[2019] EWHC 3169 (Admin)

CO 4782/2018

Judgment handed down on 6 December 2019

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

LEEDS DISTRICT REGISTRY

HH Judge Kramer sitting as a judge of the High Court

BETWEEN:

THE QUEEN

(On the Application of the CHIEF CONSTABLE OF NORTHUMBRIA POLICE)

Claimant

And

THE INDEPENDENT OFFICE FOR POLICE CONDUCT

Defendant

And

T VICKERS, P REAY, J McINTOSH, N O'DONNELL, C SHERLOCK, P KIRWAN & T HOBBS

Interested Parties

JUDGMENT

Introduction

1. The claimant challenges the decision of the Independent Office for Police Conduct (IPOC) upholding the appeals of the interested parties against the Chief Constable's decision not to uphold their complaints and finding that Chief Superintendent Neill, a now retired police officer, had a case to answer for misconduct. Permission to proceed with the application on all grounds of challenge was given by HHJ Saffman on 4 April 2019.

2. Before me, the claimant, Chief Constable, was represented by John Beggs QC and the defendant, IPOC, by Anne Studd QC. The interested parties did not appear. Their solicitors emailed the court to say that had they had funding they would have been eager to take part.

The parties

3. The claimant is the 'appropriate authority' responsible for investigating certain complaints by members of the public about the conduct of Northumbria Police officers pursuant to paragraphs 2, 6 and 16 of schedule 3 to the Police Reform Act 2002.

4. The IOPC, formerly the Independent Police Complaints Commission, is the relevant appeal body for certain appeals against the findings of complaint investigations by the appropriate authority pursuant to paragraphs 25 and 30 of schedule 3 to the 2002 Act.

5. The interested parties were arrested by officers of Northumbria Police on 25th May 2013 upon the instruction of Chief Superintendent Neill. They complained to the claimant about their arrest and subsequent treatment. On the rejection of their complaints they appealed to the IPCC, as it then was, which upheld the complaints of all but Mr Vickers, finding that the claimant had not sufficiently evidenced the findings of the investigation and requiring a further investigation. As the evidence was the same in each case, the decision in the case of Mr Vickers was the subject of a judicial review and the decision quashed with the consent of the IPCC on 17th August 2015. This resulted in a fresh decision in his case on 21st December 2015 under which there was a direction for the claimant to re-investigate his complaint as well. The further investigation by the claimant again rejected Mr Vickers's complaint on 16th April 2018. Similar investigation reports were produced with respect to the other interested parties, whose complaints were not upheld. In April and May 2018 solicitors for the interested parties appealed the claimant's decision in their cases. On 29th August 2018 the IOPC took the impugned decision upholding some of the complaints in each of the interested parties' appeals, namely those relating to Ch Supt Neill. The claimant challenges the decisions in the cases of all interested parties although in its grounds it uses the case of Mr Vickers as an example applicable to all cases.

Background facts

6. Chief Superintendent Neill was the Silver Commander in charge of Operation Cygnet which was set up to police demonstrations due to take place in Newcastle upon Tyne on 25th May 2013. The English Defence League ("EDL") intended to march through the city and place a wreath at the Cenotaph. There were to be counter- demonstrations. The largest group of counter-demonstrators were members of, or affiliated to, a group called Newcastle Unite ("NU"). The leadership of that group liaised with the police so as to prevent public disorder. The interested parties were members of another group proposing to demonstrate against the EDL. The group goes under the name Fight Racism Fight Imperialism ("FRFI")and also uses the name The Revolutionary Communist Group ("RCG"). This group declined to liaise with the police in relation to its proposed counter-demonstration.

7. Between 3000 to 4000 EDL supporters attended the demonstration in Newcastle. Chief Superintendent Neill described the city as being a 'tinderbox' that day with tensions heightened due to the recent murder of Drummer Lee Rigby as well as some recent convictions of Asian males for explosives and firearms offences, terrorist offences, and convictions and reports of sexual offences by Asian males upon white females. Such were the tensions that the EDL had been informed by the police that they would not be permitted to lay their wreath.

8. Shortly before midday the interested parties were in the Haymarket area of the city. At 12.15pm Chief Supt Neill instructed the Bronze Commander, Chief Inspector McKenna, to arrest them for conspiracy to commit a violent disorder if they did not comply with a request to move to an alternative designated protest site, Cow Hill, which is some distance from the Haymarket and the Cenotaph. Shortly after 12.40pm the interested parties were arrested by the Bronze Commander and colleagues and taken to Etal Lane police station. Their subsequent treatment, though the subject of complaints relating to other officers, need not be considered as it is not relevant to the challenge which is the subject of this claim. It is sufficient to relate that following investigation no criminal proceedings were brought against the interested parties.

9. Solicitors for the interested parties complained to the Chief Constable about the arrests. There were five complaints in total. Those relevant for present purposes were as follows:

> "1. Officers had no reasonable grounds to suspect our client had committed the offence for which he was arrested."
>
> "2. In the event our client's arrest was based on intelligence received our client does not accept that Northumbria police officers correctly processed, evaluated or corroborated the information received in accordance with Northumbria police policies to assess the accuracy and reliability of the information."

<u>The regulatory regime and how it operated in this case.</u>

10. The investigation of police complaints is governed by Part 3 of Schedule 3 to the Police Reform Act 2002 ("the 2002 Act"). In accordance with that part the claimant recorded the complaints, directed that they be investigated, and appointed an investigator.

11. Paragraph 19B to Part 3 requires that where it appears to the investigator that the person under investigation may have behaved in a manner which would justify the bringing of disciplinary proceedings they must certify the investigation as one subject to special requirements. The paragraph goes on to require an investigator who has so certified to make a severity assessment in relation to the conduct of the person concerned. A severity assessment is defined in paragraph 19 B(4) as "*an assessment as to-(A) whether the conduct, if proved, would amount to misconduct or gross misconduct, and (B) if the conduct were to become the subject of disciplinary proceedings, the form which those proceedings would be likely to take."* Paragraph 19 B(6) obliges the investigator, on completing an assessment under the paragraph, to give a notice to the person under investigation in a prescribed form. The requisite form in such a case is that prescribed by regulation 16 of the Police (Complaints and

Misconduct) Regulations 2012. I shall look more closely at that provision when dealing with the claimant's first ground of challenge.

12. A regulation 16 notice was served on Ch Supt Neill on 2 October 2014 relating to the complaints of all the interested parties. The complaints were investigated by Detective Sgt Pollock. In relation to Mr Vickers he rejected the complaints in a report dated on 5 June 2015. Similar investigation reports were produced in relation to the other interested parties all of whose complaints were rejected. Following the events described in paragraph 4, above, the appeal in the case of Mr Vickers and the other interested parties was finally determined by an IOPC caseworker on 29th August 2019. She upheld the appeal in relation to the two complaints set out above as against Ch Supt Neill, finding that he had a case to answer. She refused to uphold the appeals on the 3 further complaints and, thereby, the disciplinary process in the case of the other officers against whom complaints were made concerning the arrest and detention was exhausted.

13. A finding that there is a case to answer does not automatically lead to a misconduct hearing. The appropriate authority has the options of referring the case to misconduct proceedings or taking management action against the officer; regulation 19(5) of the Police (Conduct) Regulations 2012. In this case the claimant cannot do either as Ch Supt Neill had retired from the police by the time of the final IOPC decision and under the regulations then in force there was no power to continue such action against a retired officer.

14. Just to complete the story, on 25 January 2018 the interested parties Reay and Sherlock issued a claim against the Chief Constable of Northumbria in the County Court at Newcastle upon Tyne seeking damages for wrongful arrest, false imprisonment, trespass, assault, misfeasance in a public office and breaches of articles 5,8,10 and 11 of the European Convention on Human Rights. The case was tried with a jury at Newcastle in October 2019 and, following the verdict of the jury, and the decision of the judge, all their claims were dismissed. As regards the claim for wrongful arrest, that must have been on the basis that the Chief Constable satisfied the jury that Ch Supt Neill and the arresting officers honestly believed the grounds upon which they relied to justify the arrest and the judge decided that these amounted to reasonable grounds to suspect that the interested parties had committed the offence for which they were arrested. I am told an appeal has just been filed. The Notice of Appeal does not challenge the jury's finding that the officers', including Ch Supt Neill's, suspicions were genuine and the point which it makes is not one which the IOPC case worker suggested could amount to misconduct as against Ch Supt Neill.

15. I have been invited by Mr Beggs to place some significance on the fact that the claims were dismissed as supporting his assertion that the IOPC decision was irrational. I disagree with that proposition. The subsequent decision of the County Court is not relevant on this issue. It came after the impugned decision and followed a trial at which there would have been far more information before the court than was available to the IPOC when is made it's decision. Furthermore, it does not follow that the fact that the claim was ultimately dismissed indicates that there was no case to answer on the issue of misconduct. I will confine myself to looking at the information which was before the caseworker when she made her decision.

The grounds upon which the decision is challenged.

16. The decision is challenged on the following three grounds:

    (a) The decision was unlawful and/or procedurally improper because the regulation 16 notice served on Ch Supt Neill did not refer to the first ground of complaint and it was thus not open to the IOPC to find there was a case to answer on that ground.

    (b) The decision was unlawful because the IOPC failed to apply the correct test for the lawfulness of the arrest.

    (c) On the evidence, the decision that there was a case to answer was irrational in the Wednesbury sense.

Ground 1, The regulation 16 notice ground

17. Regulation 16 of Police (Complaints and Misconduct) Regulation 2012 ("PCMR") provides that:

    "(1) For the purposes of paragraph 19B(7) of Schedule 3 to the 2002 Act *(assessment of seriousness of conduct under investigation*) the notification given by the investigator to the person concerned must be in writing and state-

    (a) The conduct that is the subject matter of the allegation and how that conduct is alleged to fall below the Standards of Professional Behaviour"

    (b) …

    (c) The investigator's assessment of whether that conduct, if proved, would amount to misconduct or gross misconduct;

    (d) Whether, if the matter were referred to misconduct proceedings, those would be likely to a misconduct meeting or a misconduct hearing;"

    The following parts of the regulation set out the detail which must be given to officers concerning the protections available to them as part of the process.

18. The regulation 16 notice served on Ch Supt Neill, after setting out the names of the complainants and giving the detail of the date, place and grounds for their arrest states:

    "They allege that their arrests were based on intelligence received. They do not accept that Northumbria Police officers correctly processed, evaluated or corroborated the information received in accordance with Northumbria Police policies to assess the accuracy and reliability of the information."

    The notice goes on to record that based on the information then available the conduct described, if proven or admitted, has been assessed as amounting to *"Misconduct"* which *"may result in your attendance at a Misconduct Meeting."* The notice does not identify how that conduct is alleged to fall below the Standards of Professional Behaviour; the relevant standards are to be found in Schedule 2 to the Police (Conduct) Regulations 2012, albeit this failing has not featured in argument.

19. Mr Beggs argues that it is not open to the IOPC to find a case to answer in relation to a complaint which does not appear on the notice, for the disciplinary consequence of such a finding, namely a misconduct meeting or management action, would be an abuse of process. In support of this contention Mr Beggs referred me to a number of cases which highlight the importance of compliance with the requirement to serve a regulation 16 notice so as to ensure that the process of investigation and discipline is fair to the officer concerned. The three cases to which I was taken were claims for judicial review in which Chief Constables' failings as regards the service of notices as required by the predecessor statutory provisions to those currently in force resulted in the quashing of decisions made in the disciplinary proceedings which followed.

20. In **Chief Constable of Merseyside Police ex parte Calveley & Others [1986] QB 424** the five officers who were the subject of complaints were not given a notice under regulation 7 of the Police (Discipline) Regulations 1977, the equivalent of a regulation 16 notice, until two years after the complaints. The Chief Constable rejected a submission on behalf of the officers that they had been irremediably prejudiced by the delay and he proceeded to conduct the hearing in which the officers were found guilty and dismissed from the force or required to resign. That decision was quashed on the grounds that the delay in the service of the notices was a serious departure from the disciplinary procedure which had prejudiced the officers. In the course of the judgment Sir John Donaldson MR said at p.432 D-E:

    "For my part I regard regulation 7 as providing an essential protection for police officers facing disciplinary charges and think that, save in the rare case… It will be difficult to justify any appreciable delay in giving the officer concerned notice of the complaints."

    Later he explained why the regulation is to be regarded as a protection to the officer when he said at p.432 F-G:

    "the primary purpose of the regulation is to put the officer on notice that a complaint has been made and to give him a very early opportunity to put forward a denial, which in some cases might even take the form of an alibi, or an explanation and to collect evidence in support of that denial or explanation."

21. In **R (Wheeler) v Metropolitan Police Service [2008] EWHC 439 (Admin)** the Assistant Commissioner's decision to uphold a finding that the officer had committed breaches of the code of conduct was quashed on the grounds that the reasons for the decision were insufficient. In giving judgment, Stanley Bunton J observed that the hearings before the original disciplinary panel and the review by the Assistant Commissioner would have been better focused if the charges had not been in vague terms. He said at para [6] of the judgment:

    "the vagueness is a ground for judicial review if it leads to unfairness in the proceedings, and the danger with a vague charge is that the parties, and in particular the respondent…, do not know with some precision what is alleged against them and therefore are not fully able to address those matters in the course of the hearing."

22. Mr Beggs also relied upon the Home Office guidance 'Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures 2018' which provides that:

"2.145 the notice should clearly describe in unambiguous language the particulars of the conduct that it is alleged fell below the standards expected of a police officer"

"2.150 in the interests of fairness, care must be taken when an incident is being investigated to ensure that the notification is given to the police officer as soon as practicable after an investigator is appointed (subject to any prejudice to that or any other investigation)."

23. Ms Studd's response to the argument, with which I agree, is that deficiencies in the regulation 16 notice do not impact on the scope of the IOPC's obligations when reviewing a complaint. These obligations are to be found in paragraph 25 of Part 3 of Schedule 3 to the 2002 Act. These provide:

"25 Appeals… with respect to an investigation
(1) This paragraph applies where a complaint has been subjected to-
(a) an investigation by the appropriate authority on its own behalf; or
(b) …

(2) the complainant shall have the following rights of appeal to the relevant appeal body (*the IOPC*)-
….

(c) A right to appeal against the findings of the investigation;

(ba) a right of appeal against any determination by the appropriate authority that a person to whose conduct the investigation related has a case to answer in respect of misconduct or gross misconduct or has no case to answer or that such a person's performance is, or is not, satisfactory.

"(5) on an appeal under this paragraph the relevant appeal body shall determine such of the following as it considers appropriate in the circumstances-

(a)...

(b) whether the findings of the investigation need to be reconsidered

(8) If, on an appeal under this paragraph, the Commission determines that the findings of the investigation need to be reconsidered, in a case where the Commission is the relevant appeal body, it shall either
(a) review those findings without an immediate further investigation; or
(b) direct that the complaint be reinvestigated and in a case with the appropriate authority of the relevant appeal body the authority shall reinvestigate the complaint.

(9) If, on an appeal under this paragraph, the relevant appeal body determines that the appropriate authority has not made a determination as to whether there is a case for a person to whose conduct the investigation related to answer that the relevant appeal body considers appropriate, or determines that the appropriate authority has not made a determination as to whether a person's performance is or is not unsatisfactory, or determines that the appropriate authority has not determined that it is required to all wheel, in its discretion, take

the action in respect of the matters dealt with in the report that the relevant appeal body considers appropriate-

(a) subparagraph (9ZA) applies if the Commission is the relevant appeal body;

…

(9ZA) The Commission shall-

(a) determine, in the light of that determination, whether or not to make recommendations under paragraph 27; and

(b) make such recommendations (if any) under that paragraph as it thinks fit."

Paragraph 27 provides for the Commission to*, inter alia,* make a recommendation to the appropriate authority that an officer has a case to answer and gives it power to direct the appropriate authority to act on its recommendation.

24. The statutory guidance under which the IOPC operates provides:

"13.5 consideration of an appeal must involve a fresh consideration of the case. Although it is not a reinvestigation it should not merely be a 'quality check' of what has happened before.

13.94 The appropriate authority should have looked at every allegation that the complainant has made, for example, in a statement or letter of complaint. If the investigation has not answered the allegations that have been made, the person dealing with the appeal should consider whether this was an appropriate and proportionate approach, taking into account the substance and circumstances of the case. If not, it may be appropriate to uphold the appeal on this ground. The person dealing with the appeal should continue to assess the findings in relation to those allegations that have been dealt with.

13.95 The person dealing with the appeal must consider whether the conclusions of the investigation are supported by the evidence available, and ensure that a clear rationale is being made to link the evidence to the conclusions."

25. It is clear from these provisions that the IOPC has the freest hand to give fresh consideration to the complaint and evidence in the case. It would be inconsistent with the provision of an independent reviewing mechanism if the IOPC were to be constrained by the approach of the investigator appointed by the Chief Constable. If, for example, in the case of a complainant who alleged assault the investigator found that there was a case to answer that the injury arose due to neglect by an officer and produced a regulation 16 notice on that basis but the IOPC considered that the evidence pointed to a deliberate injury, it would emasculate the power of review if the IOPC was prevented from finding there was a case to answer for assault because the investigator had overlooked or underplayed evidence pointing towards deliberation. Furthermore, paragraph 13.39 of the IOPC guidance on appeals provides that the fact that a notice has been withdrawn does not prevent the appeal from being considered. This further supports the view that the IOPC is not limited by the contents of the notice.

26. There are two further reasons why, as a matter of principle, defects in the regulation 16 notice do not constrain the scope of the IOPC review. The first is that the obligation to serve the notice is upon the Chief Constable, not the IOPC. The conduct of the appropriate authority's investigation is itself subject to the review. Paragraph 13.94 of the IOPC guidance makes it

clear that where the investigator concludes that the appropriate authority has not dealt with every allegation of complaint, unless it considers such an omission to be appropriate and proportionate, the appeal can be upheld on that ground alone. It is highly likely in such a case that the regulation 16 notice will not have included the allegations with which the investigator chose not to deal.

27. The second reason is that the time at which a defective regulation 16 notice causes prejudice, or is capable of giving rise to an abuse of process, is when the Chief Constable decides to proceed with the misconduct meeting. It is at that stage that the officer is at risk of an adverse finding against which there has been inadequate protection resulting from the defective notice. There is some support for this conclusion in the three cases relied upon by Mr Beggs, cited above, where the unfairness was found to exist at the hearing stage, not the point at which it was found that there was a case to answer. Further, in **R (Redgrave) v Metropolitan Police Commissioner [2002] EWHC 1074**, a case in which there was an allegation of unfairness due to delay, Moses LJ at [40] said:

"The correct approach is to consider whether a fair and just hearing is possible in the light of such inexcusable delay and serious prejudice as the officer may establish… If disciplinary boards and others conducting disciplinary hearings focus on the concept of the possibility of a fair hearing, they will, in my view, be following the guidance given by both ex parte Merrill and Attorney- General's Reference (No 1 of 1990)"

Thus, the stage at which the impact of procedural unfairness falls to be considered is at the hearing at which such unfairness may eventuate.

28. I do not rule out the potential for challenge to an IOPC direction, under paragraph 25(9ZA), requiring the appropriate authority to act on its recommendation in the face of a defective regulation 16 notice, as in such a case the IOPC may be compelling the Chief Constable to act to the unfair prejudice of the officer. That, however, is not the case here.

29. Finally, on the Regulation 16 notice point, Ms Studd argues that, generally, procedural defaults in respect of a statutory process do not invalidate subsequent decision making unless Parliament intended that to be a consequence of a breach. In that regard, she referred me to **R v Secretary of State for the Home Department ex parte Jeyeanthan [2000] 1 WLR 354** where Lord Woolf MR said, at p.362 C-E, that in deciding whether the failure to follow a procedural step renders what follows a nullity or merely irregular, the questions which are likely to arise are:

"1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)

2. Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.

3. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)

Which questions arise will depend upon the facts of the case and the nature of the particular

requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependant on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver."

30. Ms Studd says that in this case there has been substantial compliance with regulation 16 and that any deficiency was waived by the continuation of the investigation, once it was referred back by the IPCC on the basis that Ch Supt Neill had not sufficiently explained the rationale for his order, without any complaint by either the Claimant or Ch Supt Neill that the notice was inadequate.

31. The argument on waiver cannot succeed. Since it is the officer against whom the complaint is made who is the subject of the appeal, it would require his consent to waive the point if the subsequent appeal decision was entitled to ignore a defect in the notice. He could only be said to have waived the deficiencies if he had the power to elect whether to go on with the disciplinary process. Clearly, he did not.

32. Considering the Defendant's case as to substantial compliance, it is clear that the basis for the assertion that the arresting officers did not have reasonable grounds for believing that the interested parties had committed the offences for which they were arrested was that the intelligence which led to the arrest had not been properly processed, evaluated or corroborated. As the person who directed the arrest on his analysis of the intelligence, Ch Supt Neill was well aware that the allegation was that his failings in this regard resulted in the arrests without the requisite belief. Thus, he had sufficient opportunity to, and did, explain his justification for the arrests. It is clear from an examination of Ch Supt Neill's responses to the complaint, dated 28th October 2014, 16th March 2015 and 11th May 2015 and the investigation report of 5th June 2015 and the report following the re-investigation dated 16th April 2018 that he appreciated that the complaint against him required him to justify the objective reasonableness of his suspicion. Accordingly, this is a case in which there has been substantial compliance, for the notice was effective to give the officer sufficient opportunity to deal with the allegation concerning an absence of reasonable grounds for arrest.

<u>Ground 2: The failure to apply the correct test as to the lawfulness of the arrest.</u>

33. The claimant identifies three errors of law to justify this ground. They are as follows:-

    (a) It is the arresting officer who must have the requisite reasonable grounds to suspect but Ch Sup Neill was not the arresting officer. If it was his instruction to arrest that was in issue, then notice of that allegation should have been given in the rule 16 notice.
    (b) The defendant elided the question of reasonable grounds to suspect with the separate question of the necessity for the arrest. The latter was never part of the interested parties' complaints and thus did not fall for consideration by the defendant.
    (c) The defendant's decision-maker did not have any or any proper regard to the low threshold for reasonable grounds to suspect.

34. As regards the first error, Mr Beggs argues that it is the arresting officer who must have the requisite reasonable grounds to suspect and not anybody else. He relies upon **O'Hara v Chief Constable or the Royal Ulster Constabulary [1997] A.C. 286** as support for this proposition. That was a case in which a detective constable arrested the plaintiff on the basis of information received at a briefing earlier in the day. The constable said that a superior officer had ordered him to arrest the plaintiff. At trial, details about the briefing were scant as counsel for the plaintiff took the tactical decision not to cross-examine the constable about what he had been told. The trial judge found that the briefing afforded reasonable grounds for the requisite suspicion as he inferred that some further details must have been given at that time. The Court of Appeal upheld the judge at first instance on that basis as did the House of Lords. There is obiter in the speech of Lord Steyn at p.293 D-F to the effect that the police officer making the arrest has the executive discretion whether to do so and that at the time of the making of the arrest the information which causes the constable to be suspicious of the individual must be in existence to the knowledge of that officer. The mere fact that the arresting officer has been instructed by a superior officer to effect the arrest is not capable of amounting to reasonable grounds for the necessary suspicion.

35. Nowhere in the judgment does it say that the superior officer directing the arrest does not need to have the requisite reasonable suspicion to justify what would otherwise be a wrongful arrest. Ms Studd referred me to ample authority for the proposition that an officer who briefs others to arrest without himself having the requisite belief is liable for the wrongful arrest which follows; see **R (Rawlinson and Hunter) and others v Central Criminal Court [2013] 1 WLR 1634** per Sir John Thomas P at [227] and [231], **Clerk v Chief Constable of North Wales Police [2000] Police Law Reports 23 (Court of Appeal)** per Sedley LJ at [25] and **Copeland v Commissioner of Police of the Metropolis [2015] 3 All ER 391** per Moses LJ at {20]. There is nothing in Mr Beggs's first point.

36. The second alleged error, said to be the elision of reasonable grounds to suspect with necessity to arrest arises from the text of the impugned decision where, having recorded that efforts were made by the police to get the FRFI group to join the NU demonstration against the EDL, it said:

> "*it has not been clearly demonstrated how police did simultaneously believe that the threat from this group was so significant as to necessitate arrest, and yet still seek for them to enter the main counter-demonstration. In my opinion, this weakens the credibility of the rationale and the necessity for the arrest."*

Mr Beggs argues, correctly, that the question of reasonable grounds to suspect the interested parties' guilt under s.24 (2) of the Police and Criminal Evidence Act 1984 is an entirely separate question to that of the necessity for the arrest under s.24(4). Ms Studd does not suggest otherwise. She makes the point that the reference to necessity was used in the general context of assessing the credibility of the rationale given for the arrest. The IOPC drew no conclusion as to whether there was a case to answer on the question as to whether the arrest was justifiable under s.24(4), there was no such question, it confined itself to the complaint concerning an absence of reasonable grounds to suspect.

37. I agree with Ms Studd that the caseworker did not elide these separate questions. Nevertheless, this passage in the decision, and what follows does cause me some difficulty. It

appears what is being said is that there is an inconsistency between the attempt to secure the interested parties' place within the NU demonstration and holding the requisite belief that they had conspired to commit violent disorder and as a result there are reasons to believe that the Ch Supt did not genuinely suspect the interested parties of committing an offence. This is against a background in which the original complaint and the appeal did not claim that he was not genuine in his belief but that it lacked objective grounds because the intelligence upon which it was said to be based had not be correctly assessed. Mr Beggs made the point that this is not a case in which the good faith of Ch Supt Neill was under challenge and Ms Studd did not dissent from that proposition; she said that there is no integrity or honesty issue here, the case against the Ch Supt is just that he got it wrong, i.e. the objective justification was absent.

38. My unease is amplified by the subsequent reference in the decision which contrasts the motivation of the police to take preventative measures to avoid disorder with the grounds relied on to justify the arrest. This may indicate that what the case worker had in mind was that the arrest was used as an expedient to remove potential troublemakers from the streets without any genuine belief that they had committed an offence. That unease could have been allayed had the caseworker identified which standard(s) of professional behaviour may have been breached, but she did not. I shall return to this point when I consider the third ground, irrationality.

39. The third challenge under this ground is the failure to identify, or apply, the established case law which sets out the low threshold for reasonable grounds to suspect. Mr Beggs points to the fact that nowhere in the decision is there a consideration that the actions of the Ch Supt are to be measured against that low threshold. The defendant accepts that there is a low threshold but asserts that it is a specialist regulator who can be taken to understand the basic principles that underpin a lawful arrest and one would not expect a reference to the threshold in the decision. Nothing in the decision indicates that the decision-maker misunderstood the test. Mr Beggs responds that the decision is irreconcilable with an application of the correct test.

40. The claimant has not pursued a challenge on the basis that the standard of reasons provided by the defendant was inadequate. Neither have I heard argument as to whether it is necessary for the defendant to articulate, within its decision, its self-direction on the issue of the threshold for suspicion. The nature of the grounds of challenge and the argument on either side has centred around the question as to whether the finding of a case to answer is rational given the low threshold, a Wednesbury challenge. Mr Beggs argues that it is apparent from the result that the defendant's caseworker cannot have applied the appropriate threshold, Ms Studd says the opposite. I will, accordingly, look at this issue in the context of the third ground namely, Wednesbury irrationality.

<u>Ground Three: Irrationally concluding that the case to answer test was met with respect to Ch Supt Neill</u>

41. The Defendant's task on the appeal was to decide whether there was a case to answer in relation to the complaint. The statutory guidance on appeals provides:
"finding that there is a case to answer means that the person dealing with the appeal is of the opinion that there is sufficient evidence upon which a reasonable misconduct hearing or meeting could find on the balance of probabilities gross misconduct or misconduct."

It is not for the IOPC to make a finding as to whether the officer acted lawfully or unlawfully; **R (Chief Constable of West Yorkshire) v IPCC [2015] ICR 184** per Sir Colin Rimer at [50].

42. This case concerns misconduct, which is a statutorily defined term. Regulation 3 of the Police (Conduct) Regulations 2012 provides the following definition:

    ""misconduct" means a breach of the Standards of Professional Behaviour"

    The Standards of Professional Behaviour are to be found in Schedule 2 to the 2012 Regulations. These are set out under 10 headings as follows:

    "Honesty and Integrity
    Police officers are honest, act with integrity and do not compromise or abuse their position.
    Authority, Respect and Courtesy
    Police officers act with self-control and tolerance, treating members of the public and colleagues with respect and courtesy.
    Police officers do not abuse their powers or authority and respect the rights of all individuals.
    Equality and Diversity
    Police officers act with fairness and impartiality. They do not discriminate unlawfully or unfairly.
    Use of Force
    Police officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances.
    Orders and Instructions
    Police officers only give and carry out lawful orders and instructions.
    Police officers abide by police regulations, force policies and lawful orders.
    Duties and Responsibilities
    Police officers are diligent in the exercise of their duties and responsibilities.
    Confidentiality
    Police officers treat information with respect and access or disclose it only in the proper course of police duties.
    Fitness for Duty
    Police officers when on duty or presenting themselves for duty are fit to carry out their responsibilities.
    Discreditable Conduct
    Police officers behave in a manner which does not discredit the police service or undermine public confidence in it, whether on or off duty.
    Police officers report any action taken against them for a criminal offence, any conditions imposed on them by a court or the receipt of any penalty notice.
    Challenging and Reporting Improper Conduct
    Police officers report, challenge or take action against the conduct of colleagues which has fallen below the Standards of Professional Behaviour."

43. In the course of the hearing I pointed out that Reg 16 notice did not identify which of the Standards may have been breached. Mr Beggs and Ms Studd identified a number which could be relevant, "Authority, Respect and Courtesy"," Orders and Instructions", "Duties and Responsibilities" and "Discreditable Conduct", but it is nevertheless the case that the

Defendant's case worker did not indicate as to which there was a case to answer and the way in which she formulated her decision does not assist in this regard when she stated:
"a reasonable tribunal properly instructed could find the evidence sufficient to support that the conduct alleged may amount to a breach of the standards of professional behaviour in relation to the allegations relating to the grounds relied upon to suspect the members of the FRFI group of conspiracy to commit violent disorder."

This could be a reference to all or only some of the Standards leading counsel identified, depending upon whether the caseworker had in mind a case to answer as to a genuine, as opposed to reasonable, suspicion. I shall look at this apparent shortcoming after consideration of the Claimant's case on irrationality.

44. The case has been argued by both sides on the basis that the conclusion of the IOPC was that Ch Supt's evaluation of the evidence may have been flawed and thus there may have been no objective justification for the suspicion, not that his suspicion was not genuine. I, accordingly, approach the decision on that basis. If the caseworker had concluded that there was a case to answer on the grounds that the officer was not truthful as to his suspicion I would have expected her to make that explicit in the decision. Furthermore, the decision which she was reviewing considered the allegation that the Ch Supt was guilty of neglect of duty by incorrectly processing and evaluating information. She did not indicate that the potential misconduct was any more than that.

45. Mr Beggs referred me to cases which demonstrate how low the bar is set in when a court or disciplinary body comes to determine the existence of reasonable grounds for suspicion. From those cases I derive the following propositions:-

    (a) In a case of wrongful arrest by the police, the defendant must establish that (i) the arresting officer suspected that the claimant had committed an arrestable offence and that (ii) he had reasonable grounds for his suspicion. If the defendant establishes those requirements, the arrest is lawful unless the claimant can establish, on Wednesbury principles, that the arresting officer's exercise or non-exercise of his power of arrest was unreasonable; see **Castorina v Chief Constable of Surrey (Court of Appeal transcript 10th June 1988)** per Woolf LJ at p.20 E-H and **Holgate-Mohammed v Duke [1984]AC 437** per Lord Diplock at p.443 A-C.

    (b) The same considerations apply to the state of mind of an officer who directs another to effect an arrest; see paragraph 34 above.

    (c) What amounts to suspicion? *"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking…Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if an arrest before that were forbidden, it could seriously hamper the police"*; **Hussien v Chong Fook Kam (1970) AC 942** per Lord Devlin at p.948 B-C.

(d) Courses of enquiry which may or may not have been taken before the arrest are not relevant to whether, on the information available at the time of the arrest, there was reasonable cause for suspicion; **Castorina** per Purchas LJ at p.13 B.

(e) Reasonable grounds for suspicion can arise in relation to a group of suspects only one of whom could have committed the offence; **Cumming v Chief Constable of Northumbria Police [2003] EWCA Civ 1844** per Latham LJ at [41]. There is nothing in **Raissi v Commissioner of Police of the Metropolis [2008] EWCA 1237** to detract from this or to support a requirement that there must be an individualised basis for each arrest in a case of several suspects, in part because what Latham LJ said at paragraph 41 was referred to with approval in **Raissi**, see per Sir Anthony Clarke MR at [20]-[21], but also because **Raissi** turned on the fact that the arresting officer did not have sufficient information to found objective grounds for his suspicion. On the facts of this case, however, I accept that the officer would have to suspect all those arrested of agreeing to take some part in the conspiracy.

(f) Those considering the question as to whether reasonable suspicion has been established have to be careful not to over compartmentalise the various pieces of information upon which the officer based their decision. The correct approach to a judgement upon the lawfulness of arrest is not to look at each piece of information individually and ask whether it creates reasonable grounds for suspicion but to look at them cumulatively as the arresting officer had to at the time; see **Armstrong v Chief Constable of West Yorkshire Police [2008] EWCA Civ 1582** per Hallett LJ at [19] and **Buckley v Chief Constable of Thames Valley [2009] EWCA Civ 356** per Hughes LJ at [16].

46. I was taken to the facts relied upon by the Ch Supt to justify his belief. These were contained in his responses to complaints to which I have already referred and the two investigation reports by the claimant. The evidence, as seen from Ch Supt Neill's point of view, was as follows. He had been the Silver Commander in charge of Operation Dunadry which was set up to police a May 2010 demonstration by the EDL in Newcastle and counter-demonstrations. On that occasion he attempted to engage with the protest groups but the FRFI refused to engage with the police. Prior to that protest there had been serious disorder at every EDL demonstration across the country usually triggered by counter-demonstrators. During the course of Operation Dunadry he received intelligence from Special Branch on the day of the demonstration that FRFI intended to charge at the EDL. As a result of the precision of the information he was able to intercept members of FRFI as they ran down Grainger Street towards the EDL.

47. In May 2013 there was to be the EDL protest which gave rise to the arrests. Tensions were high due to the murder of Drummer Lee Rigby three days earlier, leading to an expected rise in EDL protesters from 400 to 4000. The previous month there had been convictions of six Asian males for possession of firearms and explosives who had attempted to attack an EDL protest in Dewsbury and three Asian males had been convicted of conspiracy to commit explosions in Birmingham. There had also been a conviction of seven Asian males for serious sexual offences as part of a grooming gang in Oxford less than two weeks prior to the demonstration and there were locally reported issues relating to serious sexual offences by Asian males against two white young females. There were further tensions due to the EDL

proposal to lay a wreath at the Cenotaph which was to be vehemently opposed by left-wing activists. The EDL were told that if they tried to do so they would be prevented. As someone with 20 years' experience as a public order practitioner Ch Supt Neill considered this was the highest risk public order operation he had been involved in and it was his view that Newcastle was like a tinderbox.

48. The policing operation of the EDL demonstration on 25 May 2013 was given the name Operation Cygnet. The Ch Supt was again the Silver Commander. The intelligence model used for the operation is one that has been identified as best practice by Northumbria Police and he had used this model in other public order operations he had commanded, including other EDL protests. Under this model there are several planning meetings of crime and intelligence personnel chaired by the Silver Commander where intelligence and its provenance is discussed. This gives him the wider picture in relation to other information which comes from police liaison teams' negotiations with intending demonstrators and community officers. Intelligence was managed by a designated Bronze Commander with a bespoke intelligence cell of intelligence officers and analysts. He describes a sophisticated system for gathering and evaluating intelligence.

49. On 24 April 2013 he received intelligence from Special Branch that FRFI intended to take some action in Newcastle city centre in relation to the EDL protests. On that day he received information that RCG/FRFI were going to do "something spectacular" on 25 May. There was also intelligence that they intended to occupy the Monument in Newcastle. This corroborated information from the police liaison team arising from their meetings with other counter-protest organisers on 17 April 2013. The Special Branch source intelligence revealed that FRFI were in conflict with the main organisers of the counter-demonstration and the Ch Supt accordingly thought that the intelligence he was receiving from such organisations was accurate. Furthermore, it was corroborated by another source. The accuracy of the intelligence he had received concerning FRFI was supported by the fact that they arrived in Newcastle city centre at the time and in the numbers which a source had revealed. This gave him confidence that the quality of the intelligence he was receiving was exceptionally high.

50. On 1 May 2013 the police liaison team told him that RCG was refusing all attempts to engage with them. There was intelligence on 13 May 2013 that an inflammatory article had been written by the RCG alleging indecent assault on one of their members by a member of NU, which was organising the counter-demonstration. On 15 May 2013 there was intelligence indicating that RCG would hang around the city centre after the protest and infighting continued with NU. Intelligence on 22 May 2013 indicated NU were concerned that RCG were going to commit some act to provoke the EDL and they did not want them protesting as part of their demonstration. This was repeated on 23 May 2013 when the police liaison team reported that the organisers of the NU protest were concerned that the RCG would carry out direct action against the EDL.

51. There had been several attempts to speak and engage with RCG/FRFI to negotiate a suitable protest route and demonstration location but they refused to deal with the police. Attempts were made by the police liaison team to secure the agreement of NU to RCG joining the back of their protest march but that was not successful. There was further intelligence that Mr Vickers was one of the main agitators in the attempted attack on the EDL in 2010 and was present in the group in May 2013 along with another FRFI supporter who had also been with

him on the day of the 2010 incident. The Ch Supt said that at 11:40 am on 25 May 2013 he gave instructions that the group of FRFI supporters were to be asked to move to an alternative protest site at Cow Hill, which is some considerable distance from the Haymarket, and if they refused to comply, they should be arrested. Set against all this, there was a Special Branch risk assessment from May 2013, the date is not specified, which indicated that the local RCG/FRFI cadre were considered unlikely to seek direct confrontation and the threat level for them was moderate with confrontation possible but not likely. External RCG/FRFI participants, those bussed in, were likely to be more confrontational, the threat level was substantial and confrontation was a strong possibility.

52. Mr Beggs says that this is ample evidence to surmount the low threshold for reasonable suspicion. Accordingly, the caseworker cannot have applied the correct test in finding there was a case to answer. Further, he says that she has compartmentalised the evidence in reaching her conclusion thereby failing to appreciate how each strand of evidence works with the other evidence to lend support for the Ch Supt's view. He points to her observation that the intelligence indicating that RCG members intended to do something spectacular in Newcastle on the day of the demonstration and to occupy the Monument did not, in her view, suggest violent disorder and could arguably be part of a peaceful demonstration. He says that if it could be arguably peaceful it could also arguably be violent. Accordingly, a reasonable tribunal properly directed could not find that evidence sufficient to support the complaint of a lack of objective justification given the low threshold.

53. As regards the IOPC upholding the complaint that the Ch Supt did not correctly process, evaluate or corroborate the information received in accordance with Northumbria Police policies to assess the accuracy and reliability of the information, he says that the IOPC have not even identified the alleged policies let alone analysed how his treatment of the evidence departed from the policies. That alone is irrational.

54. At most, an error of judgement has been made in the fine assessment of weight given to the intelligence received. That does not amount to misconduct. He sought to amplify this submission by arguing that even if the assessment of the intelligence had been negligent that would not amount to misconduct. In that respect he referred me to the decision of the Visitors of the Inns of Court in the case of **Walker v Bar Standards Board (unreported 19 September 2013).** In that case Sir Anthony May said at [16] "*… The concept of professional misconduct carries resounding overtones of seriousness, reprehensible conduct which could not extend to the trivial."* At [32] he characterised behaviours sufficient to be characterised as professional conduct as "*particularly grave"*. Although I am not bound by **Walker,** it is guidance from an eminent source.

55. Negligence can amount to misconduct; that was recognised in **Walker** where the appeal against a finding of misconduct was only upheld on the basis that the appellant had made a momentary slip in the heat of the moment. The answer to Mr Beggs's argument is that for behaviour to amount to misconduct it must fall below a recognised standard of probity or competence relating to the task in respect of which the misconduct is said to arise. If it does not, it cannot be characterised as particularly grave. For an error of judgment to amount to misconduct it must be the result of actions which fall below those standards.

56. In the course of making his submissions in relation to **Walker,** Mr Beggs made a more fundamental point. He argued that there is not even the beginnings of a case that Ch Supt

Neill was negligent in his assessment and reaction to the intelligence. Just because the caseworker says she, or a properly directed tribunal, could reach a different conclusion is not evidence of negligence. He said that it is not operationally practical if decisions taken by officers in the field could be categorised as potentially negligent simply because the caseworker took a different view. What he was pointing to was that before it can be said that someone may have been negligent, one has to identify the standard of care for that activity and it is only then that there is a measure against which you can compare the officer's actions.

57. The Claimant also relies upon that fact that in the IOPC caseworker said in her decision letter, *"It has not been sufficiently evidenced how the intelligence from Special Branch was applied to this group, if at all or why the intelligence from Newcastle Unite was preferred over the intelligence from Special Branch"*. He says that if she thought that information was lacking on the point the Defendant should have exercised its discretion under paragraph 25(8)(b) of Schedule 3 to the 2002 Act to direct that the complaint be re-investigated. It was irrational to conclude there was a case to answer on the basis of an absence of information.

58. The Defendant's case is that the Claimant has a high hurdle to surmount to show that no reasonable decision maker could have concluded that there was a case to answer. The decision letter is not to be read as if it is a judgment. As regards the failure to identify any policies concerning the evaluation of intelligence which may have been breached, the Defendant says that the IOPC decision was not based on a failure to follow policies. The fact that there is no bad faith or malice does not undermine the decision, as this is not a prerequisite for a finding of misconduct. An unlawful arrest, whether by misjudgement or otherwise, is capable of amounting to misconduct. Where the IOPC relied upon an absence of evidence, it was justified in not requesting a further investigation as the case had already been back for re-investigation before. The IOPC was entitled to conclude that the officer had failed to provide a sufficiently clear evidenced answer to the allegations and that there was a case to answer. A challenge based on the case being at most a case of an isolated lapse of judgement in trying circumstances, cannot succeed for Ch Supt Neill had plenty of time to evaluate the information he was receiving. In essence, Ms Studd said that all the decision maker had done was to conclude that the question as to whether the arrest was lawful was not all one way in the officer's favour and that one legitimate interpretation of what happened is that though the suspicion may have been subjectively genuine, the officer was taking a preventative step to avoid disorder without the objective justification required for a lawful arrest. He had simply got it wrong.

<u>Conclusion</u>

59. I can only interfere with the decision of the IOPC if I conclude that it was one which no reasonable authority could reach, or, to put it another way, it is not a decision which *"was in the reasonable range of decisions open to the decision maker"* **Boddington v British Transport Police [1999] 2 AC 143** per Lord Steyn at p.175.

60. I start with the interested parties' complaint 2, which it is to be remembered is in the following terms:

"2. In the event our clients arrest was based on intelligence received our client does not accept that Northumbria police officers correctly processed, evaluated or corroborated the

information received in accordance with Northumbria police policies to assess the accuracy and reliability of the information."

61. The upholding of that complaint was irrational. It is apparent from the IOPC decision that the caseworker recognised that the decision to arrest was based on intelligence. Her criticism is that this may not have been correctly evaluated, essentially that incorrect inferences were drawn and too much weight given to certain information. As she does not identify any Northumbria Police polices with which the treatment of the intelligence failed to accord, she was not in a position to judge that the processing, evaluation or corroboration of such intelligence did not accord with such policies, yet she concluded that there was a case to answer that there was such a failure. The decision is all the more surprising in the face of evidence from the officer as to the detail of the procedure for obtaining and evaluating intelligence and his assertion that the polices were followed. Indeed, paragraph 33(4) of the Defendant's Detailed Grounds makes it clear that the decision was not based on any failure to follow a particular policy. In those circumstances it is difficult to understand why the Defendant sought to uphold the decision based on complaint 2.

62. The interested parties' complaint 1 is:

    "1. Officers had no reasonable grounds to suspect our client had committed the offence for which he was arrested."

    Clearly, if this was based on the finding that there had been an arguable breach of policies it could not stand in view of the error in the upholding of complaint 2. Looking at the decision as a whole, however, it is evident that the conclusion on complaint 1 did not rely on policy failings but simply a view that the officer's reliance on the intelligence may lead to a finding of a breach of the standards of professional conduct before a reasonable, properly directed, tribunal.

63. There are valid criticisms which can be made of the decision. The fundamental criticism is that, on the evidence, it is irrational when tested against the low threshold at which objective suspicion can be established. This indicates that the caseworker did not take into account the legal test for the lawfulness of the arrest. I shall deal with this issue before considering other shortcomings in the decision.

64. I have set out the information in the possession of the Ch Supt prior to the arrest. In summary, there was information from various sources that FRFI intended some action in response to the EDL protest and which tended to support that the sources were reliable. There were further reports from sources in succeeding days that FRFI were going to stage an incident to provoke the EDL. Further monitoring of intelligence revealed information indicating that FRFI planned "something spectacular". The Ch Supt's previous experience of what could be described as an FRFI "spectacular" was its attempted attack on the EDL in 2010. The police were able to thwart that attack because, on the day of the demonstration, Special Branch provided information predicting the attack and very precise information as to its location, thus enabling officers to be deployed to intercept the FRFI; that event is an indication as to how quickly disorder can develop and the importance of being able to know the whereabouts of FRFI on the day of the demonstration. They arrived at the time and in the numbers predicted by a source providing information to the police, which, as must be the case, is an indication that the source had reliable intelligence on their movements. Amongst the FRFI on the day of the demonstration

were Mr Vickers, a main agitator in the 2010 attack, and another individual who was with him at the time. FRFI actively made it difficult for the police to monitor their whereabouts by refusing to agree a march route and place of demonstration, which would have put the police in a similar position to that which prevailed in 2010 when they had to rely on intelligence on the day to provide their location and intercept the attack.

65. The caseworker said that too much weight was placed on the actions of FRFI members in 2010. The intelligence that they intended to do "something spectacular" did not, in her opinion, suggest violent disorder and could arguably be part of a peaceful demonstration. Clearly, if it could arguably be peaceful, it could also arguably be violent. If it would be legitimate to interpret the "spectacular" as a violent one, there is no basis for even arguable criticism of the officer for interpreting it in that way. Furthermore, to consider what this could have meant, without considering at the same time that there was within the group a main agitator from the 2010 incident and someone who was with him at the time, and the persistent refusal to agree a demonstration route, leaving FRFI able to deploy at their choosing, as they did in 2010, is to compartmentalise the evidence so as to rob it of context. Had she looked at these facts in the round, together with the other intelligence referred to above, as she should in the light of **Armstrong (above)**, she could not have but come to the conclusion that the officer was entitled to rely on these facts so as to have a reasonable suspicion that FRFI had come, as a group, to Newcastle city centre to have a fight with the EDL. To put it another way the facts were sufficient to give rise to "*a state of conjecture or surmise* (of guilt) *where proof is lacking".*

66. Later in the decision letter the caseworker says that after the report from NU on 24 April 2013, but which in fact came via Special Branch, there is no indication the police considered it to be a significant cause for concern. The evidence pointed completely in the opposite direction as there was ongoing collection of intelligence material from sources and the police liaison team on the potential behaviour of the FRFI throughout May, right up to the day of the demonstration, together with efforts made to agree a protest route. She says that the reason for preferring intelligence from NU over the Special Branch May assessment as to how FRFI may act on the day was insufficiently evidenced. There clearly was evidence as to why the Ch Supt considered the source of intelligence to have been accurate and thus reliable. There is no explanation in the decision letter why that was not sufficient. I do not agree with Mr Beggs that if there was insufficient evidence the IOPC was bound to ask for further information to deal with the point. It was up to the officer to explain why he acted as he did. If he failed to do so that is a matter which the caseworker could take into account. She was not to assume that there was further evidence which would be forthcoming had she asked. I only mention this for completeness as in this case there was evidence which, for no obvious reason, was labelled insufficient.

67. There are, however, other criticisms which can be made of the decision; notably, the caseworker has not identified the misconduct which she asserts may be established. 'Misconduct' is a defined term. The various forms of misconduct are set out above. The specific form of misconduct can be likened to a charge of which the details of the conduct alleged are the particulars. Not only does this failing leave the Claimant in doubt as to what breach of the standards he is supposed to be looking at in deciding what further action to take, and the officer what breach he is facing, but unless the case worker identifies to what 'misconduct' the officer's behaviour is relevant, she has no criteria against which to measure

that behaviour when considering whether there is a case to answer. It is irrational to find there is a case to answer as an abstract concept, it must connect with and support a form, or forms, of misconduct as defined in Schedule 2 to the 2012 Regulations. In the absence of an 'inadequate reasons' challenge, that would not necessarily lead to the conclusion that the decision which was produced by this process was irrational if it can be detected from the decision what misconduct the caseworker was considering.

68. There are three potential forms of misconduct which the caseworker could have been considering, those being under the headings "Order and Instructions", "Duties and Responsibilities" and "Discreditable Conduct". It is clear from the decision, that it was not the mere fact of giving what may have been an unlawful order which caused the caseworker to find there was a case to answer. The decision was based on her view as to the significance of the evidence upon which the officer said he relied. It is unclear whether she considered that his decision amounted to an error of judgement or negligence. Her view that undue weight had been given to the 2010 incident suggests the former though the observations she made that there had been an absence of enquiries to establish how NU came to be aware of what was planned or the names of persons involved, points to the latter; the relevance of further enquiries was dealt with in **Castorina,** see paragraph 45 above, and two of the participants were recognised on the day and their known behaviour formed part of the decision to direct the arrest.

69. In so far as the caseworker based her decision on the grounds that there may have been an error of judgement on the part of the officer, it is clear she felt able to reach her conclusion on the basis that a tribunal may have come to a different judgement. That, in itself, was not sufficient to conclude that there was a case to answer. She had to decide whether the error arose from an act or omission which could be characterised as misconduct, which in this case could only be negligence in the assessment as to whether there were reasonable grounds to suspect the interested parties of committing the offence for which they were arrested.

70. I agree with Mr Beggs's argument, that in order to determine that the officer had a case to answer on the basis that he was guilty of such negligence, the caseworker would have to find that a reasonable tribunal would be able to conclude that no reasonable officer carrying out the function of Silver Commander could, on the same evidence, have reached the low threshold of suspicion to justify an arrest. It would not be sufficient merely to say that the caseworker or the tribunal could have reached a different conclusion on these facts. I also agree with Mr Beggs that it would unduly stifle the operational effectiveness of the police if officers were open to misconduct charges based on the negligent performance of their duties solely on the basis that those judging their actions after the event say that they would have acted differently. In order to find a case to answer on this basis the caseworker had to identify the standard of care applicable and be satisfied that it was arguable, to the requisite degree, that the officer had fallen short of that standard. This exercise will almost always, though not invariably, require a consideration as to whether relevant policies and required or accepted practices and procedures have been followed.

71. All I can detect from the decision is that the caseworker took the view that a tribunal faced with the information possessed by the officer, if it had been in the officer's position on the day of the demonstration, could have come to a different decision on the question of reasonable suspicion. There is no consideration of the standard of care and its breach. As a

result, there could be no proper basis for concluding that Ch Supt Neill was negligent in his assessment of the intelligence. Had the decision identified the category of misconduct which was said to have resulted from the officer's behaviour that would have focussed attention on what needed to be established in order to determine whether there was a case to answer.

72. The Defendant argues that the claim is academic as the officer cannot face a disciplinary hearing, having retired, and the Claimant and officer have been vindicated by the decision in the County Court, albeit I have now been informed that this is subject to appeal. I asked if the parties wished to make further representations in the light of the dismissal of the County Court action. Both recognised that the finding of the IOPC continues to carry a stigma. I agree. Both the officer and the Claimant have reputational interests in a favourable outcome to this case and it is not, therefore, an academic exercise. The civil claim dealt with the issue of whether the arrest was lawful but what the IOPC looked at was whether, in the course of directing an arrest that may have been unlawful, the officer had a case to answer in misconduct. Furthermore, Mr Beggs' more general point on operational negligence renders the case far from academic.

Remedy

73. I shall quash the decision of the IOPC dated 29 August 2018. I will make an order remitting the matter back to the IOPC under Section 31(5) of the Senior Courts Act 1981 as at the moment there is a dismissed misconduct complaint and an outstanding appeal which is for the IOPC to re-consider.