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Case No: CO/1021/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/11/2016

Before :

LORD JUSTICE ELIAS
MR JUSTICE MALES

- -

Between :

The Queen on the application of CHIEF EXECUTIVE OF THE IPCC	**Claimant**
- and -	
INDEPENDENT POLICE COMPLAINTS COMMISSION	**Defendant**
- and -	
(1) DOROTHY BEGLEY	
(2) PC DONNELLY	
(3) PC MILLS	
(4) PC WRIGHT	
(5) PC FOX	
(6) THE CHIEF CONSTABLE OF GREATER MANCHESTER POLICE	**Interested Parties**

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Mr Jeremy Johnson QC (instructed by **IPCC**) for the **Claimant and Defendant**
Mr Stephen Killalea QC and Mr Peter Edwards (instructed by **Lexent Legal Solicitors**) for the **First Interested Party**
Mr Hugh Davies QC (instructed by **Slater Gordon**) for the **Second to Fifth Interested Parties**
Miss Anne Whyte QC (instructed by **Greater Manchester Police**) for the **Sixth Interested Party**

Hearing date: 16 November 2016

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Approved Judgment

Lord Justice Elias :

1. This is the judgment of the court to which we have both contributed.

2. On 10 July 2013, police officers were called to the house of Jordon Begley. His mother, Dorothy Begley, had telephoned the police because she was concerned that Jordon Begley might become violent. He had been drinking and was upset about having been accused of stealing a handbag. His mother said that he had a knife and wanted to go outside to confront his accusers. A number of officers arrived at the scene. After some interaction with Mr Begley, PC Donnelly decided to fire his Taser gun at Mr Begley. PC Donnelly maintains that he did so because he thought Mr Begley might have a knife in his pocket, and Mr Begley was walking towards the officer. Once tasered, Mr Begley fell to the floor and was restrained face-down by more officers arriving at the scene. These included officers Graham, Wright and Fox. In the course of bringing Mr Begley under control, one of the officers, PC Mills, delivered two strong punches referred to as "distraction strikes" to Mr Begley's back to enable him to be handcuffed. Shortly after Mr Begley was handcuffed, it became clear that he was very unwell. An ambulance was called to take Mr Begley to hospital. Tragically, he died shortly thereafter.

3. The Independent Police Complaints Commission (IPCC) investigated the matter. This is necessary in such cases to ensure that the state complies with its procedural obligations under article 2 of the ECHR which protects the right to life. The state must ensure proper accountability when someone dies as a result of action by state agents. The IPPC officer with overall responsibility for the investigation was Commissioner Dipple-Johnstone. He appointed Stephen Liston to carry out the investigation. Mr Liston produced an investigation report dated 23 April 2014. Under the statutory regime which we discuss below, such a report is required to express an opinion whether or not the officers have a "case to answer" in respect of misconduct or gross misconduct. Mr Liston's report concluded in respect of each officer that there was no case to answer.

4. The legislation requires the IPCC to send such a report to the Chief Constable of the relevant police authority, which in this case was the Greater Manchester Police (GMP). Commissioner Dipple-Johnstone did so on 24 April 2014. He invited the police, in accordance with the legislation, to reply with a memorandum stating whether or not the Chief Constable (acting through an Assistant Chief Constable) agreed with the report's finding that there was no case to answer in either misconduct or gross misconduct. In a letter dated 27 August 2014 the GMP accepted the finding of the investigation. The final decision, however, rested with the IPCC who can if necessary override the views of the Chief Constable if they are not deemed to be appropriate. That did not happen in this case. Commissioner Dipple-Johnstone deemed them to be appropriate and agreed that no action should be taken. The officers were notified accordingly.

5. Separately an inquest into the death of Jordon Begley commenced on 1 June 2015. It was heard by the Coroner with a jury. The jury answered a series of questions posed by the Coroner. The narrative verdict was delivered on 6 July 2015. This verdict was more critical of the officers than Mr Liston's report had been. The jury found that Mr Begley had died from a stress-induced cardiac arrest and that the discharge of the Taser and the manner in which the police officers restrained Mr Begley materially

contributed to his death. They also found that the length of time for which the Taser was deployed (over 8 seconds) was not reasonable. They found that there was no need for PC Mills to have punched Mr Begley twice. They found that the police had not been sufficiently concerned with Mr Begley's welfare once he was handcuffed.

6. The jury's findings in the inquest are not directly relevant to this hearing, as all counsel agree. The significance of the verdict was that it prompted the IPCC to think again. On the day the narrative verdict was issued, Commissioner Dipple-Johnstone decided that the IPCC should review the original investigation to determine whether or not there were grounds to re-open it. The IPCC was cognisant of the Divisional Court's decision in *R (on the application of Demetrio) v Independent Police Complaints Commission* [2015] EWHC 593 (Admin), subsequently approved by the Court of Appeal [2015] EWCA Civ 1248, in which the Court held that an investigation could be reopened where there were compelling reasons to do so. Commissioner Cindy Butts was charged with the review. She took into account the inquest verdict, and sought submissions from the GMP, the officers and Dorothy Begley (Mr Begley's mother) as to whether the investigation should be revisited. She also obtained a report from an independent reviewer, Mr Cummins, who recommended that the original report should stand, despite accepting that there were inconsistencies as between the jury verdict and Mr Liston's investigation report. He concluded that the original report met its terms of reference and that there were no further lines of inquiry which needed to be explored.

7. In the light of all these considerations, Commissioner Butts concluded that the investigation should be re-opened. She produced a detailed report in which she expressed her view there were various public law defects in the original report which justified quashing the original determination. The IPCC considered that in the circumstances it should obtain a formal order from the court to quash the report and the consequential decision that there was no case to answer.

8. So we have the unusual situation that the claimant in this case is the chief executive of the defendant, IPCC, both of whom wish the investigation to be quashed. They were represented by the same counsel, Mr Johnson QC. The first interested party, the mother of the deceased, who was separately represented by Mr Killalea QC, also wants the decision that there is no case to answer to be overturned. Opposition to this course comes from the second to fifth interested parties. They are the police officers who have been led to believe that no action would be taken and thus would potentially be prejudiced by a new investigation. They were represented by Mr Davies QC. The GMP is the sixth interested party, represented by Ms Whyte QC, who sent the court a brief skeleton argument which indicated that they were neutral as to the question whether or not the report should be quashed.

The legal framework

9. It is unnecessary to set out all of the applicable legislation. For present purposes the following summary will suffice.

10. The IPCC was created by section 9 of the Police Reform Act 2002. Its functions, set out in section 10, include securing the maintenance of suitable arrangements for the recording of matters from which it appears that a person has died during or following contact with the police, as well as securing that public confidence is established and

maintained in the existence of such arrangements. These arrangements include the carrying out of an investigation into a "conduct matter" or a "death or serious injury matter". The former is defined by section 12 as a situation where there is "an indication" that a police officer may have committed a criminal offence or behaved in a manner which would justify the bringing of disciplinary proceedings. The latter means any circumstances (other than those the subject of a complaint or which amount to a conduct matter) where a person dies or suffers serious injury and there is an indication that this may have been caused or contributed to by contact with a police officer. The IPCC must exercise its powers and perform its duties in the manner that it considers best calculated for the purpose of securing the proper carrying out of its functions.

11. The effect of these provisions is that whenever a person in police custody dies or suffers serious injury, there will be an investigation. If necessary, an investigation into a "death or serious injury matter" may be transformed into a conduct investigation during the course of the investigation.

12. The procedure for the conduct of investigations is governed by Schedule 3 to the 2002 Act. Typically in a death or serious injury matter, the investigation will be carried out by the IPCC itself. In such a case the IPCC must designate a Commissioner to take responsibility for the investigation. He or she will appoint an investigator to produce a report.

13. Paragraph 22(7) of Schedule 3 empowers the Secretary of State to make regulations as to matters which must be included in any report. Regulation 20 of the Police (Complaints and Misconduct) Regulations 2012/1204 made pursuant to this paragraph specifies three matters which must be included in any report. This regulation lies at the heart of the present case. It provides:

> "… on completion of an investigation the investigator's report shall –
>
> (a) provide an accurate summary of the evidence;
>
> (b) attach or refer to any relevant documents; and
>
> (c) indicate the investigator's opinion as to whether there is a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer."

14. Thus it is not the function of the investigator to decide whether criminal or disciplinary proceedings should be brought. His function is to produce a report which provides an accurate summary of the evidence and states his opinion (which must obviously be reasoned) whether there is a case of misconduct or gross misconduct to answer.

15. In potential disciplinary cases, in accordance with paragraph 23(6) of Schedule 3 to the 2002 Act, the IPCC must send the report to the "appropriate authority". This is the chief officer or an acting chief officer of the police force concerned, although in practice (as in this case) this role is usually delegated by the Chief Constable to an Assistant Chief Constable or officer of equivalent rank. That officer must then

exercise an independent judgment about whether, in the light of the report, he or she considers that the relevant police officer does or does not have a case to answer. The authority must notify the IPCC as to what action, if any, it proposes to take (para. 23(7)). However, the authority does not have the last word. Under paragraph 23(8)(a), the IPCC must decide whether or not this determination is "appropriate". Paragraph 23(8)(b) then provides that the Commission shall, in light of the above, decide whether or not to make a recommendation under paragraph 27, i.e. a recommendation that disciplinary proceedings are brought against the police officer concerned. If the authority does not accept such a recommendation, the Commission has power to direct it to do so (paragraph 27(4).

16. Accordingly the investigator's report is only one step in the process of determining whether criminal or disciplinary proceedings should be brought against an officer and the investigator's opinion as to whether there is a case to answer does not bind the decision makers. However, the report (including the investigator's reasoned opinion as to whether there is a case to answer) is obviously an important step. The contents of the report will certainly be the focus of any future decision making and are likely in practice to heavily influence those decision makers.

Guidance

17. Section 22 of the 2002 Act enables the IPCC to issue guidance to police bodies and officers as to the way in which it will perform its functions. Guidance issued in 2013 stated, in paragraph 11.13, that:

> "In reaching conclusions, an investigator must apply the civil standard of proof, that is 'the balance of probabilities' – whether it is more likely than not that the conduct alleged did, in fact, take place."

18. It went on to elaborate on what is meant by this standard of proof and how an investigator should go about resolving conflicting accounts.

19. This was the guidance in force when the report in the present case was issued, but it was common ground before us that this guidance was wrong and misleading. As the Court of Appeal made clear in *R (Chief Constable of West Yorkshire Police) v Independent Police Complaints Commission* [2014] EWCA Civ 1367, it is not the role of an investigator to reach final conclusions as to whether misconduct has been committed, or to resolve conflicting evidence, but only to express an opinion whether or not there is a case to answer. In the *West Yorkshire* case Sir Colin Rimer, in a judgment with which Beatson and Gloster LJJ concurred, said this (paragraph 50):

> "A "case to answer" in that context means a case to answer before a criminal court and/or a disciplinary tribunal. It is, one might think, obvious that if the investigators' task is to report their opinion as to whether there is such a case to answer before another tribunal, it is not their function also to purport to *decide* the very question or questions that are raised by such a case."

20. Sir Colin then explained why it was positively wrong for an investigator to express a view on the merits of the case. He said that

> "…for … the investigators to purport to decide the matter themselves is potentially prejudicial to the fairness of the proceedings before that other tribunal …"

21. New guidance issued in May 2015 replaces the earlier guidance to give effect to the *West Yorkshire* ruling. It provides, under the heading of "The 'case to answer' test":

> "11.31 The investigator should indicate that in their opinion there is a case to answer where there is sufficient evidence, upon which a reasonable misconduct meeting or hearing could, on the balance of probabilities make a finding of misconduct or gross misconduct.
>
> 11.32 It follows from the case to answer test, that where the investigator's opinion is that there is a case to answer, a subsequent misconduct hearing or meeting may, nonetheless, make different findings of fact and/or about whether the conduct breached the Standards of Professional Behaviour. Therefore, although the investigators must still explain the evaluation of the evidence that has caused them to come to such a conclusion, they must be careful to stop short of expressing findings on the very questions that will fall to be answered by the disciplinary proceedings, court or tribunal which may consider the matter."

These paragraphs indicate that it is not for the investigator to decide whether on the balance of probabilities there has been misconduct or gross misconduct but rather whether that conclusion would be open to a reasonable body assessing the facts and applying the law. This new formulation is still not in our view entirely satisfactory because para.11.32 suggests that a disciplinary body may make different findings of fact from the investigator; but the investigator should not be making findings of fact at all, at least not where there is credible conflicting evidence. It would be right to say, however, that the disciplinary body may reach findings of fact which are properly open to it on the evidence and yet are contrary to the findings which the investigator would make, if he or she were to make them. The investigator has to be alive to that possibility so that if there is a case to answer on one legitimate construction of the facts, the investigator has to recommend that there is a case to answer. The investigator's own opinion whether the case should succeed is immaterial and should not be revealed. Of course, where the investigator finds that there is no case to answer, it necessarily follows from the fact that in the investigator's view no reasonable body could think otherwise that the investigator himself, as a reasonable man, also considers that there was no misconduct. But the converse is not true: there may be a case to answer even though the investigator would personally find that there has been no misconduct.

The alleged errors of law

22. The claimant's primary case is that the investigator applied the wrong test when determining whether there was a case to answer. This was reinforced by two additional grounds alleging a breach of regulation 20, namely that the investigator

failed to provide an accurate summary of the evidence and as a consequence had failed to attach or refer to all of the relevant documents

Ground 1: application of the wrong test

23. Mr Johnson placed this at the forefront of his submissions. He focused on the way in which the investigator had expressed his conclusions. In all the investigator made six "determinations" and expressed each of them in similar terms. The first determination" was this:

> "On the basis of the evidence collected it is concluded that on the balance of probabilities, PC Donnelly has no case to answer for gross misconduct in respect of the allegation that he used excessive force on Mr Begley by deploying his Taser in contradiction to his training in the use of Taser."

24. The formula that "On the basis of the evidence collected it is concluded that on the balance of probabilities, X has no case to answer for gross misconduct …" was repeated for each determination.

25. These determinations were said to follow from a series of what were described as "Findings". These Findings consisted of positive and unqualified statements, including in summary statements to the effect that (1) the police had responded appropriately to the request for assistance by Mrs Begley, (2) PC Donnelly's initial decision to discharge his Taser was in accordance with his training and the national decision-making model (albeit that the investigator recommended training to improve officers' awareness of the duration of cycling of the Taser device), (3) the restraint of Mr Begley was appropriate and in line with the officers' training, (4) the post Taser procedure and aftercare performed by the officers was appropriate and in line with guidance, with any deviations from guidance having sound operational reasons, and (5) all reasonable care was provided to Mr Begley to a high standard by well-equipped and well-trained officers.

26. Counsel submits that the formulation of the investigator's "determinations" displays an error of law of the kind identified in the *West Yorkshire* case, no doubt because the investigator was following the same defective guidance. The investigator is not asking whether a reasonable disciplinary panel, having regard to all the evidence and in particular the conflicting evidence, could on the balance of probabilities find that there was misconduct or gross misconduct. Rather he is reaching his own conclusion about that. Counsel accepts that if the investigator had in fact applied the right test but inaccurately expressed himself, that would not justify quashing the report. But he says that it is plain that when one focuses on the reasoning itself, including the various "Findings" referred to above, that is not what the investigator did. He has made no reference to the possibility that given certain conflicts in the evidence of the officers, there is potentially a number of factual conclusions which a reasonable body could reach, depending upon how it assessed the evidence. Those factual conclusions could in turn impact upon the decision whether misconduct or gross misconduct has been committed.

27. Mr Davies QC, counsel for the police officers, robustly sought to defend the report. He contended that although the way in which the investigator sought to express

himself was unfortunate, and potentially ambiguous, a careful consideration of the substance of the report showed that in essence he did adopt the right test. In any event, he submitted that it was clear that even if all the alleged areas of factual dispute were determined in the manner most adverse to the police, there was no basis for saying that a reasonable disciplinary body could find any misconduct, let alone gross misconduct. He took us to various policies and guidance documents and contended that given the circumstances facing the officers and the need to make decisions in the heat of the moment, there was simply no basis for saying that any of the officers had acted improperly.

28. We accept that if the investigator's formulation of his "determinations" was a mere infelicity in the way in which the case to answer test had been expressed, there would be no basis for quashing the decision. In our judgment, however, the error runs far deeper than that. On any sensible reading of this report as a whole it is plain that the investigator was reaching his own determination as to whether misconduct or gross misconduct had been committed. The premise of the investigator's analysis was that unless he was satisfied on the balance of probabilities that misconduct had been committed, there was no case to answer. In so doing he was following the guidance which *West Yorkshire* later said was erroneous. Nowhere do we find the investigator recognising that potentially conflicting evidence could be evaluated in a number of ways, or applying his mind to the questions whether a reasonable disciplinary body could accept the evidence that was least favourable to the police officers or, if it did, whether it might go on to conclude that there had been misconduct. Rather, as explained above, he made a series of findings, on the basis of which he determined that no misconduct or gross misconduct had been committed. Mr Davies' contention that the investigator found that there was no misconduct on an assumption about the facts least favourable to the officers finds no echo in the report at all. In any event, even that conclusion would not be enough; it would still be necessary for the investigator to conclude that no reasonable body could find otherwise, and to give his reasons for so concluding.

29. In our judgment this error fatally undermines the validity of the report. It is quite impossible for us to say, as Mr Davies suggested that we should, that in all the circumstances the only conceivable conclusion which any investigator could reach is that there is no case to answer. It is not the function of this court to make that decision. We are not equipped to do so. More importantly, we are not the body constitutionally charged with making it.

30. Given our findings on this principal issue, we do not strictly need to engage with the other grounds. But since we heard argument about them, we will briefly touch upon them.

Grounds 2 and 3: inadequate statement of facts and failure to refer to documents

31. We would preface our consideration of these two grounds with the following observations. First, we accept the submission of Mr Johnson that regulation 20 seeks to ensure that the report contains a sufficiently detailed summary of the evidence and reasoning of the investigator to enable the Chief Constable as the appropriate authority, and the IPCC itself, which ultimately has to make the decision whether there is a case to answer, to take a properly informed view when determining that question.

32. Second, it follows from this that it is not the function of the investigator to provide an exhaustive account of the evidence, only such as is material to the matters in issue. Inevitably there is an area of judgment for the investigator about what is material and what is not, and no court will interfere with a report simply because with hindsight it may be thought preferable to have referred to a particular piece of evidence or a particular policy or guidance.

33. Third, what is relevant will depend upon what potential disciplinary issues arise in the circumstances. The nature of the investigation, and the matters which may need to be specifically covered in interviews and statements, will be determined by the nature of the disciplinary actions which potentially could, on the facts, arise. So in this case it would involve asking such questions as whether the use of the Taser was justified at all; if so, whether it was used appropriately; whether the use of force by PC Mills was necessary and if so, proportionate; and whether the procedures were properly complied with once Mr Begley was brought under control. In our view evidence material to those issues (and any others thought by the investigator to be potentially relevant) should be summarised and the investigator would need to consider whether, having regard to the fact that there may be a number of possible findings of fact, there was a case of misconduct or gross misconduct to answer.

34. Mr Johnson identified a number of areas where he said that the report was defective in failing to provide an adequate statement of the relevant evidence. Mr Killalea, for the family, suggested further examples. But given our finding on the first ground, we do not think that we need consider each of those matters. We will focus on two alleged failings which we believe are sustained in this case.

35. First, there was conflicting evidence about whether Mr. Begley had his hands in his pockets when the Taser was discharged. PC Donnelly said that this was material to his decision to use the Taser because he thought that Mr Begley might have a knife in his pocket and he was advancing towards the officer. Other officers gave conflicting evidence about precisely where Mr Begley's hands were. Mr Davies submits that this does not matter because wherever Mr Begley's hands were, it was plainly appropriate to use the Taser. He may ultimately be right about that, but in our view it was nonetheless relevant for the investigator to draw attention to the fact that there were differences about this, particularly since this was a matter which weighed with PC Donnelly himself. If the investigator were to take the view that the fact that there were differences in the officers' accounts of the incident could not properly be considered material by any disciplinary panel, as Mr Davies submits is the case, then we think that in the circumstances of this case he should have explained why.

36. The second relates to the obligation under one of the policy guidance manuals to advise someone who has been subject to a Taser blast that its effect is only temporary and that the individual should breathe deeply. None of the officers said that this information was given (although nor did they say that it was not). Mr Davies says that it would not have been possible to give the warning because the officers were alerted to Mr Begley's distress almost immediately after he had been brought under control. But again there was conflicting evidence about that which in our view the report should have noted. That conflict would need to be resolved before it could be said whether or not the policy had been infringed.

37. Accordingly, in our view the report did not adequately set out the material evidence on this matter. This reinforces our view that it was an unsatisfactory report which cannot stand.

Discretion

38. Mr. Davies advanced some powerful arguments why, even if we were against him on the law, we should exercise our discretion not to quash the report. His principal reason is that the delays have already been very significant and a new investigation may, if past precedent is any guide, take years rather than months. It is simply unacceptable for the police officers to be kept in limbo in this way. They are on restricted duties which bars them from the more interesting and challenging work and moreover they cannot even leave the force and obtain employment elsewhere because the police have the power to refuse a resignation and place an officer on suspension until the process is completed. Of course, if the decision is taken that there is a case to answer, the final resolution of this issue will take even longer.

39. Second, the new investigator would have the unenviable job of looking at what are now voluminous documents and forming a view on the case without even having carried out the original interviews. Alternatively, he or she would have to start from scratch, interviewing officers and other parties years after the incident when memories will inevitably be poor. There is no guarantee that a reliable investigation could now be completed.

40. We are very alive to the difficulties which the individual officers have to face and the stress they will undoubtedly be under. We are concerned also that Mr Johnson for the IPCC could give no assurance as to how long a new investigation may take. However, we do not think that in a case of this nature those considerations can override the need for a proper investigation. A man's life has been lost while he was under retraint by the police. If there has been wrongdoing, the individuals concerned should be accountable. If there has not, that should be explained in a report which fulfils the statutory requirements. There needs to be a proper investigation to meet the requirements of article 2 and there has not been. Furthermore, the IPCC has an obligation to ensure public confidence that the police are being subjected to appropriate procedures which properly hold them to account. The answers from the jury in the inquest have understandably raised some concerns about the conduct of the police. In our view that consideration also dictates that a proper report must be produced. It will not be an easy task for the investigator, but we are satisfied that it will be a feasible one.

41. We have borne in mind the argument of Mr Davies that the investigation report was not conclusive and that the Commissioner and the Chief Constable had to review it and were in a position to put it right. But that takes him nowhere if they did not in fact put it right, and they did not. The reality is that the report set the contours of the subsequent consideration and tainted the decisions both of the Chief Constable and the IPCC itself. Mr Davies sensibly did not seek to argue otherwise.

42. In our judgment we should quash the report and the consequential decision that there was no case to answer. We should emphasise that this does not mean that there is necessarily a case to answer for any of these officers; we have no view about that. A

new decision will have to be taken in the light of the fresh report and nothing in this judgment is intended to indicate, one way or the other, what that decision should be.

43. We do not think that it would be appropriate to tie the hands of the investigator as to how he or she should conduct the new investigation. We would have thought that it would make sense to rely on the existing material and perhaps to carry out supplementary interviews focused on particular issues which the investigator believes are potentially relevant and which have not been satisfactorily explored. But it would not be right for us to be prescriptive in a matter of this nature.

44. We had observations from the GMP who expressed two concerns. The first was that inquest proceedings should not determine the contents of independent IPCC investigation reports. We agree, but that is not what has happened here. The only relevance of the inquest is that the jury's verdict prompted the IPCC to look again at the contents of the report which had been produced. That further look lead to the conclusion that the investigator had applied the wrong legal test, and had in some respects failed accurately to summarise the evidence before him. The second concern was that the terms of reference of a new investigation might be wider than on the last occasion. We see no reason why that should be so.

45. Finally, we note that the evidence of the deceased's mother asserts that the investigator, Mr Liston, never had any intention of carrying out a proper investigation and that his report was "nothing but an incompetent whitewash". Mr Killalea's written submissions make much the same point in more measured language. That submission amounts to an allegation of bias and/or bad faith. It was sensibly not pursued orally but in fairness to Mr Liston we should say that in our judgment it is wholly without foundation.

Disposal

46. This application for judicial review succeeds. We quash the report and the consequential decision that there was no case to answer. The matter will have to be considered afresh.