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Case No: CO/6509/2008
CO/7183/2008

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/10/2008

Before :

MR JUSTICE UNDERHILL

Between :

The Queen
on the application of
(1) Charlotte Saunders
(2) Corinna Tucker

Claimants

v.

**(1) The Independent Police Complaints
Commission**
(2) The Commissioner of Police of the Metropolis
(3) The Chief Constable of Kent

Defendants

(1) The Association of Chief Police Officers
(2) The Police Federation of England and Wales
(3) Elizabeth Saunders

Interested Parties

Tim Owen QC and Hugh Southey (instructed by Deighton Guedalla) for Ms. Saunders
Phillippa Kaufmann (instructed by Bhatt Murphy) for Ms. Tucker
**Dinah Rose QC, Tom Weisselberg and Stephen Morley (instructed by the Independent
Police Complaints Commission Legal Affairs Directorate)**
for the Independent Police Complaints Commission
**Edmund Lawson QC and Sam Grodzinski (instructed by the Metropolitan Police Legal
Affairs Directorate) for the Commissioner of Metropolitan Police**

Judgment Approved by the court for handing down.

Richard Perks (instructed by **Kent Police Legal Services Department**)
for the **Chief Constable of Kent**
Lord Lester of Herne Hill QC and **Clair Dobbin** (instructed by **Bircham Dyson Bell**) for the
Association of Chief Police Officers
Michael Egan QC (instructed by **Russell Jones & Walker**) for the **Police Federation**

Hearing dates: 10-12 September, 15 September 2008

Approved Judgment

Mr Justice Underhill:

1. There are before me two applications for judicial review raising overlapping but not identical issues. In both cases a young man was shot dead by police officers. In the earlier of the two cases to be brought the victim (I use that term neutrally) was Mark Saunders, who was shot on 6th May 2008; and in the later it was Dayniel Tucker, who was shot on 29th December 2007. Both deaths were of course profoundly shocking and distressing to the families of the victims. In each of the cases the Independent Police Complaints Commission is pursuing an investigation into the circumstances of the shooting. In each case the victim's family believes that that investigation has not been properly conducted, and a sister of the victim – in the former case Ms. Charlotte Saunders and in the latter Ms. Corinna Tucker – has issued proceedings against the Commission for judicial review. Proceedings in the two cases were issued on 9th and 30th July respectively. The two cases have been ordered to be heard together and the hearing has been expedited. A number of interested parties were served – specifically, the chief officers of the two police forces involved, namely the Commissioner of Metropolitan Police and the Chief Constable of Kent; the Association of Chief Police Officers (“ACPO”); the Police Federation; and Mr. Saunders' widow, Mrs. Elizabeth Saunders. All save Mrs. Saunders have participated in the hearing before me. In the course of the hearing the Claimants sought permission to amend their applications so as to join the Commissioner and the Chief Constable as additional Defendants and to seek relief against them: those applications were not opposed and I granted them.

2. I should make clear that in both cases the Commission's investigation remains incomplete, and no final conclusion on the matters which it has to consider has been reached, let alone published. In *Tucker* the responsible senior investigator has recently produced what will, if it is approved by the Commission, be a final report. But such a report does not carry the authority of the Commission until it has been approved; and that has not yet occurred. The family has been given a copy of the report, and it was also put before the Court; but because of the risk of prejudice to any potential subsequent proceedings I made an order under CPR 31.22 (2) restricting reference to it. It is not in fact necessary for the purpose of this judgment to refer to the report's conclusions or to any of the details contained in it. In *Saunders*, where the shooting was much more recent, and in which the Commission's enquiries have to some extent been held up by the

pendency of these proceedings, there is considerable work still to do. The Commission's best estimate at present is that a report will not be ready until March 2009.

3. I am grateful to the many counsel instructed – both those who addressed me and those sitting behind them – for their cogent and helpful submissions. I was also impressed by the comprehensiveness and clarity of the witness statements lodged, which were prepared in accordance with a tight timetable, and with the speed and care with which all these materials had been incorporated in bundles for the Court.

THE INDEPENDENT POLICE COMPLAINTS COMMISSION

4. The Independent Police Complaints Commission was established, under Part 2 of the Police Reform Act 2002, as a result of concerns about the independence and effectiveness of the Police Complaints Authority which it replaced. The nature of those concerns was set out in a witness statement, lodged by the Claimant in *Saunders*, from Ms. Helen Shaw, the co-Director of the charity Inquest. The Commission started to operate with effect from 1st April 2004. The provisions governing its operation were significantly amended, with effect from 1st April 2006, by the provisions of Schedule 12 to the Serious Organised Crime and Police Act 2005.

5. Under the original provisions of the 2002 Act the Commission's role was limited to cases of complaints against the police or of "conduct matters"; but by amendments introduced by the 2005 Act its functions were extended to cover the investigation of "death or serious injury matters" ("DSI matters"): see s. 12 (2A)-(2D). There is an elaborate statutory definition of "DSI matters", but for present purposes it is sufficient to say that the term covers any incident in which a person has suffered death or serious injury as a result of the action of police officers. The deaths of Mr. Saunders and Mr. Tucker were thus DSI matters. (It should be noted that there are many other types of DSI – e.g. where a person is killed or injured by a police vehicle or where a death occurs in police custody.)

6. The general functions and powers of the Commission are set out in s. 10 of the Act in terms to which I shall have to refer below. I note here only that its primary functions expressly include not only matters of substance relating to the establishment and

operation of appropriate arrangements for investigating complaints and other matters but also the maintenance of public confidence in those arrangements. The powers and duties of the Commission (and those of other relevant authorities) in relation to the “handling” of complaints, conduct matters and DSIs are set out in Schedule 3. Again, I will refer to the relevant provisions later in this judgment. All that I need note at this stage is that para. 15 (4) of Sched. 3 sets out four possible forms of investigation, of which the Commission must, by para. 15 (3), prescribe one. Three of the alternatives provide for investigation by the “appropriate authority” (either the relevant chief officer or in some circumstances the police authority), with varying degrees of involvement on the part of the Commission; but the fourth is an investigation “by the Commission itself”. That, which is the most independent form of investigation, is employed as a matter of policy in the case of all DSI matters and is accordingly the form of investigation with which I am concerned in these proceedings. In such a case the investigation is carried out entirely by the Commission’s own team of investigators, under the management of a senior investigator.

7. S. 22 of the Act empowers the Commission to issue guidance to chief officers of police and others about the exercise of their powers or performance of their duties under Part 2 of the Act or otherwise relating to, *inter alia*, the handling of DSI matters. Such guidance has been issued under the title *Making the New Police Complaints System Work Better*, to which I will refer as “the Guidance”. Although the Guidance is formally directed at others, it also necessarily sets out the way in which the Commission seeks to perform its own corresponding functions.

8. The discharge of the Commission’s functions obviously requires it to work very closely with police forces. In July 2004 it agreed with “the Police Service” – I am not sure what precise body this refers to, but that does not matter for present purposes - the terms of a Memorandum of Understanding (“the MoU”) covering a wide range of issues of mutual interest. One of its sections deals with “Immediate Response Protocols” – that is, procedures covering cases where the involvement of the Commission is required in the immediate aftermath of the incident in question: although when the MoU was drafted the 2005 Act had not been enacted DSI matters plainly are of that character. Para. 1.8 deals with “Post Incident Procedures following the discharge of a firearm” and refers to chapter 6 of the ACPO Firearms Manual (“the ACPO Manual”). That is a manual, prepared by

an ACPO Working Group, which sets out policy and gives guidance on all aspects of the police use of firearms. Chapter 6 deals with “Investigations and Remedies” and incorporates (as Annex 6C) a Standard Operating Procedure. Although the Procedure is described as “agreed with the IPCC” para. 1.8 of the MoU records that it requires amendment and that it will be the subject of further discussion between the Commission and ACPO. (I note in passing that not all the incidents to which ch. 6 and the Procedure apply will be DSI matters, because they apply even where the discharge of the firearm has not caused death or serious injury; but obviously DSI matters are the most serious type of case covered by them.)

9. I record by way of background that over the four years since its inception the Commission has carried out a total of 282 independent investigations, including investigations into all fifteen cases of fatal shootings by police officers which have arisen during that period.

THE ISSUES

10. In both cases the criticisms of the Commission made in the Claim Forms, and to some extent also in the witness statements, are quite wide-ranging; but by the time that the cases were opened before me they had been consolidated under three headings which I can summarise as follows:

(A) “Conferring”. It is accepted that in both cases no steps were taken, either by the police or by the Commission’s staff, to prevent the officers who were most centrally involved in the incidents (“the principal officers”) from speaking to one another before they gave their first accounts of what had happened; or, more particularly, to prevent them from collaborating in producing the notebook entries or statements which constituted those accounts. It is also accepted that the officers did in fact so collaborate: I give the details, so far as they are known, below. It is the case of both Claimants that the Commission was in breach of its duty by failing to take adequate steps to minimise the risk of such conferring and collaboration. By the amendments to which I have referred above, they also now claim that the respective chief officers – that is, the Metropolitan Police

Commissioner and the Chief Constable of Kent - were in breach of duty for the same reason.

- (B) Failure to interview the principal officers. In *Tucker* the Claimant complains that the senior investigator did not seek to interview most of the principal officers but relied entirely on their written statements.
- (C) “Disclosure”. In *Saunders* the Claimant complains that the Commission has acted in breach of a statutory obligation under s. 21 of the 2002 Act to keep her and the family properly informed about the progress of the investigation.

A. “CONFERRING”

(1) BACKGROUND

(a) Introductory

11. Police officers routinely have to write accounts, as soon after the events in question as possible, of incidents in which they have been involved or which they have witnessed (“first accounts”). Typically the first account of an incident will be written up in the officer’s pocket-book, although that may subsequently be followed by a more formal statement for use in court or otherwise; and in some circumstances an officer may proceed straight to a formal statement without an intermediate note.

12. There has never been any prohibition in English law, or as a matter of police practice, on police officers who have been involved together in an incident speaking to one another about their involvement before they give their first account. Not only may they confer in the immediate aftermath – as would be entirely natural and may often be necessary for operational reasons – but they may collaborate in the writing up of the first accounts themselves. In *R v. Bass* [1953] 1 QB 681 the Court of Criminal Appeal (presided over by Lord Goddard CJ) was concerned with a case in which police officers who had produced near-identical accounts of their interview of a suspect had been cross-examined on the basis that they had collaborated in the production of those accounts and had denied doing so. Byrne J, giving the judgment of the Court, said this (at p. 686):

This court has observed that police officers nearly always deny that they have collaborated in the making of notes, and we cannot help wondering why they are the only class of society who do not collaborate in such a matter. It seems to us that nothing could be more natural or proper when two persons have been present at an interview with a third person than that they should afterwards make sure that they have a correct version of what was said. Collaboration would appear to be a better explanation of almost identical notes than the possession of a superhuman memory.

Although those observations were made in the particular context of preparing notes of an interview (which might be thought to be something of a special case) they have since been understood to be of general application - see, for example, *R v Skinner* (1994) 99 Cr. App. R. 212, where Farquharson LJ said (at p. 216):

It has certainly been permissible, since Lord Goddard's time, for officers to confer together in the making up of their notebooks immediately after the events or interviews in which they have both been participating, as an aid to memory [*my underlining*]. That is shown by [*Bass*].

Initially it seemed that counsel for the Police Federation was proposing to argue that those authorities gave officers a positive legal right to confer before giving their first accounts; but that is plainly wrong, and in the event no such argument was advanced.

13. The acceptance of this practice – which was referred to before me comprehensively as “conferring”, although it might in fact be more useful to distinguish between “mere” conferring and actual collaboration in the production of notes or statements – obviously has the potential to impact on the value of evidence which an officer may subsequently have to give about an incident. That evidence will often depend very heavily on the officer's first account, to which he will be allowed to refer in giving his evidence. However much an officer who has conferred with colleagues may strive to record only what he has seen or heard for himself, there is a real risk that his recollection will have been “contaminated” by what he has been told; and he may in perfect good faith incorporate elements in his own account which have in fact derived from other witnesses, or subconsciously suppress elements which seem to him inconsistent with their accounts. That is a matter of common sense and common experience, but it is confirmed by psychological studies (helpfully reviewed and summarised in the recent paper published by the Research Board of the British Psychological Society entitled *Guidelines on*

Memory and the Law: see in particular section 6.ii). There is also the risk that, quite apart from such innocent contamination, officers collaborating in producing their notes or statements may be tempted deliberately to produce an account which does not accurately reflect the individual recollections of each. Such collusion may involve no more than the smoothing out of minor inconsistencies which the officers fear may lead to the evidence being regarded as unreliable (though the unsophisticated belief that inconsistencies always diminish the credibility of evidence is in fact wrong); but it may sometimes involve substantial distortion or fabrication. Collusion of the latter kind is no doubt rare, but it is a very serious matter when it occurs. (I should add that although the distinction which I have drawn between innocent contamination and deliberate collusion is conceptually clear, its application may of course be a lot less clear in particular cases.) Similar risks of contamination are of course well-recognised in other contexts: see e.g. *R v Richardson* [1971] 2 QB 484 (at p. 490 B-C - witnesses not to be shown each others' statements before giving evidence); *R (Green) v. Police Complaints Authority* [2004] 1 WLR 725 ([2004] UKHL 6) (risk of "trimming" if complainants see other witnesses' statements - esp. *per* Lord Rodger at para. 71, pp. 747-8); and *R v Momodou* [2005] 1 WLR 3442 ([2005] EWCA Crim 177) (witness coaching – see esp. para. 61, p. 3453).

14. The risk of evidence being contaminated by conferring is sought to be guarded against, at least to some extent, in the instructions and training given to police officers. I was referred to an article at [1985] Crim LR 781 by Anthony Heaton-Armstrong (a distinguished member of the criminal bar) entitled *Police Officers' Notebooks*, in which he quotes the following passage from the 1976 edition of *The Metropolitan Police Officers' Instruction Book*:

Notes must be made at the time of the occurrence or as soon after as practicable ... *when two or more officers are present at an occurrence the details of which can be easily remembered, notes should where practicable be written by each officer separately and independently without consultation.* When, however, in more complex and more lengthy cases two or more officers witness the same incident or are present at the same interview or interrogation, there is no objection to these officers conferring together when preparing their notes so that their notes may be as full and comprehensive as possible. *In any case in which consultation takes place notes to that effect may be added ... if one officer has no recollection of a point observed or a remark remembered by his colleague he should, of course, not incorporate such matter in his book. A note, whether made in consultation with a colleague or otherwise must reflect only genuine personal observation and recollection* [my italics].

The passages which I have italicised clearly recognise the desirability of first accounts being made without conferring, where that is practicable, and the importance of guarding against contamination where it is thought necessary to collaborate. I was told that the Metropolitan Police Instruction Book is no longer in use and has not been replaced by any equivalent document, and I am not sure that the passage in all its aspects reflects current guidance, let alone practice; but I was told that training in both the Metropolitan Police and the Kent Police continues to emphasise that even where conferring occurs an officer's notes should only contain facts which he has witnessed for himself and that if officers have collaborated that fact should be stated.

15. It is important to recognise that an “uncontaminated” first account of an incident will by no means necessarily be more accurate than an account produced after discussion between the persons principally involved. On the contrary, such discussion – or reference to contemporary records for such matters as timings – will often quite genuinely remind an officer of something which he had forgotten or mis-stated in his first account or help him to make sense of recollections which were confused. Memory of any complex event involves elements of reconstruction, and a purist insistence that only “actual” memory is valid would be misconceived. The definitive evidence which an officer wishes to give may entirely properly contain revisions or amplifications of his first account. But in theory, and subject to operational requirements, that would not be an argument for not attempting to record first accounts before any such discussion has taken place, so that in cases where a real dispute emerges as to the precise sequence of events the extent and significance of any subsequent revisions in the witness's account can be assessed.

16. It does not follow from the acknowledgment of the risks inherent in the practice of permitting officers to confer, and in particular to collaborate in writing up their notes, that there should be a general prohibition on the practice; and in any event the latter practice has, as I have shown, the endorsement of the Court of Appeal¹. A ban on “mere” conferring not only would be difficult to enforce in practice but would in many cases

¹ Mr Heaton-Armstrong did in fact in the article referred to urge that “the practice of pre-note-making collaboration by police officers about all but the most complex of occurrences must be uncompromisingly condemned”. But when he threw down this gauntlet in submissions to the Court of Appeal a few months later it declined to pick it up – see *R v. Owen* (1986) 83 Cr. App. R. 100 (at p. 107).

have serious operational disadvantages: prompt exchange of information between officers in the immediate aftermath of an incident is often essential. That objection might not apply to collaboration in the production of notes; but, as already observed, there are advantages as well as disadvantages in officers pooling their recollections, and the theoretically optimal practice of their doing so only after they have produced an uncontaminated first account may be both cumbersome in practice and of limited real value (particularly in a case where there has already been a degree of conferring in the immediate aftermath of the incident). It is important to recognise that the extent and seriousness of the risk to the quality of officers' evidence caused by conferring or collaboration will vary greatly from case to case. The advantages of a blanket prohibition on collaboration in the production of notes might very well involve disproportionate disadvantages. However, that leaves open the more limited question of whether there should be a prohibition on conferring and/or collaboration in particular classes of case – such as DSI matters - where the risk of contamination of evidence is thought to be particularly high, or particularly serious in its consequences, or where the maintenance of public confidence in the process carries special weight; and it is essentially that question which provides the context for the issues in this case.

(b) Conferring in the context of police shootings

17. Consistently with the general practice described above, chapter 6 of the ACPO Manual expressly provides that officers involved in incidents in which a firearm has been discharged may collaborate in the writing-up of their notes, though certain important caveats are included. The relevant paragraphs read as follows:

The Making of Notes

- 2.56 The removal of the officers from the scene at an early stage will provide those involved with a period of re-orientation and allow for the preparation of a summary of events.
- 2.57 Initial notes (e.g. pocket notebook, Incident Log pages for each officer, or a pro forma) should be made as soon as practicable, subject to any individual legal advice received to the contrary. The entry should be timed, dated and signed.

- 2.58 Any suggestion that any officer is unfit to make notes at the time should be verified by the officer being examined by a professionally qualified person who can independently certify to this fact.
- 2.59 If officers have been involved in the same incident, they may confer when preparing notes. Notes should consist of an individual officer's recollection of events. Where notes have been made after conferring, or the incident has been discussed, the officers should endorse their notes to that effect (highlighting issues discussed, and with whom). Any other documents/sources referred to when compiling notes should also be highlighted.
- 2.60 Officers may nevertheless wish to be mindful that any discussion could at a later date be portrayed in cross-examination as a rehearsal or manipulation of the evidence.
- 2.61 It is acknowledged that the effects of stress upon people's focus and memories may well affect an individual's initial perception of events and their constituent details. Where recollections change, this can be dealt with by clarification in further notes and/or later, formal statements.
- 2.62 Formal statements should not normally be required immediately but, providing initial notes are made, can be left until witnesses (including officers) have overcome any initial shock of the incident and are able to better recollect their experience at the time.

Sec 2.4 of the Standard Operating Procedure at Annex 6C is in similar though not identical terms.

18. Other sections of the Manual also have some relevance. I need not set them out in full, but I note the following points:

- At paras. 2.26-2.28 the Manual introduces the concept of "principal officers", meaning the officers "most involved in, and most affected by, an incident". It points out that they may include officers other than those who have actually used their weapons.
- Para. 2.29 provides for the immediate appointment of a Post Incident Manager to take responsibility for Post Incident Management ("PIM") processes and "act as an interface" between the principal officers and the investigators (which will in a DSI case be the Commission).

- Paras. 2.31-32 emphasise the importance of principal officers being given early access to legal advice: in practice, this will normally be obtained under the auspices of the Police Federation.

- Para. 2.35 reads:

Once officers involved have been able to make their initial notes (subject to medical or legal advice), copies will be required as soon as possible by the Investigating Officer.

- In the context of making the point that principal officers should not be made to feel “deliberately excluded”, para. 2.37 provides that “AFOs [Authorised Firearms Officers] who have fired their weapons should not be segregated from other AFOs without good reason”.

- Paras. 2.63-64 emphasise that “formal interviews” with principal officers should not normally be carried out in the immediate aftermath of the incident because to do so would be liable to cause unnecessary stress.

- Paras. 2.65-84 deal with “de-briefing”, a term covering various different procedures which may involve principal officers learning more about an incident than they witnessed themselves. Para. 2.65 says:

It is vital that **initial witness accounts shall be recorded before a de-briefing of any kind**, to avoid later suggestions of manipulated or rehearsed evidence [original emphasis].

- Several passages in the Manual recognise that involvement in an incident where a member of the public has been shot can be very distressing and traumatic for the officers concerned and emphasises the need to take their welfare into account. That seems to me to be plainly important: quite apart from the possible disciplinary consequences for the officer if he is subsequently found to have acted wrongly, it is naturally shocking to be involved, however justifiably, in causing serious injury or death to another human being.

19. The Commission has for some time believed that the terms of the ACPO guidance as it relates to the making of notes should be changed. It is its view that, whatever the position might be as regards conferring and collaboration generally, it was highly undesirable in the case of incidents where action by police officers had caused death or serious injury to members of the public. In such cases a close scrutiny of the detailed sequence of events is likely to be of crucial importance to the carrying out of a thorough investigation. For that reason the first accounts of the officers concerned will often be of great significance; but likewise those officers will often, however justifiable their conduct may have been, be concerned about potential disciplinary or criminal proceedings and will doubtless also have found the incident upsetting (to put it no higher). In those circumstances, the likelihood that they will wish to discuss events with other colleagues involved, with the attendant risk of contamination and possibly collusion, is particularly high; and that risk is exacerbated if they collaborate in the production of their first accounts. Even if ultimately the inquiry is not seriously prejudiced, the possibility of collusion is bound to have an impact on the confidence of interested parties and the wider public in the effectiveness of the Commission's investigation; and the maintenance of public confidence in the complaints system is itself, as noted above, an important part of its responsibilities.

20. The Commission's concern was first formally expressed in February 2006, in its report into the fatal shooting of Harry Stanley by officers of the Metropolitan Police. In that report the Commission pointed out that the officers concerned wrote up their accounts of the incident together and in virtually identical terms. It acknowledged that the officers had acted in accordance with the ACPO guidance, but it made clear that it regarded the practice of permitting collaboration as unsatisfactory and concluded by making a formal recommendation "that the ACPO Committee on the Police Use of Firearms in conjunction with the IPCC revise the current protocol as a matter of urgency". It made very similar observations the following month in its report on the shooting, again by officers of the Metropolitan Police, of Jean-Charles de Menezes at Stockwell tube station. Recommendation 13 in that report was in the following terms:

Concern

Officers involved in the incident wrote up their notes together. This is current practice but makes those accounts less credible. Such practices were agreed in the protocol between the police service and the IPCC in July 2004.

Recommendation: ACPO

To review efficacy of existing post-incident management policy, guidance and practice to ensure an appropriate balance exists between being rightly held to account for one's actions while discharging the office of Constable and the rights of the principal officers. Particular attention should be paid to the need to ensure that individual accounts are obtained in a proximate and transparent manner that is consistent with the rules of evidence, the duty of care to staff and the need to secure public confidence. Post-incident procedures should be revised to ensure that officers do not write up their notes together.

21. The Metropolitan Police Authority made a similar recommendation in its own report on the shooting of Mr. de Menezes in July this year. In response, the Commission issued a press release containing a statement from its Chairman, Mr. Nick Hardwick, which I quote in full since it is an authoritative statement of its position:

The IPCC welcomes the recommendation in the MPA's scrutiny report that the practice of officers conferring to make their notes following an incident should be discontinued and procedures put in place to demonstrate that the accounts individual officers give are their best and genuinely independent recollections.

We are confident that the investigations we have conducted into fatal police shootings, are rigorous and capable of withstanding public and judicial scrutiny. But we recognise the concern and suspicion this practice sometimes generates amongst bereaved families and many members of the wider public. That suspicion cannot be in the interests of families or the officers concerned.

The IPCC has a legal duty to secure and maintain public confidence in the police complaints system. As the public body charged with oversight of the Metropolitan Police Service, the MPA's support for our recommendation confirms the IPCC's own view that the public do not have confidence in the current procedure in which police witnesses and civilian witnesses to the same incident are treated very differently.

Both the MPA and ourselves recognise the uniquely difficult and dangerous job performed by firearms officers. The IPCC is clear that its investigators do not treat officers as suspects unless there is evidence that an offence has been committed. We recognise that the firearms officers are lawfully carrying weapons and we do not treat them as suspects in a crime unless there is evidence to do so. However, when the state takes a life, we believe that there must be a rigorous investigation and the families and public are entitled to the fullest possible explanation of what

occurred and why. This is the approach we have taken in all 14 fatal shootings we have investigated since 2004.

The current post-incident procedure limits our ability to obtain the best possible evidence from police officers involved in an incident. Each case is different and the importance of the officers' notes will depend on the other evidence we have available.

The IPCC also recognises that changing the procedures following fatal shootings has far wider implications and may affect the way the police service gathers evidence for criminal investigations. Current guidance reflects the convention that police officer witnesses to an event are permitted to confer before writing their statements. This is a principle in daily police practice. It is not within the IPCC's power unilaterally to alter policing practices and we recognise that the Police Federation has strong views on the subject.

While the courts may, in time, come to a definitive ruling on the question of officers' notes we think ACPO, the Police Federation and the other police organisations need to quickly recognise the current situation is unacceptable. We think it would be possible to develop post incident procedures that provide reassurance to families and the public that best evidence has been obtained and reassurance to officers that they will be protected from unfair treatment for just doing their difficult and dangerous jobs. We seek to work with ACPO and the Police Federation to do that.

22. Consistently with that position, and indeed as foreshadowed in the terms of the MoU referred to at para. 8 above, the Commission has for some time been seeking to secure changes in the ACPO guidance. Discussions have been protracted, not least because the Police Federation - with which ACPO has quite properly wished to consult - has been very cautious about the possible impact on its members of a change in the practice of permitting conferring. The discussions have also been complicated by the decision of the European Court of Human Rights in *Ramsahai v. The Netherlands* (52391/99), handed down on 15th May 2007, which I shall have to consider below. There was disagreement between counsel advising, respectively, ACPO (Mr. John Beggs and Mr. Sam Green) and the Federation (Mr. Edmund Lawson QC and Mr. Michael Egan QC) as to the effect of that decision. It was not until the receipt of an Advice dated 24th June 2008 from Mr. Keir Starmer QC, which I am told has been accepted by both ACPO and the Federation, that it began to be possible to find a way forward. I was told by Lord Lester QC in his submissions to me on behalf of ACPO that it now seems likely that it will be able shortly to finalise changes to the Manual which represent a very substantial movement towards the position of the Commission and which will also be acceptable to

the Federation. Although he gave me a fairly detailed summary of what he described as the direction in which matters were moving, he emphasised that no final agreement had been reached, and in those circumstances I do not think it appropriate for me to say more.

(2) THE CONFERRING IN THE PRESENT CASES

23. As I have already said, it is common ground that in both the cases with which I am concerned the principal officers were permitted to confer with one another, in accordance with the guidance in the ACPO Manual. Full information on the extent of the conferring is not available, particularly in *Saunders*; but in so far as it can be established the position is as follows.

Tucker

24. The incident which led to the death of Mr. Tucker took place over a very short time. Officers were first called to the scene, which was on a road near Stansted in Kent, shortly before 8 a.m. on Saturday 29th December 2007. Unarmed officers arrived at 8.10 a.m. and armed officers (being of course authorised firearms officers (“AFOs”)) arrived some time later. The precise time of Mr. Tucker’s death is not definitely established but it was at about 8.30 a.m. He was shot by two officers to whom I will refer as C and D. Two other armed officers, A and B, were present, together with two unarmed officers. I do not wish to pre-empt the findings of the investigation or any other proceedings; but I can say that the officers’ case is that they believed Mr. Tucker to be armed with a sub-machine-gun (though it transpired subsequently that it was an imitation) and that C and D fired because it seemed from his stance and conduct that he was about to shoot at them. Each fired only once. D fired first; but, on both his account and C’s, C fired only a split-second later. It was C’s shot which was fatal. It is not known whether in the immediate aftermath of the shooting all or any of the officers discussed with each other what had happened: it would be entirely unsurprising if they did so, and in any event there is little, given the way in which the incident had occurred, that could have been done to prevent them.

25. Some time in the next hour or so a formal PIM process (see para. 2.29 of the ACPO Manual quoted at para. 18 above) was instituted. Mr. Stephen Howson, the Firearms

Command Training Manager for the Kent Police, was appointed the Post Incident Manager. All six officers who had been present at the scene reported to the Post Incident Management Suite (“PIMS”) between 10.30 a.m. and 11 a.m. From that point onwards they were accompanied by a member of the PIM team. However, at about noon the two unarmed officers were permitted to go together into a separate room at the PIMS where they, according to Mr. Howson’s witness statement, “wrote up their pocket notebooks”. As for the armed officers, Mr. Howson says this:

All the firearms officers involved were kept together at PIMS. They did talk to each other, but conversation about the actual incident was limited. Their training was that if they did speak to each other about the incident, that should be recorded. Any discussion at PIMS that may be construed as collusion would be challenged and prevented. No such talk took place in this process, but some collaboration took place for the reason that I required an initial account of the circumstances from one person within the team. I obtained this from an officer who had not discharged his weapon as a verbal account recorded third hand by another PIM. All four officers agreed its accuracy.

The officers were also seen by a Police Federation representative and by a solicitor, Ms. Freeburn, from Russell Jones & Walker. Ms. Freeburn and the Federation representative saw the officers together, without a member of the PIM team present, for about an hour. On the basis of the advice which they received the officers said that they did not wish to give statements until the following Monday (31st December) because of the risk of “perceptual distortion” following a traumatic incident.

26. In the meantime the Commission was contacted. Mr. Christopher Patridge, being the senior investigator on call, was called at about 10.40 a.m. He arrived at the scene of the shooting about an hour later, by which the time the principal officers had returned to the PIMS. He met the Deputy Chief Inspector in charge and formally told him that from that point onwards an independent investigation by the Commission was in place. He had other duties in the middle of the day but he attended the PIMS later in the afternoon and spoke to the four armed officers. According to his witness statement:

I told them that the case had been referred automatically to the IPCC and had not been referred on the facts; it was an inquisitorial search for the truth and the strategic aim of the IPCC was to increase confidence in the police complaints procedure and that confidence also included the police. I told them that on the

evidence to date they would all have the status of witnesses but as police officers they would know that the status could be reviewed in the light of further evidence.

He gave a number of directions relevant to the investigation, though none that related to conferring or collaboration by the principal officers.

27. By 5 p.m. the PIM process was regarded as closed. The armed officers were allowed to leave the PIMS and given leave until the following Monday. They were instructed not to discuss the incident with anyone not involved: that of course implies that there was no prohibition on their discussing it between themselves, although there is no particular reason to suppose that they did so.

28. The armed officers made their statements on 31st December. They did so at the Police Federation offices. They were together, with Ms. Freeburn and a Federation representative, for about seven hours. They were allowed access to the computerised log of events as a record of timings. No representative of the Commission or member of the PIM team was present. All four produced statements which were passed to the Commission. There is, unsurprisingly, no further evidence of the details of the process by which the statements were created. It can safely be inferred from the presence of a solicitor that no improper collusion took place; but it can also reasonably be inferred that there was substantial discussion between the officers, and indeed the statements of two of them expressly referred to their having “liaised”.

29. Although, in deference to the lucid and thorough submissions of Ms. Phillipa Kaufmann on behalf of Ms. Tucker, I have in the foregoing account identified the opportunities which arose for the principal officers to confer between the time of the shooting and when they came to make their statements, these are of comparatively little significance given the admitted fact that both the unarmed officers (on 29th December) and the armed officers (on 31st December) had and took the opportunity to collaborate in the production of their statements. I should emphasise that, as Ms. Kaufmann conceded, there is no evidence of collusion in the pejorative sense; but the officers’ collaboration in giving their first accounts inevitably carried the risk of contamination. I should also say that although Ms. Kaufmann was critical of various particular aspects of the steps taken by Mr. Howson and Mr. Patridge – i.e. apart from her primary complaint that conferring

was permitted - I can see nothing to suggest that they were not conscientiously following what was regarded as good practice in the light of the ACPO Manual.

Saunders

30. The circumstances of the shooting of Mr. Saunders were very different. At about 4.50 p.m. on Tuesday 6th May the Metropolitan Police received reports of shots being fired by (as it transpired) Mr. Saunders from his flat in Markham Square in Chelsea. Armed officers arrived on the scene fairly shortly afterwards. The area was cleared and a “siege” developed. Senior officers, including the firearms command team, were present, as were negotiators, the ambulance service and the fire brigade. It was not until well over four hours later, at just before 9.30 p.m., that in circumstances which have not yet been established seven officers fired a total of eleven rounds, as a result of which Mr. Saunders was fatally injured.

31. Unlike in *Tucker*, the interval between the start of the incident and its tragic conclusion meant that a senior investigator from the Commission, Mr. Paul Craig, had already been alerted to the situation before Mr. Saunders was shot; and he was called very shortly afterwards. He made his way at once to the police station where a PIM process was already under way: no fewer than seventy officers were involved. After making some initial enquiries he formally announced at about 2.30 a.m. that there would be an independent investigation. Thirteen officers were regarded as “principal officers”: these were all AFOs, including the seven who had fired at the time that Mr. Saunders was killed. Those officers did not write their first accounts forthwith – presumably for similar reasons to those given in *Tucker* – but statements from all thirteen were received on 8th May. There is no evidence as to the procedure by which the statements were prepared, but Mr. Lawson QC, for the Commissioner of Metropolitan Police, confirmed that “conferring” had been permitted and had occurred. I can, I think, safely infer that the guidance as to the making of notes given in the ACPO Manual was followed and that officers will, at least to some extent, have collaborated in the making of their statements, with the attendant risk of contamination of their first accounts. In the absence of any more detailed information, I cannot exclude the possibility that there was also collusion in the pejorative sense; but I should make clear that there is no positive indication that it occurred.

(3) THE CLAIMANTS' CHALLENGE

32. It is convenient to deal first with the case against the Commission before considering that against the two chief officers of police. Although the cases overlap very considerably, because the decision to join the chief officers as Defendants was made only at the last minute it was the case against the Commission which was much the more fully developed.

The Case against the Commission

33. The essential case of both Claimants is that the Commission should have issued instructions designed to prevent, so far as possible, any conferring between the principal officers, and certainly to prevent collaboration in the production of their first accounts; and that its failure to do so constituted a breach of duty on its part. The essential elements in that case can be analysed as follows:

- (a) The case-law of the European Court of Human Rights – and in particular the decision in *Ramsahai* (above) – establishes that a state is obliged by art. 2 of the European Convention of Human Rights to conduct an adequate investigation into the death of any person at the hands of “state agents”; and that an investigation will not satisfy that obligation unless appropriate steps are taken to prevent, so far as possible, conferring between the key witnesses. That obligation has been breached in the present cases.
- (b) The Commission is a public authority within the meaning of Human Rights Act 1998; and it is accordingly, by virtue of s. 6 (1) of the Act, unlawful for it to act in a way which is incompatible with a Convention right (subject to the provisions of s-s. (2)).
- (c) The Commission had statutory powers which would have enabled it:
 - (i) to issue general instructions to chief officers of police prohibiting, so far as practicable, conferring by principal officers in the aftermath of a DSI

incident and, more particularly, collaboration in the writing of their first accounts; or in any event

- (ii) to issue, through the appointed senior investigator, specific directions to the same effect as soon as it was seised of any particular investigation.
- (d) The effect of s. 6 (1) of the 1998 Act was to render it necessary for the Commission to exercise those powers.
- (e) The failure to issue such directions had the effect that the investigations in both cases were being, or had been, conducted in a manner incompatible with the Claimant's art. 2 rights; and the Court should grant appropriate relief.

I will consider those points in turn.

(a) Art. 2 and *Ramsahai*

34. Art. 2.1 of the Convention provides that:

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

35. Although nothing in the express terms of art. 2 imposes any obligation in relation to inquiries into the deaths of persons killed by the state, such an obligation has emerged from the case law of the European Court of Human Rights. In *Jordan v. United Kingdom* (2003) 37 EHRR 2 the Court held as follows (at para. 105, p. 87):

The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the *McCann* judgment cited above, p 49, para 161, and the *Kaya v Turkey* [1998] ECHR 22729/93, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p 324, para 86 of the latter reports). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those

cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, for example, *mutatis mutandis*, *Ilhan v Turkey* [GC] [2000] ECHR 22277/93, ECHR 2000-VII, para 63).

That principle has been reasserted in several subsequent cases (including those of *Nachova* and *Angelova* referred to by the Court in a passage quoted below).

36. *Ramsahai* is the most recent decision of the Court on this aspect of art. 2. A young man, Moravia Ramsahai, was shot dead by an officer of the Amsterdam police, Officer Brons. The only immediate witnesses of the shooting were Officer Brons himself and his colleague Officer Bultstra. An investigation was carried out by the State Criminal Investigation Department, but that department did not become involved until the best part of a day after the shooting, and much of the crucial investigation, even after it became involved, was carried out by the Amsterdam police (i.e. the same force of which Officer Brons was a member). The public prosecutor decided not to bring any proceedings against Officer Brons. Mr. Ramsahai's family sought an order from the Amsterdam Court of Appeal requiring the public prosecutor to proceed with the prosecution. That order was refused. The family then commenced proceedings in the Court of Human Rights, alleging breaches of arts. 2, 6 and 13 of the Convention. Before the Chamber their claim was dismissed in its entirety. The case then proceeded to the Grand Chamber, whose formal decision was as follows:

- (1) unanimously, that the shooting of Mr. Ramsahai did not amount to violation of art. 2;
- (2) by 13 votes to 4, that the investigation into his death was inadequate and amounted to a violation of art. 2;
- (3) by 16 votes to 1, that the investigation into his death was insufficiently independent, and amounted to a violation of art. 2;
- (4) by 13 votes to 4, that there had been no violation of art. 2 as regards the public prosecutor supervising the police investigation;

- (5) unanimously, that there had been no violation of art. 2 as regards the extent of the involvement of the relatives of Mr. Ramsahai in the investigation;
- (6) by 15 votes to 2, that there had been no violation of art. 2 as regards the application to the Court of Appeal.

37. For present purposes, the most relevant part of the decision of the Grand Chamber is that under head (2). As to that the reasoning of the Court can be analysed as follows:

- (1) The Court set out the relevant principles at paras. 321-2 of its judgment in the following terms:

321. The Court has stated the applicable principles as follows (see, as a recent authority, *Nachova v Bulgaria* [2005] ECHR 43577/98 at paras 110-113, case law references omitted):

“110. The obligation to protect the right to life under art 2 of the Convention, read in conjunction with the State's general duty under art 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (...). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (...).

...

112. For an investigation into alleged unlawful killing by State agents to be effective, the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice (...).

113. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible (...). The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony and forensic evidence. The investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements and must apply a standard comparable to the 'no more than absolutely necessary' standard required by art. 2 (2) of the Convention. Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person

responsible is liable to fall foul of the required measure of effectiveness (...).”;

and also as follows (see, among many other authorities, *Anguelova v Bulgaria* [2002] ECHR 38361/97 at para 140):

“140. There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (...).”

322. The Court would observe at this point that the obligation to carry out a prompt and effective investigation when individuals have been killed as a result of the use of force, and to bring, or enable, such proceedings as may be appropriate to the case, is not dependent on whether the said use of force itself is ultimately found to constitute a violation of art 2 of the Convention.

- (2) At paras. 323-5 the Court explained that for an investigation to be “effective”, it required to be both (1) “adequate” and (2) “independent”. It said, at paras. 324-5:

324. In order to be “effective” as this expression is to be understood in the context of art 2 of the Convention, an investigation into a death that engages the responsibility of a Contracting Party under that art must firstly be adequate. That is, it must be capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of this standard (cf *Tahsin Acar v Turkey* [2004] ECHR 26307/95 at para 223).

325. Secondly, for the investigation to be “effective” in this sense it may generally be regarded as necessary for the persons responsible for it and carrying it out to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence (cf *Tahsin Acar v Turkey* [2004] ECHR 26307/95 at para 222). What is at stake here is nothing less than public confidence in the state's monopoly on the use of force.

- (3) At paras. 326-332 the Court examined whether the investigation into the shooting of Mr. Ramsahai had been “adequate”. Various criticisms of the investigation were referred to, including – para. 326 – that:

...Officers Brons and Bultstra had not been questioned until several days after the fatal shooting, during which time they had had the opportunity to discuss the incident with others and with each other [*my underlining*].

One of the criticisms was rejected, but the Court continued as follows:

328. However, the Court considers that the other failings pointed out by the applicants impaired the adequacy of the investigation. On this point its findings differ from those of the Chamber.

329. The failure to test the hands of the two officers for gunshot residue and to stage a reconstruction of the incident, as well as the apparent absence of any examination of their weapons (see para 236 above) or ammunition and the lack of an adequate pictorial record of the trauma caused to Moravia Ramsahai's body by the bullet (see para 224 above), have not been explained.

330. What is more, Officers Brons and Bultstra were not kept separated after the incident and were not questioned until nearly three days later (see paras 94 and 107 above). Although, as already noted, there is no evidence that they colluded with each other or with their colleagues on the Amsterdam/Amstelland police force, the mere fact that appropriate steps were not taken to reduce the risk of such collusion amounts to a significant shortcoming in the adequacy of the investigation.

331. These lacunae in the investigation are all the more regrettable in that there were no witnesses who saw the fatal shot fired from close by, except for Officers Brons and Bultstra themselves. The Court has already drawn attention to the inconsistency between their statements to the effect that the fatal shot was fired by Officer Brons and those of Officers Braam and Van Daal, who both stated that they had heard Officer Bultstra report that he had fired and call for an ambulance (see para 275 above).

332. There has accordingly been a violation of art 2 of the Convention in that the investigation into the circumstances surrounding the death of Moravia Ramsahai was inadequate.

- (4) Paras. 333–341 consider the second element of “effectiveness”, namely independence. As noted above, the Court found that the investigation was not sufficiently independent, essentially because of the extent of the involvement of the Amsterdam police in the investigation. I need not set out the detailed reasoning on this point.

- (5) There were five partly dissenting opinions. I need refer only to that of Judges Costa, Sir Nicolas Bratza, Lorenzen and Thomassen. On the issue of the evidence of Officers Brons and Bultstra, the dissenting Judges said this (at para. 10):

The omission to separate Officers Brons and Bulstra [*sic*] or to question them until nearly three days after the incident is, in our view, more problematic. While, as noted in the Chamber's judgment, there is no evidence that there was any collusion between the officers themselves or between the officers and other police officers, it was in our view clearly important that steps should have been taken to prevent any risk of collusion and that the statements of both officers should have been promptly obtained by an authority independent of the police. However, we see this deficiency as one related less to the adequacy of the investigation as a whole than to the lack of independence of the initial police investigation and to the failure of the State Council Investigation Department to assume control over the investigation at the earliest opportunity - a matter which has led to the separate finding of a procedural violation of art 2.

38. In my view the judgment in *Ramsahai* demonstrates that in the case of a fatal shooting by police officers the state may be held to have violated art. 2 if, in the course of the investigation required by the article, adequate steps were not taken to prevent the police officers directly concerned from conferring before producing their first accounts of the incident; and that that is so even if it cannot be shown that they in fact did confer. I accept that the opportunity which was given to Officers Brons and Bultstra to “collude” was only one of three reasons which were held, cumulatively, to give rise to a breach. But I can see no principled reason why a vitiating factor of this kind needs to be supported by other such factors. I also accept that the Court explicitly referred to the risk only of “collusion” rather than of innocent contamination. But the risks of collusion and of innocent contamination are both alike products of the opportunity to confer, and in cases where contamination does occur it will often be difficult to know whether that was deliberate or innocent. Both are capable of prejudicing an effective investigation, and the measures aimed at preventing the one would also protect against the other. While the Court was, for obvious reasons, most exercised by the risk of collusion I very much doubt that it regarded the risks of innocent contamination as being of no concern.

39. It follows that if the circumstances of either of these cases were in due course to be considered by the Court it might very well find that a breach of art. 2 had occurred. The

facts are stronger than those of *Ramsahai*, both because it is not merely a possibility, but positively established, that the officers collaborated in producing their first accounts, and because the official guidance in force expressly permitted them to do so. It seems to me necessarily to follow from the decision in *Ramsahai* that the Court would be very chary of a general practice under which officers who are key witnesses in an art. 2 investigation are expressly permitted to collaborate in the production of their statements: the opportunity for “collusion” is, so to speak, institutionalised.

40. I am not, however, prepared to say that the mere fact that there was collaboration in the production of witness statements in these two cases means that a breach of art. 2 has been definitively established. Decisions of the European Court of Human Rights on the facts of a particular case ought not to be treated as a binding precedent, even in a case where the material facts appear to be similar. The only authoritative parts of a judgment are the statements of principle which it expounds. In my view the relevant statements of principle emerging from *Ramsahai* are that there must in every case of a killing by state agents be an effective investigation, and that in order to be effective such an investigation must be both independent and “adequate”. The case also establishes that an investigation may be inadequate, and therefore ineffective, if “appropriate steps” are not taken to “reduce” the risk of collusion (see para. 330): I do not myself regard that as a statement of principle so much as an application of the underlying principles which I have identified. But, even if I am wrong about that, the principle in question is far from absolute in its formulation and involves the need to make judgments as to what steps are “appropriate” and to what extent it is possible to “reduce” the risk: those are precisely the kinds of judgment which ACPO is having to make in formulating its revised guidance. Either way, it remains necessary in any individual case to consider the particular circumstances of that case in order to judge whether the investigation was indeed effective and/or adequate and what steps were indeed appropriate in those circumstances. The Commission says that there are special circumstances about the present case which mean that the investigations carried out were adequate and effective notwithstanding the collaboration which was permitted to occur: I consider this submission under head (d) below.

41. I should also mention a difficulty of a different kind about deciding at this stage whether a breach of art. 2 has occurred. It would in principle be possible to adopt the

approach that an investigation was inadequate and ineffective simply because conferring (and the consequent risk of collusion) had occurred, whatever its consequences. But it would also be possible to take the less hard-line approach that that gave rise to no more than a potential breach, and that if it could be shown that the opportunity for collusion did not in fact prejudice an adequate and effective investigation then no breach was established. That might, for example, be the case if it were demonstrable that no conferring had actually occurred; or that the areas of the evidence potentially affected by contamination were of no materiality to the central issues; or that the investigators had been able to detect any contamination and allow for its effect so as still to be able to make reliable findings. If this were the correct approach, it would not be possible to reach any decision on the question of breach until the conclusion of the investigation. In *Ramsahai* (where it was not established whether there had been any collusion) this question did not arise, and I was referred to no decision of the Court which addresses the issue. I am inclined to think that the latter approach is correct, and indeed Ms. Kaufmann at least did not seek to persuade me otherwise; but in the end, for reasons which will appear, I need not decide the point.

(b) Public authority

42. S. 6 of the Human Rights Act 1998 provides (so far as relevant) as follows:

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if—
 - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
 - (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

The Commission is of course a public authority and there is no dispute that s. 6 applies. But this is a convenient point at which to emphasise that the Claimants' only route to relief in this Court is *via* s. 6. It will not assist them to demonstrate that the investigation

in either case failed to comply with the requirements of art. 2 unless that can be shown to correspond to a breach of duty on the part of the Commission: the two cannot simply be conflated. While the Commission was obliged by s. 6 (1) to act compatibly with the Claimants' Convention rights, that obligation is limited, by virtue of s-s. (2), by the scope of its statutory powers. If those powers (even read with the benefit of s. 3) did not enable it to take the steps which should have been taken in order to ensure compatibility with the requirements of art. 2, it could not be in breach of s. 6.

43. Ms. Kaufmann initially submitted, by way of a fallback to her primary case, that even if the violations which she said had taken place could not be translated into any identifiable breach of duty by the Commission Ms. Tucker could seek a declaration that "the system" for the investigation of DSI matters failed to comply with the requirements of the Convention. But, as Ms. Rose, for the Commission, and Lord Lester pointed out, the Claimant can have no standing to pursue any claim under the 1998 Act unless she can show a breach of her rights under s. 6. That follows from the terms of s. 7 (1). She could only claim as "a victim of [an] unlawful act", sc. an act unlawful under s. 6: being a victim of "the system" is not enough. Ms. Kaufmann was ultimately constrained to abandon her submission in this regard.

(c) The Commission's powers

44. I start by setting out the provisions of the 2002 Act on which Mr. Tim Owen QC (for Ms. Saunders) and Ms. Kaufmann relied as giving the Commission the power to take the steps which they said should have been taken.

45. S. 10 of the Act provides for "the general functions of the Commission". The relevant provisions are as follows:

(1) S-s. (1) provides that:

The functions of the Commission shall be-

- (a) to secure the maintenance by the Commission itself and by police authorities and chief officers, of suitable arrangements with respect to the matters mentioned in subsection 2;

- (b) to keep under review all arrangements maintained with respect to those matters;
- (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 those arrangements that are in fact maintained with respect to those matters.
- (e)-(f)

(2) The matters “mentioned in subsection (2)” referred to at (a) above are as follows:

- (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 is mentioned in paragraph (b) or (ba) are investigated or otherwise handled and dealt with.

(3) S-s. (4) provides:

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 it considers best calculated for the purpose of securing the proper carrying out of its functions under subsections (1) and (3); and
- (b)

(4) S-s. (6) provides:

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.

(5) S-s. (8) provides:

Nothing in this Part shall confer any function on the Commission in relation to so much of any complaint or conduct matter as relates to the direction and control of a police force by—

- (a) the chief officer of police of that force; or
- (b) a person for the time being carrying out the functions of the chief officer of police of that force.

46. S. 15, under the cross-heading “Co-operation, assistance and information”, is entitled “General duties of police authorities, chief officers and inspectors”. S-s. (4) is in the following terms:

It shall be the duty of—

- (a) ...
- (b) the chief officer of police of every police force,
- (c)-(d) ...

to provide the Commission and every member of the Commission’s staff with all such assistance as the Commission or that member of staff may reasonably require for the purposes of, or in connection with, the carrying out of any investigation by the Commission under this Part.

47. As already noted, it is Schedule 3 which contains detailed provision for how the Commission’s investigations should be handled. It has effect by virtue of s. 13 of the Act. Part 2A of the Schedule deals with the handling of DSI matters. Para. 14B, which falls under that Part, reads as follows:

Duty to preserve evidence relating to DSI matters

(1) Where—

- (a) a DSI matter comes to the attention of a police authority, and
- (b) the relevant officer in relation to that matter is the chief officer of the force maintained by that authority,

it shall be the duty of that authority to secure that all such steps as are appropriate for the purposes of Part 2 of this Act are taken, both initially and from time to time after that, for obtaining and preserving evidence relating to that matter.

(2) Where—

- (a) a chief officer becomes aware of a DSI matter, and
- (b) the relevant officer in relation to that matter is a person under his direction and control,

it shall be his duty to take all such steps as appear to him to be appropriate for the purposes of Part 2 of this Act for obtaining and preserving evidence relating to that matter.

- (3) The chief officer's duty under sub-paragraph (2) must be performed as soon as practicable after he becomes aware of the matter in question.
- (4) After that, he shall be under a duty, until he is satisfied that it is no longer necessary to do so, to continue to take the steps from time to time appearing to him to be appropriate for the purposes of Part 2 of this Act for obtaining and preserving evidence relating to the matter.
- (5) It shall be the duty of a police authority to comply with all such directions as may be given to it by the Commission in relation to the performance of any duty imposed on it by virtue of sub-paragraph (1).
- (6) It shall be the duty of the chief officer to take all such specific steps for obtaining or preserving evidence relating to any DSI matter as he may be directed to take for the purposes of this paragraph by the police authority maintaining his force or by the Commission.

48. It was accepted by Ms. Rose, and by counsel for ACPO and the chief officers, that para. 14B (6) conferred a power on the Commission to give directions to chief officers to take steps to prevent officers in their forces involved in a particular DSI matter from conferring until they had given their first accounts: such a direction would relate to “obtaining or preserving evidence”. It was accordingly common ground that, once the

investigation in these two cases had been initiated - which in each case was within a very few hours of the shooting - the senior investigator in question could, if he had chosen, at an early stage have directed the Chief Constable or the Commissioner to prevent the principal officers conferring until they had produced their first accounts. That would not have been in time to prevent such conferring as may have taken place in the immediate aftermath of the shootings; and in *Tucker* it would probably not have prevented the collaboration by the two unarmed officers in the writing up of their notebooks. But in both cases it would have prevented the collaboration of the other principal officers in the production of their formal statements. I shall have to consider below whether it was a breach of duty for the senior investigators not to give such directions.

49. However, as noted above, it was the primary submission of Mr. Owen and Ms. Kaufmann that in addition to that case-specific power the Commission had a general power to direct chief officers to put in place procedures designed to prevent conferring and/or collaboration in the production of first accounts in DSI matters – and thus in practice to countermand the terms of the ACPO Manual. They put the case in two ways.

50. First, they submitted that a general direction of the kind in question fell within the terms of para. 14B (6). I do not agree. In my judgment it is clear that the effect of the phrase “relating to *any* DSI matter” is that the power to give directions conferred by the sub-paragraph is limited to directions given for the purpose of a particular investigation. That view is reinforced by consideration of the other provisions of para. 14B, all of which clearly arise in the context of a particular DSI matter: see in particular sub-paras. (1) and (2) (“where ... a DSI matter comes to the attention of a [police authority/chief officer]”) and sub-para. (5), which is the counterpart of sub-para. (6) and which, by the cross-reference to sub-para. (1), is unquestionably limited to particular investigations.

51. Secondly, they submitted that such a direction would constitute a request for assistance within the terms of s. 15 (4) of the 2002 Act; and that the Commission was empowered to make such a request under the general powers conferred by s. 10, and particularly s. 10 (6). I cannot accept that submission either. The duty to provide assistance under s. 15 (4) is plainly to be distinguished from a duty to comply with directions given in the context of the “handling” of investigations, which is provided for, to the extent that it is, by sched. 3 (which takes effect under a different section, forming

part of a different group of sections). Even if I were wrong about that, the use of the term “any” in s-s. (4) again seems to me necessarily to bear the sense “any particular”.

52. Quite apart from the effect of the statutory wording, Ms. Rose and Lord Lester both emphasised to me that it would be contrary to the whole scheme of the legislation, and indeed the constitutional independence of the police, for the Commission to enjoy a power to give general directions to (among others) chief officers of the kind contended for by the Claimants. Ms. Rose referred me to s. 22 of the Act. As noted above, this contains provisions – of an elaborate character – empowering the Commission to issue guidance to chief officers of police and others on a wide range of matters (which would include the obtaining and preservation of evidence in a DSI matter): s-ss. (1) and (2). Such guidance may only be issued after consultation with interested parties (s-s. (3)) and with the approval of the Secretary of State (s-s. (4)). In the usual way, such guidance will not be binding on the persons to whom it is addressed: their only obligation is to have regard to it (s-s. (7)). It would be remarkable, she submitted, if in the light of those carefully regulated provisions the Commission had an unqualified power to give general directions, binding on police officers, of the kind contended for. S. 10 does not assist the Claimants: it is no more than a standard-form powers-and-functions formulation. In that connection, Lord Lester drew my attention to s. 10 (8). I found those submissions compelling.

53. I do not believe that the Claimants are assisted by s. 3 of the 1998 Act. In the first place, I do not think it is possible to construe the provisions relied on in the way contended for by the Claimants. But in any event I do not believe that such a construction is necessary in order to ensure compatibility with art. 2. Chief officers are already under an obligation to take all appropriate steps to obtain and preserve evidence relating to a DSI matter: see para. 14B (2) of Sched. 3 to the 2002 Act. If, by virtue of art. 2 or otherwise, that imposed an obligation to take steps to prevent conferring and/or collaboration, there would be no need for the Commission to have a power to direct chief officers to do what they are otherwise obliged to do. (Ms. Rose in fact went further and submitted that as a matter of principle s. 6 could not be construed as imposing on one public authority an obligation to require another such authority to give effect to Convention obligations. She said that that principle was established by the judgment of Simon Brown LJ in *R (Adlard) v. Secretary of State for the Environment Transport and*

the Regions [2002] 1 WLR 2515 (see at p. 2530, para. 36) and confirmed in his speech in *R (Munjaz) v. Mersey Care NHS Trust* [2006] 2 AC 148 (p. 217, para. 115). I was not persuaded by this, but I do not need to consider the point further.)

54. Although the issue of the Commission's power to give a general direction to chief officers was extensively debated by counsel, and I have accordingly dealt with it in some detail, it is not really of central importance in the actual cases before me. Given that it is common ground that the Commission has the power in particular cases to give directions requiring chief officers to take steps to prevent conferring and/or collaboration, much (though I accept not all) of the effect of a general direction could in practice be achieved if as a matter of policy senior investigators gave such directions at an early stage in each DSI investigation which they undertook. The real question for me is whether in these particular cases s. 6 obliged them to give such a direction: that is the subject of the following head.

(d): Was the Commission obliged by s. 6 to give a direction under para. 14B (6) ?

55. The question under this head is whether the failure by the Commission in both cases to issue a direction under para. 14B (6) is "incompatible with" the Claimants' rights under art. 2 to an adequate, and thus effective, investigation of the victims' deaths.

56. As to that, Ms. Rose's essential submission was that it was the Commission's genuine and reasonable view that directing the relevant chief officers to prohibit conferring (so far as possible), and in particular to countermand the ACPO guidance and prevent officers collaborating in producing their first accounts, would be more likely to prejudice than to assist an effective investigation. She referred to a witness statement from Ms. Deborah Glass, the Deputy Chair of the Commission. Her evidence can be summarised as follows. The starting-point is that the Commission has at present no statutory powers to compel witnesses, including the principal officers in an investigation, to give evidence: it has in fact asked the Government to introduce legislation giving it such powers, but no decision on that request has been made. It is thus dependent on the willingness of individual officers to co-operate in providing a statement. It is true that officers will *prima facie* have to supply a statement to their own force, which the Commission could then insist on being given access to; but that duty is subject to the

privilege against self-incrimination, and officers who felt that they were being in any way unfairly treated could simply invoke that privilege and say nothing. It is important in this regard to note that officers involved in a DSI matter are routinely (and rightly) given access at an early stage to advice from the Police Federation and a solicitor - as occurred in *Tucker* - and will certainly therefore be alive to their rights. Rightly or wrongly, the Police Federation and officers relying on its advice have historically regarded the “right” to confer and to collaborate in making notes, explicitly recognised in the ACPO guidance, as an important protection. If the Commission sought unilaterally to over-ride that guidance it is Ms. Glass’s judgment (i) that chief officers might refuse to implement any direction from the Commission and in any event (ii) that there was a very serious risk of individual officers refusing to provide a statement. There was an inevitable risk that officers, who are bound to feel to some extent on the defensive after a DSI incident, will regard any investigation as “aimed at” them; and a departure from the long-established practice of collaboration, endorsed by ACPO, would encourage a perception that they were, whatever assurances were given, suspects and not witnesses. She referred to four recent cases in which, in various different contexts, police officers acting on the advice of the Federation had not been prepared to give full co-operation to a Commission investigation. In three of the cases officers refused to attend interviews. In one they insisted on the “right” to collaborate in giving their statements despite the senior investigator referring the PIM manager to what the Commission believed to be the effect of *Ramsahai*. The situations were not on all fours with those in the present cases, but they were indicative of the difficulty of the position in which the Commission found itself and of the real risk of withdrawal of co-operation.

57. Ms. Rose pointed out that that evidence as to the Commission’s thinking was unchallenged. She submitted that it was reasonable in those circumstances for the Commission to take the view that the risk that insisting on the prevention of conferring and/or collaboration, contrary to the current ACPO guidance, would lead to officers withholding evidence outweighed any potential diminution in the value of the evidence obtained. It could safely be expected that the position would be different if and when ACPO, with the support of the Federation, revised the guidance; but until that occurred the Commission had to work with the tools that it had. On that basis, there was no contravention of art. 2. The over-riding duty was to conduct an effective investigation.

Steps to prevent conferring and/or collaboration would not be “appropriate” if they conflicted with that objective.

58. I do not believe that it was reasonable for the Commission to act on the basis that chief officers might disregard an instruction which was inconsistent with the ACPO guidance (element (i) in Ms. Glass’s concerns as summarised above). Counsel for ACPO and both chief officers made it clear before me – and, in the case of ACPO, supported it by evidence – that chief officers would of course comply with any lawful direction under para. 14B. That is what I would expect; and even if the Commission had concerns on the point it could not be right that it should proceed on the basis that senior police officers would ignore their legal duties.

59. However, I have come to the conclusion, albeit after some hesitation, that it was reasonable for the Commission to judge that the giving of directions that conflicted with the ACPO guidance would be more likely to hinder than to promote an effective investigation in these cases, because of the risk that it would encourage non-co-operation by officers (i.e. “element (ii)” above). My hesitation is based on the fact that, on an objective analysis, it is hard to see why an officer who is required to give his first account without collaboration should invoke his right of silence in circumstances where he would not otherwise do so. Such a requirement is not an indication that the officer is a suspect; and, in so far as that is the impression that they might gain, in a perfect world that could be corrected by careful and sympathetic explanation. But it is not a perfect world. The Commission is entitled, indeed obliged, to make its own judgment of the practical impact of giving a direction of the kind contended for. It has to be recognised that in the fraught circumstances of a DSI investigation following a shooting police officers, and their advisers, may not adopt a wholly dispassionate approach. Perceptions are important. It is clear to me from the evidence which I have seen that there is widespread concern among AFOs that if they become involved in a shooting incident they are liable to be unfairly treated by the system: the experience of the officers who shot Harry Stanley in particular attracted widespread sympathy from colleagues. The “right to confer” has become something of a talisman in this context. This is apparent from the stance adopted by the Police Federation in the consultations about changes to the ACPO guidance and indeed in its submissions before me. It is also illustrated by an eloquent article by an AFO entitled *It’s Good to Talk* in a recent edition of the *Police Review*. It must of course be

appreciated that the problem in this case is not one of illegitimate non-co-operation by witnesses: officers choosing not to provide a statement can themselves claim to be exercising their own rights under art. 6. Against this background I cannot regard the fears expressed by Ms. Glass as fanciful or the judgment made by the Commission in the light of those fears as unjustified. It was submitted to me that the Commission had never put matters to the test by giving a direction to prevent collaboration and seeing whether that did indeed lead to the withdrawal of co-operation; but that would be a dangerous course to take, and I do not believe that it was necessary in order for the Commission to make a proper judgment.

60. My conclusion on this point is supported by two other considerations.

61. First, even under the present regime there are safeguards which tend to diminish the risk that collaboration will lead to the contamination of officers' accounts. The ACPO guidance reminds officers only to include in their notes their own recollection of events and requires them to state with some specificity when notes have been written up together (para. 2.59). Para. 2.60 points out

... that any discussion could at a later date be portrayed in cross-examination as a rehearsal or manipulation of the evidence.

Where, as in the case of the AFOs in *Tucker*, a solicitor is involved in the drafting of the statement that too will inhibit any positive fabrication or distortion. The evidence of the PIM manager in *Tucker* (see para. 25 above) shows that PIM procedures are designed at least to control the extent and nature of any conferring. I do not intend to suggest that these safeguards are necessarily sufficient, still less that they are perfect; but it would be wrong to assume that they are wholly ineffective. Further, whatever their value, it would be wrong to assume that serious contamination of evidence, still less collusion, will necessarily result whenever officers collaborate in writing up their notes. Even if the (arguably over-pessimistic) view is taken that there will always be some contamination, the areas of the evidence potentially affected by it may not be of central importance, or it may be possible for the investigators readily to detect any contamination. These considerations do not undermine the case for prohibiting collaboration; but they do mean that the choice faced by the Commission was between two courses both of which had the potential to prejudice the investigation but neither of which would certainly do so.

62. Secondly, the Commission's position is not one of passive acceptance of an unsatisfactory situation. On the contrary, it is actively pursuing the abolition of conferring/collaboration by agreement with ACPO (and thus, indirectly, the Federation); and the signs are that its efforts will shortly bear fruit. That fact could not of course by itself justify a failure to take action: a public authority which is under a s. 6 duty cannot avoid that duty by saying (however reasonably) that it prefers to act with the consent of others which it is hoped can be obtained at some point in the future. Rather, Ms. Rose's reasoning is squarely based on the proposition that acting contrary to current ACPO guidance would impact on the effectiveness of these particular investigations. But the relevance of the Commission's attempts to achieve the abolition of collaboration by the consensual route is that they make its judgment that, pending such consent, taking unilateral action in particular cases would do more harm than good the more worthy of respect.

63. Mr. Owen and Ms. Kaufmann reminded me that, even if the Commission's position was defensible on a *Wednesbury* basis, that was not the test. It was for me, and not the Commission, to judge whether in the circumstances of these cases the failure to take steps to prohibit conferring or collaboration was incompatible with the obligation under art. 2. I was referred to *Huang v. Secretary of State for the Home Department* [2007] 2 AC 167 ([2007] UKHL 11), esp. *per* Lord Bingham at para. 13 (p. 185). Though I am not in fact sure that that passage from *Huang* is precisely in point, I accept the Claimants' submission. But in making my decision I am entitled to give full weight to the Commission's own judgment. Adopting that approach, it is my conclusion that in not giving a direction of the kind contended for by the Claimants the Commission was not acting incompatibly with their art. 2 rights.

64. Mr. Owen submitted that the Commission's only responsibility was to "adopt the methodology best designed to secure the best evidence"; and that if, due to non-cooperation, no evidence from the principal officers was forthcoming "that will not be the [Commission's] fault and it will be the UK which will be liable in Strasbourg", i.e. for failing to give the Commission powers to compel officers to give evidence. Mr. Owen also submitted that the focus of the investigation "must be on the quality of the evidence obtained not the quantity". With respect to him, that seems to me altogether too glib.

The Commission's concern should not be about who is to blame if the crucial evidence is not obtained but about maximising the chance that it is. Its job is to make reliable findings about what happened. If the officers give statements after conferring, that is not the best evidence; but that does not mean that it is bad evidence (see para. 60 above), and it is certainly preferable to having no evidence at all. The situation in which the Commission has to work is delicate. As already noted, officers who choose to remain silent will themselves be asserting a right under the Convention: this is not therefore a case of a public authority acquiescing for pragmatic reasons in another party's breach of duty.

65. It should be clearly understood that the foregoing reasoning does not mean that collaboration in note-taking "complies with art. 2" or, therefore, that the revisiting of the ACPO guidance which is now being undertaken is unnecessary. On the contrary, as appears from para. 39 above, I believe that a practice of permitting principal officers to collaborate generally in giving their first accounts is highly vulnerable to challenge under art. 2. But the ultimate question is always what will conduce to the most effective investigation achievable in the particular circumstances; and in the present cases I agree with the Commission that to have issued a direction countermanding the ACPO guidance, and prohibiting collaboration, would have been likely to hinder rather than promote an effective investigation and would not have been appropriate.

(e) Relief

66. This head does not arise for consideration in view of the conclusion which I have reached above. It was Ms. Rose's submission that, essentially, these applications were premature because it could not be definitively established that the investigations required by art. 2 were ineffective until they were complete. That was not the case. As to that, she did not rely simply on the fact that the Commission's own investigation was incomplete: she pointed out that in considering whether the United Kingdom's obligations under art. 2 had been discharged in any case it was necessary to consider the totality of the arrangements under which a police shooting may be the subject of investigation, including the inquest and any subsequent disciplinary or criminal proceedings (see *R (Amin) v. Secretary of State for the Home Department* [2004] 1 AC 653 ([2003] UKHL 51)).

67. I would not have accepted that submission. Whether or not it is possible to reach a decision on whether there has been a breach of art. 2 until the investigation is complete (see para. 41 above), it is important – as I have already observed in a different context – not to confuse whether there has been a breach of art. 2 with whether there has been a breach of s. 6. The duty on a public authority under s. 6 to act compatibly with a Convention right must arise at the time that the acts or omissions to which the right may attach are done (or not done): otherwise the duty would have no meaning. In the present context that means that the question whether it was necessary in the interests of an effective investigation to try to prevent the officers conferring falls to be judged at the time when it was still possible to do so, i.e. in the very first hours or days of the investigations. If (contrary to my view) it was, and no such step was taken, the Commission would have acted in breach of s. 6 even if in later Strasbourg proceedings it was held that the completed investigation was effective notwithstanding the opportunity for conferring.

The Case against the Chief Officers of Police

68. Having reached the foregoing conclusions, I can deal very briefly with the case against the Commissioner of Metropolitan Police and the Chief Constable of Kent. Both are of course public authorities, and there can be no question that they had power to order their officers not to confer or collaborate in the writing up of their notes. But if, for the reasons which I have accepted, giving such an order, directly contrary to the terms of the ACPO guidance, would have prejudiced an effective investigation, they would be no more in breach of s. 6 than the Commission in not giving such an order.

B. TUCKER: FAILURE TO INTERVIEW

69. As described above, the six officers present when Mr. Tucker was shot all gave written statements which were provided to the Commission. The initial view of Mr. John Cummins, who took over as senior investigator from Mr. Patridge on 2nd January 2008, was that those statements were sufficiently detailed and he did not need to interview the officers. However, following representations made at a meeting with the Claimant and her solicitors on 8th April, he decided that he should interview officer C, who fired the

fatal shot: according to the statements, he had fired after D and the Claimant was, understandably, concerned about why it had been necessary to fire a second shot. Mr. Cummins saw C on 11th April in the presence of his Police Federation representative and asked him further questions. (The Commission says that this was not a “formal” interview; but, whatever precisely that means, the distinction does not appear to be significant for present purposes.) The outcome of the interview was a further statement from C giving some more details of the circumstances in which he came to fire. Mr. Cummins did not interview any of the other witnesses.

70. It is the Claimant’s case that it was essential in the interests of an effective investigation that all the other officers present, but in particular officer D, should also have been interviewed. Ms. Kaufmann contended that there was a significant difference between the statements of C and D (which have both been disclosed to the Claimant). Specifically, she drew attention to the fact that D’s statement said that Mr. Tucker had started to fall as a result of his own shot before he heard C’s shot, whereas C’s second statement suggested that he fell only after his (C’s) shot. She submitted that the significance of that difference could only properly be assessed by the direct questioning of not only C but D and indeed the other officers present. She also submitted that the case for a further interview was reinforced by the risk of contamination or collusion arising out of the failure to prevent the officers collaborating.

71. I have looked carefully at the three statements. On my reading of them there is no detectable inconsistency between C’s two statements: although he gives more detail in the second, it appears from both that he is saying that he only saw Mr. Tucker falling after he had fired his shot. There is however an inconsistency between those statements and D’s, in that, as noted above, D says that Mr. Tucker had started to fall before he heard C’s shot. (I note in passing that that is the kind of inconsistency which one might have expected to see ironed out if the officers had been consciously tailoring their accounts.) The question is whether any inconsistency between the statements was of such a character that it was necessary to an effective investigation that D, or the other officers present, be interviewed. It can safely be inferred that he did not believe that he would be assisted by further interviews. Regrettably, he has now fallen ill, and accordingly I do not have the benefit of a witness statement from him explaining that view. However, I do have the benefit of a statement from Mr. Ian Bynoe, one of the Independent Police Complaints

Commissioners, who has particular responsibility on behalf of the Commission for both the investigations with which I am concerned. He says that, in the context of the split-second decisions which, on the accounts of all the officers present, officers C and D had to take, the kind of discrepancy relied on by the Claimant is of no real significance.

72. I do not wish to prejudice the outcome of the investigation, or any subsequent proceedings, by going into more detail than I need. I will only say that in my judgment it was not necessary for the purpose of an effective investigation that Mr. Cummins should have interviewed D or the other officers present. He had interviewed C, whose perception, as the person who fired the fatal bullet, was inevitably the focal point of the investigation. The difference between his account and D's was indeed as to a matter of split seconds. It is very hard to see what further light D could have shed on the issues on which Mr. Cummins, and ultimately the Commission, had to form a view. While acknowledging, again, that my function goes beyond a mere reviewing function, I should be slow to second-guess the judgment of an experienced investigator on a question of this kind.

73. My conclusion on this point is reinforced by the fact that it is reasonable to assume that – unless there are criminal proceedings – the officers in question will give evidence to the inquest into the death of Mr. Tucker, where they can in principle be cross-examined. Ms. Kaufmann submitted that if it was necessary for the proper discharge of the Commission's duty to investigate that the officers should be interviewed, that duty cannot be avoided by shrugging it onto the family at the inquest. That is no doubt correct; but in circumstances where a senior investigator is himself satisfied that he has sufficient information for his own purposes, and the only question is whether the family or others might take a different view, or wish to probe further than he thinks necessary, it is legitimate for him to take into account the fact that they will have the opportunity to pursue their own questions at the inquest.

C. SAUNDERS: "DISCLOSURE"

74. S. 21 of the 2002 Act (as amended by the 2005 Act) imposes duties on the Commission and others with regard to the supply to "interested persons" (defined in s-s. (5)) of various specified kinds of information about investigations being carried out under

Part 2 of the Act. By s-s. (2A), where a DSI matter is being investigated relatives of a person who has died are interested persons. Ms. Saunders in her Claim Form complained of various alleged breaches by the Commission of its obligations under s. 21. The main complaint – and the only one with which I need for the present be concerned - was of a failure to supply copies of the statements received from the principal officers; and no doubt for that reason the complaints under s. 21 were described under the general (though arguably inapt) shorthand of “disclosure”. Mr. Owen has since made it clear that it is the Claimant’s case that even if she is not entitled to see copies of the actual statements she should at least be informed of their gist. The question of greatest interest to the family is why the officers who fired thought it necessary to do so. That can only be established by reference to those officers’ own accounts; yet, while the family have received a good deal of information on matters of less importance, they have been given no information on that central question. I have great sympathy with their concern on this point, but of course their very understandable wishes are not the only factor that has to be taken into account.

75. Following developments in the course of the hearing, into which I need not go, it was agreed by both parties that consideration of the claim for breach of s. 21 should be adjourned. I was however invited to rule on a discrete issue of statutory construction which would be relevant to whether, and if so to what extent and on what basis, the complaint of failure to disclose the officers’ statements could be maintained; and it is plainly sensible that I should do so.

76. The relevant provisions of s. 21 are as follows:

(6) In any case in which there is an investigation of ... [a] ... DSI matter in accordance with the provisions of Schedule 3—

(a) by the Commission, or

(b) under its management

it shall be the duty of the Commission to provide the interested person with all such information as will keep him properly informed, while the investigation is being carried out and subsequently, of all the matters mentioned in subsection (9).

...

- (9) The matters of which the interested person must be kept properly informed are—
- (a) the progress of the investigation;
 - (b) any provisional findings of the person carrying out the investigation;
 - (ba) whether the Commission or the appropriate authority has made a determination under paragraph 21A of Schedule 3;
 - (c) whether any report has been submitted under paragraph 22 or 24A 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.

(The “determination” referred to under (ba) is a decision made in the course of an investigation that (to paraphrase) a matter should be referred for potential disciplinary or criminal proceedings. Likewise, the paragraphs referred to under (c) provide for the submission of the investigator’s final report to the Commission, which triggers an obligation on the part of the Commission to consider whether the matter should be so referred.) There is a similar obligation under s-s. (7) on “appropriate authorities” (see para. 6 above) conducting their own investigations.

77. The duty under s. 6 is subject to certain exceptions prescribed by reg. 12 of the Police (Complaints and Misconduct) Regulations 2004. I need not consider that provision in detail for present purposes, but I should note that it permits the Commission to withhold information where (to summarise) it believes that its disclosure would be harmful in one of a number of specified ways – the so-called “harm test”.

78. The Claimant’s case is that she is entitled (subject to reg. 12) to disclosure of the officers’ statements, or at least to be told the gist of their contents, under s-s. (9) (a) – that is, because that constitutes information about “the progress of the investigation”. Ms. Rose submitted that that is a misunderstanding of the scope of the Commission’s obligation. On her submission, the phrase “the progress of the investigation” is concerned essentially with the steps which the Commission (or authority investigating under its management) has taken – e.g. that it has received statements from such-and-such a witness, commissioned such-and-such forensic tests, or carried out such-and-such searches; no doubt also it would cover predictions as to when a final report might

be ready. It is not concerned with providing information on an ongoing basis as to the content of information received from witnesses or others. That is, she submitted, consistent with the terms of heads (b)-(e) under s-s. (9), which are concerned with ensuring that interested persons are informed of the major procedural stages in an investigation and its consequences. She also pointed out that interested persons are entitled, under (b), to be told of the investigator's "provisional conclusions". She said that it would be remarkable in the context of those very specific and hard-edged provisions if the Commission were to be subject to a general obligation to give a running update on all significant substantive information received which might feed in to the investigator's provisional conclusions. Such an obligation would also be potentially very onerous given the limitations on the Commission's resources. Ms. Rose acknowledged that the Commission had in fact in this case provided a fair amount of such "substantive" information, but she said that it had done so as a matter of goodwill rather than of legal obligation.

79. Mr. Owen responded that such a construction would drain the obligations under s-s. (6) and (9) (a) of all substance. He said that the policy of the Act was, as expressly stated in the Explanatory Notes, "to achieve maximum openness" and he referred to the evidence of Ms. Shaw as showing that part of the complaint about the previous regime was that families of victims were left in the dark about what was happening when their complaints were investigated. He made two specific points:

- (1) He asked why the exception provided for in the 2004 Regulations, on the basis of "the harm test", was necessary if all that the Commission would otherwise have to disclose was "the most basic nuts and bolts details of the steps taken".
- (2) He referred to para. 5.5.7 of the Guidance, which is in the following terms:

The IPCC recommends that in all cases where complainants or those associated with them are witnesses, their statements should be agreed and signed by them prior to disclosure. This should help to avoid problems including accusations that statements have been altered later. Third parties should be informed before they make a statement that any information they provide may be used in criminal or disciplinary proceedings and that it may be shared with the complainant/family, subject to the harm test. Personal information should not be disclosed unless it is material to the case.

He submitted that that showed that it was contemplated that interested persons would be given copies of statements received from witnesses.

80. In my judgment neither submission is entirely correct. I certainly do not accept that the Commission is under any obligation as such to disclose to interested persons the statements received from witnesses in the course of the investigation. Such a specific obligation cannot be conjured out of the language of s-s. (9) (a), for essentially the reasons given by Ms. Rose. Even if it were permissible to construe the statute by reference to the Guidance, I can see nothing in para. 5.5.7 of the Guidance, on which Mr. Owen relies, to suggest that the disclosure of witness statements (as opposed to information derived from them) to interested persons, let alone such disclosure while the investigation is still proceeding, is contemplated. Nor does the existence of reg. 12 presuppose disclosure of such witness statements (or even their gist): it is not difficult to conceive of circumstances where disclosure of the progress of the investigation, even on Ms. Rose's construction, or of matters otherwise falling for disclosure under heads (b)-(e), could cause serious harm.

81. However, I do not believe that it is necessary to go to the opposite extreme. I see nothing in the phrase "the progress of the investigation", or in the statutory context, to require it to be interpreted in the narrowly procedural manner submitted by Ms. Rose. On the contrary, the general purpose of the Act seems to me to require a more generous interpretation. Whatever the formal status of the Explanatory Notes, I am satisfied from all the material that I have seen – not least the terms of the Commission's own Guidance - that it is part of the policy of the Act that the Commission should be as open as is reasonably possible in the communication of information to interested persons. The fact that such-and-such a witness has given such-and-such a piece of significant information seems to me to fall naturally within the concept of information about "the progress of the investigation". I am encouraged in reaching this conclusion by the fact that it seems closer to the Commission's actual practice than the approach advocated by Ms. Rose. Without wishing to stray into areas which may be the subject of a further hearing, it is evident from the material submitted to me that the Commission has provided Mr. Saunders' family with a great deal of detailed information, including some witness statements and (for example) the video footage taken by police helicopters during the siege.

82. Having said that, what degree of information is necessary to satisfy the obligation under s-s. (6) inevitably requires an exercise of judgment as to what is necessary to keep interested persons “properly informed” and as to what truly affects “the progress of the investigation”. It is plainly not the case that interested persons are entitled to be informed of every minor development or twist and turn of the investigation: that would place quite unreasonable burdens on the authority conducting the investigation (which might be the police or the Commission) and be of little value to complainants or (in the case of a fatality) their families. The judgment of what information requires to be disclosed can in the nature of things only be made by the body conducting the investigation (here, the Commission), though of course subject to the intervention of the Court where that judgment is exercised irrationally or otherwise unlawfully. Although I shall not try to specify all the factors which fall to be taken into account in making that judgment (apart from the discrete “harm test” under reg. 12), one important consideration in the case of witness evidence will be whether that evidence is in a sufficiently coherent and settled form for it to be reliably communicated, either in the form of the statement itself or by a summary which gives its gist. Given the limited nature of the question on which my ruling is required, I do not propose to say more.

83. *Postscript.* Before it was agreed to adjourn this issue, I had occasion to read the correspondence between Ms. Saunders’ solicitors and the Commission. I have not heard submissions about that correspondence, and I make no criticisms. But I would wish to remind both parties that their relationship ought not to be an adversarial one. The paramount interest of both is that there should be a thorough investigation, carried out with as much speed as the circumstances allow, into how Mark Saunders came to be shot. The Commission acknowledges a duty to keep his family properly informed about the progress of that investigation. I hope that the parties will be able in future to deal with one another in a way which furthers those objectives.

CONCLUSION

84. The claim in *Tucker* is dismissed in its entirety. The claim in *Saunders* is dismissed save that the question whether there has been a breach by the Commission of its duty under s. 21 (6) of the 2002 Act is adjourned generally, with liberty to either party to apply for it to be restored.