

Neutral Citation Number: [2014] EWCA Civ 1367

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

His Honour Judge Jeremy Richardson QC
[2013] EWHC 2698 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 21st October 2014

Before :

LORD JUSTICE BEATSON
LADY JUSTICE GLOSTER
SIR COLIN RIMER

Between :

R (on the application of THE CHIEF CONSTABLE OF THE WEST YORKSHIRE POLICE)	<u>Claimant/ Respondent</u>
- and -	
INDEPENDENT POLICE COMPLAINTS COMMISSION	<u>Defendant/ Appellant</u>
- and -	
POLICE CONSTABLE LEE ARMSTRONG	<u>Interested Party</u>
- and -	
LEEFORD SUTCLIFFE	<u>Interested Party</u>
(Transcript of the Handed Down Judgment of WordWave International Limited A Merrill Communications Company 165 Fleet Street, London EC4A 2DY Tel No: 020 7404 1400, Fax No: 020 7831 8838 Official Shorthand Writers to the Court)	

Mr Ivan Hare (instructed by **Mark James, IPCC Legal Services**) for the **Appellant, the IPCC**

Mr Matthew Holdcroft and **Ms Georgina Wolfe** (instructed by **Alison Walker, Legal Services, West Yorkshire Police**) for the **Respondent, the Chief Constable of the West Yorkshire Police**

Mr Hugh Davies QC (instructed by **Mandip Kumar, Cartwright King Solicitors**) for **PC Lee Armstrong**

Ms Henrietta Hill (instructed by **Henry Hyams & Co**) for **Leeford Sutcliffe**

Hearing date: 13 May 2014

Judgment

Sir Colin Rimer:

Introduction

1. This appeal raises a question as to the nature of the conclusions that may lawfully be arrived at in a report by the Independent Police Complaints Commission ('the IPCC') following a 'special requirements' investigation of a complaint about the conduct of a police officer. His Honour Judge Jeremy Richardson QC, in the Administrative Court, held that the IPCC's powers, when so reporting, are confined to stating whether the officer had a case to answer in misconduct proceedings and do not extend to expressing apparently conclusive findings by the investigator as to whether the police officer's conduct was reasonable and/or lawful. The judge held that in the present case the IPCC's report strayed beyond the limits so defined and by his order of 11 September 2013 he (i) quashed the report dated 19 March 2012 in relation to the arrest by PC Lee Armstrong of Leeford Sutcliffe; and (ii) directed the IPCC to produce a revised report in accordance with the terms of his judgment.
2. With the judge's permission, the IPCC appeals. We had argument for the IPCC from Ivan Hare and, for the Chief Constable of the West Yorkshire Police (the claimant/respondent), from Matthew Holdcroft and Georgina Wolfe. PC Armstrong was added as an interested party but took no part in the proceedings below. Before us, however, he was represented by Hugh Davies QC; and, at the start of the hearing, Henrietta Hill sought and was given permission to add Mr Sutcliffe as another interested party.

The facts

3. At about 2.30 pm on 11 March 2011, Mr Sutcliffe was allegedly driving his Audi car in Leeds in excess of the 30 mph speed limit. PC Armstrong, a traffic officer, stopped him and there followed an altercation resulting in Mr Sutcliffe's arrest for what was said to be a public order offence. During the arrest, PC Armstrong used CS spray and struck Mr Sutcliffe with his police baton. Mr Sutcliffe was injured by the effects of the spray and suffered an injury to his left thumb. On 16 June 2011, Mr Sutcliffe's mother made a complaint to the West Yorkshire police. Her complaint was one of abuse of authority in the way PC Armstrong spoke to her son; and assault, as she alleged that he had sprayed her son with CS spray three times, once whilst he was handcuffed.
4. The handling of the complaint was held over until after the determination of the criminal charges against Mr Sutcliffe. The CPS discontinued the charges against him on 17 June 2011, following which the complaint was referred to the IPCC on 29 September 2011. A lead and deputy senior investigator of the IPCC commenced an investigation and reported on 19 March 2012. The report's conclusion was that the complaint was upheld and that there was a case to answer in respect of an alleged 'breach of the standards of professional behaviour.' The report also made clear the investigators' view that Mr Sutcliffe's arrest was unlawful. The case was referred to the CPS for consideration of the prosecution of PC Armstrong for assault. On 26 July 2012, the CPS decided there was insufficient evidence for a realistic prospect of conviction; its view was that the arrest of Mr Sutcliffe was lawful. No prosecution of PC Armstrong was commenced.

5. The IPCC report was disclosed to PC Armstrong and Mrs Sutcliffe on 10 August 2012. The Chief Constable commenced judicial review proceedings for its quashing and His Honour Judge Behrens permitted him to bring the claim. His case was that as the contents of the report exceeded the lawful limits of such a report, the report was unlawful. His complaint was that whilst the investigators were entitled to find that the events of which Mrs Sutcliffe complained gave rise to a case that PC Armstrong would or might have to answer in disciplinary or criminal proceedings, it was no part of their function also to decide, purportedly finally, the very issues they held gave rise to a case to answer.

The report

6. The report, signed by the two investigators, is headed 'Mr Leeford Sutcliffe; Allegation of Assault and Unlawful Arrest'. Paragraph 5 described the terms of reference as being:

'To investigate police interaction with Mr Sutcliffe before and during his arrest for a public order offence, in particular:-

- a) To consider whether or not the arrest was lawful.
- b) To consider the level of force during the arrest, including deployment of CS spray.

To assist in fulfilling the state's investigative obligation arising under the European Convention of Human Rights (ECHR) by ensuring as far as possible that:

- c) the investigation is independent on a practical as well as an institutional level;
- d) the full facts are brought to light and any lessons learned.

To identify whether any subject of the investigation may have committed a criminal offence and if appropriate make early contact with the relevant prosecuting body.

To identify whether any subject of the investigation may have breached their standards of professional behaviour. If such a breach may have occurred, to determine whether that breach amounts to misconduct or gross misconduct and whether there is a case to answer.

To consider and report on whether there is organisational learning for the appropriate authority, including:

- whether any change in policy or practice would help to prevent a recurrence of the event, incident or conduct investigated.
- whether the incident highlights any good practice that should be disseminated.'

7. In paragraph 7, the report recorded that the investigation had been declared to be subject to 'special requirements' under paragraph 19B of Schedule 3 to the Police Reform Act 2002, as it was considered that an officer may have committed a criminal offence and/or behaved in a manner which might justify the bringing of disciplinary proceedings. I shall come to what a 'special requirements' investigation is when explaining the legislation.
8. Paragraph 8 recorded that on 26 October 2011 the investigators gave PC Armstrong a notice under regulation 14A of The Police (Complaints and Misconduct) Regulations 2004. That summarised the essence of the facts alleged against him and of the criticism of his conduct. The report recorded that he made no reply to the notice.
9. Paragraphs 10 to 69 are in a section headed 'Chronological summary of events'. This was based on, inter alia, statements from Mr Sutcliffe and PC Armstrong, including an account given in interview from the latter. Paragraphs 70 to 105, in a section headed 'Policies and Procedures', refer to legislation impacting upon the incident, to certain decisions of the courts and to some West Yorkshire Police policies.
10. The investigators' conclusions are in paragraphs 83 to 105. They open by stating that the investigators had been given two differing versions of the events and that there had been no independent witnesses or CCTV evidence. The conclusions include these findings:
 - '91. On the balance of probabilities the arrest of Mr Sutcliffe for a public order offence does not satisfy the requirements of either section 24 or 28 of PACE 1984, and as such the arrest was unlawful. ...
 98. Based on the fact that the arrest was unlawful, the use of CS spray was not necessary or reasonable in these circumstances. Therefore on the balance of probabilities the use of force by PC Armstrong amounts to an assault. ...
 100. ... given that the arrest has been deemed unlawful and the use of CS spray was excessive, Mr Sutcliffe would have been within his rights under Common Law to use reasonable force to defend himself from what he perceived to be an assault. This element is therefore immaterial.
 101. It follows that the subsequent baton strikes and deployment of CS spray whilst PC Armstrong was trying to restrain and handcuff Mr Sutcliffe must also be excessive.
 102. Whether the injury to Mr Sutcliffe's hand was caused deliberately or not, Mr Sutcliffe has been left with permanent ligament damage. The use of force was therefore unlawful, not necessary or indeed, reasonable in the circumstances.
 103. On the balance of probabilities all uses of force used by PC Armstrong were unlawful and excessive and thereby constituted an assault.
 104. This investigation concludes that the complaint made by Ms Sutcliffe is upheld and in respect of the Regulation 14a Notice served on PC Armstrong that there is a case to answer.
 105. There is no learning report for this investigation.'

11. Paragraph 104 set out, therefore, the investigators' conclusion that there was a case for PC Armstrong to answer, being one to the effect that he had committed a criminal offence and/or merited disciplinary proceedings. The remainder of the report's conclusions were plainly directed at recording the investigators' opinion that not only was there such a case to answer, the case was established on the facts and the law.

The IPCC

12. The IPCC is governed by the Police Reform Act 2002 ('the Act') and Regulations made under it. Part 2 of the Act is headed 'Complaints and Misconduct' and section 9 constitutes the IPCC as a body corporate consisting of a chairman appointed by Her Majesty and at least five other members appointed by the Secretary of State. Section 9(3) imposes restrictions on who can be a member of the IPCC, including if he holds or has held office as a constable.
13. Section 10 is headed 'General functions of the [IPCC]', and is said by Mr Hare to be the critical section for present purposes. In a sense it is, although it provides no direct help in answering the question raised by this litigation. Subsection (1)(a) provides for the IPCC 'to secure the maintenance by the [IPCC] itself, and by local policing bodies and chief officers, of suitable arrangements with respect to the matters mentioned in sub-section (2)'; and the following six sub-paragraphs are, in general terms, directed at requiring the IPCC to keep under review the arrangements in relation to such 'matters' and to make recommendations for their modification. Mr Hare identified the following sub-paragraphs as of present importance:

(c) to secure that arrangements maintained with respect to those matters comply with the requirements of the following provisions of this Part, are efficient and effective and contain and manifest an appropriate degree of independence;

(d) to secure that public confidence is established and maintained in the existence of suitable arrangements with respect to those matters and with the operation of the arrangements that are in fact maintained with respect to those matters;

(e) to make such recommendations, and to give such advice, for the modification of the arrangements maintained with respect to those matters, and also of police practice in relation to other matters, as appear from the carrying out by the Commission of its other functions, to be necessary or desirable;

I shall come to how Mr Hare sought to squeeze some support for his case from, in particular, section 10(1)(d).

14. In summary so far, whilst section 10(1) makes clear that the general function of the IPCC is to secure that the carrying out of various 'matters' is carried out efficiently, independently and in a way that maintains public confidence, it does not itself explain the 'matters' in respect of which the IPCC is to secure the maintenance of the required 'arrangements'. It instead keeps the diligent reader in a state of suspense until he reaches section 10(2), which lists as follows 'those matters' to which section 10(1) had referred:

‘(a) the handling of complaints made about the conduct of persons serving with the police;

(b) the recording of matters from which it appears that there may have been conduct by such persons which constitutes or involves the commission of a criminal offence or behaviour justifying disciplinary proceedings;

(ba) the recording of matters from which it appears that a person has died or suffered serious injury during, or following, contact with a person serving with the police;

(c) the manner in which any such complaints or any such matters as are mentioned in paragraph (b) or (ba) are investigated or otherwise handled and dealt with.’

15. So, we learn from subsection (2)(a) that the IPCC is there to ensure the maintenance of suitable arrangements for the handling of complaints against persons serving with the police. Subsection (2)(b) shows that a particular activity for which the IPCC must also ensure that there are suitable arrangements is the recording of matters from which it appears that a person *may* have committed a criminal offence or have done something that justifies disciplinary proceedings: that is, matters that indicate that there *may* be a case to answer in criminal and/or disciplinary proceedings. Any such proceedings will of course be within the province of courts, tribunals or bodies other than the IPCC. Subsection 2(ba) is a self-explanatory amendment added by the Serious Organised Crime and Police Act 2005. Subsection (2)(c), as amended, is directed at the manner in which any complaints under subsection 2(a), and the recording of matters under subsections (2)(b) and (2)(ba), are to be investigated and dealt with.

16. Section 10(3) refers to the IPCC as also having specific functions under particular provisions of the Act which are not suggested to be presently relevant. The only other subsections of section 10 I shall set out are these:

‘(4) It shall be the duty of the Commission –

(a) to exercise the powers and perform the duties conferred on it by the following provisions of this Part in the manner that it considers best calculated for the purpose of securing the proper carrying out of its functions under subsections (1) and (3); and

(b) to secure that arrangements exist which are conducive to, and facilitate, the reporting of misconduct by persons in relation to whose conduct the Commission has functions. ...

(6) Subject to the other provisions of this Part, the Commission may do anything which appears to it to be calculated to facilitate, or is incidental or conducive to, the carrying out of its functions.’

17. The next port of call is section 12, ‘Complaints, matters and persons to which Part 2 applies’. Section 12(1) explains that references in Part 2 of the Act to a ‘complaint’ (cf section 10(2)(a)) are to any complaint about the conduct of a person serving with

the police made by (i) a member of the public who claims to have been the victim of the conduct; (ii) a member of the public who is not the victim of the conduct but is adversely affected by it; (iii) a member of the public who claims to have witnessed the conduct; and (iv) anyone acting on behalf of any of the aforesaid. In this case, on the assumption that Mrs Sutcliffe was acting for her son (as to which the report made no finding), the complaint made fell under alternative (iv). If it did not, it is not clear to me that the IPCC would have had any jurisdiction to investigate it.

18. Section 12(2) explains that a ‘conduct matter’ means any matter which is not the subject of a complaint but in the case of which ‘there is an indication ... that a person serving with the police may have – (a) committed a criminal offence; or (b) behaved in a manner which would justify the bringing of criminal proceedings’ (cf section 10(2)(b)).
19. Section 12(2A) describes what is called a ‘death or serious injury matter’ – or a ‘DSI matter’ – being any circumstances of the nature then explained which have not been the subject of a complaint nor amount to a ‘conduct matter’ (cf section 10(2)(ba)).
20. Section 13 tells us that Schedule 3, which makes provision for the handling of complaints, conduct matters and DSI matters ‘shall have effect’. I pass over sections 14 to 19 as for present purposes immaterial and come to section 20, ‘Duty to keep the complainant informed’. This provides that when there is an investigation by the IPCC of a complaint in accordance with Schedule 3, it is the duty of the IPCC to provide the complainant ‘with such information as will keep him properly informed, while the investigation is being carried on and subsequently, of all the matters mentioned in subsection (4).’ Subsection (4) provides that:

- ‘(4) The matters of which the complainant must be kept properly informed are –
- (a) the progress of the investigation;
 - (b) any provisional findings of the person carrying out the investigation;
 - (c) whether any report has been submitted under paragraph 22 of Schedule 3;
 - (d) the action (if any) that is taken in respect of the matters dealt with in any such report; and
 - (e) the outcome of any such action.’

So, again, not much help for present purposes is to be found there. Whilst subsection (4)(b) makes it clear that the IPCC can make ‘provisional findings’ (which I would regard as the type of findings it will have to make in coming to its decision as to whether there is a criminal and/or disciplinary case to answer), it does not provide any explanation as to the types of matters in respect of which it may also make what might be regarded as ‘final’ findings.

21. Section 22, ‘Power of the Commission to issue guidance’, empowers the IPCC to issue guidance ‘concerning the exercise or performance, by the persons to whom the guidance is issued, of any of the powers or duties specified in subsection (2)’. Subsection (2) explains those powers and duties as being, inter alia, those conferred or

imposed by or under Part 2 of the Act and those that are ‘otherwise conferred or imposed but relate to’, inter alia ‘the handling of complaints’. Subsection (4) prescribes that the approval of the Secretary of State is required for the issue by the IPCC of any guidance. Section 22(5) explains various things about which guidance may be issued.

22. I come to Schedule 3, ‘Handling of complaints and conduct matters etc’. Part 1 contains pages of stuff about the ‘Handling of Complaints’ but it is not necessary to refer to any of it. Part 2 relates to the ‘Handling of Conduct Matters’. Part 2A relates to the ‘Handling of Death and Serious Injury (DSI) Matters’.
23. Part 3, ‘Investigations and Subsequent Proceedings’, was said by Mr Hare to be the crucial one for our purposes. Paragraph 15 explains that when the IPCC determines that it is necessary for a complaint to be investigated, it is its duty ‘to determine the form which the investigation should take’, in doing which the IPCC must have regard to the seriousness of the case and the public interest. Paragraph 19 applies where the IPCC has determined that ‘it should itself carry out the investigation of a complaint’, which it did in this case. Paragraph 19A provides for the special procedure in paragraphs 19B to 19E to apply where the investigation relates to a police officer or special constable, as it did in this case. Paragraph 19B, ‘Assessment of seriousness of conduct under investigation’, is of particular interest, since it also applied in the present case, which was designated as ‘one subject to special requirements’. It provides, materially:

‘(1) If, during the course of an investigation of a complaint, it appears to the person investigating that there is an indication that a person to whose conduct the investigation relates may have –

- (a) committed a criminal offence, or
- (b) behaved in a manner which would justify the bringing of disciplinary proceedings,

the person investigating must certify the investigation as one subject to special requirements.

(2) If the person investigating a complaint certifies the investigation as one subject to special requirements, the person must, as soon as is reasonably practicable after doing so, make a severity assessment in relation to the conduct of the person concerned to which the investigation relates.

...

(4) For the purposes of this paragraph a “severity assessment”, in relation to conduct, means an assessment as to –

- (a) whether the conduct, if proved, would amount to misconduct or gross misconduct, and
- (b) if the conduct were to become the subject of disciplinary proceedings, the form which those proceedings would be likely to take.

- (5) An assessment under this paragraph may only be made after consultation with the appropriate authority.
- (6) On completing an assessment under this paragraph, the person investigating the complaint or matter must give a notification to the person concerned that complies with sub-paragraph (7).
- (7) The notification must –
 - (a) give the prescribed information about the results of the assessment;
 - (b) give the prescribed information about the effect of paragraph 19C and of regulations under paragraph 19D;
 - (c) set out the prescribed time limits for providing the person investigating the complaint or matter with relevant statements and relevant documents respectively for the purposes of paragraph 19C(2);
 - (d) give such other information as may be prescribed.
- (8) Sub-paragraph (6) does not apply for so long as the person investigating the complaint or matter considers that giving the notification might prejudice –
 - (a) the investigation, or
 - (b) any other investigation (including, in particular, a criminal investigation).
- (9) Where the person investigating a complaint or matter has made a severity assessment and considers it appropriate to do so the person may revise the assessment.
- (10) On revising a severity assessment, the person investigating the complaint or matter must notify the prescribed information about the revised assessment to the person concerned. ...’

24. Paragraph 19C provides that when an investigation of a complaint has been certified under paragraph 19B(1) as subject to special requirements, the investigating person must consider any relevant statement or document that may be provided within the time limits prescribed by paragraph 19(7). Paragraph 19D, ‘Interview of person whose conduct is being investigated’, provides:

- ‘(1) The Secretary of State may by regulations make provision as to the procedure to be followed in connection with any interview of the person concerned which is held during the course of an investigation within paragraph 19C(1)(a) or (b) by the person investigating the complaint or matter.
- (2) Regulations under this paragraph may, in particular, make provision –
 - (za) requiring the person concerned to attend an interview,

- (a) for determining how the time at which an interview is to be held is to be agreed or decided,
- (b) about the information that must be provided to the person being interviewed,
- (c) for enabling that person to be accompanied at the interview by a person of a prescribed description.'

25. Paragraph 20A is not directly in point but Mr Hare referred to it and so, therefore, shall I. It provides, inter alia, that if the person carrying out the investigation into a complaint (including one carried out by the IPCC) believes, at any time before his investigation is completed, that 'the appropriate authority' would be likely to consider that the 'special conditions' are satisfied, he shall submit to that authority a statement of his belief and the grounds for it, and a written report on his investigation to that point. Paragraph 20A(4) provides that a person submitting such a report 'shall not be prevented by any obligation of secrecy imposed by any rule of law or otherwise from including all such matters in his report as he thinks fit.' Paragraph 20A(6) provides that after submitting a report under this paragraph, the person investigating the complaint 'shall continue his investigation to such extent as he considers appropriate'. Paragraph 20A(7) defines the 'special conditions' as being that:

- '(a) there is sufficient evidence, in the form of written statements of other documents, to establish on the balance of probabilities that conduct to which the investigation relates constitutes gross misconduct;
- (b) it is in the public interest for the person whose conduct it is to cease to be a member or a police force, or to be a special constable, without delay.'

26. The present is not a 'special conditions' case, but paragraph 20A provides a good excuse for introducing the definition of 'the appropriate authority', which is in section 29 of the Act, the definition section, which defines it as, so far as material:

- '(a) in relation to a person serving with the police or in relation to any complaint, conduct matter or investigation relating to the conduct of such a person, means –
 - (i) if that person is the chief officer or an acting chief officer, the local policing body for the area of the police force of which he is a member; and
 - (ii) if he is not the chief officer or an acting chief officer, the chief officer under whose directions and control he is; ...'

27. Paragraph 22, headed 'Final reports on investigations: complaints, conduct matters and certain DSI matters', is relevant. It requires those conducting an investigation to submit a report to the appropriate authority and to the IPCC. Sub-paragraph (6) provides that a person submitting such a report 'shall not be prevented by any obligation of secrecy imposed by any rule of law or otherwise from including all such matters in his report as he thinks fit.' Sub-paragraph (7) empowers the Secretary of State by regulations to make provision requiring a report 'on an investigation within paragraph 19C(1)(a) or (b)' to include such matters as are specified in the regulations,

and to be accompanied by such documents or other items as are so specified. As this was a ‘special requirements’ case, the investigation fell within paragraph 19(C)(1)(a).

The Police (Complaints and Misconduct) Regulations 2004 (SI 2004/643)

28. The Regulations were made under, amongst other powers, powers in the Act. Regulation 14A prescribes the contents of a notice that must be given in a case to which paragraph 19B(7) of Schedule 3 to the Act applies (as in the present case). Regulation 14E, ‘Report of investigation’, provides that the report shall provide an accurate summary of the evidence, attach or refer to any relevant documents and ‘indicate the investigator’s opinion as to whether there is a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer.’ The requirements of Regulation 14E applied to the report in this case, as the investigation was a ‘special requirements’ one.

The Guidance

29. Pursuant to section 22 of the Act, the IPCC issued its ‘statutory guidance to the police service and police authorities on the handling of complaints’. It is a modest 356-page document, comprising 610 paragraphs and three Annexes. We were shown a version issued on 1 April 2010, were referred to various parts and I shall also refer to others. Paragraph 353 states that the investigation report is the main, if not only, source of information for the complainant, and lists under 12 bullet points what the report should include, two such bullet points reading ‘set out clear reasoning, drawing out conclusions from the evidence’ and ‘recommend to the appropriate authority whether each aspect of the complaint is upheld or not and why’. Paragraph 356 reads:

‘Where the matter concerns police officers and is subject to special requirements, in addition to setting out the investigator’s conclusions on the facts, the final report will need to determine whether there is a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer. This report should set out details of the behaviour considered to amount to misconduct or gross misconduct and the reasons it is thought to do so. It need not list which of the particular standards the conduct falls under.’

That paragraph is important as this was a ‘special requirements’ case. It is essentially an elaboration of what is required by regulation 14E.

30. Paragraphs 433 to 436, under the heading ‘Upheld complaints’, read:

‘433. A complaint should be upheld where the findings show that the service provided by or through the conduct of those serving with the police did not reach the standard a reasonable person could expect. Any facts on which the judgement to uphold the complaint is based must be proven on the balance of probabilities. For example, this test will be met where it is found that there is a case to answer against an officer in respect of misconduct or gross misconduct or, in the case of a member of police staff, that there are grounds for disciplinary action in relation to the matter and the matter is not an ancillary matter. This test will also be met when it is not found that there is a case to answer against an officer or, in the case of a member of police staff, that there are grounds for disciplinary action, but the

service provided by or through the conduct of a person serving with the police did not reach the standard a reasonable person could expect.

434. In deciding what standard of service a person could reasonably expect, the investigator, IPCC and appropriate authority should apply an objective standard of a reasonable person in possession of the available facts. They should have regard to the Standards of Professional Behaviour (or equivalent for police staff), any agreed service standards and any national guidance that applies to the matter.

435. The decision to uphold a complaint should not be seen as in any way prejudicing the outcome of a subsequent misconduct meeting or hearing (and possible later appeal) for police officers or misconduct procedure for police staff. The decision to uphold is always and only a judgement on the service provided to the complainant by the force as a whole and should not be seen as a judgement against the person subject of the complaint.

436. This means that an investigation without special requirements can result in an upheld complaint. For example, it will be appropriate where the officer or police staff member complained about has limited experience or skill and acts in a well intentioned but ill judged way, giving good grounds for complaint but not so as to warrant a special requirements investigation.'

31. Paragraphs 437 and 438, under the heading 'Examples of instances where complaints will not be upheld', read:

'437. A complaint will not be upheld where the facts are clearly established and it is determined that what the complainant claims happened did not occur.

438. A complaint will also not be upheld where there is insufficient evidence to conclude, on the balance of probabilities, that the complainant's allegation is true. Commonly, this will arise where there is a conflict of accounts that cannot be reconciled on the evidence available and the investigator cannot establish the facts.'

32. Paragraphs 528 and 533 read:

'528. The IPCC believes that making the final investigation report available to the complainant or interested person is the most transparent way of showing what the investigation has found, and so it should usually be provided to the complainant or interested person, subject to the harm test and any necessary redactions. There will be very rare occasions when a reasonable application of the harm test will prevent this and redaction cannot remove the risk of harm. See paragraphs 544-548 ... on disclosure where there are criminal or disciplinary proceedings. In some circumstances, where there is a difference between the recommendation made by the investigator and the decision reached by the appropriate authority of IPCC, it will be necessary to provide the investigation report accompanied by the final decision and rationale for it. ...

533. Transparency should not lead to a dilution of the contents or language of the report, which should continue to be robust and evidence-based. Investigators

should be aware that their reports may need to be disclosed under the Freedom of Information Act or otherwise.’

The judge’s judgment

33. The judge succinctly recorded the rival arguments. The Chief Constable’s case was that the role of the IPCC is not to determine criminal or civil liability. Its role is purely investigative and is to report alleged breaches of the criminal law or police discipline to the CPS or the chief constable, as appropriate. Its function, therefore, is to decide whether there is a case to answer; it is not also to purport finally to decide the answer to the case which it may have found to call for an answer. That is for the criminal court or disciplinary tribunal, as the case may be. In this case, the IPCC’s report overstepped the statutory limits by purporting in its conclusions to decide the answer to the case.
34. The IPCC submitted that it had done no such thing. Only one of its functions relates to matters of discipline. Its primary function is to respond to a complaint. Reliance was placed on section 10(1) of the Act, which it was said regarded the repose of public confidence in the IPCC’s role as demanding that complaints were handled with appropriate vigour. Whilst it was accepted that the IPCC could not decide criminal or civil liability, it was said that the boundary as to the limits of permissible opinion had not been crossed.
35. The judge’s view was that a complaint under the Act may only be handled by the IPCC in strict accordance with its statutory powers. Section 10(2)(a) of the Act shows that it is empowered to ‘handle’ complaints about the police and is required to ‘record’ matters of the nature referred to in section 10(2)(b). He preferred and accepted the submissions of the Chief Constable. The essence of his conclusion is contained in the following paragraphs:

‘44. The language of section 10(2) of the 2002 Act is deliberately restrictive and demands the IPCC “handles complaints – note “handles” and not determines a complaint. It also requires the IPCC to “record” matters that “may” amount to a crime or a disciplinary matter. The regulatory regime under the 2004 Regulations is of pellucid clarity (in particular paragraph 14E) whereby the purpose of an investigation under the 2002 Act by the IPCC is to provide an accurate summary of the evidence and “indicate the investigator’s opinion as to whether there is a case to answer”. All of this gives the author of an IPCC report a substantial leeway as to its contents; providing always the report remains within the boundary of the statutory and regulatory regime.

45. The regime demands investigations and reporting with, if appropriate, an opinion (and only an opinion) as to whether there is a case to answer. It is outside the permitted boundary to express any concluded view as to criminal liability or civil liability. There will be cases (and this is one) where it will be or may be necessary to express a view about the conduct of a member of the public or a police officer being lawful or otherwise, but that must be done in terms that do not trespass outside the boundaries of the investigation and encroach upon the territory of the body charged with the *determination* of that issue. The language of a report is as important as the investigation itself: both must be rigorous and both must be investigative of style and import – not determinative. As I have

already stated the report may furnish an evaluation of evidence and may recommend a certain course to assist the decision maker if there is prima facie evidence of criminality or misconduct. Presenting a carefully investigated record of events with a carefully evaluated opinion as to whether there is a case to answer is entirely remote from the language of determination.’

The appeal

36. Mr Hare concluded his explanation of the Act by saying that the key features that can be derived from it – namely, the importance of maintaining public confidence, the duty to encourage the making of complaints, and the Act’s emphasis on the handling of complaints – all tend to point to the conclusion that the IPCC’s powers when handling a complaint go further than the judge was prepared to accept.
37. Expanding upon this, Mr Hare’s first submission was as to the importance of the IPCC’s investigative function. If such an investigation is to achieve the maintaining of public confidence, an investigation must deal fully with the complaint. Often the report will be the only document the complainant will receive. The complainant will not be a party to any disciplinary proceedings which may follow the production of a report although he/she has the right to attend and participate in misconduct proceedings under regulation 31 of the Police Conduct Regulations 2008, others may attend under regulation 32, and in certain circumstances proceedings may be held in public. Mr Hare accepted that a complainant is not *entitled* to be provided with a copy of the report, although the complainant was provided with one in this case; and paragraph 23(12) of Schedule 3 empowers the IPCC to furnish a copy of the report to the complainant. It is clear that if the report is to deal comprehensively with the complaint, it must provide the complainant with a full response.
38. Mr Hare said this approach was supported by the Guidance. He accepted that the Guidance is not directed to the IPCC itself – it was provided by the IPCC to the police service and police authorities – but he said it would be perverse if the IPCC’s own Guidance did not apply equally to itself. He referred to the provisions of paragraph 353 to the effect that the report is the main, if not only, source of information and explanation for the complainant, and to the indication that the report should ‘set out clear reasoning, drawing out conclusions from the evidence.’ He said that paragraph 356 also supports the making by the investigator of his own conclusions on the facts. He placed similar reliance on paragraphs 528 and 533. This conclusion followed, said Mr Hare, from the fact that the IPCC has to answer the complaint and that it is not enough for it to find, at most, that the officer has a case to answer in disciplinary or criminal proceedings.
39. Mr Hare made a further point in reliance upon paragraphs 23 and 27 of Schedule 3 to the Act. The Act is a good working example of the horrors of the drafting of modern legislation, and it would be unfair to any reader of this judgment to subject him (or of course her) to more of it than is necessary, nor shall I. The essence of Mr Hare’s point was, however, that these paragraphs show that, upon production of the report to the IPCC, the IPCC may not merely recommend an appropriate authority to take disciplinary action against the officer in question but, if the authority does not do so, the IPCC may also direct it to do so. That, said Mr Hare, supports the view that the legislation contemplates that a report is not confined to finding that there is a case to answer, but also that it can make final findings as to the officer’s conduct that would

justify such a mandatory direction. In addition, said Mr Hare, the complaint may be against a former police officer, who is no longer capable of being subjected to disciplinary proceedings: in such a case, it must be the case that the report can make a finding as to the relevant facts, since otherwise the report cannot answer the complaint.

40. Mr Hare also invoked the Human Rights Act 1998. In essence, his point was that an IPCC investigation in respect of police conduct may be required in relation to a matter that calls into duty the United Kingdom's obligations under articles 2 and/or 3 of the Convention; and in such a case it will be essential for the report to record findings of fact on the issues that have called for the investigation to be carried out. There will be no justification in such a case for any conclusions merely to be provisional ones.
41. Finally, (and perhaps inconsistently with his case that it was the duty of an investigator to make clear and rigorous findings on the matters raised by the complaint) Mr Hare said it was anyway inaccurate to regard the report in the present case as in fact purporting to make any final findings as to the commission by PC Armstrong of a criminal or disciplinary offence. It was necessary to have regard to the context in which the report was produced, which was one in which there was no jurisdiction in the IPCC to determine criminal or civil liability. In addition, there were no independent witnesses, and so in order to decide whether there was a case of any sort to answer the investigators necessarily had to decide which of the competing versions before them they regarded as more likely on the balance of probabilities. Further, the interpretation of the report's conclusion section had to be made in the light of the terms of the report's terms of reference, and paragraph 104 of the report shows that the terms of reference were properly answered.
42. Mr Holdcroft, for the Chief Constable, said the starting point is that the IPCC accepts that it has no power to make a determination as to the criminal or civil liability of a police officer who is the subject of a complaint. If it has no such power, it follows that the IPCC cannot lawfully produce a report in which it purports to make such a determination. He said the IPCC's report in this case contains 14 objectionable phrases where reference is made to actions described as excessive, unlawful or as amounting to an assault. It culminates in paragraph 103 with the statement that 'On the balance of probabilities all uses of force used by PC Armstrong were unlawful and excessive and thereby constituted an assault.' Any person reading that paragraph in the context of the conclusions of the report as a whole could only conclude that the IPCC had made such a determination. It had been suggested on behalf of the IPCC that the frequent reference in the report to the 'balance of probabilities' should be seen as a matter that somehow saves the report, but it plainly did not.
43. The IPCC, he said, is not entitled to adjudicate on the merits of a complaint: the furthest it can go is to direct that the appropriate authority should conduct a disciplinary proceeding in relation to the complaint: see paragraph 27 of Schedule 3. The Chief Constable does not challenge the conclusions of the report insofar as it found that there was a case to answer; he complains only of the taking by the investigators of the further step of including in the report their finding as to the lawfulness of PC Armstrong's conduct. That was a matter which fell to be decided, if at all, by others. Mr Holdcroft said that such an approach to the limits of the IPCC's jurisdiction was supported by that of Langstaff J in *R (on the application of Allatt) v. Chief Constable of Nottinghamshire Police* [2011] EWHC 3908 (Admin). Nowhere in

the Act, Regulations or Guidance, said Mr Holdcroft, is it said that an investigator has the power to determine issues of law. The relevant references are all to the IPCC having a power to determine whether there was any basis for a conclusion that the officer the subject of the complaint *may* have committed a criminal offence or so behaved as to justify disciplinary proceedings: see section 12(2) of the Act; and, in particular, paragraph 19B of Schedule 3, which applies to a ‘special requirements’ case such as this one. This is a ‘special requirements’ case and nothing in the judgment below applies to any case that is not such a case.

44. Mr Holdcroft said that had the present report confined itself, as it should have done, to saying merely that the investigators’ conclusion was that there was a case to answer, that would formally have amounted to an upholding of the complaint, even though the ultimate outcome of the case when brought and answered might show that in fact the complainant’s criticism of the police officer was unfounded. In this context, Mr Holdcroft referred us to paragraphs 433 and 435 of the Guidance, to which Gloster LJ, during the argument, responded with what appears to me, if I may respectfully say so, to be the sound point that if the ultimate outcome of the case is that the police officer is wholly vindicated, there is something of the absurd about the suggestion in paragraph 433 that a report’s conclusion that there is a case to answer is an example of a finding that ‘the service provided by or through the conduct of those serving with the police did not reach the standard a reasonable person could expect.’ Like criticism can, it seems to me, be attached to paragraph 435: whilst I well understand the first sentence, I regard the second one as incomprehensible.
45. The essence of Mr Holdcroft’s submission was, therefore, that when the IPCC is engaged in an investigation of a ‘conduct matter’ (see section 10(2)(b) of the Act) or a complaint that is certified as ‘subject to special requirements’ (see the criteria for such a case in paragraph 19B of Schedule 3), it cannot finally decide the merits of any such conduct matter or the complaint insofar as it relates to the paragraph 19B criteria, but can lawfully do no more than conclude (if it is so satisfied) that there is a case to answer. That is all that the IPCC could lawfully do in this case, whereas it in fact overstepped the limits of its powers and purported to make final findings which it had no power to make.
46. Mr Davies QC, for PC Armstrong, emphasised that this investigation was a ‘special requirements’ one which, by regulation 14E of the Regulations required the investigators’ report to indicate the investigators’ opinion as to whether there was a case to answer in respect of misconduct or gross misconduct or whether there was no case to answer. That required an evaluation of the evidence by the investigators and a consequential conclusion as to whether there was or was not a case to answer. Once the investigators had arrived at their conclusion as to that, and had reported on it, they had discharged their function. It was no part of their function to go further and to decide, and report on, the merits of the case. In any event, any purported findings as to such merits would not be binding on the court or body subsequently concerned to rule upon such merits. Moreover, fairness to PC Armstrong demanded that they should not make such findings. Their report was provided to the complainant, and was available for viewing on the IPCC website. Nothing in the report, however, indicated that its apparently final findings on the merits of the complaint had no final or binding nature. The judge was right in his conclusion that the investigators had overstepped the limits of their jurisdiction.

47. Ms Hill, for Mr Sutcliffe, allied herself with the submissions advanced by Mr Hare to the effect that the findings in the report cannot and should not be regarded as having overstepped any limits to which the investigators were subject, and that it followed that the quashing of the report by the judge was not justified.

Discussion and conclusion

48. The mass of pages of legislation, regulation and guidance relating to the IPCC's jurisdiction collectively conspire to suggest that the question raised by this case might not be straightforward. But the clarification of it that was helpfully provided to us by counsel served to show that in fact the question is a relatively easy one.
49. First, insofar as it was suggested that the investigators' report did not include findings by the investigators as to the substantive issues raised by Mrs Sutcliffe's complaint – that is, as to the lawfulness or otherwise of PC Armstrong's actions – I regard the suggestion as groundless. With respect, I do not understand it. The report could not have made clearer the investigators' findings that PC Armstrong's arrest of Mr Sutcliffe was unlawful, that the force applied by PC Armstrong in making the arrest was unlawful and amounted to an assault, that the use of CS spray was unnecessary and unreasonable, and that the baton strikes applied by PC Armstrong were excessive. In making those findings, the investigators assumed the role of judge and jury.
50. Second, I regard it as clear that, given the particular nature of their investigation, the investigators had no power to make any such findings. Having certified pursuant to paragraph 19B of Schedule 3 to the Act that the investigation was one 'subject to special requirements', they ought also to have known (and paragraph 104 of their report indicates that they did) that their report had to 'indicate [their] opinion as to whether there is a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer' (see Regulation 14E). A 'case to answer' in that context means a case to answer before a criminal court and/or a disciplinary tribunal. It is, one might think, obvious that if the investigators' task is to report their opinion as to whether there is such a case to answer before another tribunal, it is not their function also to purport to *decide* the very question or questions that are raised by such a case. When magistrates commit a defendant for trial under an old-style committal they do not add their own finding that, on the evidence they have heard, he is guilty. When a judge in civil proceedings dismisses a defendant's CPR Part 24 application for summary judgment, he will not do so by a judgment that expresses his opinion that the claimant is entitled to judgment. That is because, in both types of case, the ultimate question as to liability is for the tribunal before whom the case eventually comes; and for the magistrates, judge or (in this case) the investigators to purport to decide the matter themselves is potentially prejudicial to the fairness of the proceedings before that other tribunal; and (in this case) it was obviously also unfair to the police officer whose conduct was impugned.
51. This is in my view so obvious that I do not regard it as requiring any elaboration. It is, in short, obvious that in a 'special requirements' investigation it is beyond the powers of the investigators to purport themselves to decide the merits of a case that they consider calls for an answer. The legislation cannot be interpreted as empowering the investigators to make findings that would have the potential to be so prejudicial or unfair.

52. Of course, the investigators still have plenty to do. They still have to investigate the complaint and evaluate the evidence adduced before them in order to decide whether there is such a case to answer; and they have to provide a reasoned report as to the outcome of their investigation. Their investigation and evaluation of the evidence may enable them to conclude, and report, that in fact there is *no* such case to answer. If, for example, the evidence in this case had demonstrated beyond question that PC Armstrong had been abroad on the afternoon of the alleged incident, so that the complaint against him was obviously misdirected, the investigators would have been entitled to make clear findings on the evidence to that effect and to report that there was no case for him to answer. If, however, their conclusion was that there is a case to answer, then whilst they must explain the evaluation of the evidence that has caused them to come to such a conclusion, they must be careful to stop short of expressing findings on the very questions that will fall to be answered by the court or tribunal which may later become seised of the matter. It is not difficult to do so. It is the sort of exercise that judges regularly have to perform.
53. It follows that, in agreement with the judge, I consider that the investigators' report in this case exceeded their powers. Nothing in Mr Hare's elegant and eloquent submissions persuaded me otherwise. His submission that the contemplation of section 10(1) of the Act is that it is only if investigators deal rigorously and comprehensively with the allegations before them that there will be universal confidence in the effectiveness of the complaints system is one I unhesitatingly reject. If the system is to enjoy such confidence, it must be one that is, and is seen to be, operated lawfully and fairly. In this case it was not. Nor did Mr Hare's analogy with the need for thorough investigations of the type required under article 2 of the Convention help him. A 'special requirements' investigation which results in a 'case to answer' conclusion not only does not require the making of findings as to the merits of the case, it positively requires that there should be none.
54. I ought not to part with this case without referring to *R (on the application of Allatt) v. Chief Constable of Nottinghamshire Police and IPCC* [2011] EWHC 3908 (Admin), to which the judge referred in his judgment in this case and upon which all parties place some reliance. *Allatt* raised a challenge to the lawfulness of an IPCC investigators' report on the ground that, as in this case, it had made findings that were properly within the remit of a disciplinary tribunal. Langstaff J, in the Administrative Court, held that the criticism of the report in this respect was not established, whereas I agree with the judge that a different view deserves to be taken of the investigators' report in this case. I also read Langstaff J as recognising that it is not for an IPCC investigator to make final decisions on matters arising in the case that he finds calls for an answer.
55. Finally, Mr Hare asked this court to provide further guidance on the preparation of reports by the IPCC in relation to complaints referred to it. As to that, I would say two things. First, we have been faced with questions arising in relation to a report made in the particular circumstances of a 'special requirements' investigation, and this judgment has focussed only on such a case. In my view, if the court is to add any sort of general guidance, it would be inappropriate for it to do so in relation to other types of investigation that the IPCC may have to carry out.
56. Second, however, as regards 'special requirements' investigations, I do have a concern that the form of the report in this case reflects a comprehensive lack of

understanding by the investigators as to the difference between (a) an evaluation of the evidence for the purpose of the making a final decision on the merits of an allegation of misconduct or gross misconduct by the officer who is the subject of the complaint, and (b) an evaluation of the evidence for the purpose of deciding whether there is a case against such officer that calls for an answer. The investigators' technique in their report was to decide in paragraphs 91 to 103 that the assertion of misconduct on the part of the officer was established on the law and the facts and, in paragraph 104, that there was therefore a case for him to answer. That approach betrays a misunderstanding by the investigators of the nature of their task. They should, in paragraphs 91 to 103 have been focussing not on whether in their opinion the misconduct was proved, but only on whether an evaluation of the evidence justified the conclusion that there was a case to answer in respect of it in other proceedings. As these two senior IPCC investigators were apparently unaware of the distinction between such approaches, and of the approach that they should correctly have adopted, it may be that there is a need for further training of investigators as to the manner in which such reports should be prepared. Or perhaps there is a need for some further statutory guidance on the topic – although, ideally, in fewer than 356 pages.

57. I would dismiss the appeal.

Lady Justice Gloster:

58. I agree.

Lord Justice Beatson:

59. I also agree.