources for the PONI *.* These are matters for policy makers rather than judges,, for the executive rather than the judiciary and in the instant case , for the Department . ”

The Court of Appeal concluded that the Department took the impu gned decision in good faith,, rationally and compatibly with the express or implied statutory purpose.. It said it was aware that a n appellate court should be slow to second guess the approach of a first instance judge in such matters but held that the trial judge had failed to adequately address and recognise the nature and width of the broad discretion vested in the Department under Schedule 3 to the 1998 Act and ha d thus fallen into error .

The Court of Appeal granted the appeal and reversed the findings of the trial judge..

**NOTES TO EDITORS**

1.. This summary should be read together with the judgment and should not be read in isolation.. Nothing said in this summary adds to or amends the judgment.. The full judgment will be available on the Court Service websi te (

www..ccourtsni..ggov..uuk

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**ENDS**

If you have any further enquiries about this or other court related matters please contact::

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