

**Regina Vs. Police Complaints Authority (Respondents) Ex Parte Green (Fc)
(Appellant)**

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Court : House of Lords

Decided On : Feb-26-2004

Judge : The Appellate Committee comprised: Lord Bingham of Cornhill, Lord Hoffmann, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Carswell

Appeal No. : on appeal from: [2002] EWCA Civ 389

Appellant : Regina

Respondent : Police Complaints Authority (Respondents) Ex Parte Green (Fc)
(Appellant)

Judgement :

LORD BINGHAM OF CORNHILL

My Lords,

1. For the reasons given by my noble and learned friend Lord Rodger of Earlsferry, which I have had the advantage of reading in draft, I agree that this appeal should be dismissed.

LORD HOFFMANN

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Rodger of Earlsferry. For the reasons he has given, I too would dismiss this appeal.

LORD SCOTT OF FOSCOTE

My Lords,

3. I have had the advantage of reading in draft the opinion on this appeal of my noble and learned friend Lord Rodger of Earlsferry and am in complete agreement with his analysis of the issue and with his reasons for concluding that this appeal should be dismissed. Having regard, however, to the manner in which the case for the appellant was put to your Lordships I wish to add a few supplemental remarks.

4. The appeal arises out of a complaint by the appellant, Mr Green, of serious police misconduct. The complaint, pursuant to the statutory scheme prescribed by the Police Act 1996 and the regulations made thereunder, was investigated by a member of a police force other than that to which the officers complained about belonged and the investigation was supervised by the Police Complaints Authority ('the Authority').

5. The important features of the Authority's supervisory role are, in my opinion, for present purposes, the following:

(1) The Authority has power to ensure that a suitable officer conducts the investigation (see section 72(3)(b) of the 1996 Act). No suggestion has been made that the officer appointed to investigate Mr Green's complaint was not suitable.

(2) At the end of the investigation, when the investigating officer has sent his report to the chief officer of the police force to which the officers complained about belong and a copy of the report has been sent to the Authority, the Authority must make a statement stating whether the investigation has been properly conducted and, if they think the investigation has not been properly conducted, identifying the defects (section 73(2) and (9) of the Act). On 10 January 2000, the investigation having commenced in June 1999, the Authority issued a statement that the investigation of Mr Green's complaint had been carried out to its satisfaction. A

copy of the statement was sent to the appellant. There has been no challenge to this statement.

(3) The Authority has no power over decisions, taken in the light of the investigating officer's report, as to what, if any, criminal proceedings an officer complained about should face. This is a matter for the prosecuting authorities (sections 73(1)(b) and (2) and 75(2) and (3) of the Act). In the event, the prosecuting authorities decided to charge DS Lawrence with driving without due care and attention. He pleaded guilty by post and was fined 250 plus costs. His driving licence was endorsed with five points.

(4) The Authority has power to recommend, and, if necessary, to insist, that disciplinary proceedings be brought against an officer complained about (section 76 of the Act). In the present case the Authority decided not to recommend that disciplinary proceedings be taken against DS Lawrence. Following a complaint by Mr Green about the basis on which that decision had been reached the Authority agreed to review the case again and reach a fresh decision.

6. Before reaching its fresh decision as to whether or not to recommend disciplinary proceedings against DS Lawrence, the Authority invited Mr Green to send them any additional evidence or any additional representations he wanted them to take into account. The appellant contends that before responding to this invitation he is entitled to disclosure of the witness statements and other documentary evidence held by the Authority. The witness statements and documents constitute the evidential material collected by the investigating officer in the course of his investigation and supplied by him to the Authority.

7. Mr Gordon QC, counsel for the appellant, put the case for disclosure of this material on two connected grounds. First he submitted that Mr Green was entitled to disclosure under the statutory scheme established by the 1996 Act and the regulations made thereunder. As to that, there is nothing I can usefully add to the reasons given by Lord Rodger for concluding that section 80 of the Act stands immovably in Mr Green's path. Disclosure to Mr Green is not necessary for any of the functions of the Authority.

8. But, secondly, Mr Gordon submitted that the appellant had the right to disclosure of the material pursuant to articles 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

9. I would agree with counsel that the nature of the complaint against DS Lawrence did engage articles 2 and 3. Mr Green was alleging that DS Lawrence had driven the car into him deliberately. He said it had been an attempt by DS Lawrence to kill him. If Mr Green had been killed by the collision with the car and it had been the case that the fatal collision had been deliberately brought about by DS Lawrence, there can be no doubt but that article 2 would have been engaged. It would have been incumbent on the state to conduct a "thorough, impartial and careful examination of the circumstances surrounding the killing" (*McCann v United Kingdom* (1995) 21 EHRR 97, 164, para 163). A no less thorough, impartial and careful examination would be required in the case of an allegation of an attempted killing by a police officer while on duty.

10. Further, if a police officer while on duty were to drive a car at someone with the intention of inflicting serious physical injury, such as the fractured femur that Mr Green sustained, the infliction of the injury could, in my opinion, reasonably be represented as constituting inhuman treatment for article 3 purposes. But in the absence of the requisite intention, article 3 would not, in my opinion, be engaged. There is a clear difference between using a vehicle as a tool by means of which to inflict serious injury and carelessly, or even recklessly, using a vehicle with the unintended consequence that serious injury is caused. Conduct of the latter sort might constitute a serious criminal offence under domestic law but it would not, in my opinion, engage article 3.

11. It is clear, therefore, that Mr Green's allegation that DS Lawrence drove the car at him deliberately in order to kill or seriously to injure him did engage articles 2 and 3 and did require a thorough, impartial and careful investigation by a suitable and independent state authority: see *Assenov v Bulgaria* (1998) 28 EHRR 652, 701, para 102.

12. The investigation of a complaint of serious police misconduct carried out by a suitable member of a police force other than that of which the officer complained

about is a member, and with the investigation supervised, in the manner provided for by the 1996 Act, by the Authority constitutes an investigative structure that complies, in my opinion, with the requirements of the Convention. And a statement by the Authority at the end of the investigation certifying that the investigation has been properly conducted shows, in my opinion, unless the statement can be impugned, that the obligation for the state to subject the allegation to a thorough, impartial and careful investigation has been discharged.

13. In the present case the investigation and the investigating officer's report led to the levelling of criminal charges against DS Lawrence no more serious than driving without due care and attention. An injury, notwithstanding its serious nature, inflicted by a police officer driving without due care and attention would not begin to engage either article 2 or article 3. Both are directed at conduct very far removed from relatively minor driving offences.

14. So, unless the appellant could challenge the conduct of the investigation, articles 2 and 3 should have had no further relevance. The Authority, a body accepted as being independent of the police, expressed its satisfaction with the conduct of the investigation. Mr Green has not challenged that decision of the Authority. Articles 2 and 3 ought, in my view, to have played no further part.

15. The judicial review proceedings that have now found their way to this House relate to the only outstanding decision that the Authority has still to reach, namely, a decision as to whether to recommend disciplinary proceedings against the police officers about whom Mr Green complained, in particular DS Lawrence. The properly conducted investigation into their conduct has already taken place and has led to no more than a driving without due care and attention charge against DS Lawrence. Articles 2 and 3 have, in my opinion, no possible relevance to the Authority's decision about disciplinary charges.

16. The only point for the House is a very narrow one, namely, whether Mr Green's disclosure request can find its way around the block presented by section 80. In my opinion, for the reasons given by Lord Rodger, it cannot. I, too, would dismiss this appeal.

LORD RODGER OF EARLSFERRY

My Lords,

17. In the early evening of 7 April 1999 police officers were carrying out a surveillance operation in relation to a property in Catherine Road, Sheffield. In the course of that operation Detective Sergeant Lawrence, who was a member of the South Yorkshire Police, was driving an unmarked police car. The appellant, Mr Anthony Lloyd Green, rode his cycle along Catherine Road. DS Lawrence in the police car pursued him from there into Bressingham Road where the car collided with the appellant's bicycle. The appellant was knocked off but got up and ran off. The car then collided with the appellant and ran over his legs. The appellant suffered injuries, including a fractured femur.

The history of the appellant's complaint

18. On 4 May 1999 the appellant lodged a complaint against the police, alleging that he was "deliberately knocked down by the police car." The Chief Constable of South Yorkshire Police ("the Chief Constable") asked for an officer from a separate force, the West Yorkshire Police, to investigate the complaint. Since the appellant had suffered "serious injury" as a result of DS Lawrence's conduct, in accordance with section 70(1)(a)(i) of the Police Act 1996 ("the Act") the Chief Constable referred the appellant's complaint to the Police Complaints Authority ("the Authority"). As required by section 72(1), the Authority then supervised the investigation of the complaint by the West Yorkshire force. In particular, in exercise of their powers under section 72(3) the Authority approved the choice of the investigating officer from the West Yorkshire force.

19. The investigating officer proceeded to investigate the complaint. As part of that investigation, on 10 June 1999 the appellant made a statement about his complaint. In it he complained about the conduct of a number of officers in connexion with the incident and its aftermath. These additional allegations were included in the investigation. On 6 October 1999 the appellant and his solicitor viewed a video recording of the incident made from a police helicopter - indeed they saw it several times. After that the appellant made a further statement to the

investigating officers which concluded "Having seen the video, it looks like the officers were trying to kill me."

20. Because of the six-month time-limit in section 6 of the Road Traffic Offenders Act 1988 for bringing summary proceedings, the investigating officer provided an interim report on which the Director of Public Prosecutions could, if so advised, arrange for proceedings under the Road Traffic Act 1988 to be started in due time. The Director in fact decided to bring proceedings against DS Lawrence for driving without due care and attention in contravention of section 3. Under section 73(7) and (8) of the Police Act the Director could, exceptionally, bring these proceedings before the Authority had submitted an "appropriate statement" in terms of section 73(2).

21. On 15 November 1999 in terms of section 73(1) the investigating officer submitted his final report to the Authority and sent a copy to the Chief Constable. It included 24 statements and 23 other documents and exhibits, including video evidence and copies of tape-recorded interviews with the officers concerned.

22. On 10 January 2000 in terms of section 73(2) the Authority submitted a statement to the Chief Constable which concluded that "The matter has been investigated to the satisfaction of the Police Complaints Authority." A copy of the statement was sent to DS Lawrence and to the appellant in accordance with section 73(3) and (4). At the same time the appellant was told that, following the conclusion of any criminal matters, the Chief Constable would tell the Authority whether it was proposed to charge any officer with a disciplinary offence. If the decision was not to do so and the Authority disagreed, they would have power to recommend or, if necessary, to direct the Chief Constable to bring a disciplinary charge.

23. On 10 March 2000 in the Sheffield Magistrates' Court, DS Lawrence pleaded guilty by letter to driving without due care and attention. In due course the magistrates fined him 250 and imposed 5 penalty points. He was ordered to pay 55 costs. A representative of the appellant's solicitor attended the hearing. If DS Lawrence had not pleaded guilty, the appellant would have been an important witness at any trial. It is equally clear that, if disciplinary proceedings were brought

in relation to the incident, the appellant would be an important witness.

24. The Chief Constable then informed the Authority that it was not proposed to bring disciplinary proceedings against any officer in relation to the incident or its aftermath. In terms of section 76(1) the Authority had to consider, in particular, whether to recommend that the Chief Constable should bring such proceedings against DS Lawrence. On 5 September 2000 a member of the Authority, Anne Boustred, wrote to the appellant to tell him that the Authority did not intend to recommend disciplinary proceedings. Ms Boustred stated *inter alia* that, in the absence of any "irrefutable" evidence of recklessness or intent on the part of DS Lawrence, she did not believe that a disciplinary hearing would find any more fault in the officer's conduct than did the trial. In their reply dated 13 September 2000 the appellant's solicitors pointed out that the authority member had misdirected herself in considering that the absence of "irrefutable evidence" against DS Lawrence was a sufficient basis for deciding against disciplinary proceedings.

25. On 22 September the authority member issued a fresh letter, this time simply saying that, "in the absence of any evidence of recklessness or intent on the part of DS Lawrence," she did not believe that a disciplinary hearing would find any more fault than did the trial - ie than was involved in the plea accepted by the prosecution. On 23 November 2000 the appellant lodged a judicial review claim form challenging the Authority's letters of 5 and 22 September 2000. On 14 December 2000 the Authority filed an acknowledgment of service, accepting that the reference in the letter of 5 September to "irrefutable evidence" had been an error and that the letter of 22 September had failed to make it sufficiently clear that the Authority were directing themselves that the issue was whether there was a genuine prospect of a finding of misconduct which would go beyond a finding of careless driving. The acknowledgment of service went on to state: "Accordingly, the [Authority] intends to conduct a full review of [the appellant's] case and to make a fresh decision." Thereafter on 25 January 2000, on the ground that the matter was now academic, Maurice Kay J refused permission.

26. On 26 January 2001 Caroline Mitchell, another member of the Authority, wrote to the appellant's solicitors to tell them that she had been "appointed to conduct

the review into the investigation of your client's complaints against officers of the South Yorkshire Police". She indicated that, while she would "look afresh at all the evidence in the case," she would "confine [her] review to the conduct of Sgt Lawrence". The letter gave the appellant the opportunity "to submit any further evidence" within 14 days. On 31 January the appellant's solicitors replied and said that the review should not be confined to the conduct of DS Lawrence. They also said that, in order to consider what further evidence to submit, the appellant wanted to know what evidence the Authority already had.

27. On 13 February 2001 Ms Mitchell stated that she was "happy to review the entire case rather than confining the review to Sgt Lawrence". She attached a schedule listing the statements and documents that she would be taking into account. On 26 February the appellant's solicitors wrote to Ms Mitchell asking her to "disclose to us all the statements and documents in the list you sent to us so that we are in a position to make informed representations". On 13 March she replied, declining to disclose the statements and documents. She ended her letter by saying that if the appellant wished to submit any evidence to her, she would be pleased to receive it as soon as possible so that the review might be taken forward.

28. On 14 March 2001 the appellant and the Authority signed a consent order withdrawing the judicial review proceedings "upon the [Authority] conducting a full review of [the appellant's] complaint and making a fresh decision in relation to the police complaint".

29. On 23 March 2001 the appellant's solicitors wrote to Ms Mitchell noting that she was not willing to provide disclosure of any of the statements or documents. They went on to say that without disclosure they were not able to make informed representations to her and that the appellant was therefore disadvantaged. They did not have copies of the correspondence with the Crown Prosecution Service and were therefore unable to make effective representations. Generally, they were not able to make informed representations based on the evidence. They believed that non-disclosure was in breach of articles 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the

Convention"). If they did not hear from Ms Mitchell by 30 March that disclosure would be forthcoming, they would advise their client to commence proceedings for judicial review.

30. On 3 April 2001 Ms Mitchell replied, indicating that the Authority were unable to accede to the appellant's solicitors' request for disclosure and giving the reasons. In particular she said:

"Section 80 of the Police Act 1996 prevents the Authority disclosing any information received by the Authority in connection with its functions under Part IV of the 1996 Act. The information which you have requested is such information. Section 80 sets out three exceptions where disclosure is permitted. The only one of the three that is presently relevant is section 80(1)(a). This permits disclosure 'so far as may be necessary for the proper discharge of the functions of the Authority'.

The Authority does not consider in the circumstances that disclosing to Mr Green the material that you seek is necessary for the proper discharge of its functions. Mr Green is the person who made the complaints and has himself made a statement for the purpose of the investigation of those complaints. He knows the identities of the persons whose statements have been received by the Authority. He and his legal representatives have seen the video of the incident, though they do not retain a copy. The Authority is satisfied that the material available to it (which includes evidence from Mr Green) does not contain anything on which at present it requires Mr Green's representations in order for it to carry out its statutory functions. Mr Green remains free to submit to the Authority any further evidence which he wishes the Authority to consider, and I note in this connection the letter dated 5 March 2001 from Mr J F Watts enclosed with your letter of 23 March, which will of course receive consideration.

The Authority recognises that article 3 of the European Convention on Human Rights requires a contracting state to provide a thorough and effective investigation into serious injury caused by the use of force by officers of the state. It is the Authority's statutory function to ensure, as an independent body, that this happens. The Authority is satisfied that disclosing the material that you seek to Mr

Green is not required in order for the United Kingdom to comply with its obligations under article 3.

The Authority is aware that Mr Green has either made or intimated a claim for compensation against South Yorkshire police. The determination of that claim, and of any civil proceedings that result from it, is a separate matter and has no bearing on the issues of disclosure under section 80(1)(a)."

The letter from Mr Watts, to which Ms Mitchell referred, related to events at the hospital to which the appellant was taken after the incident.

31. The claim form in the present proceedings was issued on 25 April 2001 and challenged the decision in Ms Mitchell's letter of 3 April 2001 on behalf of the Authority. In due course, after acknowledgments of service on behalf of the Authority, the Home Secretary and DS Lawrence, Stanley Burnton J ordered an oral hearing of the application for permission. On 17 August 2001 the appellant amended the grounds in the claim form, but continued to challenge the same decision. On 19 December 2001 the oral permission hearing was listed before Moses J. At this stage the Authority had filed no evidence. Without giving advance notice to the parties - but also without objection from them - Moses J proceeded to treat the hearing as both the application for permission and the substantive hearing. On 21 December he gave an ex tempore judgment, ruling that the Authority should disclose certain material [2001] EWHC Admin 1160. He gave the parties an opportunity to agree what documents should be disclosed to the appellant.

32. On 11 January 2002 the Authority filed a notice of appeal against the decision of Moses J. On 14 February 2002 the appellant and the Authority signed a draft order agreeing that the Authority would disclose to him the documents scheduled to the order. On 1 March 2002, accordingly, Moses J ordered the Authority to disclose 28 witness statements, seven of them redacted, and 14 other documents, three of them redacted. The order was pronounced on the basis of an undertaking by counsel for the appellant that he would not disclose the material or information in the material, or cause or permit it to be disclosed, to any person other than his own counsel or firm of solicitors or the Crown Prosecution Service / Director of

Public Prosecutions. In the event, however, only the video recording of the incident was actually handed over.

33. At the hearing of the appeal the Court of Appeal had the benefit of certain additional evidence that had not been before Moses J. On 26 March 2002 the Court of Appeal allowed the Authority's appeal: [2002] EWCA Civ 389. On 17 December 2002 your Lordships' House granted the appellant leave to appeal.

34. In order to try to minimise any further delay in dealing with the appellant's complaint, however, the appellant and the Authority agreed that the Authority would begin their review. On 23 October 2003 the Deputy Chairman was able to inform the appellant's solicitors that Ms Katherine Reid, an Authority member, had been asked to undertake the review and that the Authority were waiting for the results of certain further work that they had commissioned. On 30 December 2003 Ms Reid sent a twelve-page letter to the appellant setting out her provisional decision on the various aspects of his complaint. The letter goes into the relevant matters in very considerable detail, summarising key aspects of the evidence gathered in the original investigation. Ms Reid also makes reference to the report from the professional road traffic investigators commissioned by the Authority to help them to assess the nature of DS Lawrence's driving for the purposes of deciding whether to recommend that disciplinary proceedings should be brought. On the basis of her detailed analysis of the evidence and a close scrutiny of the video, Ms Reid considers that there was a reasonable prospect of a disciplinary tribunal being satisfied to the relevant standard of proof that DS Lawrence's driving fell below the required standard. She reaches this conclusion on the basis of the existing evidence and there was nothing in the new independent report to cause her to alter this view. None the less, having regard to the passage of time since the incident, to the fact that DS Lawrence had been told of the original decision that he was not to face disciplinary proceedings, and to the availability of lesser, proportionate means of dealing with DS Lawrence's standard of driving, her provisional conclusion is that there should be no disciplinary proceedings against him. She adds that, if her involvement in the case had been at the material time in 2000, a different conclusion might have been reached.

35. At the end of her letter Ms Reid told the appellant that he now had an opportunity to comment within 28 days on her provisional decision "and to send any further information or evidence [he] may have." She enclosed a reply form which set out the choices open to the appellant. The form asks the appellant to tick all the options that apply. The possible options are:

"I believe the Authority has made a mistake in law or reasoning. (Please enclose your written reasons.)

I believe that the proposed action to deal with the officer is inappropriate. (Please enclose your written reasons.)

I want to make other comments on the provisional decision. (Please enclose your comments.)

I have new evidence that has not been considered, and I enclose copies. (Please set out what the evidence is, e g photos, medical evidence etc. Do not send originals. If you have items which are difficult to copy, such as photographs, videos or audio tapes, please respond within the time allowed, and the Authority will ask the force to make arrangements to collect the items from you and send us copies.)"

Mr Gordon QC indicated that the appellant intended to take up the invitation to comment on the provisional decision.

36. The present proceedings are not, of course, for review of this provisional decision but for review of the Authority's decision of 3 April 2001 to refuse disclosure of the material sought by the appellant. Your Lordships were invited to look at the provisional decision letter, however, not just to show the stage which the Authority's review of the appellant's complaint had reached but also as an illustration of the way the Authority were now handling complaints involving a possible breach of article 2 or 3 of the Convention. Mr Catchpole QC explained that the Authority had previously been piloting a system of issuing provisional decisions in two police authority areas but, following on the decision of Moses J in these proceedings, they had decided to use it in all such cases.

Section 80 of the Act

37. The Authority's decision of 3 April 2001 to refuse the appellant's request for disclosure took section 80(1)(a) of the Act as its starting point. For that reason section 80 is also the correct place to begin any review of that decision:

"(1) No information received by the Authority in connection with any of their functions under sections 67 to 79 or regulations made by virtue of section 81 shall be disclosed by any person who is or has been a member, officer or servant of the Authority except -

(a) to the Secretary of State or to a member, officer or servant of the Authority or, so far as may be necessary for the proper discharge of the functions of the Authority, to other persons,

(b) for the purposes of any criminal, civil or disciplinary proceedings, or

(c) in the form of a summary or other general statement made by the Authority which does not identify the person from whom the information was received or any person to whom it relates.

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

38. The section contains a general ban on members, officers or servants of the Authority disclosing any information received by the Authority and makes disclosure a criminal offence punishable with a fine. This is a somewhat unpromising starting-point for identifying what Mr Gordon contended was a general duty on the Authority to disclose information to complainants, such as the appellant, unless there were good reasons not to disclose the information. Indeed the section does not itself require the Authority to disclose information in any circumstances. Rather, the three exceptions to the ban in subsection (1) in effect permit the Authority to disclose information in circumstances falling within the exceptions. The parties are agreed that, since the appellant seeks disclosure of statements from named witnesses, referring to named individuals and relating to

DS Lawrence and other officers about whom the appellant has complained, the only conceivable basis for permitting that disclosure would be exception (a). That exception gives the Authority power to disclose information when the disclosure is necessary for the proper discharge of their functions. In the present case, therefore, section 80(1)(a) permitted Ms Mitchell, as a member of the Authority, to disclose the material to the appellant "so far as," but only "so far as," this was "necessary for the proper discharge of the functions of the Authority".

39. Mr Gordon submitted that all the evidential material which the appellant sought should be disclosed; he did not differentiate among the items. The critical question is therefore whether disclosure of that material is "necessary" for the "proper" discharge of the Authority's functions. If disclosure is necessary for that purpose, then a member of the Authority not only can, but indeed must, make it; if it is not necessary, then she cannot lawfully make it and commits a criminal offence if she does. Mr Harrison QC for DS Lawrence described the Authority as having a discretion whether to disclose information. But deciding whether the disclosure of information is necessary for the proper discharge of the Authority's functions involves an exercise of judgment rather than an exercise of discretion. The Authority member can only disclose information when in her judgment disclosure is necessary if the Authority is to discharge their functions properly in the circumstances. In that event, she must disclose it. Obviously, not all members of the Authority will reach the same judgment on this matter in every situation, but discussion, experience and training will doubtless help to develop a common view. In the present case Ms Mitchell's judgment was that disclosure of the material sought by the appellant was not necessary for the proper discharge of the Authority's functions in the circumstances. The Authority have backed that judgment. The appellant challenges it on the ground that disclosure is necessary for the Authority to discharge their functions compatibly with his Convention rights. If he is right, and in the circumstances no reasonable member of the Authority could have thought that disclosure was unnecessary, then it follows that the material must be disclosed and the relevant member of the Authority has the power to disclose it under section 80(1)(a).

The aims of the Authority under the Act

40. Although the Act contains no general statement of the aims of the Authority, they are by no means obscure. The police in this country are organised into various disciplined forces. Recruits go through a period of residential training, including a certain amount of drill. Police officers are promoted to various ranks with the power to give orders to more junior officers. Police men and women regularly have to confront dangers and challenges that members of the public can avoid. They therefore enjoy special powers of restraint and are privy to information that is not available to the public but, above all, they have to be able to rely on the loyalty and help of their fellow officers. So members of a successful police force, like members of a successful unit in the armed forces, will be imbued with a certain esprit de corps. The flip side of these positive features is the risk that, out of a misplaced sense of loyalty, officers may close ranks and condone, or turn a blind eye to, misconduct by a fellow officer, especially when the complaint is made by an outsider. In particular, complaints of misconduct may not be investigated thoroughly or objectively. To counteract these risks - which are evident not only to complainants but to the wider public - Parliament passed the legislation that now makes up Chapter I of Part IV of the Act. The provisions tackle the problem in two ways. First, they impose a series of duties on the chief constable and the police officer appointed to carry out the investigation; secondly, they establish the Authority and set out their functions. The main role of the Authority is to supervise the police investigation of alleged misconduct on the part of police officers and to make sure that the investigation is independent and thorough. But, of course, there could still be a risk that, for much the same misguided reasons, no action would be taken on the results of such an investigation. In the case of possible criminal conduct, that risk is met if the decision on criminal proceedings is taken by the independent Director of Public Prosecutions. That external independent check is not available with disciplinary proceedings. So Parliament gave the Authority the right to recommend and, ultimately to insist, that such proceedings should be brought, even against the views of the chief constable.

The scheme of the Act

41. The relevant provisions are to be found in Chapter I of Part IV of the Act. They are shortly to be superseded by Part 2 of, and schedule 3 to, the Police Reform

Act 2002. The scheme of the new legislation is, however, so different that counsel were agreed that, while it might show the state of Parliament's thinking about the issue of disclosure today, it does not assist in interpreting or applying the existing legislation.

42. For present purposes the special provisions in the Police Act 1996 for handling complaints against senior officers can be left on one side. In other cases, the starting-point is the duty of the chief constable, when a complaint is submitted, to take steps for the purpose of obtaining or preserving evidence relating to the conduct complained of: section 67(1). This duty, which is given the highest priority, is plainly intended to prevent evidence being removed or destroyed. Thereafter under section 68(1) the chief constable must record the complaint - no mere formality, but a step that makes sure that the complaint is not ignored or concealed. Where the complaint cannot be resolved informally, it is the chief constable's duty to appoint a member of his own or of some other force to investigate it formally: section 69(5) and (6). The chief constable may refer any complaint to the Authority but, if the complaint alleges inter alia that the conduct "resulted in the death of, or serious injury to, some other person", then he must refer it: section 70(1)(a) and (b). For their part, the Authority can require the chief constable to submit any complaint for their consideration: section 70(2).

43. However the complaint comes to them under the Act, "the Authority shall supervise the investigation": section 72(1). Very importantly, when the Authority are to supervise the investigation of a complaint, under section 72(3) they may require that the chief constable is not to appoint any officer from his own or any other force to investigate the complaint unless the Authority have given notice that they have approved the appointment of that person. If an appointment has already been made, the Authority may demand that another officer be appointed after approval by the Authority. These powers should ensure that the investigating officer is not only truly independent but likely to pursue the investigation diligently.

44. Once the investigating officer is appointed, it is up to him to investigate the complaint. The Authority are not involved. But at the end of the investigation the investigating officer submits a report to the Authority and sends a copy to the chief

constable: section 73(1). After considering the report, under section 73(2) the Authority must submit an appropriate statement about the investigation to the chief constable. In terms of subsection (9) an "appropriate statement" means a statement:

"(a) as to whether the investigation was or was not conducted to the Authority's satisfaction,

(b) specifying any respect in which it was not so conducted, and

(c) dealing with any such other matters as the Secretary of State may by regulations provide."

A separate statement may be submitted in respect of the disciplinary and criminal aspects of an investigation: section 73(5). Other than in exceptional circumstances, neither the chief constable nor the Director of Public Prosecutions is to bring criminal proceedings before the Authority submit their statement to the chief constable: section 73(7) and (8).

45. The Act does not spell out what is to happen if the Authority submit a statement to the effect that the investigation was not satisfactory. The implication must be, however, that the chief constable will take account of the Authority's criticisms and, unless they can be shown to be mistaken, ensure that the perceived defects in the investigation are remedied. Otherwise, the Authority's supervision of the investigation would be at best ineffective and the purposes of the legislation would be frustrated. This would be apparent not only to the complainant but to all interested members of the public.

46. When the chief constable receives the copy of the report submitted to the Authority under section 73(1), he must determine whether it indicates that a criminal offence may have been committed by an officer of his force: section 75(2). If so, he must send a copy of the report to the Director of Public Prosecutions: section 75(3). Again, the Act does not spell out what is to happen next. This is simply because, assuming that the investigation has been satisfactory, the Director and the Crown Prosecution Service, who are independent of the police,

will treat it like any other report of alleged criminal conduct. Applying the appropriate criteria, they will decide whether to bring criminal proceedings. If brought, proceedings follow the usual course: it will be for the prosecution to make any appropriate discovery to the defendant and, in the event of a trial, to present the evidence fairly. The decision to convict or acquit is for the magistrates or jury.

47. The Authority have no role to play in supervising any of these stages. This is because the steps are taken not by the police but by bodies which are independent of the police. Parliament must therefore have decided that the potential dangers that are inherent in any situation where the police investigate themselves are not present at these later stages. Indeed a scheme that subjected the independent prosecuting authorities to supervision by the Authority would raise substantial, and very different, issues.

48. Once the Director has dealt with the question of criminal proceedings, the chief constable must send the Authority a memorandum stating whether he has brought, or proposes to bring, disciplinary proceedings in respect of the conduct complained of. If not, he must give his reasons: see section 75(3) and (4). The chief constable must send a similar memorandum to the Authority when, on considering the report, he decides that there is nothing to indicate that an officer committed a criminal offence: see section 75(5). In either event, if the chief constable has indicated that he intends to proceed with disciplinary proceedings, he must do so: subsection (7). The proceedings will fall to be conducted in accordance with the Police (Conduct) Regulations 1999 (SI 1999/730).

49. Where the chief constable's memorandum indicates that he has not taken disciplinary proceedings, and does not propose doing so, the Authority may recommend that he bring them: section 76(1). If the chief constable accepts the recommendation, he must proceed with the disciplinary proceedings. If, however, the chief constable remains unwilling to take such proceedings, the Authority may direct him to do so and they must supply him with a written statement of their reasons for so directing: section 76(3) and (4). The chief constable must comply with the direction. This power provides a long-stop against any conceivable danger that a chief constable, perhaps because of narrower concerns of force morale,

might overlook the wider public interest in taking appropriate disciplinary proceedings. To enable the Authority to discharge these important functions properly, under section 76(7)(b) the chief constable must "supply the Authority with such other information as they may reasonably require for the purposes of discharging" them.

50. Once the chief constable brings disciplinary proceedings, the Authority's functions are at an end. All the further steps are for other persons and bodies whose performance the Authority have neither the duty nor the power to supervise. Indeed, strictly speaking, there is nothing in the legislation or in the regulations that requires that the Authority even be informed of the outcome. Parliament assumes that proceedings which are conducted in accordance with the Conduct Regulations will by their nature be sufficiently thorough and independent. Again, any provision for such proceedings to be supervised by the Authority would raise very significant issues.

51. By contrast, under regulation 25 of the Conduct Regulations, if a disciplinary hearing is held, after giving his evidence, a complainant, such as the appellant, is allowed to attend while witnesses are being examined or cross-examined. Although the hearing is conducted in private (regulation 26(1)), at the discretion of the presiding officer, the complainant may be accompanied by a friend or relative (regulation 25(2)) and a solicitor may attend, subject to the consent of all the parties to the hearing. Moreover, where the officer concerned gives evidence, the presiding officer must put to him any proper questions which the complainant requests should be put. Alternatively, the presiding officer may allow the complainant to put the questions himself: regulation 25(4).

The aims of the legislation

52. In these circumstances I am, with respect, unable to accept Hale LJ's formulation of the primary purpose of the Authority's functions. She said, at paras 74 - 77 of her judgment in the Court of Appeal, that the statutory functions of the Authority are there to fulfil at least three purposes:

"(1) The primary purpose must be to secure proper behaviour by police officers, by ensuring that allegations of improper behaviour are fully investigated and any wrongdoers brought to book, either by prosecution or by disciplinary proceedings.

(2) That purpose can only be achieved by a process which is fair, and perceived to be fair, by both parties to the complaint, the complainant and the officer against whom the complaint is made. Proper behaviour is not secured or promoted by a disciplinary process which is arbitrary or unfair. Why keep to the rules if you may be punished anyway? Why make a complaint if it will be turned down anyway?

(3) The process must also be such as to promote public confidence in the police. It is hugely important in a democratic society that the great mass of the population who are inclined to be law-abiding should have the reassurance that their law enforcement agencies can be trusted to act properly or face sanctions if they do not."

53. The Authority have not been given their functions so as to secure proper behaviour by police officers: that is the objective of good training, of force discipline, of codes of conduct and, ultimately, of the criminal law. Nor is it any part of the Authority's functions to see that wrongdoers are "brought to book" by being prosecuted. That is a matter for the independent prosecuting authorities. The aim of the Authority in carrying out their functions must be to satisfy the legitimate interests of both complainants and the wider public that the investigation of complaints against police officers, and any decisions on taking disciplinary proceedings should be, and should be seen to be, independent and thorough. The means of achieving that purpose are for the Authority to supervise the police investigation and thereafter to ensure that, where appropriate, disciplinary proceedings are taken against the officers concerned.

54. If that is the aim of the Authority's work, it follows that they must carry out their functions in such a manner as to further that aim. In the language of section 80(1)(a) the "proper discharge" of their functions will be designed to further that aim. Therefore, the Authority may judge that it is necessary for the proper discharge of their functions to disclose certain information derived from the investigation to complainants if their legitimate interests and those of the wider

public are to be met. And it is clear that the Authority have so judged: they have adopted the practice, not specifically envisaged in the legislation, of writing to complainants to explain why their complaints are being rejected and of disclosing information from the investigation in such letters. The original (flawed) decision letter of 5 September 2000 in this case is an example. When explaining the reasons for her decision, the Authority member disclosed information about what various witnesses, named and unnamed, had said in the course of the investigation about the actions of various identifiable people. Since disclosure of that kind of information does not fall within either paragraph (b) or (c) of section 80(1), the Authority must have judged that in this case disclosure of that information as part of a reasoned decision was necessary if the Authority were to discharge their functions in a transparent manner that would give effect to the legitimate interests of the appellant, as complainant, and of the wider public.

55. The Authority's assessment of the degree of disclosure of information necessary for the proper discharge of their functions may, of course, alter and deepen in the light of experience. The letter to the appellant's solicitor from an Authority member, James Elliot, dated 21 March 2000 explains indeed how the Authority had been considering various aspects of disclosure before and after the Lawrence inquiry. It is consistent with this evolving approach that the Authority should have decided to start issuing provisional decision letters to complainants inviting their comments in article 2 and 3 cases. As Mr Gordon rightly pointed out, the information disclosed in the provisional decision is such that this practice too must be based on the judgment that issuing a provisional decision in these terms is necessary for the proper discharge of the Authority's functions. There is no challenge to that assessment.

56. In para 80 of her judgment, Hale LJ envisaged that the purposes of the legislation would be served by the disclosure of as much information as possible to both parties even while the investigation is going on. This would seem to imply that, subject to considerations about the contamination of the evidence, the proper discharge of the Authority's functions would require disclosure to both parties at that stage. I deal briefly with the issues of contamination and confidentiality below, but at this stage I would reject this suggestion on somewhat wider grounds. When

the investigating officer is gathering evidence and other information under the Authority's supervision, he will generally be conducting a criminal investigation. Police officers investigating a crime do not share their information with the suspect unless this will serve the purposes of the investigation. Indeed, it will often be essential that the suspect does not find out that he is under investigation in case he destroys evidence or interferes with potential witnesses. Similarly, police officers investigating an allegation of assault, for example, will not routinely keep the supposed victim informed of the results of their investigation - if only because they must keep an open mind. At the end of their inquiries, the evidence may point to the supposed victim having been the true aggressor in the incident. There is nothing in the scheme of the Act to suggest that the practice should be different for complaints against police officers. In particular, there is nothing to suggest that the Authority, which do not carry out the investigation, should interfere with it by disclosing information while it is in progress. Indeed, as Mr Catchpole pointed out, even where disciplinary proceedings eventually take place, the police officer concerned has no right to be supplied with copies of any relevant statement, document or other material obtained during the course of the investigation until three weeks before the hearing: Regulation 13(1) of the Police (Conduct) Regulations 1999.

57. Mr Gordon, while not abandoning the argument that a duty of disclosure applied during the criminal investigation, acknowledged the difficulties. He stressed, however, that in this case the decision to refuse disclosure was taken after the police investigation was over and the criminal proceedings were finished. At the relevant time the Authority were considering, under section 76, whether to recommend that the Chief Constable should bring disciplinary proceedings against police officers, in particular, DS Lawrence. At this stage the case for disclosure was compelling. By issuing the provisional decision letter outlining aspects of the evidence, the Authority had shown that, in their judgment, in an article 3 case it was necessary for the proper discharge of these functions that this information be given to the appellant. In inviting the appellant to respond by pointing out mistakes in the Authority's reasoning and, in particular, by supplying new evidence for their consideration, the Authority had acknowledged that the appellant had an important role to play that could influence their final decision on disciplinary proceedings.

What the Authority had failed to realise, however, was that the appellant could not play that role effectively unless they gave him the witness statements and other documents which he sought. Only once he had that material - on which the Authority member had based her provisional decision - would the appellant be in a position to assist the Authority member by providing informed comment on her proposed decision. Although this applied to all the relevant witness statements, Mr Gordon gave, as a cogent example, certain independent witnesses who, he said, supported the appellant's contention that DS Lawrence had been trying to kill him. While the provisional decision letter ran to over 12 pages and dealt with a lot of material, the Authority member made no mention of this important evidence. In order to comment effectively on this omission in the reasoning of the provisional decision, the appellant had to see the statements of the witnesses.

Article 3 of the Convention

58. In advancing this submission Mr Gordon prayed in aid article 3 of the Convention prohibiting inhuman or degrading treatment. Although the incident giving rise to the appellant's injuries occurred in April 1999, some 18 months before the Human Rights Act 1998 was brought into force, neither the respondent nor any of the interveners contended that, for this reason, the obligation under article 3 to investigate the incident was not engaged. Indeed, counsel for the respondent argued the case on the basis that article 3 did apply. Moreover, he accepted that, when taken in conjunction with article 1, article 3 - like article 2 - required there to be an effective official investigation capable of leading to the identification and punishment of those responsible: *Assenov v Bulgaria* (1998) 28 EHRR 652, 701, para 102; *McCann v United Kingdom* (1995) 21 EHRR 97, 163 - 164, paras 161 - 164. I therefore proceed on the assumption that article 3 is engaged without exploring its precise ambit or deciding whether article 2 might also have been invoked since the appellant was alleging that DS Lawrence had tried to kill him.

59. Both parties accepted that a convenient summary of the requirements of an effective investigation for the purposes of article 3, according to the case law of the European Court of Human Rights, was to be found in the speech of my noble and

learned friend, Lord Bingham of Cornhill, in *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51; [2003] 3 WLR 1169, 1177-1179, para 20. In point 10 he said, referring to *Jordan v United Kingdom* (2001) 37 EHRR 52:

"The court has not required that any particular procedure be adopted to examine the circumstances of a killing by state agents, nor is it necessary that there be a single unified procedure: *Jordan*, para 143. But it is 'indispensable' (*Jordan*, para 144) that there be proper procedures for ensuring the accountability of agents of the state so as to maintain public confidence and allay the legitimate concerns that arise from the use of lethal force."

While the general points analysed by Lord Bingham were not in doubt, counsel were sharply divided on the implications of article 3 for the involvement of a complainant, such as the appellant, in the investigation. Mr Gordon referred, in particular, to the judgments of the European Court of Human Rights in *Edwards v United Kingdom* (2002) 35 EHRR 487 and *Jordan v United Kingdom*, both involving applications based on article 2.

60. The first case arose out of the killing of Mr Christopher Edwards by a mentally disturbed prisoner who was sharing his cell in Chelmsford Prison. On the basis of article 2 Mr Edwards' parents alleged that the authorities had failed to protect their son's life and that they were responsible for his death. In addition they argued that the investigation of his death had not been adequate or effective. The European Court of Human Rights held that there had been a violation of article 2 in both respects. So far as the second aspect is concerned, there had been no inquest and the fellow prisoner had pleaded guilty to manslaughter and been dealt with by means of a hospital order. For that reason the circumstances of Mr Edwards' death were not investigated fully at his trial. The authorities involved did, however, set up a non-statutory inquiry to investigate the circumstances. The inquiry, chaired by a Queen's Counsel, sat in private. It heard evidence on 56 days over a period of 10 months and eventually published a detailed report. The inquiry did not, however, have the power to compel the attendance of witnesses and, in fact, two prison officers refused to give evidence. The evidence of one of them, at least, would have been potentially significant.

61. The court dealt with the inquiry in this way, at 35 EHRR 487, 515, paras 81 - 84:

"The inquiry sat in private, during its hearing of evidence and witnesses. Its report was made public, containing detailed findings of and criticisms of failures in the various agencies concerned and recommendations.

The Government argued that the publication of the report secured the requisite degree of public scrutiny. The court has indicated that publicity of proceedings or the results may satisfy the requirements of article 2, provided that in the circumstances of the case the degree of publicity secures the accountability in practice as well as theory of the state agents implicated in events. In the present case, where the deceased was a vulnerable individual who lost his life in a horrendous manner due to a series of failures by public bodies and servants who bore a responsibility to safeguard his welfare, the court considers that the public interest attaching to the issues thrown up by the case was such as to call for the widest exposure possible. No reason has been put forward for holding the inquiry in private, any possible considerations of medical privacy not preventing the publication of details of the medical histories of Richard Linford and Christopher Edwards.

The applicants, parents of the deceased, were only able to attend three days of the inquiry when they themselves were giving evidence. They were not represented and were unable to put any questions to witnesses, whether through their own counsel or, for example, through the inquiry panel. They had to wait until the publication of the final version of the inquiry report to discover the substance of the evidence about what had occurred. Given their close and personal concern with the subject-matter of the inquiry, the court finds that they cannot be regarded as having been involved in the procedure to the extent necessary to safeguard their interests."

The court concluded, at p 516, para 87, that the lack of power to compel witnesses and the private character of the proceedings from which the applicants were excluded, save when they were giving evidence, failed to comply with the requirements of article 2.

62. In this respect the difference between the parents of the victim in Edwards and the appellant in the present case could not be more striking. Mr Edwards' parents were excluded from the inquiry, except when giving evidence, and so could not even find out what was going on. The first they knew was when the inquiry published its report. By contrast, the appellant has been involved throughout the investigation of the incident envisaged by the Act. At the outset, he was interviewed and was able to give his version of events. At a later stage he and his solicitor saw the video recording and he then had a further opportunity to give evidence to the investigating officer. When the investigation was complete, the appellant received a copy of the appropriate statement by the Authority, in terms of section 73(4). This was accompanied by a letter explaining what would happen next and, in particular, that the Authority would have the power to recommend that disciplinary proceedings should be taken. In due course the Authority member wrote to the appellant in fairly detailed terms to tell him that she had decided not to recommend such proceedings. This gave the appellant the opportunity to point out an error in the member's reasoning, which led her to withdraw that letter and issue a fresh decision letter. The appellant was then able to challenge that letter successfully in judicial review proceedings. Once these were over, another Authority member, who had taken over the case, wrote to the appellant to explain how she proposed to conduct the review of his complaint. Again, the appellant was able to comment on her letter and bring about a modification in her approach. She also told the appellant the names of the witnesses whose statements she would be using, although she refused to disclose the statements themselves. After the decision of Moses J, the appellant was supplied with a copy of the video recording of the incident. Even while the present appeal was pending, the Authority were in correspondence with the appellant's solicitors to explain how they proposed to proceed with the review. Finally, the Authority member sent the appellant a very detailed letter setting out her proposed decision not to recommend proceedings. The letter explained the reasons, under reference to the evidence obtained in the initial police inquiry and a further expert report commissioned by the Authority. The Authority member also gave the appellant an opportunity to comment on the proposed decision and to submit further evidence. He intends to do so. Clearly, the member will have to consider any relevant material that the appellant submits.

If, after doing so, the Authority member remains of the same view, she will send the appellant a detailed letter setting out her final decision not to recommend proceedings and explaining the reasons. If, on the other hand, she changes her mind and decides to recommend disciplinary proceedings against DS Lawrence or any other officer, the appellant will have the right to be present at the hearing. Moreover, if the officer concerned gives evidence, the presiding officer at the hearing will require to put to him any proper questions proposed by the appellant and may indeed allow the appellant to put the questions himself.

63. In my view there is nothing in the judgment of the European Court of Human Rights in *Edwards* 35 EHRR 487 to suggest that this degree of involvement of the appellant in the investigation of this particular incident is anything other than sufficient to safeguard his legitimate interests and so to meet the requirements of article 3.

64. In *Jordan v United Kingdom* 37 EHRR 52 the applicant claimed that in 1992 his son had been unjustifiably shot and killed by an officer of the Royal Ulster Constabulary and that there had been no effective investigation into, or redress for, his death. The court held that the inquest procedure under Northern Ireland law did not allow any verdict or findings which could play an effective role in the identification or prosecution of any criminal offences that might have occurred. For that reason it fell short of the requirements of article 2.

65. Having explained that a prompt response by the authorities to the investigation of a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion or tolerance of unlawful acts, the court continued, at p 88, para 109:

"For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."

In considering the police investigation, the court held, at p 91, para 121:

"As regards the lack of public scrutiny of the police investigations, the court considers that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under article 2. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures."

The court clearly recognised that there are legitimate reasons why police investigations cannot be subjected to public scrutiny. Therefore, even though the victim or his next-of-kin must be involved in the investigative procedure to the extent necessary to safeguard his or her legitimate interests, this does not mean that article 2 gives any automatic right for them to be given access to police reports and investigative materials. So far as the public or the victim requires to be given access, this can be done at a later stage in the procedure - for example, at any inquest, trial or disciplinary proceedings. It appears that in *Jordan*, at p 95, para 134, the court would have favoured the disclosure of witness statements in advance of any inquest.

The decision not to disclose statements in this case

66. At the time of the decision letter of 3 April 2001 the Authority member was at the stage of considering, in terms of section 76, whether to recommend that disciplinary proceedings should be brought against police officers, in particular, DS Lawrence. The relevant question is, accordingly, whether the disclosure of the witness statements sought by the appellant was necessary for the proper discharge of that particular function of the Authority. While it is correct to say that the investigation supervised by the Authority had been completed by that time, section 76(7)(b) envisages that at this stage the Authority themselves may wish to obtain further information. Moreover, the provisional decision issued after the judgment of the Court of Appeal shows that, contrary to what Chadwick LJ had supposed, at para 70, the Authority recognise that the appellant might indeed have something to contribute at this stage. Under the procedure now adopted by the Authority in article 2 and 3 cases, the complainant has an opportunity to make that

contribution when the Authority member sets out her provisional decision and gives detailed information about the evidential basis of that decision. Even without seeing the witness statements and other primary material, such a letter puts a complainant, such as the appellant, in a position to make constructive criticisms of the proposed decision. For instance - to take the example on which Mr Gordon relied - the appellant can draw the member's attention to the absence of any reference to the evidence of the independent witnesses who, he says, support his view that DS Lawrence was trying to kill him. The appellant can also draw attention to any legal or other flaw in the reasoning of the proposed decision. In these ways, even without the material being disclosed, the appellant can make an effective contribution to the process of reaching the final decision on the complaint. Mr Gordon suggested that, even though DS Lawrence had been prosecuted and fined for driving without due care and attention, the Authority might be persuaded by the appellant's response to the provisional decision to recommend that disciplinary proceedings be taken on the basis that he had, in effect, tried to kill the appellant. There is, however, considerable force in Mr Harrison's submission that this suggestion was unrealistic. In any event, the final decision under section 76 rests with the Authority.

67. In the Administrative Court, Moses J focused on the particular status of a complainant under article 3. He concluded that, to give effect to that status, the Authority should disclose the statements of eyewitnesses to a complainant such as the appellant. Having accepted that the appellant was not entitled to disclosure of certain internal communications, Moses J continued, at paras 54 and 55:

"54. But eyewitness accounts seem to me to fall into a different category. It seems to me that the claimant's legitimate interests cannot be adequately safeguarded without affording him an opportunity to comment upon factual statements made by those present at the scene at the time or shortly thereafter, for instance those who observed the aftermath at the site of the accident, such as debris or skid-marks, no doubt available from the accident report.

55. As a witness and as one whose individual rights are engaged, it seems to me that he does have a right to comment upon the evidence of others which relates to

evidence at the scene of the accident. There does not seem to be any other way in which his particular status can be recognised or his particular legitimate interest be safeguarded."

While it is correct, of course, that the appellant would be a witness in any disciplinary proceedings, that is in itself no reason for saying that he has a right to see and comment on others' evidence about the scene of the incident. Similarly, there are many ways in which the appellant's particular status and legitimate interests as a complainant can be recognised and safeguarded in the procedure required by article 3: the involvement of the appellant at many stages, from the start of the investigation through to the invitation to comment on the proposed decision on disciplinary proceedings, shows this. I would, accordingly, respectfully reject the reasoning and conclusion of Moses J, which he reached without the benefit of the fuller evidence now available and at a time when the Authority had not adopted the general practice of issuing provisional decisions in article 3 cases.

68. For these reasons I am satisfied that in her letter dated 3 April 2001 the Authority member was entitled to take the view that, in terms of section 80(1)(a) of the Act, disclosure of the witness statements and other material sought by the appellant was not necessary for the proper discharge of the Authority's functions under section 76.

69. Indeed, as Hale LJ observed, at para 86, in complaints against the police

"the best safeguard for all concerned is a fully reasoned decision, giving an account of the evidence received, any conclusions reached on disputes of fact, applying the appropriate law to the facts found, and explaining the considerations which have affected any discretion exercised. Only rarely should the reasonable recipient of such a decision be so suspicious as to wish to see the underlying evidence on which it is based. I would therefore conclude that a fully reasoned decision is the best way to safeguard the integrity of and promote individual and public confidence in the complaints procedure."

It is unnecessary to consider in this case whether, as Hale LJ went on to envisage, there might be exceptional cases in which it would be necessary for the Authority

to disclose the underlying evidence, even after the complainant has received a fully reasoned final decision letter.

70. My Lords, on the approach that I have adopted, the issues of the possible contamination of the evidence and of the need to maintain the confidentiality of witness statements are somewhat peripheral. Since both Simon Brown LJ and Hale LJ examined them in considerable detail, however, I add some brief observations.

Contamination of evidence

71. The Authority's role is to supervise the police investigation of alleged misconduct by police officers. Where the report of the investigation shows that a crime may have been committed, it is then for the prosecuting authorities to consider whether to take proceedings. Plainly, Parliament cannot have intended that anything done by the Authority should risk compromising the investigation or impairing the prospects of the Crown mounting a successful prosecution in an appropriate case. While there is no absolute rule that prevents a potential witness in a criminal trial from being shown the statements of other witnesses, in general this is avoided so far as possible. There are sound reasons for this approach. At worst, a dishonest witness - and there are many dishonest complaints against the police - may trim his evidence to fit the evidence of another witness whose statement he has seen. If the issue was covered in his original statement, the alteration will be apparent and a cross-examiner can bring out the contradiction. But in other cases the witness will be alerted to a point that he had not mentioned in his original statement. Trimming of that kind is not so easily demonstrated. Even an honest witness may suppress a genuine doubt about what he saw or heard, if he discovers that another witness is going to give evidence to a certain effect. Equally importantly, if a witness has seen the statements of other witnesses, his evidence becomes vulnerable to cross-examination and comment on the basis that he has consciously, or subconsciously, altered his evidence to fit the evidence of the other witnesses. There are, certainly, situations where the overall benefit from disclosing the evidence of another witness can be said to outweigh these disadvantages. But the correct bodies to make that judgment are the police and

the prosecuting authorities. The Authority, who do not carry out the investigation or conduct the prosecution, are not well placed to reach a sound judgment on the point. A decision by the Authority to disclose witness statements might therefore prejudice a potential prosecution. This would be contrary to the whole intention of Parliament in setting up the Authority. Of course, if disclosure were actually necessary for the proper discharge of the Authority's functions prior to any decision on prosecution, then the Authority would have both the duty and the power to make it. But the risk of prejudicing the work of the police and prosecuting authorities by contaminating the evidence is a further reason for concluding that disclosure of witness statements to complainers who are potential witnesses is not, as a rule, to be considered necessary for the proper discharge of the Authority's functions under the Act. If disclosure is to be made at this stage, it should be made by the police - as indeed is the current practice.

72. Similar factors apply at the stage when disciplinary proceedings are under consideration. As long as no final decision has been taken on bringing proceedings, a complainant such as the appellant is a potential witness in those proceedings. While it is true that they are civil in nature, the risks of contaminating the evidence and reducing its cogency remain important. Again, the Authority are not the body charged with conducting the proceedings and it is important that nothing which they do should have the potential for adversely affecting the quality of the evidence available at any hearing. These considerations reinforce the conclusion that the proper discharge of the Authority's functions under section 76 will not, as a rule, necessitate disclosure of witness statements.

Confidentiality of witness statements

73. The other factor considered by the Court of Appeal was the desirability of maintaining the confidentiality of statements given by witnesses. They did not consider that, in itself, this was a sufficient reason for never disclosing witness statements. I agree: if disclosure were indeed necessary for the proper discharge of the Authority's functions, then the statements would have to be disclosed, whether or not they were regarded as confidential. But it should be recognised that the starting-point of section 80 is that information provided to the Authority is to be

kept confidential. This mirrors the position with both the police and the prosecuting authorities. As a general rule, this appears to be entirely appropriate. Of course, witnesses who give evidence to the police must expect that, whether favourable or unfavourable to the potential accused, it will be disclosed and become public in the event of a trial. But, subject to that, they may have good reasons for being anxious that it should not be revealed - for example, if it tends to cast doubt on a complainer's trumped-up allegation against a police officer. The potential risks to such a witness are obvious. Parliament recognises this legitimate concern in section 80(1)(c) which allows information to be disclosed in the form of a summary that does not identify the person from whom the information was received. Similarly, in complaints against the police, as in many other cases, the statements will often show individuals, including the witnesses themselves, in a bad light - behaving, especially through drink, in ways or in circumstances that they would be ashamed to see made public. So witnesses will be understandably concerned that their evidence about their own or others' misdemeanours should be kept confidential unless there is a trial. The concern will be shared by the other people involved. The police and prosecutors are expected to respect that concern. And, again, in section 80(1)(c) Parliament has recognised that it is genuine. For these reasons I consider that the desirability of maintaining the confidentiality of witness statements is a legitimate factor to be taken into account when considering what the proper discharge of the Authority's functions requires at any particular stage.

74. Finally, in this regard, it should be noted that, as Mr Smith QC emphasised on behalf of the Chief Constable, there is no provision in the Act which imposes any duty of confidentiality on the recipient of information disclosed by the Authority under section 80. There would therefore appear to be nothing to prevent him from providing other witnesses with any statements disclosed to him. Of course, many complainants would be responsible and would not do this. Indeed, in the present case before Moses J the appellant gave an undertaking to keep the information confidential. But in other cases less scrupulous complainants would abuse the material disclosed, with possible adverse effects on the quality of the evidence available in any prosecution or disciplinary proceedings. It is hard to see how an Authority member would be in any position to make an accurate assessment of the potential risks in any individual case. This again suggests that, in general at least,

the proper discharge of the Authority's functions under the Act does not require them to disclose witness statements.

75. For these reasons I would refuse the appeal.

LORD CARSWELL

My Lords,

76. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Rodger of Earlsferry, and I am in agreement that the appeal should be dismissed. My reasons for so holding coincide very closely with his, but I should like to take the opportunity to state my conclusions in my own terms.

77. The appeal concerns the application of section 80(1)(a) of the Police Act 1996, which provides that no information received by the Police Complaints Authority shall be disclosed except to the Secretary of State or to a member, officer or servant of the Authority, "or, so far as may be necessary for the proper discharge of the functions of the Authority, to other persons." The basic function of the Authority is to oversee the handling of complaints made by members of the public against police officers. The issue which we have to decide turns on the determination of the way in which the Authority should properly discharge its functions in a case of this kind. In order to determine that it is necessary to consider the purposes of the 1996 Act in instituting the system of oversight by the Authority of complaints against the police. Hale LJ set out in paragraphs 75 to 77 of her judgment in the Court of Appeal a definition of three of those purposes, in the following terms:

"(1) The primary purpose must be to secure proper behaviour by police officers, by ensuring that allegations of improper behaviour are fully investigated and any wrongdoers brought to book, either by prosecution or by disciplinary proceedings.

(2) That purpose can only be achieved by a process which is fair, and perceived to be fair, by both parties to the complaint, the complainant and the officer against whom the complaint is made. Proper behaviour is not secured or promoted by a disciplinary process which is arbitrary or unfair. Why keep to the rules if you may

be punished anyway? Why make a complaint if it will be turned down anyway?

(3) The process must also be such as to promote public confidence in the police. It is hugely important in a democratic society that the great mass of the population who are inclined to be law-abiding should have the reassurance that their law enforcement agencies can be trusted to act properly or face sanctions if they do not."

I share the difficulty felt by Lord Rodger of Earlsferry in accepting this formulation and I should prefer to set out my own.

78. Public confidence in the police is a factor of great importance in the maintenance of law and order in the manner which we regard as appropriate in our polity. If citizens feel that improper behaviour on the part of police officers is left unchecked and they are not held accountable for it in a suitable manner, that confidence will be eroded. I therefore consider that the proper discharge of the functions of the Authority involves fulfilling its objectives of maintaining and enhancing public confidence in the police and the proper administration of police services by endeavouring to ensure that the following ends are achieved:

(a) police officers who behave in a way which falls below acceptable standards are not exempt from sanction but are duly subject to criminal and/or disciplinary proceedings;

(b) members of the public, in particular those who have a legitimate complaint against a police officer, can see that this is being done with a suitable degree of transparency and that there is no collusion in or tolerance of improper behaviour by officers;

(c) the process is conducted in a manner which is fair both to complainants and to police officers.

As Lord Rodger of Earlsferry stated in his opinion, it is not the function of the Authority to secure proper behaviour by police officers, although the exercise of their functions may tend to have that effect. Nor is it to bring wrongdoers to book, which is for prosecuting or disciplinary authorities. To that extent accordingly I

could not accept Hale LJ's description of the first purpose of the Authority, as set out by her in paragraph 75 of her judgment, although her second and third purposes are not dissimilar to those which I have formulated.

79. There may be some tension or conflict between purposes (a) and (b), and decisions may have to be made which will prevail, bearing in mind the high importance of maintaining a desirable level of fairness in the complaints and adjudication process. The instant case is an example of just such a conflict, in that disclosure of the documents sought by the appellant would assist the achievement of the second purpose but might have the effect of hindering the effective accomplishment of the first. There is a demonstrable public benefit in disclosure of documents where it is reasonably possible, but where there is a countervailing factor of sufficient strength it cannot be said to be necessary within the terms of section 80(1)(a) of the 1996 Act.

80. For the reasons which Lord Rodger of Earlsferry described in his opinion as his wider grounds, I would regard it as inappropriate to disclose witnesses' statements to a complainant while a criminal prosecution or disciplinary charge may be brought against the officer against whom the complaint has been made. I also regard the possibility of contamination as having quite material significance, for I think that it can be a problem in criminal cases and, by analogy, in the conduct of disciplinary charges. I agree that the issue of confidentiality is of relatively minor importance.

81. One then has to consider what steps can be and have been taken by the Authority to inform the appellant of what is being done and why, with the object of enhancing his confidence and that of other persons in the integrity of the complaints process. The appellant has been given a detailed and fully reasoned provisional decision dealing with the Authority's proposed recommendation, on which he has received an opportunity to comment. He has seen the video recording of the incident of which he complains and has been given (if somewhat belatedly) a copy of the video. He will receive a final version of the Authority's decision when it is made.

82. The appellant makes the case that he cannot comment effectively on the proposed recommendation without seeing the underlying materials consisting of witnesses' statements. He has, however, received a pretty fair idea of their content from the provisional decision letter. If his information is less than perfect in extent, it is because of the strength of the countervailing considerations. I would therefore agree with the conclusion reached by the Court of Appeal that it is not necessary for the statements to be disclosed before criminal or disciplinary proceedings have either been completed or finally ruled out, which is not yet the case.

83. The appellant also relied on articles 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as reinforcement for his case. There has not been unanimity in the views expressed by some of your Lordships about the applicability of these provisions. While I have reservations about the applicability of either to the present case, I should prefer to leave expression of a definite opinion on the issue to another occasion. I am content to assume for the purposes of this appeal that one or other article applies.

84. The requirements of the Convention relating to effective investigations were set out in para 20 of the opinion of my noble and learned friend Lord Bingham of Cornhill in *R (Amin) v Secretary of State for the Home Department* [2003] 3 WLR 1169, 1177-1179, and I need not set them out here. It is sufficient to say that they can be very shortly summarised for present purposes as requiring an independent investigation undertaken by the state, conducted with reasonable promptitude, capable of leading to a determination whether the acts of the agents of the state were justified and, if not, to identification and punishment of those responsible, with a sufficient element of public scrutiny of the process. I venture to doubt whether these requirements go beyond those imposed by domestic law in any material respect, but in any event I consider that they have been satisfied in the case before your Lordships. Accordingly, if either article 2 or article 3 applies, there has in my opinion been no breach.

85. For the sake of completeness, I would add that I agree with the judgment of Simon Brown LJ rather than that of Chadwick LJ on the ability of the Authority to re-open an investigation if they think it necessary in the light of representations

made or evidence supplied following the issue of a provisional decision letter.

86. I would therefore dismiss the appeal.

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