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Case No: AC-2023-LDS-000049
CO/456/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN LEEDS

Leeds Combined Court Centre
The Courthouse, 1 Oxford Row, Leeds
West Yorkshire
LS1 3BG

Date: 26/04/2024

Before:

MRS JUSTICE HILL DBE

- -

Between:

The King **on the application of** **GLENN SKELTON**	**Claimant**
- and –	
DIRECTOR-GENERAL OF THE INDEPENDENT OFFICE FOR POLICE CONDUCT	**Defendant**
- and -	
(1) OFFICER B50 **(2) THE CHIEF CONSTABLE OF HUMBERSIDE POLICE**	**Interested Parties**

- -
- -

Tim Moloney KC and **Angela Patrick** (instructed by **Hudgell Solicitors**) for the **Claimant**
Anne Studd KC and **Alex Ustych** (instructed by the **Independent Office for Police Conduct**) for the **Defendant**
Sam Green KC (instructed by **Gorvins LLP**) for **First Interested Party**
Jason Beer KC (instructed by **South Humberside Police Legal Services**) for the **Second Interested Party**

Hearing dates: 26 and 27 February 2024
Further written submissions: 5, 12, 20 and 27 March 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 26 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

Mrs Justice Hill:

1: Introduction

1. On 29 November 2016 Lewis Skelton was shot twice by an Authorised Firearms Officer ("AFO") serving with Humberside Police, referred to during the inquest and later proceedings as "B50". Mr Skelton died as a result of his injuries.

2. Humberside Police referred the circumstances of Mr Skelton's death to the Independent Police Complaints Commission ("the IPCC"), as a "death or serious injury" ("DSI") matter, as they were required to do. The IPCC investigated the matter.

3. The terms of reference required the lead IPCC investigator to assess under paragraph 21A of Schedule 3 to the Police Reform Act 2002 ("the 2002 Act") whether there was an "indication" that a person serving with the police "may" have "(a) committed a criminal offence, or (b) behaved in a manner which would justify the bringing of disciplinary proceedings". These would have invoked the special procedures and the investigation would have become an investigation into the conduct of the officer or officers. .

4. The investigator's report dated 27 November 2017 explained why the conclusion had been reached that there was no such indication. On receipt of the report, the Commission delegate reached the same conclusion for the purposes of paragraph 24A of Schedule 3. Accordingly, the investigation remained an investigation into a DSI matter, and there was no consideration of criminal or misconduct proceedings in relation to B50 or any other officer.

5. On 15 October 2021 the Jury at the inquest into Mr Skelton's death returned a conclusion that he had been unlawfully killed.

6. Thereafter, the Defendant, the IPCC's successor, considered whether to order a re-investigation of the DSI matter under s.13B(2) of the 2002 Act. This provides a power to re-investigate if the Defendant's Director General is satisfied that there are "compelling reasons" for doing so.

7. The Defendant's *Re-investigation of an IOPC investigation policy* (January 2021) provides that in order to find compelling reasons the decision maker must be satisfied of the following:

> "A. the original investigation was flawed in a manner that had a material impact on subsequent decisions on discipline, performance and/or referral to the Crown Prosecution Service (CPS), and/or
>
> B. there is significant new information that requires further investigation and a real possibility that the new information, had it been available, would have led wholly or partly to different decisions on discipline, performance and/or referral to the CPS, and
>
> C. it is necessary to require a re-investigation in the public interest".

8. On 3 November 2022 the Defendant identified two flaws in the original investigation for the purposes of Condition A of the policy but decided not to re-investigate under s.13B(2). The Claimant, Mr Skelton's father, seeks judicial review of that decision, with permission having been granted by Fordham J on 18 October 2023. He advances four overlapping grounds:

> **Ground 1**: The Defendant did not apply the criteria identified in its own policy in reaching the conclusion it was not satisfied that there were compelling reasons to re-investigate.
>
> **Ground 2**: The Defendant's decision that the failures identified in the original investigation were not material flaws which impacted on subsequent decisions on discipline, performance and/or referral to the CPS was irrational or unreasonable.
>
> **Ground 3**: The Defendant failed to give due consideration or adequate weight to all relevant considerations in the application of the criteria in the policy, including whether there were material flaws in the original investigation or whether there was a real possibility that new information would have led to different decisions.
>
> **Ground 4**: The Defendant's conclusion that a re-investigation was not in the public interest and that there were not compelling reasons to re-investigate (i) had failed to give due consideration or adequate weight to relevant considerations; and/or (ii) had given undue consideration or weight to irrelevant considerations; and/or (iii) was irrational or unreasonable.

9. The Defendant contends that its decision was lawful in all respects and is supported in that position by both Interested Parties, namely B50 and the Chief Constable of Humberside Police.

10. It is understood that this is the first case to consider the extent of the Defendant's power under s.13B, which came into effect on 1 February 2020, and the practical effect of its policy in relation to that power.

11. On 23 January 2023, the Divisional Court (Stuart-Smith LJ and Fordham J) dismissed a claim for judicial review brought by B50 of the Assistant Coroner's decision to leave the issue of unlawful killing to the Jury and the Jury's conclusion that the Claimant had unlawfully killed Mr Skelton: *R (on the application of Police Officer B50) v Her Majesty's Assistant Coroner for The East Riding of Yorkshire and Kingston upon Hull & Ors* [2023] EWHC 81 (Admin).

12. I wish to acknowledge, as the Divisional Court did at [6] of its judgment, the dignity and courtesy that has been shown by all the parties to this claim; and to reiterate the Divisional Court's observations about the impact these events have had on all concerned.

13. I have been greatly assisted by the written and oral submissions from all counsel, before, at and after the hearing.

2: The factual background

The events leading to Mr Skelton's death

14. The events leading to Mr Skelton's death are described in the Divisional Court's judgment at [8]-[22], to which I gratefully refer. The key facts for the purposes of this claim are as follows.

15. At around 9.15 am on 29 November 2016, Mr Skelton was observed walking on the streets of Hull, carrying a carrying a small axe or hatchet. Four '999' calls were made to Humberside Police by members of the public. In the course of these calls and during CCTV observation, Mr Skelton was identified as a person with least some history of mental health problems.

16. The Force Incident Manager, designated Officer Four, in her capacity as Strategic Tactical Firearms Command or Silver Command, authorised the deployment of Armed Response Vehicles ("ARVs"). One such ARV was crewed by B50 and another AFO referred to as "Charlie". B50 was acting as Bronze Commander or Operational Firearms Command.

17. At 9.28am, Officer Four authorised the armed deployment. She briefed B50, describing Mr Skelton's appearance, saying that he was walking "with a bit of a mission" and carrying a small axe about a foot long. She described him as "EMDI" (an emotionally and mentally distressed individual). The officers were told that Mr Skelton had not actually approached anybody or interacted with anyone and that he was not threatening anybody. He was assessed as a low risk at that time, though he was walking "with a purpose" and his intent was unknown.

18. Mr Skelton made his way along Sykes Street, Caroline Street and Caroline Place. Most, but not all, of his progress from when he turned into Caroline Place to where he was shot was covered by CCTV. On Caroline Place, the officers challenged Mr Skelton, shouting at him that they were armed police and telling him to stand still. He kept going. Within seconds, the officers' Tasers had been discharged three times, first by B50 (who fired twice) and then by Charlie. This had no obvious immediate effect on Mr Skelton, save that he broke into a jog running down Caroline Place, trailing Taser wires, and was then pursued by the officers. After being challenged by the officers, Mr Skelton passed by or near members of the public both on foot and in cars while making his way along Caroline Place and Charles Street and into Francis Street. On Charles Street, Charlie discharged his Taser again.

19. Having turned from Charles Street into Francis Street, Mr Skelton was shot by B50 twice in the back at close range. The first shot did not appear to incapacitate him. Even after he had been shot for the second time, it took considerable efforts by a number of officers to manhandle him to the ground and to subdue him. He was taken by ambulance to Hull Royal Infirmary, where he sadly died.

The IPCC's investigation

20. The IPCC's lead investigator interviewed B50 and Charlie in July 2017 and explored the accounts given in their witness statements. As the Divisional Court noted at [18], B50 said two factors were key to his decision to shoot Mr Skelton: (i) the speed at which he was travelling towards three workmen observed on Francis Street, which was described as a "collapsing timeframe"; and (ii) threatening actions by Mr Skelton directed at B50 on or around Caroline Place.

21. As required, the investigator summarised all the evidence in the report, before setting out conclusions as to (i) the nature and extent of police contact with Mr Skelton prior to his death; and (ii) the available evidence in relation to whether the police may have caused or contributed to his death. The investigator then explained why, having regard to the evidence, it had been concluded that there was no indication (for the purposes of paragraph 21A) that any person serving with the police may have committed a criminal offence or behaved in a manner that would justify the bringing of disciplinary proceedings. The reasons given were as follows:

> 505. In my analysis of the evidence, I have drawn attention to inconsistencies in the evidence, and, so far as possible, resolved those inconsistencies. However, overall it is my opinion that the evidence supports the accounts given by Charlie and B50 in relation to their interaction with Mr Skelton, and that those accounts should be considered broadly accurate.
>
> 506. To summarise, Mr Skelton was carrying an axe in a busy area of Hull. Firearms officers Charlie and B50 responded to calls from members of the public, an armed deployment having been authorised to deal with a potential threat posed by Mr Skelton to members of the public.
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> 507. Charlie and B50 challenged Mr Skelton but he did not put the weapon down; instead he ran away. Charlie and B50 discounted their

> less lethal options of baton and incapacitant spray on the grounds of ineffectiveness. Other less lethal options were not available to them. They tried to use Taser, but this was ineffective, most likely due to Mr Skelton's clothing.
>
> 508. Having exhausted or discounted their less lethal options, B50 and Charlie were faced with a situation where Mr Skelton was running towards members of the public holding an axe. He did not respond to further challenges. B50 chose to shoot Mr Skelton as, according to him, it was his honestly held belief that Mr Skelton posed a threat to those members of the public. In my opinion, there is no evidence to suggest that B50 did not genuinely hold this belief or that his belief was unreasonable in the circumstances".

The inquest

22. The inquest into Mr Skelton's death took place between 7 September 2021 and 15 October 2021, before a Coroner and a Jury.

23. The Coroner ruled that there was sufficient evidence to leave conclusions of unlawful killing, lawful killing and an open conclusion to the Jury. The Coroner directed them thus:

> "[I]n order for Mr Skelton to have been lawfully killed, you would have to be satisfied on what is called a balance of probabilities that B50 had a genuine belief that in doing what he did, he was acting in the defence of self or others in the imminent danger of harm from Mr Skelton. If you are not satisfied on the balance of probabilities that B50 genuinely had that belief, that would make his actions unlawful".

24. On 15 October 2021, the Jury concluded that Mr Skelton had been unlawfully killed.

The Divisional Court's judgment

25. The Divisional Court summarised the evidence as to the events immediately before B50 shot Mr Skelton in this way:

> "19. B50's assertion that Mr Skelton had acted in a threatening manner towards B50 on or around Caroline Place was not supported by the available CCTV. Although some witnesses referred to Mr Skelton having lifted or waved the axe, the evidence of at least some of those witnesses was that what they described conformed with what could be seen on the CCTV they were shown when giving evidence (specifically on cameras 33 and 52).
>
> 20. Nor was there support from CCTV for a suggestion that Mr Skelton had offered a threat to the officers by raising the axe when on Charles Street or when he got to Francis Street. While there was witness evidence that Mr Skelton had lunged towards the officers shortly before he was shot, that had not been B50's explanation for why he had shot Mr Skelton; and, in the event, Mr Skelton was shot in the back, which

> would not obviously be consistent with him provoking B50 to shoot him by lunging towards him. At least one witness who gave this evidence of a late lunge (Ms Mallinson) accepted that she may have been mistaken. B50's evidence was that there was no point on Francis Street where Mr Skelton turned and raised the axe at him.
>
> 21. Mr Skelton got to Francis Street, there were three workmen on the pavement further down the road. Estimates varied but tended to be that they were in the order of about 50-60 metres away when first noticed by the officers. At the relevant time, on Francis Street, there was evidence (including evidence from B50) on which the jury could conclude that Mr Skelton was not running in the direction of the three workmen but was by then walking, "dragging himself across like a lousy walk", "staggering" or "stumbling". Witnesses agreed that Mr Skelton was "out on his feet" and that the three workmen were some distance away and crossing the road away from Mr Skelton. The CCTV provides support for this witness evidence and for a submission that, by the time he got to the top of Francis Street, Mr Skelton had slowed down and was, in colloquial terms, struggling to keep going. The fact that he had by then been tasered four times may be thought to provide some support for such a submission. The three workmen did cross the road but not because they perceived Mr Skelton to be a present or imminent threat to them".

26. The evidence on which B50 relied to support his case that he discharged his pistol because he genuinely believed that Mr Skelton posed a threat to the lives of the three workmen on Francis Street was summarised by the Divisional Court in this way:

> "84. i) Mr Skelton had been carrying the axe for a significant period before B50 and Charlie located him. They were told (and had the opportunity to observe for themselves when they found him) that he was walking with an apparent purpose and was waving the axe around (rather than holding it by his side), apparently not concerned that members of the public or police officers saw him with a lethal weapon. They were also told that he had EMDI issues, which may make his behaviour unpredictable and challenging without lessening the harm that he might cause if he began to act aggressively;
>
> ii) Mr Skelton did not respond to the officers' commands to stop and put down the axe. He kept going. He was heard by at least three independent witnesses refusing to put down the axe and threatening to use it if anyone came near him;
>
> iii) He did not stop even when he had been tasered, initially three and then four times, but continued (in B50's submission) "walking with purpose and an intent to get away from the officers to someone or something." The officers did not know his intended destination or intent;

> iv) On Francis Street, Mr Skelton was on a street where there were people (the three workmen) walking in the opposite direction who did not react when B50 shouted and waved his arm at them;
>
> v) Charlie's evidence was that if B50 had not shot Mr Skelton, he would have done so: in other words, his assessment of the threat posed by Mr Skelton was the same as B50's;
>
> vi) Mr Skelton was still holding the axe when he was shot;
>
> vii) There was evidence that, during the period after the officers had engaged with Mr Skelton on Caroline Street, Mr Skelton had waved the axe above his head and/or moved towards the officers in the course of the officers' attempts to stop him…
>
> 85. Mr Green asked the rhetorical question: why else would B50 have shot Mr Skelton when he did".

27. The Court accepted that the evidence identified by B50 was capable of supporting his assertion of his belief at the moment he shot Mr Skelton, but observed that "the evidence was not all one way": [86].

28. The various aspects of the evidence relied on by Mr Skelton's family as being capable of leading a properly directed jury to the opposite conclusion were summarised by the Court in this way:

> "86. i) There was no evidence that Mr Skelton had in fact threatened any member of the public, despite being in close proximity to a significant number of people during his walk. There was evidence that, by the time he got to Francis Street, Mr Skelton was not waving or swinging the axe or acting with apparent threatening intent either towards the officers or anyone else;
>
> ii) The officers had been told that Mr Skelton had not threatened anyone before they engaged with him, that being repeated after they had done so. The officers themselves had the opportunity to observe Mr Skelton's conduct after they located him and that he had not threatened any member of the public, though it would have been easy for him to have done so given his proximity to numerous people;
>
> iii) By the time they got to Francis Street, Mr Skelton had slowed right down: see [21] above. Thus, on any view, the timeframe was "collapsing" more slowly than is suggested by the references to him walking briskly or "on a mission" earlier on. He had by then been hit by four Tasers. In evidence Charlie accepted that, at least hypothetically, if Mr Skelton had continued down Francis Street at the same slow pace, the chances were that the workmen could easily have got away from him;
>
> iv) As a matter of fact, and for whatever reason, the workmen crossed the road so as to be out of the way of Mr Skelton and the officers at or

> about the time that B50 shot Mr Skelton. The available CCTV and the evidence of the workmen was capable of supporting a submission that there had been no imminent danger at the moment that B50 shot Mr Skelton;
>
> v) As set out at [18]-[21] above, B50 (supported by Charlie) had sought to justify his actions both by his asserted perception of the imminent threat to the workmen and because he said that Mr Skelton had acted in a threatening manner towards him while on or around Caroline Place. Put at its lowest, the CCTV evidence did not support his account of what happened on or around Caroline Place. The Family's case was that it flatly contradicted it. During the inquest B50 disavowed any suggestion that Mr Skelton had threatened him at any later point. It was suggested on the basis of the CCTV evidence that his account of being threatened on or around Caroline Place had been made up to bolster his case. Although it would not follow, if the Jury rejected as untruthful B50's account of being threatened, that they either should or would necessarily conclude that B50's asserted belief that there was an imminent threat to the workmen was also untrue, the demolition of his account of being threatened was capable of supporting such a conclusion".

29. The Court observed that the strength or weakness of the evidence relied on both by B50 and by the family depended on "the Jury's view of the reliability of the witnesses and, in particular, of their view of the reliability of B50 and Charlie, both of whom they were able to observe in detail as they gave their evidence".

30. The Court acknowledged the position advanced by B50 as follows:

> "88…we recognise the force of B50's rhetorical question: why else would he have shot Mr Skelton when he did? On the evidence it appears that B50 was properly trained and had been involved in many armed responses before this one, all without adverse incident. We give full weight to the fact that, although Mr Skelton had not threatened any other member of the public despite their close proximity, the information that he was EMDI gave rise to a risk of unpredictability so that it would not have been safe to assume that, just because he had not threatened anyone up until that moment, he would not do so if confronted or obstructed by the workmen".

31. However, the Court continued:

> "…the contrary evidence is, in our judgment, significant and substantial. On one view of the evidence that was open to the Jury, Mr Skelton's progress had slowed down considerably, he was struggling and was still not showing aggressive intent despite (or perhaps because of) being tasered four times, the workmen (who were sufficiently distant that they had not yet perceived a threat) would have had ample opportunity to get out of the way had the threat become a real and present danger, and B50's justification based upon his being threatened on or around Caroline Place was contradicted in circumstances which

> could (depending on the view taken by the Jury) support a conclusion that it was a deliberate falsehood designed to bolster an untrue case. In our judgment, this evidence was such that the Jury could properly come to the conclusion that B50's asserted belief in the imminence of the danger to the workmen was not genuinely held."

32. In concluding that it was safe for the Jury to have come to conclusion that there had been an unlawful killing, the Court observed that "[w]hether we would agree with such a conclusion or whether we think such a conclusion would or should have been more likely than not is not merely irrelevant but an impermissible trespass into the proper province of the Jury": [88].

3: The legal framework

33. The Defendant's functions, set out in s.10 of the 2002 Act, are, in summary, to "handle complaints and deal with conduct and DSI matters efficiently, effectively and with public confidence": *R (Commissioner of Police of the Metropolis) v Independent Police Complaints Commission* [2015] EWCA Civ 1248at [37], per Vos LJ (as he then was).

34. Schedule 3 to the 2002 Act makes detailed provision for the handling of complaints and conduct matters.

Paragraph 21A

35. At the time of the investigation in this case, the IPCC's *Statutory Guidance to the Police Service on the Handling of Complaints* (May 2015) was operative. This explained at paragraphs 11.49-11.50 that a DSI investigation was "not an inquiry into any criminal, conduct or complaint allegation against any person serving with the police". Rather, its purpose was to "establish facts, the sequence of events and their consequences" [and] "investigate how and to what extent, if any, the person who has died or been seriously injured had contact with the police, and the degree to which this caused or contributed to the death or injury".

36. Paragraph 21A of Schedule 3 addresses the procedure where a conduct matter is revealed during the investigation of a DSI matter. At the date of the IPCC report in this case, paragraph 21A(1) provided as follows in material part:

> "(1) If during the course of an investigation of a DSI matter it appears to a person…designated under paragraph 19 that there is an indication that a person serving with the police ("the person whose conduct is in question") may have—
>
> (a) committed a criminal offence, or
>
> (b) behaved in a manner which would justify the bringing of disciplinary proceedings, he shall make a submission to that effect to the Commission".

37. Paragraph 21A(2) provided that if the Commission, having considered a submission under sub-paragraph (1), determined that there was such an indication, it would notify

the appropriate authorities (namely the relevant police force), and send them a copy of the submission.

38. The use of the words an "indication" that a person "may" have committed a criminal offence or behaved in a manner which would justify the bringing of disciplinary proceedings in paragraph 21A shows that "the threshold is a relatively low one": *R (Yavuz) v Chief Constable of West Yorkshire* (QBD) [2017] PTSR 228 at [142], per Sweeney J (in the context of the same wording of the now repealed Schedule 3, paragraph 19B).

39. A paragraph 21A determination has the effect of turning a DSI investigation into a conduct investigation, as explained at paragraph 9.24 and thereafter of the IPCC's 2015 guidance. The low threshold for a paragraph 21A determination was reflected at paragraph 11.40 of the guidance, to the effect that if there was "any" indication of criminality or conduct justifying disciplinary proceedings, the matter should be dealt with as a conduct matter.

40. If a paragraph 21A determination had been made in this case, the conduct investigation would have been carried out by the person already appointed to investigate the DSI matter, because the mode of the investigation was already at the "highest", namely an independent investigation conducted by the IPCC. There would have been several practical consequences, such as the need for a severity assessment of the conduct of the officer; and special procedures for the interview of the officer.

The case to answer test

41. In a conduct investigation, the investigator is required to give their opinion on whether any subject of the investigation has a case to answer for gross misconduct or misconduct; and provides a report under paragraph 22(5) of Schedule 3.

42. The threshold for identifying a case to answer is a "low" one: *R (Commissioner of City of London Police) v Independent Office for Police Conduct and Others* [2018] EWHC 2997 (Admin) at [16].

43. The IPCC's 2015 guidance made clear that it was not for the investigator to decide whether on the balance of probabilities there had been misconduct or gross misconduct but rather whether that conclusion would be open to a reasonable body assessing the facts and applying the law:

> "11.13 Investigators should take particular care not to unnecessarily reach findings of fact in conduct matter or complaint investigations that have become subject to special requirements. In these types of investigation, investigators should evaluate the evidence and indicate whether in their opinion there is a case to answer…It is unnecessary (and unlawful) for investigators to reach findings of fact that are conclusive of misconduct or gross misconduct – these findings should be left for any subsequent misconduct hearing or meeting".

44. The paragraph continued:

> "Often investigators are faced with conflicting accounts of the facts from, for example, a police officer and the complainant. Sometimes an account is inherently implausible or is undermined by other evidence (such as CCTV or documentary evidence). In other cases that may not be so and therefore, at the time the report is being prepared, it is a case of one person's word against the other. This is often the case in court proceedings and does not mean that there is no case to answer. A misconduct hearing or meeting can take into account witnesses' evidence and cross-examination along with their demeanour in order to make a decision about which account to accept, just as courts do daily. Where two accounts are on an analysis of the evidence equally credible, and where on one account, if proved, an officer may have misconducted himself, it will usually be appropriate to indicate that, in the investigator's opinion, there is a case to answer and for the misconduct hearing or meeting to decide which of the accounts is to be preferred".

45. This passage reflected case-law to similar effect: "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": *R (IPCC Chief Executive) v IPCC* [2016] EWHC 2993 (Admin) at [21].

Referral to the Director of Public Prosecutions ("the DPP")

46. On receipt of a report under paragraph 22(5), the Commission was required under paragraph 23(2)(b) to determine whether the conditions set out in sub-paragraphs (2A) and (2B) were satisfied in respect of the report. The sub-paragraph (2A) condition was that the report indicated that a criminal offence "may" have been committed by a person to whose conduct the investigation related. The sub-paragraph (2B) condition was that "(a) the circumstances [were] such that, in the opinion of the Commission, it [was] appropriate for the matters dealt with in the report to be considered by the [DPP], or (b) any matters dealt with in the report [fell] within any prescribed category of matters". There was and is no such prescribed category.

47. Counsel for the Claimant accurately submitted that there is nothing in paragraph 23 to suggest any requirement that the Defendant be satisfied on the balance of probabilities that there has, or has not, been a criminal offence committed; and indeed nothing approaching a requirement that there be a case to answer on a criminal charge.

Paragraph 24A

48. Because this was a case where an investigation of a DSI matter had been completed and no determination had been made under paragraph 21A(2) (or (4)), paragraph 24A applied. This provided for the investigator to submit a report to the Commission; on receipt of which the Commission was similarly required to determine whether the report indicated that a person serving with the police may have committed a criminal offence or behaved in a manner which would justify the bringing of disciplinary proceedings.

The s.13B(2) power

49. Under s.13B(2), the Director General "may at any time determine that the complaint, recordable conduct matter or DSI matter is to be re-investigated if... satisfied that there are compelling reasons for doing so".

50. Counsel for the Defendant highlighted that the s.13B power is analogous, although not identical, to the DPP's power to re-open criminal prosecutions. This is described in the Code for Crown Prosecutors thus:

> "10.1 People should be able to rely on decisions taken by the CPS. Normally, if the CPS tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, the case will not start again. But occasionally there are cases where the CPS will overturn a decision not to prosecute or to deal with the case by way of an out-of-court disposal or when it will restart the prosecution, particularly if the case is serious."

51. The Code gives the following example of the sort of cases where re-opening of a prosecution might be appropriate: "cases involving a death in which a review following the findings of an inquest concludes that a prosecution should be brought, notwithstanding any earlier decision not to prosecute".

52. The s.13B(2) power to require a re-investigation has the following characteristics.

53. First, the wording of s.13B(1) makes clear that the power under s.13B(2) only applies to investigations that have been conducted as "independent" or "directed" investigations, not where the original investigation was conducted by an appropriate authority.

54. Second, a decision to re-investigate under s.13B(2) can only be taken if the original investigation has concluded, with the report of that investigation submitted to the Defendant as set out in paragraphs 22(3), 24A or 22(5) of Schedule 3 to the 2002 Act.

55. Third, the s.13B(2) power only applies where the Director General "is satisfied" that there are compelling reasons to re-investigate. This is a higher level of proof than for example, "suspicion", meaning that "unresolved doubts and suspicions" are insufficient: *In the matter of EV (A Child) (Scotland)* [2017] UKSC 15 at [26]. The phrase has been described as meaning "proved sufficiently", with "an iterative process between the proposed order and the degree of satisfaction required": *Bagnall v Official Receiver* [2004] 1 WLR 2832 at [26], per Arden LJ.

56. Fourth, the use of the word "compelling" connotes something stronger than "desirable". It reflects, for example, the language used in CPR 24.2, relating to summary judgment, where adding the word "compelling" was "clearly intended to limit the very wide discretion" under the previous provisions in the Rules of the Supreme Court: *Commerz Real Investmentgesellschaft MBH v TFS Stores Ltd* [2021] EWHC 863 (Ch) at [17], per Senior Master Marsh. It also mirrors the second limb of the test in CPR 52.6(1)(b) and 52.7(2)(b), relating to permission to appeal, where the phrase "some other compelling reason" might include, for example, a case where it is strongly arguable that the individual has suffered "a wholly exceptional collapse of fair procedure" or there has been an error of law which has caused "truly drastic

consequences": *R (Cart) v Upper Tribunal* [2012] 1 AC 663 at [131], per Lord Dyson JSC.

57. Fifth, the Defendant's policy (see [7] above) sets out precisely how the s.13B(2) power will be exercised. The Claimant advanced no challenge to the lawfulness of the policy. Accordingly the s.13B(2) discretion is not unfettered: rather, its limits are set by the parameters of the policy.

The Article 2 procedural obligation

58. The circumstances of Mr Skelton's death engaged the procedural obligations derived from the right to life in Article 2 of the European Convention on Human Rights, set out in Schedule 1 to the Human Rights Act 1998. The inquest was conducted on that basis.

59. These obligations require the State to ensure that there is an effective investigation into the death, in order to ensure the right to life is protected by law. In order to be effective an investigation must be capable of leading to the establishment of the facts, determination of whether the force used was or was not justified in the circumstances and of identifying and punishing those responsible: *Da Silva v United Kingdom* [2016] 63 EHRR 12 at [233]. While the adequacy of any investigation is necessarily fact-sensitive, an investigation procedure which is capable of leading to consideration of criminal and/or disciplinary punishment is "vital": see, for example, the cases cited in *R (Dunne) v IOPC* [2023] EWHC 3300 (Admin) at [65].

4: The Defendant's policy

60. The Defendant's re-investigation policy provides that to find compelling reasons, the decision maker must be satisfied that Condition A and/or B, and then Condition C, are met: [7] above.

61. There is an "initial assessment" stage which the Defendant can carry out at any time, but which can be triggered by, for example, "new information which appears to be material" or "different conclusions on the evidence reached by a court or tribunal (e.g. an inquest), which indicate a material deficiency in the original investigation".

62. If the initial assessment identifies that there is potentially significant new evidence and/or a potential material flaw in the original investigation, a "review" will be required. The policy is clear that the review "will not constitute any further investigation". Rather, the person undertaking the review "will consider whether, on examination of the original investigation and consideration of any alleged flaws or new information, a re-investigation is required". If the potential compelling reason relates to new information, as part of the review the original lead investigator and where applicable the original decision maker will be informed. They will also be invited to submit a report about the new evidence for consideration by the person conducting the review.

63. The policy emphasises that "the power to re-investigate cannot be used solely to retake a decision following completion of the investigation report and should only be used where the compelling reasons test is met".

64. The policy provides that the following non-exhaustive list of issues "should" be considered when determining whether a re-investigation is "necessary":

- the seriousness of any allegations in the original investigation
- the strength, reliability and significance of the new evidence or information and reasons why it was not considered in the original investigation
- the potential prejudice to the subjects of investigation
- whether the subjects of the investigation have already faced disciplinary or performance proceedings flowing from the investigation
- any authoritative promises or representations given to the subjects that the allegations would not be revisited
- the impact of a re-investigation on any complainant and/or interested person
- the community impact of the incident under investigation
- the findings of other tribunals which have examined the same incident, for example civil courts, inquests and inquiries
- the extent to which any identified flaw is likely to have affected the outcome of the investigation, disciplinary and performance proceedings and/or referral to the CPS, and
- the further investigative steps required to address or remedy any identified flaw and any resource implications.

65. If there is a decision to re-investigate, it will result in the completion of a new investigation report.

5: The Defendant's review and decision

66. The Defendant's review, carried out by the then Regional Director, later Director of Operations, involved reviewing footage, evidence and transcripts of the inquest and considering representations from the Claimant and the other Interested Parties. The decision was set out in a 44 paragraph document entitled "Re-investigation review and formal decision" ("the review").

67. It had been decided not to delay the decision on re-investigation pending the conclusion of the Divisional Court proceedings. The decision maker gave the reasons for this at [6] of the review:

> "(a) I am tasked with reviewing the nature and quality of the IPCC investigation as opposed to the lawfulness of the subsequent coronial proceedings and (b) I do not consider that further delay would be

> justified given the time which has elapsed since the original investigation was undertaken and the tragic death of Mr Skelton occurred".

68. Accordingly, the decision maker explained:

> "I have proceeded on the basis that the conclusion of the jury in the coronial proceedings is lawful, which I understand remains the position unless and until it is quashed by the Administrative Court. I can confirm that I have considered the evidence which was adduced in the coronial proceedings in detail when deciding whether the criteria for reinvestigation has been met".

69. The Defendant concluded that there were two flaws in the IPCC investigation. These related to (i) B50's perception of the speed at which Mr Skelton was travelling when he was shot; and (ii) B50's allegation of threatening behaviour by Mr Skelton: [12]-[21].

70. The Defendant addressed Condition A of the Defendant's policy under the heading "Was the original investigation flawed in a manner that had a material impact on subsequent decisions on discipline, performance and/or referral to the CPS". The Defendant indicated that the test that had been applied was "whether on the balance of probabilities the above errors affected the outcome of the investigation". The conclusion was that "this is not so": [24].

71. Reasons for this conclusion in respect of the speed issue were given at [25]-[30], with the conclusion that "on the balance of probabilities…the outcome of the investigation would have been the same even if the investigator had concluded that Mr Skelton was walking along Francis Street, including a walk which involved him stumbling and staggering": [31].

72. As to the threatening behaviour issue, the Defendant concluded that it was "likely that consideration of this issue would have resulted in a conclusion that a threat was made, albeit not at the specific location identified by officer B50": [32]-[33].

73. This part of the review concluded as follows:

> "34…I find that the compelling reasons test condition (A) is not satisfied. I do not consider on the balance of probabilities that the outcome would have been different if the mistakes which I have identified did not occur. The investigation would in my judgment have resulted in a conclusion that the use of force was necessary, reasonable and proportionate".

74. The review then considered whether re-investigation would be in the wider public interest under Condition C in the policy (albeit that the same was not strictly required, as neither Condition A nor B were satisfied), by reference to several of the issues listed in the policy as set out at [64] above. The review addressed the potential prejudice to the subjects of the investigation, the impact of a re-investigation on any complainant and/or interested person and the further investigative steps required to address or remedy the identified flaws and resource implications: [37]-[39] and [42].

75. As to the "findings of other tribunals" the review stated:

> "40. A jury has returned a conclusion of unlawful killing which stands as the legal cause of death unless and until it is overturned…This is a significant factor weighing in favour of reinvestigation when deciding where the public interest lies. It is also a matter which I have taken account of in deciding what the probable outcome would be upon reinvestigation (in relation to which my conclusions are set out above) …".
>
> As to "the extent to which any identified flaw is likely to have affected the outcome of the investigation, disciplinary and performance proceedings and/or referral to the CPS", the review found as follows:
>
> "41. For the reasons set out above it is in my view possible but unlikely that a reinvestigation would result in a different outcome. The probable outcome is a significant factor weighing against reinvestigation".

76. The review's overall conclusions on Condition C were to this effect:

> "43. I have given consideration to whether it would be in the public interest to order a reinvestigation in this case, taking full account of the need to maintain public trust and confidence in the police and its regulator, particularly in cases involving the use of lethal force. Balancing the factors outlined above I have decided that it would not be in the public interest for a reinvestigation to occur. It follows that on an application of the factors set out above I am not satisfied that there are compelling reasons to justify a reinvestigation in this case".

77. The Defendant maintained the decision after the Divisional Court's judgment.

6: The "decision" issue

78. Both Condition A and Condition B require reference to "decisions" taken in the course of investigations: for Condition A, the Defendant must consider whether flaw(s) in the original investigation had a material impact on "subsequent decisions" on discipline, performance and/or referral to the CPS; and for Condition B, the Defendant must consider whether there is a real possibility that the new information (as defined) would have led wholly or partly to "different decisions" on discipline, performance and/or referral to the CPS: see [7] above.

79. Further, in the list of issues in the policy which decision makers should consider, reference is made to the extent to which any identified flaw is likely to have affected the "outcome" of the "investigation, disciplinary and performance proceedings and/or referral to the CPS" (**"the outcome issue"**): see [64] above.

80. For these reasons, I accept the Claimant's submission that the exercise of the s.13B(2) power, necessarily in accordance with the policy, cannot be "detached" from the framework in Schedule 3, which sets out a series of potential decisions that can be taken on discipline, performance and referral to the CPS.

81. Here, the key decision was the investigator's decision not to make a determination under paragraph 21A (and the same decision which was then made by the Commissioner delegate under paragraph 24A). The effect of both these decisions was that the investigation remained a DSI not a conduct investigation; and no criminal or misconduct proceedings followed: [35]-[40] and [48] above. The Claimant therefore focussed his submissions on the impact of the flaws in the investigation and the new information on the paragraph 21A decision (and by extension the paragraph 24A decision).

82. The Chief Constable, supported by the Defendant and B50, argued that reliance on paragraph 21A was misconceived and problematic for the Claimant's claim (**"the decision issue"**). This issue only crystallised during oral argument and necessitated a series of post-hearing written submissions.

83. First, it was argued that a focus on paragraph 21A took matters in the wrong order, in that whether a paragraph 21A determination is ultimately made on a re-investigation after the exercise of the s.13B(2) power can have no bearing on whether the s.13B(2) power should be exercised in the first place. This submission correctly identified that a paragraph 21A determination can be made during a re-investigation that takes place after the s.13B(2) power has been exercised. However, in a case such as this, where a decision relating to paragraph 21A was the central decision that had been taken in the original investigation, the exercise of the s.13B(2) power inevitably requires consideration of that decision, for the reasons given at [75]-[77] above.

84. Second, the Chief Constable characterised a decision relating to paragraph 21A as an "interlocutory" or "procedural" step, which was outwith the Defendant's policy, that being focused on final decisions taken at the end of an investigation. However, the decision in respect of paragraph 21A in this case was explained in the final report on the investigation. It negated and removed the potential for any subsequent decisions with respect to disciplinary or criminal proceedings. It was the only decision of substance taken in this case. It was therefore more than an interlocutory or procedural decision in either form or substance. Further, neither the wording of s.13B(2) nor the policy give any indication that paragraph 21A decisions are excluded from the scope of the power. The Defendant had not sought to justify the s.13B(2) decision on such a basis. I would also query whether an exclusion of paragraph 21A decisions from the scope of the s.13B(2) power would be consistent with the Defendant's Article 2 obligations in those cases where they apply. In any event the identical paragraph 24A decision taken in this case was undoubtedly a final one as that was taken on completion of the report.

85. Third, the Chief Constable contended that a positive determination under paragraph 21A would, on the facts of this case, have made no real difference. This was because (i) the investigation was already an independent one; and (ii) the other consequences of a paragraph 21A determination (the giving of additional rights to the officer through special procedures at interview and the notification to the police force in question) would have made no material difference here. However, as noted in the preceding paragraph, the effect of a paragraph 21A determination is substantive as well as procedural. Specifically, after such a determination an investigation ceases to be simply a DSI investigation and becomes a conduct investigation. As well as the

procedural consequences cited by the Chief Constable, paragraphs 22 and 23 are engaged: see [41]-[47] above.

86. Fourth, it was argued that by focussing on paragraph 21A, the Claimant had alighted upon the wrong "target". In reality he needed a target of "greater ambition", and to argue that the outcome – namely the conclusion as to whether there was a case to answer – would have been different. I observe that "outcome" as such is only relevant to the outcome issue (see [64] above). In any event, the Claimant's detailed arguments under his various grounds stand, whether they are treated as related to the paragraph 21A decision (which was made in this case) or a hypothetical subsequent case to answer decision (which was not).

87. Fifth, on the issue of referral to the CPS, the Chief Constable rightly identified that in addition to the provision in paragraph 23(2A) which includes language similar to that in paragraph 21A(2B), the condition in paragraph 23(2B) would also need to be fulfilled: see [46] above. However, as the Claimant highlighted, in reality, the Director General has a broad discretion as to whether it is appropriate for the DPP to consider such a report. In a case involving a death caused by the state, Article 2 obligations would be relevant to the exercise of that discretion.

88. For all these reasons, I do not consider that the focus in the Claimant's submissions on the initial paragraph 21A decision was as problematic for his claim as was contended.

7: The Claimant's grounds in overview

89. Grounds 1, 2 and 3 overlapped considerably. Ground 1 contended that the Defendant had failed to apply the criteria in the policy in concluding that neither Condition A or Condition B was satisfied. Ground 2 was limited to the Defendant's approach to Condition A. It asserted that the Defendant's decision that the flaws identified in the original IPCC investigation were not material to the subsequent decisions on discipline, performance and/or referral to the CPS was irrational or unreasonable. Ground 3 submitted that the Defendant had failed to give due consideration or adequate weight to all relevant considerations in the application of the criteria in respect of both conditions.

90. Ground 4 was a discrete ground, challenging the Defendant's approach to Condition C. It was parasitic on Grounds 1-3 such that the Claimant contended that if the errors identified in Grounds 1-3 relating to Conditions A and B were upheld, these permeated and rendered unlawful the Defendant's approach to Condition C and justified a finding that Ground 4 should also succeed. Because the Defendant's policy requires the Defendant to be satisfied that Condition C is satisfied as well as either Condition A or B before deciding to re-investigate, for the Claimant's claim to succeed overall, he would need to succeed on one ground in respect of either Condition A or B and on Ground 4.

8: Ground 1

8.1: Condition A

91. The Defendant concluded that the original investigation in this case was flawed in two respects, thus satisfying the first part of Condition A: see [7] and [69] above and

[172]-[176] below). The focus of the Claimant's challenge under Ground 1 (and indeed Grounds 2-3) was the approach the Defendant took to the remainder of Condition A, namely whether the flaws were "in a manner that had a material impact on subsequent decisions on discipline, performance and/or referral to the CPS" (**"the materiality issue"**).

92. Ground 1 contended that the Defendant had failed to apply the criteria in the policy to the materiality issue by applying too high a causation threshold, in breach of the Claimant's "basic public law right to have his…case considered under whichever policy the executive sees fit to adopt": *R (Lumba) v SSHD* [2012] 1 AC 245 at [35], per Lord Dyson.

Submissions

93. The Claimant's case was that when considering Condition A, the Defendant was not required to be satisfied on the balance of probabilities that the outcome "would have" been different if the flaws identified had not occurred. Rather, the relevant question was whether a flaw had a material impact on subsequent decisions taken by the original investigator; and this issue should be assessed by reference to a "possibility" test.

94. Counsel for the Claimant submitted that there was nothing in the wording of the policy which indicated that a "probability" test was appropriate. There were good policy reasons for a "possibility" test: if an investigation was flawed, it was consistent with the Defendant's statutory objectives and, in appropriate cases, its Article 2 obligations, for Condition A to be satisfied by such a test. Further, a possibility test was consistent with the approach taken when considering a material error of fact in the context of certain statutory appeals and claims for judicial review, where a material error need "not necessarily [be] decisive" (*E v Home Secretary* [2004] QB 1044 at [66]) and a claim can succeed if the decision "might" have been different, absent the error (*R (March) v Secretary of State for Health* [2010] EWHC 765 at [20(iii)] and [53]).

95. Accordingly, he argued that the Defendant had erred in asking whether on the balance of probabilities the flaws affected the outcome of the investigation at [24], [31], [34], [40] and [41] of the review. This approach applied a threshold test higher than that in the Defendant's policy and thus breached the *Lumba* principle. The same was true of the Defendant's references to the probable outcome upon re-investigation at [40] and [41].

96. The Defendant and Interested Parties argued that the decision maker had correctly directed herself in accordance with the wording of the policy. The reference to whether the errors "affected the outcome" in [24] of the review must be considered in light of the heading and reference immediately above to "had a material impact." "Material impact" imparts a qualitative assessment of the degree of impact, which in this context must relate to whether or not it would have had an effect on the outcome of the original investigation, in relation to decisions as to discipline, performance or referral to the CPS. The word "material" is not a legal term but a word of common usage, the precise meaning of which varies according to the context. The exercise of the s.13B(2) policy is not a function comparable to an appellate, error of law

jurisdiction. Accordingly, comparisons with the approaches taken in statutory appeals or judicial review claims are not apposite.

97. Further, they argued that the policy deliberately draws a distinction between errors made by the investigator on the available evidence (Condition A) and new evidence which has become available since the original investigation was completed (Condition B). Under Condition A the decision maker is required to be satisfied that the error "had" a material impact on the decisions in the investigation, as opposed to "may" have had. This imports a probability test. However, a lower "real possibility" test is applied in Condition B to reflect the fact that the information was not previously available. The distinction gives effect to the principle of finality and reflects the statutory test of "compelling reasons" to justify a re-investigation following a concluded investigation process.

98. Counsel for the Chief Constable also submitted that while "satisfied" in s.13B(2) does not require proof beyond reasonable doubt, it requires the Defendant to have concluded on the evidence available that there are compelling reasons to investigate. Accordingly, the Claimant was wrong to criticise the Defendant for rejecting a "possibility" that there may have been a different conclusion to the investigation.

Analysis

(i): The proper approach to Condition A

99. It is clear from the wording of the policy that Condition B requires nothing more than a "real possibility" that the new information would have led wholly or partly to different decisions being made. Establishing the proper causation threshold for Condition A is more complex, because unlike Condition B, (i) the wording of Condition A does not refer in terms to a probability or possibility test; and (ii) the outcome issue (see [76] above) is relevant to Condition A.

100. The Claimant and Defendant/Interested Parties each relied on underlying policy reasons to support their competing positions that it was appropriate to "read in", respectively, a possibility and a probability test, to Condition A. Neither position was supported by any evidence. I find it hard to see why policy reasons provide the answer to how the wording should be interpreted, not least because the policy imperatives relied on (on the one hand, the need for rigorous investigation and accountability when a use of force by the state has led to a death and on the other, finality in investigations) pull in opposing directions in terms of the need for re-investigation; and one is not obviously more powerful that the other. Moreover, it is not apparent why the policy imperative relied on by the Defendant (finality) would justify a probability test for Condition A but a possibility test for Condition B.

101. I consider that the best indicators of the proper interpretation of Condition A are the specific language and structure of the policy and the underlying statutory framework in Schedule 3, setting out the relevant decisions that can be made in the investigations.

102. The policy provides in terms on p.4 that "[a] 'material flaw' does not require the investigation to be so flawed as to give rise to grounds for judicial review". I regard this as an indication that the "not decisive" and "might have made a difference" approach set out in *E* and *March* is appropriate. As the language used in the policy

reflects the public law concept of materiality, it is appropriate for the approaches in each context to be consistent. Further, given the express reference to a possibility test in Condition B it is reasonable to infer that if those drafting the policy had intended that a higher threshold would apply to Condition A, the policy would have said so. In addition, in approaching Condition A, the Defendant must bear in mind that in a case where the original decision was a negative paragraph 21A determination, the threshold for a positive determination (and thus a different decision) is a relatively low one, as is the threshold for finding a case to answer and for a referral to the CPS: see [37]-[38] and [41]-[47] above. These provisions also arguably militate in favour of a more permissive approach to the causation test.

103. For these reasons, and the further reason given at [110] below relating to the outcome issue, I conclude that a possibility test is appropriate for Condition A. Accordingly Condition A will be met if the Defendant concludes that flaws in the original investigation might have had an impact on the subsequent decisions on discipline, performance or a referral to the CPS.

(ii): The proper approach to the outcome issue

104. The outcome issue is relevant in Condition A cases and only in Condition A cases. This much is clear from the reference in the outcome issue to "any identified flaw", which can only relate back to the comparable language relating to flaws in Condition A. In my judgment the outcome issue has the following features.

105. First, the Defendant is only required to consider the outcome issue once Condition A is met. That the issues listed in the policy, of which this is one, are only relevant at the Condition C stage, once either Condition A or B is met, is clear from the introduction to the list, which states that they are relevant to the question of whether a re-investigation is "necessary". This reflects the specific language of Condition C: see [7] and [64] above.

106. Second, the outcome issue has a wider focus than the "decisions" on discipline, performance and/or a referral to the CPS which feature in Condition A. It encapsulates not only the outcome of the "investigation" but also the outcome of any "disciplinary and performance proceedings and/or the referral to the CPS".

107. Third, in some cases, the finding in respect of Condition A will determine the answer to the outcome issue. If a flaw was so material that it would or might have led to a fundamentally different decision on discipline, then by definition the outcome of the investigation would have been, or was likely to have been, different. However, the wider focus of the outcome issue means that the two issues will not necessarily be congruent. For example, on particular facts the decision at the end of the investigation might have been different (thus satisfying Condition A) but the overall outcome would not have been, due to supervening events. An example of such a scenario proffered by counsel for the Defendant was where a different decision as to referral to the CPS might have been made thus satisfying Condition A, but where the officer had already been prosecuted for the relevant criminal offence, thus rendering the outcome the same in practical terms.

108. Fourth, if the Defendant is satisfied that Condition A is met, and then goes on to make a finding on the outcome issue, the latter finding is not determinative of the s.13B(2)

decision: in accordance with the wording of the policy, it is simply one factor to be considered when, overall, deciding whether Condition C is met.

109. Fifth, the outcome issue requires the Defendant to determine "the extent to which" any identified flaw is "likely" to have affected the outcome of the investigation, disciplinary and performance proceedings and/or referral to the CPS. "The extent to which" is an open-ended phrase. It suggests that the Defendant is permitted to make a range of decisions on the "extent" issue, ranging from, for example, a conclusion that it is highly likely that the outcome would have been affected by the flaw to a conclusion that it is not likely at all that it would have been. Accordingly, a conclusion that a different outcome was more likely than not, and a conclusion that the same outcome was more likely than not, would both be permissible. However, counsel for the Claimant was right to contend that the wording does not require a probability threshold to be met.

110. In some cases, the decision maker would be hampered in applying this flexible test to the outcome issue if they had already, by definition (because they were at the Condition C stage), concluded that the flaws had more likely than not impacted the outcome of the investigation. This provides an additional reason for my conclusion that a possibility test applies to Condition A.

111. For all these reasons while I accept the Claimant's submission that a "possible" causation threshold applies to Condition A, I conclude that the Defendant is not so limited when considering the outcome issue.

(iii): Findings on the approach taken in this case

112. In making the decision in this case, the Defendant did not follow the approach set out above. Rather, consideration of the Condition A issue, and the outcome issue were merged. There is no suggestion that the correct possibility threshold was applied to the Condition A question. Aside from one reference to what "might" have happened if one of the flaws had not occurred at [17] (which was not a determinative paragraph overall) the Defendant applied a probability test throughout, as is clear from the language used at [24], [31], [34], [40] and [41] of the review. The clear impression from the wording of the review, read as a whole, is that the Defendant's underlying understanding was that Condition A could only be satisfied if on the balance of probabilities, the outcome would have been different. I therefore accept the Claimant's submission that the Defendant applied a higher threshold than the policy provided for, in breach of the *Lumba* principle, and for that reason erred in concluding that Condition A was not satisfied.

113. Further, the Defendant focussed at [26] and [34] of the review on the conclusion the investigator was likely to have reached about whether the use of force was "necessary, reasonable and proportionate". For the purposes of Condition A, the first question should have been on whether the paragraph 21A/24A decision in the investigation might (or even, on the Defendant's approach, would) have been different, applying the low threshold set out at [37]-[38] above. If the Defendant concluded that a positive determination under paragraph 21A/24A might have been made, then the Defendant was entitled to consider, for the purposes of Condition A, whether a different decision as to a case to answer or referral to the CPS might also have been made, cognisant of the low thresholds for each of these decisions as noted at [41]-[47]

above. Similar questions could also fall to be considered for the purposes of the outcome issue. However, the answer to none of these questions turned on the investigator's own view on the legality of the use of force, as the statutory language, guidance and principles referred to at [37]-[38] and [41]-[47] above make clear. As the Claimant correctly submitted, this was not a conclusion the Defendant was required to reach in order to be satisfied that there were compelling reasons to re-investigate.

114. Finally, at both [40] and [41] of the review the Defendant went even further than looking at the original investigation and reached conclusions as to the probable outcome of a re-investigation. Notably, the conclusion to this effect at [41] is the sole conclusion under the sub-heading which cites the specific wording of the outcome issue. Thus its focus should have been the outcome of the original investigation and not any re-investigation. Consideration of the outcome of a re-investigation does not feature in the wording of Condition A or as one of the Condition C issues in the policy. As the Claimant identified, this was a further question the Defendant was not required to answer.

115. I accept that the list of issues in the policy at [64] above is non-exhaustive, such that it could be said that it was permissible for the Defendant to take the outcome of a re-investigation into account. However, as noted in the preceding paragraph, that is not the approach the Defendant took here: this conclusion was reached while purportedly addressing the outcome issue which has a different focus. Further, as counsel for the Claimant argued, seeking to determine the outcome of a re-investigation would involve a significant degree of speculation, particularly on the facts of a case such as this where there had been no criminal or misconduct proceedings. It would also appear premature and inconsistent with the policy which is clear that at the review stage, the decision maker does not carry out "any further investigation" (see [62] above), but merely decides whether to require re-investigation.

(iv): Conclusion on Ground 1 relating to Condition A

116. For all these reasons I find that the Defendant misapplied the policy in adopting a probability test to Condition A and thus concluding that it was not satisfied. The conclusion on the outcome issue was also flawed in the ways set out above. Ground 1 therefore succeeds in respect of Condition A.

8.2: Condition B

117. The Defendant's review did not address Condition B of the policy in terms: the only heading mentioning either condition referred to Condition A, and the only conclusion explicitly making a finding as to whether either condition was satisfied referred to Condition A. However, in the body of the review the Defendant referred to two items of potential "new information" but effectively found that neither satisfied the requirements of Condition B.

118. Under Ground 1, the Claimant contended that this amounted to a misapplication of the criteria in the policy. I address the two items of evidence in turn.

(a): Unedited CCTV footage and B50's evidence to the inquest about it

119. B50's evidence to the original IPCC investigation was that Mr Skelton had offered a threat to the officers by raising the axe, at the junction between Caroline Place and Charles Street; and that this incident was relevant to his assessment of the risk Mr Skelton posed. The Defendant accepted at [21] of the review that CCTV footage showed that a threat did not occur at the junction of Caroline Place and Charles Street.

120. The Claimant initially suggested that the CCTV footage in question was "new information" for the purposes of Condition B in that it related to unedited CCTV footage which was only disclosed during the inquest proceedings. He observed that this unedited footage, as opposed to the compilation created from it, had not been referred to in the original IPCC report.

121. However, a witness statement from Christopher Hodgson, the Defendant's Exhibits Manager for the investigation, made clear that the continuous, unedited footage had been available to the lead investigator at the time of her work on the 2017 report. It had been listed on the Defendant's Schedule of Unused Material, which was sent to the Coroner, and was then disclosed by the Defendant to the Interested Persons during the inquest. The Defendant was therefore correct in asserting at [21] of the review that the CCTV footage in question was not "evidence which has since become available" but was "available to the [IPCC] investigator".

122. On that basis the Defendant cannot be criticised for concluding that the unedited CCTV footage was not new information for the purposes of Condition B. Any failure by the original investigator adequately to engage with the footage would fall to be considered as a potentially material flaw in the investigation under Condition A. This was the approach the Defendant took, and indeed found at [20] of the review that there was a flaw in this regard: see [176] below.

123. Counsel for the Claimant sensibly accepted this position in oral submissions. He nevertheless continued to place some reliance on B50's evidence at the inquest about the alleged threatening behaviour, based on the unedited CCTV footage, as "new information" for these purposes.

124. The Claimant advanced a broad case under Ground 3 that the Defendant had failed to give due consideration or adequate weight to the relevant consideration of the conflicting evidence from the officers as to Mr Skelton's alleged acts of aggression in deciding that Condition B was not satisfied. The evidence B50 gave at the inquest relating to the CCTV was part of this argument. However, I did not discern from the Claimant's submissions any positive case that this evidence from B50, alone, was sufficient to fall within Condition B.

125. I therefore conclude that the Defendant did not misapply the criteria in the policy by failing to find that Condition B was satisfied in relation to the unedited CCTV evidence or B50's inquest evidence responding to it.

(b): B50's evidence at the inquest about Mr Skelton's speed

126. As noted at [20] above, the speed at which Mr Skelton was travelling towards the workmen on Francis Street was one of two factors key to B50's decision to shoot him. The Claimant contended under Ground 1 that the Defendant had erred in failing to

conclude that certain aspects of B50's evidence at the inquest on this issue satisfied Condition B.

(i): The evidence B50 had given on the speed issue

(a): B50's accounts as considered in the IPCC investigation

127. Counsel helpfully agreed a table summarising the various accounts that B50 had provided on the speed issue which were considered in the original investigation. While I do not purport to refer to all the evidence, the salient points are as follows.

(i) In the Dictaphone account he recorded immediately after he had shot Mr Skelton (commencing the recording at 9.49 am on 26 November 2016), B50 said Mr Skelton was "walking towards a group of men" and "continued to walk with purpose towards the members of the public".

(ii) In his 'MG11' police witness statement dated 5 December 2016 he described Mr Skelton as walking with "a purpose", at "above average walking pace" and "fast purposeful pace" and continuing in a "purposeful jog". He also said that he discounted the idea of trying to put himself between Mr Skelton and workmen in part "due to the pace we were travelling [at]". This, he said, meant that he would not have been able to get far enough ahead of Mr Skelton in order to create a "reactionary gap" that would have afforded him sufficient time to challenge Mr Skelton and still be a relatively safe distance from the workmen.

(iii) In his IPCC interview dated 7 July 2017 he clarified that by "above average walking pace", he meant as one "might be…walking through the airport to get to your boarding gate before the gate closes…not just a casual stroll down the street". He said that Mr Skelton was moving "quick as he can but, he wasn't running" and "[a]s quick and as comfortably as he possibly could". He later said that on Caroline Place, after contact with the officers, Mr Skelton began to "jog" and "the arms were swinging more…the feet were moving faster, his speed was higher, there was a noticeable difference" and that when on Francis Street, "[i]t wasn't a sprint, it wasn't a run, it was just a jog". He again discounted getting between Mr Skelton and the workmen "because [of] the pace that he was going at...that wasn't an option, really…[t]he speed, well, time wasn't long enough. The speed was too high."

(iv) He said that after Mr Skelton had been shot, his pace was "pretty much the same, really…it wasn't a walk, it was…back to how it was" and that between the first and the second shot, "[h]e'd taken a few steps…[h]alf a dozen steps maybe, or so, but he was back into his rhythm…as before". When asked about his Dictaphone account, he said that he had provided that in the immediate aftermath of the incident and with hindsight, Mr Skelton's pace "wasn't just a walk". He said that his MG11 reflected the position more accurately than the Dictaphone account.

(b): B50's evidence at the inquest

128. At the inquest B50 gave evidence to the Coroner that (i) at the junction of Caroline Place and Charles Street, after he had drawn his pistol, pointed it at Mr Skelton, and told him to stand still and put the axe down, Mr Skelton "turned and continued to run away from us, with the axe still in his hand"; (ii) on Francis Street he was "walking away at a fast, purposeful pace" and "walking purposefully towards" the workmen; and (iii) after the first shot, he "stumbled into a car that was to his left" and then "continue[d] to walk away" from B50.

129. When questioned by counsel for Mr Skelton's family, B50 said that when he had described Mr Skelton "walk[ing] away from [him] at a fast purposeful pace" and "[s]winging his arms along Francis Street with the car park to his left", he was really talking about Charles Street. He denied that he had "made up" the allegation that Mr Skelton had raised the axe at him and taken a step forward in order to justify his shooting of him. He said, "Mr Skelton continued to run from us, not to listen to our instructions and headed towards members of the public that were not involved still with the weapon in his hand and me unsure of his intentions".

130. CCTV footage at the corner of Charles Street and Francis Street was played to B50. He agreed with counsel that "from that jog, he is now walking, is he not?" and "after Charlie had Tasered him he did not jog along the road…he was going slowly" and "had slowed right down". When asked if he thought Mr Skelton "had just run out of fitness" and "could not jog anymore" he said, "Quite possibly, yes".

131. There was then this exchange:

> "Q. If a witness were to describe him as "staggering along" or "stumbling along", that would essentially cover what he looks like?
>
> A. Quite possibly, yes".

132. B50 said that there was a danger that Mr Skelton would carry on walking, but disagreed with the proposition that "[r]ealistically there was negligible danger to [the] workmen ahead" or that Mr Skelton could "barely walk, let alone run". Counsel put to him that he had tasered Mr Skelton, he had not stopped, "and by this stage, you have run out of Tasers…and he is still stumbling along?" and B50 said "This is correct".

133. The Claimant's case was that this evidence from B50 at the inquest, and in particular the evidence in the quoted at [131] above (**"the key inquest exchange"**), plainly constituted significant new information that satisfied the requirements of Condition B.

(ii): The review's approach to the key inquest exchange

134. At [16] of the review, the Defendant accepted that the key inquest exchange, which was quoted verbatim, was "one aspect of B50's evidence (relating to manner of walking) which was not before the investigator". However the review continued:

> "17. Whilst the above evidence is new it <u>was in my view available to the previous investigator</u> for the following reason. It was based on witness evidence which the investigator had themselves assembled and which the investigator could have invited B50 to comment on in a similar manner to the family's counsel. I do not consider that (viewed in

> isolation) the failure by the investigator to ask a similar question to that of the family's counsel amounted to an error. Investigators have a wide discretion as to how much of other witnesses' account to put to an officer to comment on" [my emphasis].

135. For this reason the Defendant effectively, albeit not explicitly, concluded that the key inquest exchange did not meet the requirements of Condition B because it had, in fact, been available to the previous investigator. The wording of Condition B (see [7] above) refers to "information…had it been available" to the original investigation (my emphasis) and thus excludes information that was in fact available.

136. The review considered the impact of the key inquest exchange in the context of Condition A, not Condition B, with the overall conclusion, applying a probability test, being that "the outcome of the investigation would have been the same even if the investigator had concluded that Mr Skelton was walking along Francis Street, including a walk which involved him stumbling and staggering": [31] of the review.

(iii): Submissions

137. The Claimant contended that the Defendant's approach amounted to a failure to apply the criteria in the policy.

138. First, it was simply not open to the Defendant to conclude that the key inquest exchange had been "available" to the original investigator. While the witness evidence which was the premise of the proposition put to B50 by counsel during the inquest was available, his response to it was not, as he had not been asked about it in the IPCC interview, nor otherwise volunteered a response to it.

139. Counsel for the Claimant sought to illustrate the error in the Defendant's approach with a hypothetical example, along these lines. Witness A said that Officer B was present when a person was shot. Witness A's account was not put to Officer B when he was interviewed, and Officer B denied presence at the scene. The investigator concluded Officer B was telling the truth and that conclusion informed the decisions made in and at the end of the investigation. Officer B later said that he had indeed been present at the shooting. On the Defendant's approach, the later evidence would still have been "available" to the investigator and the Defendant would have been precluded from taking it into account under Condition B.

140. Second, the Defendant had erred by failing to find the remaining criteria of Condition B satisfied: the key inquest exchange was plainly "significant" new evidence, it required "further investigation" and there was a "real possibility" that had it been available, it would have led wholly or partly to different decisions on discipline, performance and/or referral to the CPS, so as to meet the remaining elements of Condition B.

141. The Defendant, supported by the Interested Parties, submitted that it was important to draw a distinction between significant new information requiring further investigation and a "possible recasting" or "different interpretation" of information that was already available. B50's evidence at the inquest fell into the latter category. If the position were otherwise, the default position would become that re-investigation was required every time an inquest conclusion differed from the outcome of an investigation report.

Such an interpretation would be inconsistent with the restrictive wording of s.13B(2) and the policy and unworkable as well as overly resource intensive in practice.

142. They also relied on the following general principles: (i) appropriate deference should be afforded to the decisions of an independent prosecutor and investigator (*R (Corner House Research) v Director of the SFO* [2009] AC 756 at [30], per Lord Bingham); (ii) in decisions such as this involving a "matter of judgment", the court should decline to intervene unless satisfied that the Defendant "has gone beyond that permissible area to reach a conclusion not fairly and reasonably open to it" (see *(Muldoon) v Independent Police Complaints Commission* [2009] EWHC 3633 at [19], per Parker J; and *R (Cubells) v Independent Police Complaints Commission* [2012] EWCA Civ 1292 at [21]); and (iii) decision letters should be read in a "broad and common-sense way without being subjected to excessive or overly punctilious textual analysis" (*R (Monica) v DPP* [2019] QB 1019 at [46]) and thus with what counsel for B50 described as "a measure of benevolence".

143. They contended that, in applying these principles, it was clear that the Defendant's decision was one that did not disclose a public law error. It was carefully considered, properly reasoned, and this court should not interfere with it.

(iv): Analysis

144. I address the various elements of Condition B in turn.

(a): Not "available" to the original investigator

145. Whether or not a particular piece of evidence was "available" to the original investigator is not a matter requiring specialist expertise or an exercise of judgment. The Defendant's approach to this issue is clear from the wording of the review, and no "excessive or overly punctilious" analysis of the review is required to elicit the Defendant's reasoning.

146. I consider that it was not open to the Defendant to interpret "available" for the purposes of Condition B as meaning "hypothetically available, had the investigator asked B50 the relevant question and had he answered it in the way he did at the inquest", which is the effect of the approach taken by the Defendant.

147. In my judgment, the example given by counsel for the Claimant set out at [139] above illustrates the flaw in the Defendant's approach. Developing the example a little further, in order to illustrate its soundness, let us imagine that (i) Witness A said that Officer B was not only present when the person was shot, but had done the shooting; (ii) as in the original example, Witness A's account was not put to Officer B in interview and Officer B denied presence at the scene; and (iii) after the Defendant's investigation had concluded, Officer B accepted that he had in fact carried the shooting. On the Defendant's approach to the concept of "available", the later evidence from Officer B would be outwith Condition B and the Defendant would be justified in deciding not to even consider whether Condition C rendered a re-investigation necessary. That, with respect, cannot be correct, not least as it would be inconsistent with the Defendant's statutory objectives and Article 2 obligations; and would permit the Defendant to benefit from its original flawed investigation.

148. Taking a benevolent approach to the decision-letter, what may well have happened is that the decision maker was, in [17] of the review, mistakenly and unhelpfully eliding the question of whether the investigator's failure to test B50's account in interview further was a flaw for the purposes of Condition A with the question of whether his later evidence, when he was so tested, fell within Condition B.

149. Be that as it may, the effect of [17] of the review is that the Defendant erred in finding that the key inquest exchange had been available to the original investigator, such that Condition B was not met. This constituted a failure to apply the criteria in the policy properly.

150. In my judgment, had the criteria in the policy been applied properly, the only lawful conclusion the Defendant could have reached was that the key inquest exchange was in fact new information that was not available to the original investigator, such that Condition B was in principle engaged. I accept the Claimant's submissions to this effect.

(b): "Significant new information"

151. I cannot accept that the key inquest exchange amounted to a "possible recasting" or "different interpretation" of information that was already available. There was a substantive difference between an independent witness giving evidence on this issue and B50 doing so, given that it was his rationale for the decision to shoot Mr Skelton that was the central issue.

152. I agree with the Claimant that the Defendant's approach, in focussing on the other witnesses' evidence, neglects the significance of B50's evidence on speed to the threat Mr Skelton posed to the three workmen; and to B50's genuine belief in that threat and its immediacy. It also takes no, or no adequate, account of the fact that B50 had not previously said that it was quite possible that Mr Skelton was "staggering along" or "stumbling along". To the extent that this was inconsistent with his previous accounts that in itself might have been significant.

153. The evidence to this effect was part of the body of evidence described by the Divisional Court as "significant and substantial": see [31] above.

(c): "Required further investigation"

154. I accept the Claimant's submission that the significant new information required further investigation.

155. While not in the specific context of Condition B, the Defendant acknowledged that on re-investigation it would be necessary to "reinterview the officers…provide them with an opportunity to submit additional evidence…[and]…take fresh expert advice in the light of those enquiries": [42] of the review.

156. At [31] of the review the decision maker opined that "it would be difficult upon reinvestigation to form a view as to the precise speed at which Mr Skelton was moving due to the number of different accounts". However, that only hinted at the possibility of what might happen if there was further investigation of B50's account, rather than addressing the prior question of whether the new evidence required such

further investigation. For similar reasons I cannot accept the oral submission by counsel for the Defendant that it was hard to see what any reinvestigation would add.

(d): A "real possibility that the new information…would have led wholly or partly to different decisions on discipline, performance and/or referral to the CPS"

157. The Defendant relied on a series of factors in support of the conclusion that the outcome would have been the same.

158. At [25](a)-(d) of the review reliance was placed on the following facts: (i) Mr Skelton was walking along the street holding a hand axe; (ii) his conduct posed a risk of serious harm to members of the public and there was no reliable way of knowing if, when and how he intended to use the axe; (iii) he had failed to respond to repeated instructions from armed officers to drop the axe; and (iv) lesser uses of force had been attempted by the officers via the repeated use of Tasers which had had no or no significant effect. None of these factors were disputed by the Claimant.

159. The Defendant relied at [25](e) on the presence of the workmen and the fact that the officers shouted to the men to "get out of the way". Again this was not disputed by the Claimant. However, the Defendant failed to refer to the fact that there was some evidence, including from the workmen themselves, that they had crossed the road or begun to do so before the shots were fired, as the Divisional Court noted: see [25] and [28] above. The issue of Mr Skelton's speed as reflected in the key inquest exchange was also central to the risk he posed to the workmen. Indeed, Charlie accepted in evidence at the inquest that if he had been walking and not running the three workmen could have evaded the risk he posed.

160. The Defendant relied at [25](f) and (g) on the view that there were only two realistic options open to the officers: the use of pre-emptive force on Mr Skelton in the form of the use of firearms or continuing to "trail" Mr Skelton "in the hope both that he would not use the axe and that effective corrective action could be taken if he did". Again, however, the key inquest exchange was directly relevant to the viability of this second option.

161. The Defendant specifically addressed the causative potency of the key inquest exchange thus:

> "29. I do not consider that B50's acknowledgment at the Inquest that Mr Skelton may have been staggering or stumbling when proceeding down Francis Street would have made a material difference to the outcome of the investigation. My understanding of the officer's evidence in cross-examination was that he first accepted that Mr Skelton's pace had slowed to a walk after moving into Charles Street and that Mr Skelton then continued at the same pace down Francis Street. This was broadly consistent with his witness statement. He then acknowledged that Mr Skelton may have been staggering or stumbling but went on to expressly disagree with the suggestion that Mr Skelton could "barely walk". There is in my view no reliable evidence upon which an investigator could conclude that Mr Skelton was walking at a pace which was so slow as to reduce or negate the existence of the threat described in paragraphs (a) to (g) above. Indeed, some

> independent witnesses observed him to be moving at a pace which was faster than that observed by B50.
>
> 30. I have also considered the evidence of Charlie to the effect that he was unable to move to a satisfactory strategic position between Mr Skelton and the members of the public in his path on Francis Street. When Charlie originally made this assertion, he asserted that Mr Skelton was running. He appeared to accept in cross-examination that this may not have been so but maintained that he was unable to get between him and the advancing group of workmen. I think it unlikely that an investigator would be able to reliably conclude upon reinvestigation that there was an opportunity for either officer to obtain a satisfactory position between Mr Skelton and the approaching members of the public".

162. In light of the body of evidence which was left by the Coroner to the jury, as upheld by the Divisional Court, of which the key inquest exchange formed part, it was in my judgment simply not open to the Defendant to conclude at [29] of the review that there was "no reliable evidence" that the speed at which Mr Skelton was walking had reduced or negated the existence of the threat he posed. The decision of the Coroner, as upheld by the Divisional Court, shows that there was sufficient evidence to support the contrary proposition: see [28] and [31] above. This evidence was also directly relevant to, and undermines, the conclusion at [30] of the review.

163. The focus needed to be on whether the new evidence meant that there was a "real possibility" that the investigator would have made different decisions. It is clear from the decision read as a whole that the "real possibility" test was not addressed in the context of Condition B, or at all. In my judgment, had the test been properly applied, the only proper conclusion was that it was satisfied, for the following reasons.

164. First, the "decisions" which might have been different were whether to make a paragraph 21A determination, whether to find a case to answer and whether to refer the matter to the CPS. There is a low threshold for the making of all these decisions: see [37]-[38] and [41]-[47] above.

165. Second, the original investigator's decisions had relied on the conclusion that Mr Skelton was running. This was a reasoned conclusion, reached after considering each of the different accounts of B50 and other eye witnesses:

> "477. In his dictaphone recording made immediately after the incident, B50 also referred to Mr Skelton as 'walking' on Francis Street. In interview, he said his later statement, which referred to Mr Skelton running, was more accurate. He pointed out that he made the dictaphone recording almost immediately after having been involved in a traumatic incident.
>
> 478. In my opinion, B50 and Charlie's evidence that Mr Skelton was running is likely to be accurate. I have given less weight to the evidence of Mr Spence, Mr Moss and Mr Kirk, because they were facing Mr Skelton who was coming towards them, which would make it more likely that they would have difficulty judging his speed".

166. With the benefit of the key inquest exchange, seen in the context of the totality of B50's evidence on speed, there was plainly a real possibility that the investigator would not have concluded that Mr Skelton was running. This was central to the overall assessment of B50's actions (see further at [173] and [182] below).

167. Third, the key inquest exchange formed part of the body of evidence which, as the Divisional Court confirmed, was sufficient to justify an unlawful killing conclusion being lawfully left to the Jury (and indeed returned). Specifically, it was part of the evidence which would have entitled the Jury to conclude that "Mr Skelton's progress had slowed down considerably, he was struggling and was still not showing aggressive intent despite (or perhaps because of) being tasered four times", such that "the workmen (who were sufficiently distant that they had not yet perceived a threat) would have had ample opportunity to get out of the way had the threat become a real and present danger": see [28] above.

168. Fourth, the Defendant's own conclusion at [35] of the review (see [185] below) appeared to accept this possibility (albeit wrongly, in my judgment, apparently discounting it as a "real" one).

169. I cannot accept the Defendant's "floodgates" argument reflected at [141] above. The decision in this case involved a misapplication of the wording of the policy to a particular situation. However, the policy as a whole has various aspects to it which should prevent the Defendant's decision makers from automatically exercising the s.13B(2) power each time an inquest conclusion differs from that originally reached by the investigator. These include (i) the strict wording of Conditions A-C; (ii) the specific directive to decision makers that the s.13B(2) power "cannot be used solely to retake a decision", but only where the compelling reasons test is met; and (iii) the fact that the findings of other tribunals such as inquests is just one of the factors to be considered in deciding whether re-investigation is necessary: see [63]-[64] above.

(iv): Conclusion on Ground 1 relating to Condition B

170. Accordingly, for all these reasons the Defendant misapplied the criteria in the policy by failing to find that Condition B was satisfied in relation to the key inquest exchange, as defined at [133] above.

9: Ground 2

171. Under Ground 2, the Claimant contended that the Defendant's conclusion on the materiality issue in Condition A was irrational or unreasonable.

(i): The flaws identified in the original investigation

172. The flaws related to (i) B50's perception of the speed at which Mr Skelton was travelling when he was shot; and (ii) B50's allegation of threatening behaviour by Mr Skelton.

173. As to (i), the original investigator had recognised that the speed at which Mr Skelton was moving was "relevant to the immediacy of the threat he posed": [475] of the IPCC report. The report's key findings were that (i) "B50 and Charlie's evidence that Mr Skelton was running is likely to be accurate"; and (ii) B50 had discounted other

options as the gap between Mr Skelton and the workmen was "rapidly" closing: [477]-[478] and [480]-[481]. The finding that Mr Skelton was "running towards members of the public" formed an explicit part of the investigator's overall conclusion as to B50's actions at [508] of the report: [21] above. This led to the investigator's decision not to make a determination under paragraph 21A. It no doubt informed the same decision which was then made by the Commissioner delegate under paragraph 24A.

174. The Defendant concluded that the investigator had wrongly concluded that Mr Skelton was perceived by B50 to have been running down Francis Street when he was shot, when this had not been B50's evidence: rather, B50 had asserted in his witness statement that Mr Skelton had been walking at a "fast, purposeful pace" and although he had said in interview that he had been "jogging", he later clarified that his statement accurately reflected the true position: [12]-[16] of the review.

175. As to (ii), the original investigator had set out B50's description of the alleged threatening behaviour by Mr Skelton in uncritical terms. This referred to Mr Skelton raising the axe above his head, grimacing as if clenching his teeth, taking a step forward and making a loud but muffled growling or grunting sound. B50 said the incident took place at the junction of Caroline Place and Charles Street: [141] of the IPCC report. B50 had indicated in his statement and interview that he perceived the way Mr Skelton had raised the axe above his head as a direct threat towards him; and that this was the first justification for him deploying his pistol and preparing to fire.

176. The Defendant found that the investigator had failed to carry out an assessment of whether Mr Skelton had engaged in such behaviour and, if so, when and where, bearing in mind that CCTV showed that any threat did not occur in the location given by B50: [18]-[21] of the review.

(ii): The approach the Defendant took to the materiality issue

177. Matters are complicated by the fact that in considering the materiality issue for the purposes of Condition A, the decision maker referred in various parts of the review to the evidence that had been given at the inquest, which could only fall within Condition B. This was said to be in order to test the materiality issue for the purposes of Condition A. However this was not, with respect, a helpful approach, given the limits of the flaws that had been identified; and given that consideration of Condition A had to focus on the material impact of such flaws.

178. The first flaw was, as noted at [173] above, the investigator's inaccurate conclusion that Mr Skelton was perceived by B50 to have been running down Francis Street when he was shot, when that had not been B50's evidence. The decision maker specifically ruled out as a flaw that the investigator should have tested B50 in his interview more: see [17] of the review at [134] above. On that basis, in order to test the material impact of the identified flaw, it was necessary to decide what might (or, on the Defendant's approach, would) have happened if the investigator had reached an accurate conclusion on the evidence B50 had given. What he might or would have said had he been tested further in interview was irrelevant for the purposes of Condition A. It was also speculative to assume that if he had been so tested, he would have given the same answers that he gave in answer to counsel for the family at the inquest.

179. The second flaw was, as noted at [175] above, that the investigator had failed to carry out an assessment of whether Mr Skelton had engaged in the threatening behaviour alleged by B50 and, if so, when and where. Although it could credibly be said that a proper assessment of this issue required B50 and Charlie to have been asked more questions about it in interview, that was not how the flaw was framed: rather, the focus was on the apparent tension between B50's account and the CCTV. Further, the comment the decision maker made at [17] (see [134] above) about the broad discretion afforded to investigators suggests that there was no intention to encapsulate within this second flaw any failure by the investigator to question the officers further about the issue. Again, therefore, what B50 or Charlie said at the inquest about the alleged threat by Mr Skelton was irrelevant for the purposes of considering Condition A.

180. In my judgment in order to determine Ground 2 in relation to Condition A it is necessary to keep a clear focus on the materiality issue insofar as it related to the identified flaws in the original investigation.

(iii): Submissions and analysis

181. It is notable that the two areas in which the Defendant concluded that the original investigation was flawed reflected the two issues that B50 said were central to his decision to shoot Mr Skelton: see [20] above.

182. Counsel for the Claimant was therefore right to contend that the issue of B50's perception of Mr Skelton's speed was integral to the investigator's overall approach. It was particularly relevant to the central question of B50's assessment of the immediacy of the threat Mr Skelton posed. This much is clear from the summary set out at [173] above. The alleged threatening behaviour by Mr Skelton was also relevant to this issue.

183. The effect of both the flaws was, potentially, that the investigator had been working on the basis that Mr Skelton posed a greater threat than was justified: if he was not in fact running, and had not in fact engaged in earlier threatening behaviour, it was reasonable to regard him as of less of a risk than if he had in fact done either of things.

184. In my judgment given this factor, and given the direct relevance of both the flaws to the investigator's analysis, it must follow that if the flaws had not occurred, the decisions taken in the investigation might have been different. This is because the investigator might have concluded that it "appeared" that B50 "may" have committed a criminal offence, or behaved in a manner which would justify the bringing of disciplinary proceedings. This would have required a paragraph 21A determination and thus a different "decision" for the purposes of Condition A. This might have led to a different decision as to whether there was a case to answer against B50 in a paragraph 22(5) report and/or a different decision as to whether to refer the case to the DPP under paragraph 23(2)(b). I say this bearing in mind the low thresholds required for these decisions: see [37]-[38] and [41]-[47] above.

185. The Defendant addressed the possible impact of the flaws in this way in the review:

> "35…it is possible that, had the errors referred to above not occurred, the outcome of the investigation could have been different…The

> possibility arises from the fact that Mr Skelton had not attempted to attack any member of the public whom he had passed previously. It could be possible for an investigator to conclude in such circumstances that the officers ought to have continued to trail him in the hope that such an attack would not take place and that, if it did, they would be able to take effective corrective action. It is also possible that an investigator could conclude that there was an opportunity for an officer to get between Mr Skelton and the approaching members of the public and attempt some form alternative use of force."

186. Accordingly the Defendant recognised that if the flaws had not been made, the investigator might have identified realistic alternative options for B50 other than the use of force. This effectively confirms that the flaws in the original investigation might have had an impact on the subsequent decisions. This was sufficient to satisfy Condition A for the reasons I have given above.

(iv): Conclusion on Ground 2

187. Accordingly if the correct test had been applied, the only rational conclusion was that the flaws were material. The only rational consequence of such a conclusion on Condition A was, for the purposes of the outcome issue, that it was – at least – possible that the outcome of the investigation would have been different. To this extent Ground 2 succeeds.

10: Ground 3

188. Under Ground 3 the Claimant argued that the Defendant had failed to give proper consideration or afford adequate weight to the following relevant considerations in failing to conclude that neither Condition A nor Condition B were met: (i) the evidence of B50 and Charlie as to Mr Skelton's speed and the inconsistencies in that evidence; (ii) the evidence as to the availability of less lethal alternatives on Francis Street and the connection between that evidence and speed; (iii) the evidence as to the position of the three workmen and the threat to them; and (iv) the conflicting evidence from the officers as to Mr Skelton's allegedly threatening behaviour.

189. The Defendant and Interested Parties submitted, in summary, that (i) it was not necessary for the review to cite every piece of evidence considered; (ii) matters of weight were primarily for the decision maker; (iii) it was necessary to have regard to the principles summarised at [143] above; and (iv) Ground 3, in reality, amounted to a disagreement with the decision maker on the facts and did not disclose any public law error.

190. The Claimant's arguments on Ground 3 overlapped considerably with those advanced under Grounds 1 and 2. I have already concluded under Grounds 1 and 2 that the Defendant failed to apply the criteria in the policy properly and that proper application of the policy would have led to the conclusion that Condition A and B were met. In those circumstances I consider that it is unnecessary for me to determine Ground 3.

11: Ground 4

191. Under Ground 4 the Claimant advanced a detailed challenge to the Defendant's approach to Condition C. The Defendant and Interested Parties contended that the decision maker had set out all the relevant factors in a careful and nuanced way and that the Claimant's arguments did not disclose any public law errors.

192. The Claimant contended that the Defendant had had insufficient regard to the unlawful killing conclusion of the Jury at the Condition C stage. While the unlawful killing conclusion was highly relevant to the Condition B issue in the ways set out at [162] and [167] above, I cannot accept that the Defendant did not have it well in mind at the Condition C stage: the review was clear at [40] that the conclusion was a "significant factor" weighing in favour of re-investigation when deciding where the public interest lay.

193. The Defendant observed that the Jury's conclusion was unreasoned at [40] of the review. However, I do not regard this as wrongly diminishing its significance as the Claimant suggested, not least as the Defendant correctly identified the underlying meaning of the Jury's conclusion. This was that "on the balance of probabilities that B50 did not genuinely believe when he fired his gun that it was necessary to use force because of an imminent risk to life (or of serious harm) to the approaching workmen": [40].

194. The Claimant also submitted that the decision maker had wrongly taken into account the view that "the need to reinvestigate cannot…be regarded as the fault of the officers concerned": [38] of the review. This observation was a reflection of the fact that the errors with respect to B50's perception of Mr Skelton's speed and the allegation of threatening behaviour in the original report were at least in part, or perhaps largely, due to the investigator. I do not consider that it was irrational for the Defendant to take this into account. I say this particularly because the observation featured as part of a wider point about the extensive delay since the material events, and because the policy specifically directed the decision maker to consider the potential prejudice to the officers (see [64] above), of which delay was potentially part.

195. However, I accept the Claimant's submission that, on the face of the review, the Defendant had not given consideration to (i) the seriousness of the allegations in the original investigation; or (ii) the fact that the subjects of the investigation had not previously faced disciplinary proceedings flowing from the investigation. These are both matters that "should" be considered under Condition C: see [64] above.

196. On any view this was a case of the utmost seriousness, involving as it did an allegation that a decision by a police officer to shoot a man was unnecessary, unreasonable and disproportionate. There had been no misconduct proceedings and no referral to the CPS following the original IPCC investigation. The Article 2 obligations were engaged. These were all relevant considerations that should have been considered.

197. More fundamentally, I accept the Claimant's submission that the Defendant's flawed approach to Condition A was integral to, and permeated, the consideration of Condition C: the review makes clear at [41] in the context of Condition C that the probable outcome of re-investigation was "a significant factor weighing against reinvestigation". To put this in context, this was one of only two "weighty" factors

against re-investigation, the other being the prejudice to the officer: [38]. These were balanced by the Defendant against two "weighty" or "significant" factors in favour of re-investigation, namely the impact on the family and the jury's unlawful killing conclusion: [39] and [40].

198. As I have concluded under Grounds 1-2 that the Defendant erred in respect of the approach to Condition A, it follows that the Condition C conclusion is no longer sound. Further, I accept the Claimant's argument that if, in fact, Condition B was properly satisfied, that could also affect the Condition C analysis. I have found that the Defendant erred with respect to Condition B, such that the same point around the linkage with Condition C arises.

199. Ground 4 therefore succeeds and the Condition C issue will need to be considered afresh.

12: Conclusion

200. Accordingly, the Claimant's claim succeeds. I quash the Defendant's decision and order that it be re-made in accordance with this judgment.