Neutral Citation Number: [2017] EWHC 1349 (Admin)

Case No: CO/5079/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2017

Before:

LADY JUSTICE SHARP

and

MR JUSTICE GARNHAM

Between:

The Queen

on the Application of

David Crompton	**Claimant**
- and -	
Police and Crime Commissioner for South Yorkshire	**Defendant**
- and -	
HM Chief Inspector of Constabulary	**First Interested Party**
- and -	
South Yorkshire Police and Crime Panel	**Second Interested Party**

- -

Hugh Davies QC and **Jessica Boyd** (instructed by **Kingsley Napley LLP**) for the **Claimant**
Jonathan Swift QC and **Joanne Clement** (instructed by **Bevan Brittan LLP**) for the **Defendant**
Clive Sheldon QC and **Christopher Knight** (instructed by **HMIC**) for the **First Interested Party**
Mr Adrian Phillips (solicitor) for the **Second Interested Party**

Hearing dates: 28th & 29th March 2017

- -

Approved Judgment

Mr Justice Garnham

Introduction

1. This is the judgment of the Court.

2. On the 15 April 1989, 96 people were killed in the disaster at Hillsborough Stadium in Sheffield during the course of the FA Cup semi-final game between Liverpool and Nottingham Forest.

3. On the morning of 26 April 2016, the jury hearing the inquests into the deaths of the 96 returned their verdicts (or, more accurately, their determination). Later that day the Chief Constable of South Yorkshire (hereafter "the Chief Constable") issued a full apology on behalf of the force.

4. At 12.20pm the following day, 27 April 2016, the Chief Constable issued a second statement. At 2.50pm the Police and Crime Commissioner for South Yorkshire ("the Commissioner" or "the PCC") suspended the Chief Constable from his office. On 29 September 2016, following the application of the appropriate statutory procedure over the intervening months, the Commissioner formally called upon the Chief Constable to resign and he did so.

5. This case concerns the lawfulness of the Commissioner's conduct.

The Challenges

6. The Chief Constable seeks to judicially review the decision making of the Commissioner. The Chief Constable argues that the PCC's decision on the 27 April 2016 to suspend him, the decision of 4 July to maintain that decision following receipt of the views of Her Majesty's Chief Inspector of Constabulary ("HMCIC"), his decision on the 15 August to continue the process despite receipt of representations submitted on behalf of the Chief Constable, and his decision of the 29 September 2016 to call on the Chief Constable to resign with immediate effect, were all flawed. The Chief Constable argues that each of those decisions was irrational, disproportionate, took account of irrelevant considerations and breached his rights under Art. 8 of the European Convention on Human Rights (ECHR).

7. The Chief Constable is supported in his arguments by HMCIC.

8. The PCC resists each of the challenges, maintaining that he was entitled to take each of the decisions under challenge. The South Yorkshire Police and Crime Panel (the "PCP") is, in essence, neutral on the issues of substance but argues it is unnecessary for the Court to scrutinise its action given the part it played in the process.

9. The Chief Constable needs permission to bring these proceedings. Mrs Justice Lang adjourned his application for permission and directed that the case be listed as a "rolled up" hearing at which the grant of permission would be considered and the substantive hearing would follow if permission was granted. Her ruling made clear that, in her view, the Chief Constable had raised arguable grounds of challenge but that the grant of permission should await this court's ruling on the PCC's argument that the challenges to the decisions of the 27 April and 4 July were out of time.

10. We received detailed and helpful skeleton arguments from Mr Hugh Davies QC and Ms Jessica Boyd on behalf of the Chief Constable, Mr Jonathan Swift QC and Ms

Joanne Clement on behalf of the PCC, Mr Clive Sheldon QC and Mr Christopher Knight on behalf of the First Interested Party, HMCIC, and from Mr Adrian Phillips on behalf of the Second Interested Party, the South Yorkshire Police and Crime Panel. We heard careful and well-argued submissions from all concerned at a hearing on the 28 and 29 March 2017. We record here our gratitude to all counsel and solicitors involved.

The History

11. A proper understanding of the detail of the history of these events is essential to a fair adjudication of this challenge. We therefore set out that history at a little length.

The Parties

12. The Claimant, David Crompton, was appointed Chief Constable of South Yorkshire on 24 January 2012. Prior to the conclusion of the Hillsborough Inquest, Mr Crompton had indicated an intention to retire from the post of Chief Constable in November 2016. He had had no involvement in South Yorkshire Police at the time of the Hillsborough disaster.

13. The Defendant, Alan Billings, was elected Police and Crime Commissioner for South Yorkshire on 3 November 2014. He was re-elected as PCC on 5 May 2016.

14. Sir Thomas Winsor was appointed as HMCIC on 1 October 2012.

The Hillsborough Inquests

15. In December 2012 the High Court quashed the verdict in the original inquest into the deaths at the Hillsborough Stadium and ordered fresh inquests to be held. Sir John Goldring was appointed Assistant Coroner for South Yorkshire (East) and West Yorkshire (West) to conduct those inquests. They commenced on 31 March 2014 in Warrington.

16. Seven months into those lengthy proceedings, on 31 October 2014, the Coroner refused an application made by the families of the deceased to admit into evidence South Yorkshire Police's previous apologies. Sir John Goldring concluded:

> "I have come to the clear conclusion that for a number of different (and independent) reasons it would be wrong to admit this evidence. It would have no or little probative value. It would be highly prejudicial. It would divert the jury into complex avenues which would be collateral to the real issues. It would for no good reason further prolong the inquests. Moreover, I do not think that Ms Barton's conduct of the chief constable's case would justify the admission of such evidence. Her criticisms … were not necessarily inconsistent with the admissions made by the chief constable. While her questioning regarding the perimeter gates might not have been wise, it does not begin to justify the admission of this evidence."

17. The inquest jury returned their verdict at approximately 11am on 26 April. The jury's findings included the following:

i) By a majority of 7 to 2, the jury indicated that they were satisfied, so that they were sure, that those who died in the disaster were unlawfully killed.

ii) They determined that there was no behaviour on the part of football supporters which caused or contributed to the dangerous situation at the Leppings Lane turnstiles at Hillsborough.

iii) They determined that there had been a number of errors and omissions by South Yorkshire Police that had caused or contributed to the deaths.

iv) They found in particular, that there were errors or omissions by the police after the crush in the West Terrace at the ground which caused or contributed to the loss of lives.

v) They concluded that, after the crush in the West Terrace had begun to develop, there were errors or omissions by the ambulance service which caused or contributed to the loss of life.

vi) They concluded there were features of the design, construction and layout of the stadium which were dangerous or defective and which caused or contributed to the disaster.

vii) They concluded that there were errors or omissions in the safety certification and oversight of the stadium that caused or contributed to the disaster.

viii) They found that there were errors or omissions by Sheffield Wednesday Football Club in the management of the stadium and preparation for the match which caused or contributed to the dangerous situation which developed on the day of the match.

ix) They concluded that there were errors or omissions by Sheffield Wednesday Football Club on 15 April 1989 which may have caused or contributed to the dangerous situation that developed at the Leppings Lane turnstiles and in the West Terrace.

x) They found that Eastwood and Partners should have done more to detect and advise on any unsafe or unsatisfactory features of the Hillsborough Stadium which caused or contributed to the disaster.

Reaction to the Inquest

18. On 25 April 2016 it was widely reported that the inquest's findings would be delivered the following day. A meeting was held that same day, involving the Chief Constable and other senior officers at South Yorkshire Police, and the PCC and his staff, at which the appropriate response from South Yorkshire Police was discussed. It was agreed that the Chief Constable would issue a clear and unequivocal statement of apology on behalf of South Yorkshire Police after the findings were delivered.

19. In the days leading up to the verdict, the PCC asserts, he had telephone conversations with a number of local MPs who expressed:

> "…their views on how perilous the situation could be for South Yorkshire Police particularly in light of various other historical matters that had already undermined public confidence in South Yorkshire Police. This included the recent failures in respect of child sexual exploitation in Rotherham and the call for a public inquiry into South Yorkshire Police's conduct at Orgreave during the 1984/85 miners' strike".

20. On 22 April 2016 the PCC invited South Yorkshire MPs to a briefing to discuss the implication of the forthcoming verdicts. According to the PCC:

> "The question was how much more damage to its reputation could the force could sustain before there was an intervention resulting in possibly disbanding the force, a forced merger or imposing a new leadership team. I shared those concerns."

21. On the evening of 25 April 2016 the PCC spoke with Jack Dromey MP who was a member of the shadow home affairs team. He told him that the Shadow Home Secretary, Andy Burnham MP, was intending to make a statement in the House of Commons on 27 April 2016 and "that he intended to call on the Chief Constable to resign." The PCC says that Mr Dromey told him that:

> "this was because of the way in which South Yorkshire Police's legal team had conducted the Inquests, and because of increasing media reporting of the Hillsborough families' position that the conduct of South Yorkshire Police's legal team at the Inquests had undermined the apology given on behalf of the Force in 2012."

22. The reference to an apology in 2012 was a reference to a televised public statement made by the Chief Constable in September 2012, in which he made a fulsome apology in respect of both the disaster and the amendment of witness statements by police officers.

23. Sometime between 7.30am and 7.45am on 26 April 2016 the PCC went to see the Chief Constable in his office. He reported the conversation he had had the night before with Mr Dromey. According to the PCC he "discussed with the Chief Constable the possibility of issuing the planned apology and then resigning". The Chief Constable declined to offer his resignation.

24. At 11.59am on 26 April the PCC received an email from Mr Bernie Keavy, a Labour Party official, which read "Alan, See Andy's initial statement. The third paragraph is the one with most implications." The attached statement came from the Labour Party press office and it set out the following statement from Mr Burnham:

> "This has been the greatest miscarriage of justice of our times. But, finally, it is over. After 27 long years this is real justice for the 96, their families and all Liverpool supporters. The survivors of this tragedy can finally be remembered for what they were on that day - the heroes of Hillsborough who tried to help their fellow fans.
>
> The Hillsborough Independent Panel gave us the truth. This Inquest has delivered justice. Next must come accountability. For 27 years, this police force has been consistently put protecting itself above protecting those hurt by the horror of Hillsborough. People must be held to account for their actions and prosecutions must now follow.
>
> Disgracefully, the lawyers of retired police have attempted to continue the cover-up in this courtroom. They made it an adversarial battle in defiance of the Lord Chief Justice's ruling. This has been brutal on the Hillsborough families and put them through hell once again. The current leadership of South

> Yorkshire Police needs to explain why it went back on its 2012 apology at the Inquest prolonging the agony for the families.
>
> The sense of relief that we feel is tempered by the knowledge that this day has taken far too long in coming. The struggle for justice has taken too great a toll on too many. But the Hillsborough families have at long last prevailed and finally their loved ones can rest in peace."

25. At about 2pm, the Chief Constable released a press statement on behalf of South Yorkshire Police as had been agreed with the PCC. A video recording of the Chief Constable reading the statement was uploaded onto the South Yorkshire Police's website. The statement included the following:

> "I want to make it absolutely clear that we unequivocally accept the verdict of unlawful killing and the wider findings reached by the jury in the Hillsborough Inquests.
>
> On 15 April 1989 South Yorkshire Police got the policing of the FA cup semi-final at Hillsborough catastrophically wrong. It was and still is the biggest disaster in British sporting history. That day 96 people died and the lives of many others were changed forever. The force failed the victims and their families.
>
> Today, as I have said before, I want to apologise unreservedly to the families and all those affected……..
>
> We will now take time to carefully reflect on the implications of the verdicts. We recognise that this is an important day for the families of those who died at the Hillsborough disaster and for everyone affected by what happened. They have waited 27 years for this outcome. Our thoughts are with them."

26. According to the PCC, criticism of South Yorkshire Police began immediately after the release of the press statement. He says that the criticism "was also directed personally against the Chief Constable because of the way his legal team had asked questions at the inquests". He says he received a number of emails from members of the public calling for the Chief Constable's resignation. He says that the "victims' families began to call for the Chief Constable to resign and this was reported on a regional BBC Look North programme".

27. It had been agreed between the Chief Constable and the PCC and others in the weeks prior to the conclusion of the inquest that the Chief Constable would issue an apology on the day the inquest concluded and then avoid saying anything further. The Chief Constable says that after the statement by Mr Burnham he felt a further response was necessary. Later that afternoon the Chief Constable drafted a second statement. At approximately 18.05pm he emailed a draft of it to Ms Michelle Buttery, the Chief Executive and Solicitor to the Police and Crime Commissioner.

28. The proposed second statement was the subject of discussion between the Deputy Chief Constable, Dawn Copley, and Ms Buttery. Ms Buttery says she told Ms Copley that the Commissioner had real concerns about the proposed statement. She says she

told her that parts of the statement could be perceived as an inference that South Yorkshire Police were still blaming fan behaviour.

29. At about 9.30pm on 27 April there was a meeting between the Chief Constable, Ms Copley and Ms Buttery. A revised second statement was provided to Ms Buttery in which the references to Gate C and the perimeter gates, the matters to which Ms Buttery had indicated that particular exception was taken, were removed. Ms Buttery indicated that she would take a revised second statement to the PCC for his consideration.

30. Ms Buttery said that it was clear from her discussion with the Chief Constable that he was "insistent on a further statement being issued". She says it was agreed between the Commissioner and his advisors that it was not his "role to assist in writing such a statement."

31. At about 10am on 27 April a meeting took place between the Chief Constable and the Commissioner in the Commissioner's office. The PCC told the Chief Constable that he could not advise him on the wording of any further statement. The PCC says:

> "by this time I felt that I had made it abundantly clear that I thought a further statement should not be issued at all; it was equally clear to me that the Chief Constable did not agree with me. I did not consider that I could advise him on the detailed content of any further statement. I said this to the Chief Constable. My role as Commissioner is to hold the Chief Constable to account; not to direct him as to the content of statements he makes, on behalf of South Yorkshire Police to the media" (Emphasis added.)

32. At about 12.20pm that day the further statement was posted on the South Yorkshire Police website. It is necessary to set out that statement in its entirety:

> "In 2012, the Chief Constable made a full apology for the failures of South Yorkshire Police (SYP) and the force has stood by that ever since. In the aftermath of the verdicts, the Chief Constable apologised again and unequivocally accepted the jury's conclusions.
>
> We have been asked about our conduct at the Inquests. The Coroner himself gave a clear ruling that specifically addresses the relationship between apologies and evidence at the Inquests. He ruled that to admit the previous 2012 apology by the Chief Constable into proceedings would be 'wrong' and 'highly prejudicial'. He also ruled that the conduct of SYP during the Inquests was not inconsistent with this earlier apology. The force has taken careful note of the Coroner's comments during the Inquests and has sought to be open and transparent at all stages.
>
> It is important to remember that Inquests are not about guilt, liability or blame, but about establishing the facts. The intention throughout these proceedings has been to assist the jury understand the facts. We have never sought, at any stage, to defend the failures of SYP or its officers. Nevertheless,

> these failures had to be put into the context of other contributory factors. In other words, where do the failings of SYP stand in the overall picture?
>
> We are sorry if our approach has been perceived as at odds with our earlier apology, this was certainly not our intention."

33. Fifteen minutes after that statement was issued, the then Home Secretary, Mrs Theresa May, made a statement to the House of Commons. She paid tribute to Mr Burnham who, she said, had "campaigned so tirelessly over the years on the families' behalf".

34. At 12.55pm Mr Burnham responded. His remarks included the following:

> "The much bigger question for South Yorkshire Police to answer today is this: why at this inquest did they go back on their 2012 public apology? When the Lord Chief Justice quashed the original inquest he requested that the new one not degenerate into an "adversarial battle". Sadly that is exactly what happened. Shamefully, the cover-up continued in that Warrington courtroom. Millions of pounds of public money was spent retelling discredited lies against Liverpool supporters. Lawyers for retired officers threw disgusting slurs around; those from today's force tried to establish that others were responsible for opening of the gate. If the police had chosen to maintain their apology, this inquest would have been much shorter. But they did not and they put the families through hell once again. It pains me to say it, but the NHS through the Yorkshire Ambulance Service, was guilty of the same. Does the Home Secretary agree that because of his handling of this inquest, the position of the South Yorkshire Chief Constable is now untenable?....."

35. Thereafter some ten Members of Parliament asked the Home Secretary further questions. The last of those was Mr Chris Heaton-Harris Conservative Member for Daventry. He expressed concern:

> "about the culture that still exists in South Yorkshire Police. From statements on its website and statements it has made I fear it still has not learned all the lessons of that tragedy all that time ago. Will the Home Secretary be commenting on what is going on in South Yorkshire Police Force?"

36. The Home Secretary replied:

> "I think everybody will be disappointed and, indeed, concerned by some of the remarks that have been made by South Yorkshire Police today. There was a very clear verdict yesterday in relation to the decisions that were taken by police officers and the action of police officers on 15 April 1989, and I urge South Yorkshire Police Force to recognise the verdict of the jury. Yes it must get on with the day to day job of policing in its force area but it needs to look at what happened-at what

> the verdicts have shown-recognise the truth and be willing to accept that."

37. There was criticism of South Yorkshire Police in statements of Members of Parliament that followed.

38. At approximately 1.45pm, the PCC says, he received a telephone call from Clive Betts MP who said that the Chief Constable's statement had been very badly received by a large number of MPs "who thought the statement was defensive, self-justifying and showed that South Yorkshire Police was failing to acknowledge its own responsibilities."

39. At 1.50pm, the PCC says, he received a telephone call from a member of one of the Hillsborough families who suggested that the Chief Constable should resign.

40. At about 2.00pm the PCC saw the Chief Constable and told him that he thought his options "were either to resign and make a dignified statement that he accepted responsibility for South Yorkshire Police's action (which I would acknowledge) or that I would have to suspend him and would invoke the section 38 / Schedule 8 process". The Chief Constable asked "how long I had to consider the options and the Commissioner said the deadline was 15.00 hours". The Chief Constable asked for time to consider it overnight so that he could discuss the position with his wife. The PCC refused.

41. Shortly before 3.00pm the Chief Constable went to the PCC's office and said he thought the 15.00 hours deadline was unreasonable. The PCC then said he would suspend him. On returning to his office the Chief Constable found an email from the PCC timed at 14.50pm. That email read:

> "David,
>
> It is with great regret that I have no choice other than to suspend you from duties as Chief Constable.
>
> I have reached this decision with a heavy heart, following discussions we have had both in the run up to, and following, the delivery of the Hillsborough verdicts. My decision is based on the erosion of public trust and confidence referenced in statements and comments in the House of Commons this lunchtime, particularly the Home Secretary's comments on the statement you released today. There have also been public calls for your resignation over the last 24 hours from a number of quarters, including local MPs and during a telephone call I received personally from one of the Hillsborough families today.
>
> I am sorry you didn't feel able to resign but I cannot ignore the weight of public opinion and the need I feel to restrict any further damage to the Force and its current workforce.
>
> I am proposing to call for your retirement or resignation under Section 38 of the Police Reform and Social Responsibility Act 2011. You have the opportunity to make written representations about my proposal and I would be grateful if

> you could indicate as soon as possible whether you intend to do so.
>
> Yours sincerely,
>
> Alan"

42. The following day the Chief Constable's suspension was widely reported in the press. The front page of the Times newspaper contained an article referring to the Chief Constable and headed "Disgraced Police Chief may never face action". The front page of the Metro newspaper carried a headline "Top cop is forced to step down".

43. Later in the afternoon of 27 April the PCC took part in hustings for the forthcoming PCC election.

The Section 38 process and decisions

44. The PCC's decision to suspend the Chief Constable was recorded in a PCC decision record dated 27 April 2016. The rationale for the decision is in the same terms as the email referred to above.

45. On 3 May 2016 the PCC's solicitors wrote to the Chief Constable's solicitor, explaining the reason for the PCC's decision which was summarised in the email of 27 April 2016. The letter went on:

> "The Commissioner believes that the consequence of [the second press statement] is that the public confidence in the Force has been further and significantly harmed, above and beyond the severe damage that has been done to the Force by the verdicts themselves. More importantly he believes that the statement has affected public confidence in your client's ability to act as Chief Constable of the Force."

46. On 17 May 2016 the PCC sent a letter to Sir Thomas Winsor, HMCIC, providing a detailed explanation of his reasons for invoking the section 38 procedure and seeking his views. Included in the letter were some 330 pages of supporting material. He confirmed that "the immediate cause for my decision and the reasons for it" were the Chief Constable's decision to issue the second statement and what followed.

47. On 15 June 2016 HMCIC provided the PCC with a detailed response setting out his view on the proposal to require the Chief Constable to resign or retire. We summarise the contents of that letter at paragraph 157 below.

48. In June 2016, a report commissioned by the PCC and the-then acting Chief Constable and called the "Peer Review", was published. It was produced by Deputy Chief Constable Andy Rhodes of Lancashire Constabulary in his role as The College of Policing Professional Community Chair for Organisational Development. It was said to be:

> "a way of helping the new Chief Constable of South Yorkshire understand more clearly and quickly some of the key challenges and opportunities that will face him as he takes up his post."

49. On 4 July 2016 the PCC provided the Chief Constable with his letter to Sir Thomas Winsor and the accompanying material, and a further document setting out the PCC's response to Sir Thomas' views. That letter indicated that the PCC maintained his decision of 27 April; it is the second decision under challenge in these proceedings.

50. On 22 July 2016 the Chief Constable provided his written response to the PCC.

51. On 15 August 2016 the PCC notified the Chief Constable that having considered the representations from him and HMCIC, he was still proposing to call upon the Chief Constable to resign or retire and accordingly would be inviting the PCP to make a recommendation pursuant to paragraph 15 of Schedule 8 to the 2011 Act. That is the third decision under challenge.

52. On 17 August 2016, the Chief Constable's solicitors sent a letter before action to the PCC. The PCC's solicitors responded on 2 September 2016. Further correspondence between solicitors followed.

53. The Second Interested Party, the PCP, sought the view of HMCIC on the PCC's response to his letter of 15 June 2016 and asked three further questions of HMCIC. HMCIC responded to the first of those requests on 12 September with further detailed observations in which he indicated that he remained of the view that the proposed removal would be unlawful. On 15 September he answered the PCP's three questions.

54. On 16 September 2016, the PCP held a scrutiny hearing under paragraph 15 of Schedule 8. Following that hearing on 21 September 2016, the PCP published its recommendation which was that the PCC should call on the Chief Constable to resign or retire.

55. By letter dated 29 September 2016 the PCC informed the Chief Constable that he had accepted the PCP's recommendation and was calling on him to resign from his post as Chief Constable. The letter concluded:

> "The reasons for my decision are those I have set out in the course of the section 38/Schedule 8 process. Put very shortly, I remain of the opinion that the Chief Constable's resignation is necessary to ensure public confidence in the South Yorkshire Police Force."

56. That was the fourth decision under challenge. The Chief Constable resigned later the same day.

The Statutory Scheme

57. Section 1 of the Police Reform and Social Responsibility Act 2011 abolished Police Authorities and established Police and Crime Commissioners. Section 1 provides as follows:

> "1 Police and crime commissioners
>
> (1) There is to be a police and crime commissioner for each police area listed in Schedule 1 to the Police Act 1996 (police areas outside London).

(2) A police and crime commissioner is a corporation sole.
...
(4) The police and crime commissioner for a police area is to be elected, and hold office, in accordance with Chapter 6.

(5) A police and crime commissioner has—
(a) the functions conferred by this section,
(b) the functions relating to community safety and crime prevention conferred by Chapter 3, and
(c) the other functions conferred by this Act and other enactments.

(6) The police and crime commissioner for a police area must—
(a) secure the maintenance of the police force for that area, and
(b) secure that the police force is efficient and effective.

(7) The police and crime commissioner for a police area must hold the relevant chief constable to account for the exercise of—
(a) the functions of the chief constable, and
(b) the functions of persons under the direction and control of the chief constable.

(8) The police and crime commissioner must, in particular, hold the chief constable to account for—
(a) the exercise of the duty under section 8(2) (duty to have regard to police and crime plan);
(b) the exercise of the duty under section 37A(2) of the Police Act 1996 (duty to have regard to strategic policing requirement);
(c) the exercise of the duty under section 39A(7) of the Police Act 1996 (duty to have regard to codes of practice issued by Secretary of State);
(d) the effectiveness and efficiency of the chief constable's arrangements for co-operating with other persons in the exercise of the chief constable's functions (whether under section 22A of the Police Act 1996 or otherwise);
(e) the effectiveness and efficiency of the chief constable's arrangements under section 34 (engagement with local people);
(f) the extent to which the chief constable has complied with section 35 (value for money);
(g) the exercise of duties relating to equality and diversity that are imposed on the chief constable by any enactment;
(h) the exercise of duties in relation to the safeguarding of children and the promotion of child welfare that are imposed on the chief constable by sections 10 and 11 of the Children Act 2004."

58. Section 2 of the Act makes provision in respect of Chief Constables. Section 2 provides as is material as follows:

> "2 Chief constables
>
> (1) Each police force is to have a chief constable.
>
> (2) The chief constable of a police force is to be appointed, and hold office, in accordance with—
> (a) section 38, and
> (b) the terms and conditions of the appointment.
>
> (3) A police force, and the civilian staff of a police force, are under the direction and control of the chief constable of the force.
>
> (4) A chief constable has the other functions conferred by this Act and by other enactments.
>
> (5) A chief constable must exercise the power of direction and control conferred by subsection (3) in such a way as is reasonable to assist the relevant police and crime commissioner to exercise the commissioner's functions…"

59. Section 28 establishes Police and Crime Panels in each area. Section 28 provides as is material as follows:

> "28 Police and crime panels outside London
>
> (1) Each police area, other than the metropolitan police district, is to have a police and crime panel established and maintained in accordance with Schedule 6 (police and crime panels)…
>
> (2) The functions of the police and crime panel for a police area must be exercised with a view to supporting the effective exercise of the functions of the police and crime commissioner for that police area.
>
> (3) A police and crime panel must—
> (a) review the draft police and crime plan, or draft variation, given to the panel by the relevant police and crime commissioner in accordance with section 5(6)(c), and
> (b) make a report or recommendations on the draft plan or variation to the commissioner.
>
> (4) A police and crime panel must—
> (a) arrange for a public meeting of the panel to be held as soon as practicable after the panel is sent an annual report under section 12,
> (b) ask the police and crime commissioner, at that meeting, such questions about the annual report as the members of the panel think appropriate,

(c) review the annual report, and
(d) make a report or recommendations on the annual report to the commissioner.

(5) A police and crime panel has the functions conferred by Schedules 1 (procedure for appointments of senior staff), 5 (issuing precepts) and 8 (procedure for appointments by police and crime commissioners).

(6) A police and crime panel must—
(a) review or scrutinise decisions made, or other action taken, by the relevant police and crime commissioner in connection with the discharge of the commissioner's functions; and
(b) make reports or recommendations to the relevant police and crime commissioner with respect to the discharge of the commissioner's functions,
insofar as the panel is not otherwise required to do so by subsection (3) or (4) or by Schedule 1 , 5 or 8…"

60. The critical statutory provision in this case is section 38 of the Act. That provides:

"38 Appointment, suspension and removal of chief constables

(1) The police and crime commissioner for a police area is to appoint the chief constable of the police force for that area.

(2) The police and crime commissioner for a police area may suspend from duty the chief constable of the police force for that area.

(3) The police and crime commissioner for a police area may call upon the chief constable of the police force for that area to resign or retire.

(4) The chief constable must retire or resign if called upon to do so by the relevant police and crime commissioner in accordance with subsection (3).

(5) Schedule 8 (appointment, suspension and removal of senior police officers) has effect.

(6) This section is subject to Parts 1 and 2 of Schedule 8.

(7) This section and Schedule 8 are subject to regulations under section 50 of the Police Act 1996."

61. By section 79 the Secretary of State must issue a "Policing Protocol". Police and Crime Commissioners, Chief Constables and Police and Crime Panels are required to have regard to the Policing Protocol in exercising their powers. That Protocol is contained in the Schedule to The Policing Protocol Order, SI 2011/2744. Much of that

Protocol is relevant to this case; we set out here just those provisions relied upon by the parties. We refer to further paragraphs below:

> "9. This Protocol does not supersede or vary the legal duties and requirements of the office of constable. Chief Constables remain operationally independent…
>
> 11. The 2011 Act establishes PCCs within each force area in England and Wales with the exception of the City of London. The 2011 Act gives these PCCs responsibility for the totality of policing within their force area. It further requires them to hold the force Chief Constable to account for the operational delivery of policing including in relation to the Strategic Policing Requirement published by the Home Secretary.
>
> 12. The 2011 Act does not impinge on the common law legal authority of the office of constable, or the duty of constables to maintain the Queen's Peace without fear or favour. It is the will of Parliament and Government that the office of constable shall not be open to improper political interference…
>
> 15. The PCC within each force area has a statutory duty and electoral mandate to hold the police to account on behalf of the public…
>
> 17. The PCC has the legal power and duty to—
>
> …
>
> (b) scrutinise, support and challenge the overall performance of the force including against the priorities agreed within the Plan;
>
> (c) hold the Chief Constable to account for the performance of the force's officers and staff;
>
> …
>
> (f) remove the Chief Constable subject to following the process set out in Part 2 of Schedule 8 to the 2011 Act and regulations made under section 50 of the Police Act 1996;
>
> (g) maintain an efficient and effective police force for the police area;
>
> …
>
> (i) provide the local link between the police and communities, working to translate the legitimate desires and aspirations of the public into action…
>
> 18. In addition, the PCC must not fetter the operational independence of the police force and the Chief Constable who leads it…
>
> 22. The Chief Constable is accountable to the law for the exercise of police powers, and to the PCC for the delivery of efficient and effective policing, management of resources and expenditure by the police force. At all times the Chief Constable, their constables and staff, remain operationally independent in the service of the communities that they serve.

> 23. The Chief Constable is responsible to the public and accountable to the PCC for—
>
> (a) leading the force in a way that is consistent with the attestation made by all constables on appointment and ensuring that it acts with impartiality;…
>
> (h) being the operational voice of policing in the force area and regularly explaining to the public the operational actions of officers and staff under their command;…
>
> (j) remaining politically independent of their PCC;..
>
> (l) exercising the power of direction and control in such a way as is reasonable to enable their PCC to have access to all necessary information and staff within the force;…
>
> 26. The Chief Constable retains responsibility for operational matters…
>
> 30. The operational independence of the police is a fundamental principle of British policing. It is expected by the Home Secretary that the professional discretion of the police service and oath of office give surety to the public that this shall not be compromised…"

62. The powers in section 38 are exercisable subject to the provisions of Schedule 8 and regulation 11a of the Police Regulations 2003. The effect of those provisions is common ground. The PCC must give the Chief Constable a written explanation of the reasons why he is proposing to call for his retirement or resignation (paragraph 13(2)). He must notify the relevant PCP he is proposing to call on the Chief Constable to retire or resign and must provide it with a copy of the reasons given to the Chief Constable for proposing so to do (paragraph 13(3)). He must obtain the views of HMCIC in writing and must have regard to those views (regulation 11A of the 2003 Regulations). He must give the Chief Constable the opportunity to make representations about the proposal (paragraph 13(4)). He must consider those representations and provide them to the PCP (paragraph 13(5)).

63. If he still proposes to require the Chief Constable to retire or resign after so doing, he must notify the Chief Constable and the PCP that this remains his intention (paragraph 14). The PCP so notified must within six weeks make a recommendation to the PCC as to whether or not he should call for the retirement or resignation (paragraph 15(2) and (3)). Before doing so it may consult HMCIC and must hold a "scrutiny hearing" at which the PCC and the Chief Constable may make representations (paragraph 15(4) and (9)). Having considered again the PCP's recommendation, the PCC may accept or reject it and must notify the PCP of his decision (paragraph 16).

64. By section 38(4) a Chief Constable called on to resign or retire at the end of this process "must" do so.

Preliminary Issues

65. We come later in this judgment to address individually the challenges to each of the four decisions. Three preliminary issues arise, which are relevant to more than one of the decisions under challenge, and it is convenient to deal with them now. They are:

    i) The Policing Protocol and the duty of co-operation;

    ii) The test to be applied to the PCC's decisions and the margin of appreciation, if any, due to the Chief Constable; and

    iii) The application of Art 8.

The Policing Protocol

66. The 2011 Act seeks to achieve two, sometimes conflicting, objectives. First, it seeks to maintain proper operational independence for Chief Constables. Second it seeks to achieve proper democratic oversight of the conduct of Chief Constables, for which purpose the electoral mandate of PCCs to hold the police to account is given statutory expression.

67. There will inevitably be tension between these two imperatives in practice. But the Protocol provides a mechanism by which these tensions are to be managed. The Protocol is contained in a schedule to a statutory instrument and all those involved in policing are required, as a matter of law, to have regard to the Protocol in exercising their functions.

68. Paragraph 8 of the Protocol provides:

> "The establishment and maintenance of effective working relationships by these parties is fundamental. It is expected that the principles of goodwill, professionalism, openness and trust will underpin the relationship between them and all parties will do their utmost to make the relationship work…." (Emphasis added.)

69. Paragraph 35 provides:

> "The PCC and Chief Constable must work together to safeguard the principle of operational independence, while ensuring that the PCC is not fettered in fulfilling their statutory role. The concept of operational independence is not defined in statute, and as HMIC has stated, by its nature, is fluid and context-driven…" (Emphasis added.)

70. Paragraph 42 provides:

> "The PCC is a publicly accountable individual who together with their Chief Constable will need to establish effective working relationships in order to deliver policing within England and Wales. Where differences occur they should be resolved where possible locally between the PCC and Chief Constable. Professional advice may be offered by HMIC."(Emphasis added.)

71. These are unusual provisions to find in a schedule to a statutory instrument but, in our judgment, they are critical to the proper functioning of the new arrangements for which the 2011 Act makes provision.

72. It follows that in their approach to the verdicts of the jury in the Hillsborough Inquest, the Commissioner and the Chief Constable were obliged to conduct their relationship with each other in accordance with the principles to which we have just referred. An absence of goodwill, professionalism, openness and trust, or of efforts to work together, is likely to destroy the proper working relationship between Commissioner and Chief Constable. It is also likely to undermine attempts to secure that the police force is efficient and effective, an obligation placed on the Commissioner by s.1(6), and to undermine the proper exercise of the powers of the Chief Constable to assist the Commissioner under s.2(5).

73. Accordingly it is necessary to test the actions of parties to these proceedings against those requirements. The respect accorded to that obligation will provide a critical metric for determining the rationality of decisions taken by the parties.

The test to be applied to the PCC's decisions and the margin of appreciation to be accorded to the Chief Constable

74. It is common ground between the parties that the effect of s.38 and Part 2 of Schedule 8 to the 2011 Act and regulation 11A of the Police Regulations 2003 is to give the PCC a power to suspend the Chief Constable. These provisions require the Commissioner to follow the procedure summarised above when contemplating calling upon the Chief Constable to resign or retire. It is also common ground that that procedure was followed here. However the parties took starkly conflicting positions as to the breadth of the powers given to the PCC and the test to be applied by the court to determine the lawfulness of his decision. Closely related to that latter decision is the margin of discretion, if any, to be allowed to the Chief Constable in the decisions he takes.

75. It was argued by Mr Davies for the Chief Constable, and by Mr Sheldon on behalf of HMCIC, that s.38 should be construed as permitting the PCC to require the Chief Constable to resign or retire only for matters within the PCC's "primary duty" under s.1(6), as interpreted by reference to the Policing Protocol. We reject that submission.

76. In our judgment the words of s.1 are plain. The PCC is not just entitled, but obliged, to hold the relevant Chief Constable to account in respect of all the functions of the Chief Constable and for all the functions of those acting under his direction and control. Nothing in the Act limits the wide obligations of the PCC under s.1(7) which requires him to hold the Chief Constable to account for the exercise of any of the Chief Constable's functions.

77. It is said that exercise of the s.38 powers cannot interfere with the operational independence of a Chief Constable. That point goes both to the breadth of the PCC's power and the margin of appreciation to be allowed to the Chief Constable.

78. It is right to observe, as Mr Davies points out, that the operational independence of the Chief Constable is repeatedly recognised in the Policing Protocol. However, the PCC is obliged to hold the Chief Constable to account for every function he performs. In our judgment, matters relevant to operational independence are not excluded from the scope of the PCC's powers of scrutiny. The operational independence at common law (see notably *R v Commissioner of Police of the Metropolis ex parte Blackburn*

[1968] 2 QB 118 at 135) must give way, if so required, by the terms of the 2011 Act and, in our judgment, the Act qualifies that common law rule.

79. The Act adopts a more nuanced approach than the common law in this regard, recognising in the Protocol it introduces both the importance of operational independence and an important competing imperative, namely democratic oversight of the police. It is, in our judgment, impossible to see operational independence as being beyond the supervision of the PCC.

80. Next it was said by Mr Davies that s.38(3) is what he calls a "sanctioning power", which, he says, can only be exercised on the basis of cogent reason and thorough enquiry.

81. The power under s.38 can fairly be described as a "sanctioning power". But there is no principle that such a characterisation mandates the reading down of the clear words of the statute. The consequences of the exercise of the power are relevant to issues of rationality and proportionality, where that is in issue, but no more.

82. Mr Swift argues that in exercising the power under s.38(2) the Commissioner was obliged to have regard to matters specified in the 2011 Act, namely the Police and Crime Plan issued by the Commissioner (under s.8) and the views of the people in the area about policing in the area (s.17(1)). He says that the powers are to be exercised in the light of the Commissioner's duties under s.1 of the Act, including the duty under s.1(6)(b) to secure that the police force is efficient and effective.

83. Mr Swift says that, other than the procedural regime imposed by the Act and the rules and the constraints of public law, there was no restriction on the circumstances which might prompt the PCC to suspend the Chief Constable or to call for his resignation or retirement. He observes that s.38(2) and (3) provide simply that the PCC "may" suspend or call upon the Chief Constable to resign or retire. He argues that neither the Act nor the rules require the PCC to allow any margin of appreciation to the Chief Constable at all.

84. In other words, says Mr Swift, it is open to the PCC simply to disagree with the Chief Constable about a decision he has taken and, provided the statutory procedure is followed, to call upon him to retire or to resign in consequence. That, says Mr Swift, is the statutory consequence of the obligation on the PCC to hold the Chief Constable to account. The breadth of that submission was illustrated during argument. Mr Swift maintained that it would have been as open to the PCC to require the Chief Constable's resignation if he had failed to make a second statement on the 27 April 2016 as it was because he made one in the terms he did.

85. According to Mr Swift, the Court's powers of review of his client's decision were limited to the familiar challenges of illegality, procedural impropriety and irrationality. Of those, only the last was in play here.

86. Mr Sheldon argued that, regardless of whether a Convention right was engaged, the potential impact of a decision would justify the court subjecting the decision to strict scrutiny as a matter of common law, in a manner which mirrored a proportionality test. We were taken to the Supreme Court's decisions in *Kennedy v Information Comr (Secretary of State for Justice intervening)* [2015] AC 455 where at paragraph 51 Lord Mance said

> "the common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle. The nature of judicial review in every case depends upon the context. The change in this respect was heralded by what Lord Bridge of Harwich said in R v Secretary of State for the Home Department, Ex p Bugdaycay [1987] AC 514 , 531 where he indicated that, subject to the weight to be given to a primary decision-maker's findings of fact and exercise of discretion, "the court must … be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines".

87. At paragraph 54 Lord Mance continued:

> "As Professor Paul Craig has shown (see e.g. "The Nature of Reasonableness" (2013) 66 CLP 131), both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context."

88. In *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591, Lord Carnworth (with whom the other members of the court agreed) cited the judgment of Lord Mance in *Kennedy* with approval.

89. We consider whether proportionality in the context of Art 8 is relevant in the present case in the following section of the judgment. For the present, it suffices for us to indicate that we accept Mr Swift's submissions that these two decisions do not mean proportionality has been incorporated into English domestic law where neither EU law nor the ECHR is engaged. But in our judgment they do make good the submission, if it were ever open to doubt, that the intensity of review of a decision subject to judicial review will vary according to context. And here, in our judgment, the critical context is provided by the Protocol.

90. In our view, the terms of the Protocol serve to qualify the powers of the PCC. The duty of co-operation which we have described above proceeds on the basis of "goodwill, professionalism, openness and trust" between Chief Constable and the PCC. Given those considerations, in our judgment, it is necessary always for a PCC to accord a Chief Constable a margin of appreciation in the decisions he takes. The obligation on PCC and Chief Constable to "work together to safeguard the principle of operational independence" requires the PCC to recognise and respect the professional judgment of the Chief Constable and to work with him to maintain that independence. Action by the PCC based on the basis of simple disagreement with a decision of the Chief Constable would be inconsistent with those obligations.

91. As the Protocol makes clear "The operational independence of the police is a fundamental principle of British policing". The fact that the PCC's powers to call the Chief Constable to account extend to operational matters does not mean that operational independence is of no significance. There is an important difference between scrutiny of the Chief Constable's action and control of his actions.

92. The analysis set out above applies whatever the nature of the decision taken by the Chief Constable. It is particularly important where operational independence is concerned but we accept Mr Sheldon's submission that this case does not directly involve operational independence. HMCIC says in his report to the PCC, and we accept, that relations with the media is, nonetheless, an important part of modern police leadership and the need for a Chief Constable to be permitted a margin of discretion here is as real as in areas more commonly regarded as subject to operational independence.

93. The Chief Constable is not the PCC's employee. He leads, and is responsible for, his force. He occupies an office of considerable constitutional significance. As Mr Sheldon submitted, the stability or fragility of a police force depends to a significant degree on the way in which a Chief Constable is treated. If Chief Constables can too readily be removed, there is a serious risk of the stability of the force being undermined. It follows that we prefer the argument with which Mr Davies concluded his submissions on this issue; it cannot be reasonable for a PCC to suspend the Chief Constable for taking a decision which was itself reasonable.

94. In our judgment therefore, the proper test to be applied by the PCC to the actions of a Chief Constable is to ask whether those actions are outside the range of reasonable responses available to a Chief Constable. The test for the court to apply to the PCC's decision-making is to ask whether that decision making meets the requirements of public law, namely whether it is lawful, procedurally proper and rational. Since the lawfulness and procedural propriety of the PCC's actions are not in issue here, the question resolves to this: could the PCC rationally conclude that the Chief Constable's actions were outside the range of reasonable responses?

Art 8 ECHR

95. The Chief Constable maintains that there is a further element to the test; he says that the PCC's decision is also vulnerable to challenge if it was disproportionate. There was a debate between the parties as to whether our contemporary common law imports into public law a requirement of proportionality. But we do not need to determine that issue. It was agreed that if Art 8 ECHR was engaged, proportionality was an element of the test.

96. We reject Mr Swift's submission that Art 8 is not engaged. In our judgment, it is plain that the exercise of the s.38 powers had the capacity significantly to affect the reputation of the Chief Constable concerned. Certainly on the facts here, the Chief Constable's suspension on 27 April 2016 severely damaged his reputation. We have seen some of the press coverage of the decision to suspend and it was plainly devastating of that reputation. We have no hesitation in rejecting Mr Swift's submission that the interference in the Chief Constable's private life occasioned by the suspension and its consequent publicity was insufficiently grave to engage Art 8. We admit into evidence the Chief Constable's additional witness statement which describes how he regarded the effect of his suspension on his private life. But in our judgment that late evidence was not necessary; the public suspension of the Claimant from his role of Chief Constable inevitably impacted on his private life.

97. Mr Swift argued, relying on *Turner v East Midlands Train Ltd* [2012] EWCA Civ 1470 at paragraph 35, that Art 8 cannot be relied upon "in order to complain of a loss of reputation which is a consequence of one's own actions." But, in our view, that does not assist him here as the very issue that calls for determination is whether the

loss of reputation was the consequence of the Chief Constable's actions or of a disproportionate reaction to those actions by the PCC.

98. Accordingly, we hold that it is open to the Chief Constable additionally to challenge the decisions of the PCC on the grounds that they were disproportionate.

99. There was some suggestion in argument that it would have been open to the Chief Constable to pursue remedies in contract for his loss of office. Those arguments were not developed before us and accordingly we do not deal with them further.

The Questions for Decision

100. In our judgment the following questions arise for decision on the facts of this case:

i) Should permission be given to challenge the first, second and third decisions or are they out of time?

ii) Was the first decision, to suspend the Chief Constable rational?

iii) Was the second decision to continue the section 38 process, having received the views of HMCIC, rational?

iv) Was the decision of 15 August 2016 to maintain the decision, following receipt of the Chief Constable's representations, rational?

v) Was the final decision to require the Chief Constable's resignation lawful?

vi) Were the decisions proportionate?

Discussion

Permission and Delay

101. The obligation under CPR 54.5 is to file the claim form in judicial review proceedings "promptly…and in any event not later than three months after the ground to make the claim first arose."

102. The ground for making the claim in respect of the first decision, namely the decision to suspend the Chief Constable, first arose on 27 April 2016. The claim should have been issued promptly thereafter and in any event should have been issued by 27 July 2016, the expiry of three months after that date. It was not in fact filed until 3 October 2016.

103. Mr Davies for the Chief Constable sought to argue that full reasons were not provided by the PCC for his reason to suspend the Chief Constable until 4 July 2016 and so the claim was issued in time. We reject that submission. In our judgment, the Chief Constable knew of the decision he seeks to challenge and knew the substance of the PCC's reasons on 27 April. He did not need to wait until receiving the letter on the 4 July to decide whether there were grounds to challenge it. In any event, as is set out in the notes to CPR 54.5(1) in the White Book:

> "time runs from the date when the grounds first arose not on the date when the claimant learned of the decision or from the date when the claimant considered that they had adequate

information to bring the claim" (see *R v Secretary of State for Transport ex parte Presvac* [1992] 4 Admin LR 121 at 133).

104. The second decision under challenge was that of the 4 July to continue with the proposal to require the Chief Constable's resignation, notwithstanding the observations of HMCIC. That decision was taken almost precisely three months before the proceedings were issued. In respect of that claim, the proceedings were certainly not issued promptly.

105. The third decision was dated 15 August 2016. In our view, the claim form in respect of that decision was issued both promptly and within three months, and we note that Lang J did not suggest otherwise when making the Order of 15 November 2016. There is no suggestion that the challenge to the fourth decision to require the Chief Constable's resignation was not in time.

106. The question that arises, therefore, is whether we should grant an extension of time under CPR Part 3.1(2)(a) to permit the Chief Constable to challenge the first and second decisions, notwithstanding that the claim in respect of them was issued out of time. We look to see whether there is a good reason to do so. We have also considered whether doing so would cause hardship or prejudice to the PCC or a detriment to good administration.

107. We resolve each of those questions in the Chief Constable's favour. In our judgment, on the facts of this case, where each of the decisions was a step along the path required by statute when a direction under section 38 is being contemplated by a PCC, and where the Chief Constable argues that a flawed approach by the PCC underlies all the decisions made, it is understandable that the Chief Constable should wait until the final decision before launching proceedings. Those circumstances provide a good reason to extend time. We anticipate that PCC would have alleged a challenge was premature if launched before the process was completed.

108. Given that on any view the challenges to the third and fourth decisions are in time and fall to be considered, we can see no prejudice to the PCC or detriment to good administration in permitting these claims also to be considered.

109. In those circumstances, we extend time. Furthermore we indicate now that in our judgment this is an appropriate case in which to grant the Chief Constable permission to apply for judicial review in respect of all four decisions. In our view, now that time has been extended, all of those challenges are at least properly arguable.

The Decision to Suspend

110. The PCC contends that it was not necessary for the Chief Constable to make a second statement at all. The parties had agreed that a statement should be made on the day the jury's determination was received and then not to comment again.

111. He says that by the morning of 27 April 2016 it was apparent to him that to release the second statement in the form then proposed would be a serious misjudgement on the part of the Chief Constable. In his view, the reference to "other contributory factors" in a statement released within hours of the inquest jury's verdict was "disastrous". He said he had sought to advise the Chief Constable not to issue a statement at all but the Chief Constable was determined to do so.

112. Mr Swift, for the PCC argues that there was plainly a rational basis for a proposal to call on the Chief Constable to resign. He says that the Chief Constable's second statement had prompted a significant response. He says that the Commissioner considered the decision to issue that statement a very serious misjudgement that seriously damaged public confidence in the Chief Constable and South Yorkshire Police. He says that the reference in it to "contributory factors" could be interpreted, and was widely interpreted, to refer to fan behaviour, in other words to the contention that the behaviour of the Liverpool Football Club fans caused or contributed to the dangerous situation at the Leppings Lane turnstiles.

113. Mr Swift argues that the PCC considered that the second statement could be understood as an indication that South Yorkshire Police did not fully accept the Hillsborough verdicts and would reinforce public perception that South Yorkshire Police were either unwilling or unable to accept responsibility for its own actions. He says that the PCC considered the content and timing of the second statement to be disastrous. He says the public standing of the police in South Yorkshire was already low following the publication in 2014 of the Jay Report into child sexual exploitation in Rotherham. He says the second statement provoked extensive criticism of South Yorkshire Police and the Chief Constable in Parliament, from local MPs, and families of Hillsborough victims and from local people.

114. Mr Swift argues that the result was the Chief Constable's position had become untenable. In the Commissioner's view there had been an erosion of public trust and confidence in both the Chief Constable and South Yorkshire Police.

115. In our judgment, there are five critical points on this issue:

i) The decision to make any second statement at all;

ii) The propriety of the PCC's response;

iii) The relevance of the background in South Yorkshire;

iv) The proper interpretation of the statement; and

v) Public reaction to the second statement.

No need to respond to the Shadow Home Secretary.

116. The Commissioner suggests that it is often wisest for people in public life to make 'no comment' in respect of a demand by politicians to make a statement. Whilst that may be true in certain circumstances, we reject the suggestion that to decide to issue a second statement on the facts of this case was outside the range of reasonable responses by the Chief Constable.

117. The call for a further statement had been made in Parliament by a senior politician, the politician who had played the most important part in the campaign to secure justice for the victims of Hillsborough. One of the criticisms made of South Yorkshire Police, which the PCC adopted in his letter to HMCIC of 17 May 2016, was that "no-one at the top ever took responsibility for anything and their reaction to any issue was to hide themselves away and hope everything would blow over".

118. In those circumstances we regard the Commissioner's stance that it was wrong to respond at all to Mr Burnham's statement as irrational. On any view, the conclusion

that it was appropriate to issue a second statement was one that was properly open to the Chief Constable.

The Propriety of the PCC's Response

119. The Commissioner says that, faced with the Chief Constable's decision to make a second statement, it was not for him to advise further on the contents of the statement. To do so, he says, would inhibit his holding the Chief Constable to account. He says in his second witness statement that it "was not part of my role to direct him not to publish the statement…It was my role to hold the Chief Constable to account for that decision". Ms Buttery puts it in this way in her statement:

> "We agreed it was not the Commissioner's role to assist in writing such a statement. This would be inappropriate and would frustrate the Commissioner's ability to fulfil his duty to hold the Chief Constable to account for his final decisions and actions".

120. We regard that approach as surprising in the extreme. The Commissioner's statutory obligation under s.1(6) was to secure the maintenance of South Yorkshire Police and to secure that that force was efficient and effective. On his case, he was faced with a proposal to act in a way which would cause the force real damage. In those circumstances, in our judgment, to fail to do all he could to prevent that harm was a serious error.

121. Furthermore, in our judgment, "goodwill, professionalism, openness and trust" and the requirement to work together, the qualities required by the Protocol, ought to have led the Commissioner to engage with the Chief Constable on the drafting of the second statement on the morning of the 27 April. He should have told the Chief Constable, frankly and plainly, the risks he believed he was running by issuing the statement in that form. He did not do so. It was, in our judgment, inconsistent with the collaborative approach required by the Protocol for the Commissioner to 'sit on his hands' as the Chief Constable made what the Commissioner regarded as a fundamental mistake.

122. Rather than standing by and allowing the Chief Constable to make the error, for which the PCC could then hold him to account, the proper applications of the principles in the Protocol should have led the Commissioner to warn the Chief Constable that if he went ahead and issued the statement, he would be at risk of suspension under s.38. As it was, within an hour and a half of the Chief Constable releasing the second statement, but without any such warning, the Commissioner was asking for his resignation. An hour later when that resignation was not forthcoming, the Commissioner exercised his section 38 power to suspend.

123. Furthermore, it seems to us implicit in the PCC's statement that he regarded "holding the Chief Constable to account" as synonymous with suspending him. We regard that interpretation of the statutory duty as a wholly unreasonable one.

124. In *Shoesmith v Ofsted* [2011] PTSR 1459 Maurice Kay LJ said (at paragraph 66) "'Accountability' is not synonymous with 'Heads must roll'". Nor in our judgment, is it synonymous with requiring a Chief Constable's suspension. There is a continuum of possible means of performing the function of holding to account. It may require no more than requiring an explanation from the Chief Constable. It may involve the provision of advice or the administration of a warning or reprimand. It may be

possible to impose a short, or longer, period of suspension. At the further end of the continuum, it may involve requiring early retirement or ultimately resignation.

125. We have seen no evidence that the PCC even considered any measure less severe than suspension on 27 April 2016.

The Background in South Yorkshire

126. In communications subsequent to the decision to suspend, the PCC pointed to a number of background events which he asserts were relevant to his decisions to suspend and then to call for the resignation or retirement of the Chief Constable. Those background events included the conduct of South Yorkshire Police in relation to the allegations of child sexual exploitation in Rotherham and the proposal for an inquiry into events at Orgreave during the miners' strike. It was said that those events had undermined public confidence in South Yorkshire Police so that any further undermining of that confidence in the statements issued by the Chief Constable in respect of Hillsborough would be especially serious.

127. It is to be noted that none of those background matters were relied on by the PCC at the time of making the decision to suspend the Chief Constable. They did, however feature, in subsequent decisions. In our view the PCC was entitled to have regard to the state of public confidence in South Yorkshire Police in making the second, third and fourth decisions. He was entitled to view the significance of the second statement in the context of his assessment of the strength of public feeling about the competence of South Yorkshire Police.

128. The PCC accepts that these factors were only matters of background and did not themselves prompt the decisions under challenge. However, the argument that these matters meant that public confidence in the Chief Constable was fragile is only relevant if, on a proper analysis, the second statement can fairly be said to have caused further damage to public confidence. It is to that question that we turn at paragraph 130 below.

129. Reference was also made by the PCC in subsequent correspondence to what has been called the "Peer Review". That was the review commissioned by the Acting Chief Constable and the PCC in May 2016 into the operational and organisational capability and capacity of South Yorkshire Police. It was published on 25 September 2016. It was critical of the police but it did not identify the Chief Constable for particular criticism. In fact, as was submitted by Mr Davies, it could be read as being as critical of the PCC as of the Chief Constable. In our judgment the PCC was entitled to place very little weight on this document in reaching the decisions he did after its receipt.

The Interpretation of the Second Statement

130. We have set out in paragraph 32 above the full terms of the second statement issued by the Chief Constable. It is necessary in order properly to interpret that to have regard to its immediate context. By that expression, we refer to the 2012 statement, the first statement delivered on 26 April 2016 and the determination of the Hillsborough jury.

131. Read against that context, it seems to us that, from a legal point of view, the meaning of the second statement was perfectly clear. South Yorkshire Police stood by the apology made in 2012. Immediately after the jury's determination the Chief Constable repeated his apologies. The Chief Constable "unequivocally accepted the

jury's conclusions". South Yorkshire Police did not seek to defend the failures of their predecessors but asserted that those failures had to be put into the context of other contributory factors. The expression "other contributory factors" read in context, could only refer to the other failures identified by the jury at the Hillsborough inquest.

132. We recognise, however, that this statement was not intended solely, or even primarily, for lawyers. It was a public statement and falls to be considered as the public would view it. Furthermore, the context to that statement was wider than the immediate considerations to which we have referred. In particular, the context included the conduct of the inquests by both South Yorkshire Police and retired South Yorkshire police officers, who were represented independently of South Yorkshire Police. The conduct of the inquests by those representing the retired officers had been the subject of criticisms; that conduct demonstrated that those former officers continued to blame Liverpool football supporters for what happened at Hillsborough.

133. Even taking into account that wider context, and trying to view the second statement from the standpoint of a non-lawyer, we cannot see how any fair minded person could conclude that the reference to "other contributory factors" was possibly intended to be a reference to the conduct of Liverpool football supporters. Such an interpretation could only be based on some pre-existing assumption about the attitude of the Chief Constable or a failure to distinguish between the position at the inquests of the South Yorkshire police and the retired officers. Given that only two paragraphs earlier the Chief Constable had repeated his apology and unequivocally accepted the jury's conclusion, it would be impossible for any fair minded observer to conclude that the Chief Constable was challenging the conclusion of the jury that Liverpool football supporters had been blameless. The only contributory factors identified by the jury had been the conduct of parties unconnected to Liverpool supporters.

134. In those circumstances we reject the PCC's assertion that this statement could reasonably have been interpreted as implying criticism by the Chief Constable of the Liverpool supporters. We note in that context the ruling of Sir John Goldring, the Coroner, set out at paragraph 16 above, to the effect that questioning of witnesses at the inquest on behalf of South Yorkshire Police (in contradistinction to that on behalf of retired officers) was not inconsistent with the 2012 apology.

Public Reaction to the Second Statement

135. The PCC asserts that the decision to suspend the Chief Constable and then to require his resignation was justified because the "decision to issue the second statement was a very serious misjudgement that seriously damaged public confidence in the Claimant and consequently South Yorkshire Police".

136. The Chief Constable responds that that justification does not withstand scrutiny. Mr Davies argues that it is not enough that there is some sector of public opinion which demands removal and that the PCC must exercise a detached approach to "public clamour". He refers to the decision of the House of Lords in *R v Secretary of State for the Home Department ex p Venables* [1998] AC 407 and of the Court of Appeal in *Shoesmith.*

137. We accept that this case, like *Shoesmith*, is very different to the quasi-judicial context of *Venables.* We accept too that the decisive factor in *Shoesmith* was the lack of procedural fairness which led to the dismissal of the applicant, a feature that does not obtain here. What is critical in the present case is the nature and extent of the

evidence of an adverse public reaction which could be said to support the PCC's assessment.

138. The evidence shown to us of any significant public reaction to the Chief Constable's statement between the time when he was interviewed and the time when the Commissioner made the section 38 decision to suspend was very limited. And given that the PCC says that it was the making of that second statement that prompted him to act, it is the evidence in that period which is critical.

139. As noted above the second statement was made by the Chief Constable at 12.20 on 27 April. The decision to suspend him was communicated to the Chief Constable at 2.50pm. As is apparent from the chronology set out in detail above, the events of relevance that occurred in that period of two and half hours were the telephone call from a member of one of the Hillsborough families, the remarks of Mr Burnham and the response of the Home Secretary in the House of Commons, the remarks of other MPs in the debate on the Hillsborough verdicts, and the telephone call from Mr Betts.

140. We see nothing in this material that could possibly justify a conclusion that there had been a significant adverse public reaction to the second statement from the Chief Constable.

141. There is no evidence to suggest that the member of the Hillsborough families was motivated to contact the PCC by the second statement, as opposed to that person's understanding of what had occurred during the course of the inquest. The statement of Members of Parliament, like the earlier email from Labour Party offices, demonstrated that no clear distinction was being drawn in the political debate between the conduct of those acting on behalf of retired South Yorkshire Police officers and those acting for the current force. In any event, there is nothing to suggest that in the very short period between the making of the second statement and the commencement of the debate in Parliament, there had been any close attention paid to the detailed terms of the statement. Had there been, we have no doubt that a conclusion similar to that set out at paragraphs 130 and following would have been drawn.

142. The PCC's strongest argument rests on the remarks in Parliament by the-then Home Secretary. The Home Secretary expressed concern about "some of the remarks that had been made by South Yorkshire Police today". Notably, however, she did not call for the Chief Constable's resignation nor did she align herself with the calls for that resignation made by others. Her statement too was made only minutes after the Chief Constable's second statement had been delivered and there was no evidence that she had, in fact, had time to consider it closely. In any event, the decision was for the Commissioner who certainly had time to consider the Chief Constable's statement carefully before reaching his decision.

143. It was suggested during the course of argument that the Commissioner had made the decision to suspend by the time that the second statement was read out. Even if that was not the case, there was nothing in the second statement, or in the reaction to it, which justified a decision to suspend. Given that the PCC asserted that it was the reaction to the second statement that led him to make the decision to suspend, the decision to suspend was perverse.

Conclusion on the Decision to Suspend

144. Given the margin of appreciation which, in our judgment, the Commissioner should have allowed the Chief Constable, his decision to exercise his section 38 powers in

those circumstances was irrational. The Chief Constable's statement was comfortably within the range of reasonable responses to the jury's verdict and to the call by the Shadow Home Secretary for a further statement from South Yorkshire Police.

145. For all those reasons we regard the decision to suspend taken at 2.50pm on 27 April 2016 as irrational. Our conclusion on that first issue is plainly of central importance to the challenge to all four decisions. In consequence, we can deal with the other challenges rather more briefly.

The Second Decision: The proper approach to the views of the statutory consultees

146. The procedure required by Part 2 of Schedule 8 to the 2011 Act, as supplemented by regulation 11A of the 2003 Regulations, is common ground and is summarised at paragraph 62 above. It follows from those arrangements that the PCC "must have regard" to the views of HMCIC and must consider the PCP's recommendation.

147. It is accepted by the Chief Constable that the PCC followed that procedure. It is plain, furthermore, that the PCC read and responded to the views of HMCIC and considered and followed the recommendation of the PCP.

148. The sole area of dispute between the parties is as to the weight which the PCC should accord the views of HMCIC. Mr Davies submits that the PCC ought to follow those views unless there are good reasons for not doing so. By contrast, Mr Swift contends that the statutory requirement is simply to have regard to HMCIC's views. He referred to the judgment of Laws LJ in *R (Khatun) v Newham LBC* [2005] QB 37. At paragraph 47, Laws LJ said:

> "Although the guidance is provided for by statute and housing authorities are obliged by s.182 of the 1996 Act to have regard to it, it is not a source of law. However Mr Luba cited in his skeleton (paragraph 22) the decision of Dyson J as he then was in *R v North Derbyshire Health Authority ex p. Fisher* to support the proposition that an authority is not entitled to depart from guidance given in a circular issued by central government, to which it is obliged by statute to have regard, merely because it disagrees with it. But this case, I think, goes no further than to underline what is conventional law, namely that respondents to such a circular must (a) take it into account and (b) if they decide to depart from it, give clear reasons for doing so. If the decision is thought to support a proposition which would bind public bodies more tightly to a duty of obedience to guidance to which by statute they are obliged (no more, no less) to have regard, then I would respectfully question its correctness."

149. That passage was followed by Aikens LJ in *Brown v Secretary of State for Work and Pensions* [2008] PTSR 1506. Mr Swift argued that the duty here was no greater than that in *Khatun*, namely to give clear reasons for disagreeing. And that, he said, the PCC had done.

150. Mr Sheldon submits that the inclusion of HMCIC within the process is to ensure that an independent view is heard and seriously considered. He agrees that the ordinary principle is that the weight to be given to a relevant consideration is a matter for the decision maker. But he contends that "where the relevant consideration takes the

form of detailed and reasoned views, what rationality requires by way of departure from those views must be commensurately greater".

151. We agree with that submission of Mr Sheldon.

152. As we have sought to describe, the 2011 Act seeks to strike a delicate balance between the operational independence of Chief Constables on the one hand, and oversight and scrutiny of the police by elected office holders on the other. As we have said, the statutory regime mandates trust and cooperation between the parties involved. But a further and significant element of the arrangements is the requirement for the PCC to consider the views of HMCIC.

153. Her Majesty's Inspectorate of Constabulary was established in July 1856. Its function is to provide an independent assessment of police forces and policing across England and Wales. Pursuant to section 54 of the Police Act 1996 Inspectors of Constabulary inspect and report on the efficiency and effectiveness of every police force. The First Interested Party was appointed pursuant to section 54(1) of the 1996 Act to lead that Inspectorate.

154. HMCIC's independence, statutory function and experience makes him especially well equipped to provide a view on the wisdom of a proposal to call on a Chief Constable to retire or resign. In our view, the independence, statutory function and institutional experience of the Inspectorate means that it would be irrational of a PCC to fail to give particular weight to the views of HMCIC. That is especially so where the expression of those views is detailed, thorough and closely reasoned.

155. Mr Sheldon argued that the position here was akin to that in *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2006] 2 A.C. 148 where the House of Lords was considering a Code of Practice issued under the Mental Health Act 1983. At paragraph 21, Lord Bingham said this:

> "It is in my view plain that the Code does not have the binding effect which a statutory provision or a statutory instrument would have. It is what it purports to be, guidance and not instruction. But the matters relied on by Mr Munjaz show that the guidance should be given great weight. It is not instruction, but it is much more than mere advice which an addressee is free to follow or not as it chooses. It is guidance which any hospital should consider with great care, and from which it should depart only if it has cogent reasons for doing so. Where, which is not this case, the guidance addresses a matter covered by section 118(2), any departure would call for even stronger reasons. In reviewing any challenge to a departure from the Code, the court should scrutinise the reasons given by the hospital for departure with the intensity which the importance and sensitivity of the subject matter requires."

156. In our judgment, the observations provided by HMCIC here were much more than mere advice which the PCC was free to follow or not as he choose. It was guidance of a type which any PCC should consider with great care, and from which he should depart only if he has cogent reasons for doing so.

157. Much of what we regard as legitimate criticism of the Commissioner's decision to suspend was set out in the letter from HMCIC of 15 June 2016. That letter is

conveniently summarised in the Chief Constable's skeleton argument. It was Sir Thomas's view that:

> "(a) This was not an appropriate case for the use of section 38; (b) The second statement had been issued in response to a direct call for an explanation from SYP about its conduct at the inquest, and the Claimant had not acted inappropriately in deciding to do what has been demanded of him by a senior politician in a matter of very considerable public interest and attention; (c) When read fairly and as a whole the content of the second statement was unobjectionable; (d) There was little to no evidence of any loss of trust and confidence on the part of the public which is policed by SYP, (e) The reliance on a loss of trust and confidence was not made out and it was unreasonable for the Defendant himself to consider that his trust and confidence in the Chief Constable has been seriously damaged; (f) The Defendant's proposal was unsound and should be rescinded."

158. He explained his views further in his representations of 12 and 15 September 2016.

159. The PCC's response, in our judgment, failed to engage with the substance of much of Sir Thomas' observations and failed to provide cogent reasons for taking a different view. We give three examples. First, the PCC's response failed adequately to address the points made by Sir Thomas as to the reasonable interpretation of the Chief Constable's second statement, which points, for the reasons we have given, we have found to be sound. Second, and on an obviously related issue, the PCC maintains his view that the second statement suggests that the Chief Constable was not accepting the verdict. For the reasons we have given, we regard that view as misconceived. Third, the PCC's response failed to address at all the obvious unfairness of criticising the Chief Constable for deciding to respond to Mr Burnham's comments, given what the Commissioner himself had said about South Yorkshire Police failing to engage with criticism.

160. We regret to say that we are left with the clear impression that the PCC had decided upon his course of action on 27 April and was unwilling to recognise or properly address the powerful points made by Sir Thomas in opposition to his proposal. In all those circumstances we regard the second decision as irrational.

The Third Decision

161. The third decision was dated 15 August 2016 and was to maintain the second decision following receipt of the representations submitted on behalf of the Chief Constable.

162. In the light of our conclusions on the challenges to the first and second decisions, it is plain that the third decision too cannot stand.

163. We would add that, in our judgment, the submissions made by those acting for the Chief Constable on 22 July 2016, adopting as they did the views of HMCIC, were compelling.

164. For all the reasons set out above we regard the decision of the Commissioner to press on with section 38 process in the light of all that he had received from the Chief Constable and HMCIC as irrational.

The Fourth Decision

165. The final decision was taken by the PCC on 29 September 2016. It was to require the Chief Constable's resignation. If follows from all that we have said above that we regard that decision as irrational.

166. It is right to observe that the Second Interested Party, the PCP, had recommended that the PCC should call upon the Chief Constable to resign or retire. However the PCP's reasoning was thin and unconvincing. The PCP described the second statement as "a catastrophic error of judgment". They gave two reasons for that assertion. First, because of the "inevitable risk that it would be perceived as rowing back on the previous apology". Second, because of the need for confidence in the police.

167. In our judgment, the first of those reasons proceeds on the same flawed interpretation of the second statement as did those relied on by the PCC, which we have addressed above. As to the second, for the reasons given above, this background material cannot justify a conclusion that the requirement to resign or retire was warranted.

168. In our judgment, the PCC had made an irrational first decision and, despite the powerful observations of both the Chief Constable and HMCIC about the validity of that decision, had failed to recognise its flawed nature in his final decision.

169. Even if we were wrong about that, we would regard the decision to require the Chief Constable's resignation as disproportionate. The Chief Constable was due to retire within a matter of weeks and we cannot see how the "offence" of publishing a statement that might be misunderstood could possibly justify a direction under s.38 requiring resignation. By then he had been suspended for more than four months and no further sanction could sensibly be required.

Proportionality

170. Given those conclusions on the rationality challenge, it is not strictly necessary for us to consider the application of Art 8 ECHR. However, we have concluded above that Art 8 is engaged here and we set out, in brief, our view on the proportionality of the PCC's decision making.

171. Art 8 requires that there should be no interference by a public authority with the exercise of the right to respect for private and family life unless it is in accordance with the law and is necessary in a democratic society to protect certain fundamental interests. Necessity imports a requirement that any interference corresponds to a pressing social need and is proportionate to the legitimate aim pursued.

172. For the reasons given at paragraph 124, we do not regard suspension or requiring resignation or retirement as synonymous with holding the "Chief Constable" to account.

173. The appropriate means of calling to account is a matter for the PCC but the choice of means is a matter subject to review in this court. In conducting that review we must consider whether the means chosen were proportionate to the aim pursued.

174. The Claimant was a Chief Constable with a 30 year unblemished record. He had previously issued perfectly proper apologies for the conduct of South Yorkshire officers at Hillsborough. The "offence" in issue was the publication of a statement which, to put it at its highest, might be misinterpreted. The PCC had failed to warn

him of the likely consequences of issuing the statement. And it should have been obvious how such a suspension would be reported in the press and the likely effect on the Chief Constable of both the fact of the suspension and the manner of its likely reporting.

175. In those circumstances, in our judgment the decisions both to suspend and then pursue the s.38 process were disproportionate.

176. Similarly, in our judgment the final decision to require the Chief Constable's resignation was wholly disproportionate. The Chief Constable was due to retire in November 2016 in any event. To require his resignation in September 2016 was not a decision designed to pursue any legitimate aim; South Yorkshire Police would be in no better position by requiring resignation in the September than by allowing the planned retirement to come into effect in November.

177. Even if we are wrong about that and there was some benefit to be achieved by bringing about the end of the Chief Constable's career with South Yorkshire Police in the September, we have seen no evidence that the PCC addressed his mind to the question whether it would have been sufficient, at that point, to require retirement rather than resignation. In our view, the former carries less opprobrium than the latter and would have been the more proportionate response.

Conclusions

178. In those circumstances this application for judicial review must succeed. All four decisions will be quashed.