



Easter Term
[2016] UKSC 22
On appeal from: [2014] NICA 11

JUDGMENT

**In the matter of an application by JR55 for Judicial
Review (Northern Ireland)**

before

Lord Neuberger, President
Lord Clarke
Lord Sumption
Lord Carnwath
Lord Toulson

JUDGMENT GIVEN ON

11 May 2016

Heard on 8 March 2016

Appellant

Tony McGleenan QC
Philip McAteer BL
(Instructed by Browne
Jacobson LLP)

Respondent

David A Scoffield QC
Gerard Boyle
(Instructed by Carson
McDowell Solicitors)

LORD SUMPTION: (with whom Lord Neuberger, Lord Clarke, Lord Carnwath and Lord Toulson agree)

Introduction: Ombudsmen

1. The Parliamentary Commissioner Act 1967 created for the first time in the United Kingdom an officer, the Parliamentary Commissioner for Administration, charged with investigating complaints of maladministration against government departments and a limited number of other public authorities exercising the functions of the Crown or controlled or funded by the Crown. Since then, ombudsmen have come to fulfil an increasingly important role in mediating between the state and the public service on the one hand and the citizen on the other. Commissioners have been established for complaints against the National Health Service since 1973, for complaints against local government since 1974 and for complaints against social housing landlords since 1996. There are also separate Commissioners charged with examining complaints against public bodies or the providers of public services in Scotland, Wales and Northern Ireland. There are currently 19 statutory officers charged with the handling of complaints against government departments, local government, the National Health Service and other public authorities or undertakers. They are generally known as ombudsmen, after the officer of that title first established in Sweden in 1809. In some cases, the same person performs the functions of more than one ombudsman, but each role has its own statutory basis. The various enactments have a strong family resemblance. But some of them have distinctive features which mean that considerable caution is required before principles derived from one legislative scheme can be read across to another.

2. In 1969, two ombudsmen were established for Northern Ireland. The Parliamentary Commissioner Act (Northern Ireland) 1969 established a Northern Ireland Parliamentary Commissioner for Administration (later known as the Assembly Ombudsman for Northern Ireland). His role and powers were closely modelled on those of the Commissioner established by the United Kingdom Act of 1967. The Commissioner for Complaints Act (Northern Ireland) 1969 established a Northern Ireland Commissioner for Complaints. I shall call him the “Complaints Commissioner”. He is charged with reporting on complaints against bodies which were not within the jurisdiction of the Northern Ireland Parliamentary Commissioner, notably local authorities, the Northern Ireland Health Board and various public statutory undertakers. Since 1972, the same person has held both offices. But until recently (see below) his two roles have had distinct legislative foundations. It is therefore necessary to have regard to the particular capacity in which an ombudsman is acting and the particular legislation governing that function

in order to determine what his powers are. The current legislation comprises two Orders in Council made on the same day in 1996, which repealed and replaced the corresponding Acts of 1969. They are the Ombudsman (Northern Ireland) Order 1996 (SI 1996/1298 (NI 8)), governing the work of the Assembly Ombudsman, and the Commissioner for Complaints (Northern Ireland) Order 1996 (SI 1996/1297 (NI 7)), governing that of the Complaints Commissioner.

3. This appeal is about the powers of the Complaints Commissioner under the latter order, which I shall call “the 1996 Order”. In particular it is about his powers in relation to general medical practitioners working in the National Health Service. In Northern Ireland, as in other parts of the United Kingdom, the National Health Service is one of the main sources of complaints. The original jurisdiction of the Complaints Commissioner extended to the various boards and committees responsible for the administration of the National Health Service in Northern Ireland. But it was confined to maladministration and did not extend to any “action in the discharge of a professional duty by a medical or dental practitioner, pharmacist, nurse, midwife or member of a profession supplementary to medicine in the course of diagnosis, treatment or care of a particular patient”: see the Commissioner for Complaints Act (Northern Ireland) 1969, Schedule 2, paragraph 4. That jurisdiction was preserved in the 1996 Order. But the position was significantly altered by an amendment of 1997, which followed a similar amendment to the United Kingdom legislation. Its effect was to extend the Complaints Commissioner’s jurisdiction to “the merits of a decision to the extent that it was taken in consequence of the exercise of clinical judgment”: see article 8(7) of the 1996 Order as amended.

4. The main questions at issue in this appeal are whether, and if so in what circumstances, the Complaints Commissioner has power to recommend the payment of a money sum to a complainant; and whether in the event that that sum is not paid he has power to make a special report drawing the attention of the legislature to that fact. The Northern Ireland Court of Appeal decided that the answer in each case was No.

5. These questions will shortly become moot. The Public Services Ombudsman Act (Northern Ireland) 2016 abolishes the offices of both the Assembly Ombudsman for Northern Ireland and the Complaints Commissioner with effect from 1 April 2016, and combines their functions in a new officer, the Northern Ireland Public Services Ombudsman. The jurisdiction and powers of the new office are in some respects greater than those of either of its predecessors, and his mode of operation different. But the new Act has no bearing on the present appeal. The transitional provisions provide for current matters to be transferred to the Public Services Ombudsman, but to be dealt with by him in accordance with the 1996 legislation. We have been told that there are some 53 reports completed since the decision of the Court of Appeal which have been held back pending the determination of this

appeal, and that in four further cases payment of a money sum has been recommended but the recommendation has not been followed.

The facts

6. The respondent is a general medical practitioner in sole practice in Northern Ireland. The National Health Service operates in Northern Ireland through a Health and Social Care Board. The respondent provides general medical services under contract with the board for his area under Part VI of the Health and Social Services (Northern Ireland) Order 1972 (SI 1972/1265 (NI 14)). This means that complaints against him are liable to be investigated by the Commissioner under article 8 of the 1996 Order. I shall deal below with the scope of that article.

7. The complainant is the widow of one of his patients, who has been referred to in this litigation as “R”. R died on 6 January 2009 of a myocardial infarction. The complaint concerns the care and treatment received by him during the last eight months of his life. He attended the respondent’s surgery on 30 May 2008 to ask for a heart screen. Although he had no symptoms and was not complaining of chest pains, he was referred to a NHS hospital for a treadmill test. The test was carried out in July, but terminated early due to fatigue. The test recorded “negative for ischaemic heart disease” at the level of exercise attained at the time it was terminated. A report to this effect was sent to the respondent, whose staff recorded it on the practice computer system, but no action was taken.

8. On 10 December 2008, R attended the surgery again, this time complaining of chest pains. He was seen by a locum doctor, who noted “typical angina pain but normal treadmill earlier in the year”, but again, no action was taken. R returned to the surgery on 15 December 2008 complaining of further chest pains. He saw the respondent, who referred him to the Rapid Access Chest Pain Clinic at the same hospital. The clinic, however, declined to give him an appointment, because the earlier treadmill test had been negative. They suggested in a report dated 20 December that if any further medical review was required R should be referred to the outpatients department. Their report arrived at the practice on Christmas Eve, and was input into the practice computer system. The respondent was on holiday. The locum was on duty, but she did not review the report because it was not marked urgent. R returned to the surgery on 6 January 2009 to find out what had happened about the referral to the clinic. The locum told him that an appointment had been refused, but referred him to the clinic as an outpatient for a treadmill test, as suggested in the report. He died later that day, before anything had been done to follow up this suggestion.

9. Mrs R complained to the Complaints Commissioner. She gave his officials to understand that she was not looking for compensation but wished to understand what had happened. The Commissioner agreed to undertake the investigation, and in due course reported. He concluded that the practice had failed to provide a reasonable level of care and treatment. In particular, he found that it was guilty of maladministration in (i) failing to take action after the treadmill test, (ii) failing to follow up promptly the clinic's failure to give R an appointment, and (iii) failing to refer R to the emergency services on 6 January 2009. He also found that the respondent had acted inappropriately after R's death in (iv) prematurely assigning responsibility to the hospital, (v) discouraging the family from making a complaint, and (vi) having promised to contact the hospital about Mrs R's complaint against them, failing to get back to Mrs R after doing so. The Complaints Commissioner made no finding that these failures caused the death of R, and the facts that he has found do not suggest that they did. He specifically found that the failure to take appropriate action on 6 January 2009 made no difference to the outcome. But at para 70 of his report he concluded:

“I have identified learning points earlier in this report for the Practice and I recommend that [the GP] acts upon them. I also recommend that the Practice should pay [the complainant] £10,000 in respect of the clearly identified failings in the care provided to [the patient] and the events which consequently followed.”

10. The respondent has apologised to Mrs R and, as the Complaints Commissioner's report observes, has put in hand changes to his practice's procedures designed to avoid a recurrence of the administrative failings. But, having taken legal advice, he has declined to pay the money sum recommended, on the ground that he was not legally bound to do so. The Complaints Commissioner has responded by saying that in that case he was minded to issue a “special report” to the Northern Ireland legislature reporting the respondent's failure to comply with the recommendation.

The Commissioner for Complaints (Northern Ireland) Order 1996

11. The Complaints Commissioner is empowered to investigate and report on complaints made to him by those claiming to have suffered injustice as a result of the conduct of certain bodies and persons. The bodies and persons in question, and the matters which he is empowered to investigate are identified by articles 7 to 10 of the Order. The scheme of these provisions is that article 7 provides for the investigation of complaints about maladministration by any of the bodies listed in Schedule 2. These are all non-departmental public bodies exercising functions conferred on them by statute. Schedule 2 may be amended by Order, but article 7(3)

provides that such an Order may extend its operation only to bodies which either exercise statutory functions or have their expenses substantially defrayed from public funds. The investigation of Mrs R's complaint against the respondent was conducted under article 8, which deals with the investigation of complaints against individuals who have undertaken to provide general medical, dental, ophthalmic or pharmaceutical services under Part VI of the Health and Social Services (Northern Ireland) Order 1972 or in certain circumstances those performing personal medical or dental services. Unlike the bodies whose conduct may be investigated under article 7, the persons liable to be investigated under article 8 are not public bodies. They are individuals like the respondent providing professional services under contracts or other consensual arrangements with the National Health Service. The distinction is significant, as I shall explain. article 8(a) provides for the investigation of complaints against independent health and social care providers. These are not public bodies either. Like the individuals covered by article 8, they provide services under arrangements with the National Health Service. Articles 9 and 10 restrict in certain respects the undertaking of investigations authorised under all three preceding provisions.

12. Article 9 is mainly concerned with the potential overlap between the Complaints Commissioner's investigations and other remedies available to the complainant. Article 9(3) and (4) provides:

“9. Matters not subject to investigation

...

(3) Subject to paragraph (4) and to [section 78 of the Northern Ireland Act 1998], the Commissioner shall not conduct an investigation under this Order in respect of -

(a) any action in respect of which the person aggrieved has or had a right of appeal, complaint, reference or review to or before a tribunal constituted under any statutory provision or otherwise;

(b) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in a court of law.

(4) The Commissioner may conduct an investigation -

(a) notwithstanding that the person aggrieved has or had such a right or remedy as is mentioned in paragraph (3), if the Commissioner is satisfied that in the particular circumstances it is not reasonable to expect him to resort to or have resorted to it; or

(b) notwithstanding that the person aggrieved had exercised such a right as is mentioned in paragraph (3)(a), if he complains that the injustice sustained by him remains unremedied thereby and the Commissioner is satisfied that there are reasonable grounds for that complaint.”

13. Article 11 provides, in relation to all three categories of investigation:

“11. Purposes of investigation

The purposes of the investigation by the Commissioner shall be -

(a) to ascertain if the matters alleged in the complaint -

(i) may properly warrant investigation by him under this Order;

(ii) are, in substance, true; and

(b) where it appears to the Commissioner to be desirable -

(i) to effect a settlement of the matter complained of; or

(ii) if that is not possible, to state what action should in his opinion be taken by the body concerned, the general health care provider concerned or the independent provider concerned

(as the case may be) to effect a fair settlement of that matter or by that body or provider or by the person aggrieved to remove, or have removed, the cause of the complaint.”

14. Articles 15-19 cover (among other things) enforcement. Three modes of enforcement are provided for. First, under article 15, the Complaints Commissioner is required to send a copy of the report of his investigation to specified people, including the complainant and the body or person investigated. Where the investigation is carried out under article 8 into the conduct of an individual health provider, the report must be sent to the National Health Service entity with whom he or she has contracted or arranged to provide the service in question. That body may take whatever disciplinary or other action is open to it under its arrangements with the practitioner. Secondly, article 16 provides:

“16. Application for compensation by person aggrieved

(1) Where on an investigation pursuant to a complaint under article 7 the Commissioner reports that a person aggrieved has sustained injustice in consequence of maladministration, the county court may, on an application by that person, by order award that person damages to be paid by the body concerned.

...

(3) Damages awarded under this article shall be such as the county court may think just in all the circumstances to compensate the person aggrieved for any loss or injury which he may have suffered on account of -

(a) expenses reasonably incurred by him in connection with the subject matter of the maladministration on which his complaint was founded; and

(b) his loss of opportunity of acquiring the benefit which he might reasonably be expected to have had but for such maladministration.

(4) In calculating the amount of damages to be awarded by virtue of paragraph (3)(b) the county court shall apply the same rule concerning the duty of a person to mitigate his loss as applies in relation to damages recoverable at common law.”

The third mode of enforcement is provided for by article 17. The substance of this provision is that where the Complaints Commissioner conducts an investigation under article 7 and reports persistent or systemic maladministration, the Attorney-General may, at his request, apply to the High Court for an injunction. In court proceedings under article 16 or 17, article 18(1)(a) provides that

“a recommendation of the Commissioner and any report of the Commissioner relating to the complaint in connection with which the recommendation is made shall, unless the contrary is proved, be accepted as evidence of the facts stated therein.”

15. It is, finally, necessary to refer to articles 19 and 21. They provide as follows:

“19. Reports to the Assembly

The Commissioner shall annually lay before the Assembly a general report on the performance of his functions under this Order and may from time to time lay such other reports before the Assembly as he thinks fit.

...

21. Disclosure of information by Commissioner

(1) Information obtained by the Commissioner or his officers in the course of, or for the purposes of, an investigation under this Order shall not be disclosed except as permitted by paragraph 1(B) or for the purposes of -

(a) the investigation and any report to be made thereon under this Order;

(b) any proceedings for an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Commissioner or any of his officers by virtue of this Order;

(c) any proceedings for an offence of perjury alleged to have been committed in the course of an investigation under this Order;

(d) an inquiry with a view to the taking of proceedings of the kind mentioned in sub-paragraphs (b) and (c); or

(e) any proceedings under article 14, 16 or 17.”

Power to recommend monetary redress: Article 9(3) and (4)

16. On the particular facts of this case, there is a short answer to the Complaints Commissioner’s appeal. Under article 9(3) of the 1996 Order, he may not carry out an investigation into any actions in respect of which the complainant has a remedy by way of proceedings in a court of law. This is, subject to article 9(4), a condition precedent to his jurisdiction. It follows, as a Divisional Court in England held about a similar provision limitation on the powers of the Commissioner for Local Administration under the Local Government Act 1974, that the operation of article 9(3) cannot depend on whether the complainant’s allegations are well-founded. For the purposes of article 9(3) she has a remedy by way of proceedings in a court of law if, on the assumption that her complaint was justified, she would have a remedy in court: see *R v Commissioner for Local Administration, Ex p Croydon London Borough Council* [1989] 1 All ER 1033, 1044.

17. By way of exception to the restriction in article 9(3), article 9(4) provides that the Complaints Commissioner may nevertheless conduct the investigation if he is satisfied that in the particular circumstances it is not reasonable to expect the complainant to resort to law. This is primarily directed to cases where litigation would not be worth the cost and trouble involved. But it may also apply in other cases, for example where the complainant is looking for explanations rather than money. According to the evidence of the Commissioner’s staff, this was the position of Mrs R. The Commissioner accepted that the complaint should be investigated because Mrs R said that she was not seeking monetary redress but only wanted to know what had gone wrong. I agree that that was a proper basis on which to

undertake the investigation. The Commissioner could properly conclude that it would not have been reasonable to expect Mrs R to commence proceedings in court if she was not seeking financial relief. But if the only basis on which the Commissioner felt able to undertake the investigation at all was that Mrs R did not want money, it could not be proper for him to recommend a payment of money and threaten to report on the respondent's failure to pay it.

Power to recommend monetary redress: in general

18. There is, however, a more fundamental question, which is directly raised by the Court of Appeal's judgment, namely whether the Complaints Commissioner has power to recommend monetary redress at all. The Court of Appeal held that he did not. If that is correct, it applies irrespective of the basis on which the Commissioner satisfied the conditions in article 9(4).

19. The starting point is the legal and constitutional status of the Complaints Commissioner's reports. The practice of the United Kingdom government is to comply with the recommendations of statutory ombudsmen unless the department in question can put forward good reasons for not doing so: see *Handling of Parliamentary Ombudsman Cases* (Cabinet Office, 1996), para 61, and *Managing Public Money* (HM Treasury, 2013), para 4.12.2. This corresponds to what has been held to be the position of the United Kingdom government in relation to reports of the Parliamentary Commissioner for Administration. In *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36; [2009] QB 114, the Court of Appeal in England accepted (para 63) that where a minister was responsible to Parliament for the public body in question, he was not bound to accept the Commissioner's findings or recommendations, because Parliament cannot have intended to preclude the minister from explaining his rejection of them to Parliament. Nevertheless, it was held (para 72) that he could not rationally reject them without "cogent reasons".

20. The decision in *Bradley* raises delicate questions about the relationship between judicial and Parliamentary scrutiny of a minister's rejection of the recommendations of the Parliamentary Commissioner for Administration. But they are not questions which arise on this appeal, because on any view the principle stated in *Bradley* cannot be transposed without modification to a case where the Complaints Commissioner recommends financial redress against a medical practitioner. In the first place, as I shall explain below, the Complaints Commissioner has a very different relationship with the legislature. Secondly, even in a case where his recommendation is directed to a public body, article 16, which has no equivalent in the United Kingdom legislation, provides for claims to compensation to be determined in adversarial litigation before a court. The effect is to create a statutory cause of action for maladministration which would not

necessarily exist otherwise. The function of the court is to decide the issue on the merits, and not simply by way of judicial review of the Commissioner's report. The Commissioner's recommendations and findings are no more than rebuttable evidence of the facts. It necessarily follows that the public body in question is entitled to dispute them on any ground which may find favour with a court. Third, and critically, the recommendation which is challenged in the present case was not directed to a public body. A general practitioner working in the National Health Service is not a public body, but merely provides services to a public body under a contract or some other consensual arrangement. The Complaints Commissioner is not a court. He is an official, albeit an independent one, performing an investigatory and advisory function under statute. Except in relation to compelling the attendance of witnesses and the production of documents (see article 13 of the 1996 Order), he has no powers of compulsion. Subject to the terms of the practitioner's agreement with the relevant NHS body and to any power of enforcement conferred by the relevant legislation, the Commissioner's recommendations are not binding on any one as a matter of private law. At best, they are legally enforceable only by virtue of the public law duty of a public body not irrationally to reject them. But that duty is irrelevant to a person in the position of the respondent, who has no relevant public law duties.

21. The scheme of the 1996 Order, like that of the 1969 legislation which it replaced, is based upon a similar distinction between public and private bodies. The right of a complainant to claim damages in court under article 16 is limited to cases of maladministration found in the course of an investigation conducted under article 7, ie by one of the public bodies to which that article applies. The same limitation applies to the right to request the Attorney General to apply for an injunction under article 17. Similarly, by article 21, the Complaints Commissioner is permitted to disclose information obtained in the course of or for the purpose of an investigation only for limited purposes. They are conducting the investigation and preparing his report on it, defending himself and his officers against a charge of breach of the Official Secrets Acts, and taking proceedings for perjury or obstruction in the course of an investigation. The information may also be made available for the purpose of enforcement proceedings under articles 16 and 17, both of which as I have pointed out are limited to investigations conducted under article 7. Leaving aside the possibility of a special report, to which I shall return, there is no power to use the information for the purpose of enforcement measures of any other kind.

22. Article 11 of the 1996 Order empowers the Complaints Commissioner to try to effect a fair settlement of the complaint. If that is not possible, he may state what action should in his opinion be taken by the object of the complaint in order to effect such a settlement. In a case where the complainant has suffered loss in consequence of the defaults found by the Commissioner, a fair settlement is likely if not certain to require that that loss should be made good. It follows that if the Commissioner chooses to operate the settlement procedure, and fails to achieve a settlement, he

must be entitled to recommend in his report a monetary payment sufficient to bring about a fair settlement. That power is available irrespective of the statutory basis of the investigation, and therefore whether the party investigated is a public or a private body. But the power is not relevant here, because the Complaints Commissioner never sought to operate the settlement procedure. If he had done, a settlement might well have been achieved without difficulty, since Mrs R had not sought monetary redress and the respondent has accepted the Commissioner's other recommendations.

23. Article 18(1)(a) of the 1996 Order provides that the Commissioner's recommendations as well as his findings may be relevant to an action for damages against a public body under article 16. It is arguable that the Complaints Commissioner may also have power to make recommendations that would be relevant in such proceedings. But since the respondent is not a public body and not amenable to proceedings under article 16, that question does not arise on this appeal and I should prefer to leave it open.

24. What is clear is that investigations under article 8 into the conduct of persons who are not public bodies are an entirely different matter. It is one thing for a public officer performing an investigatory and advisory role to recommend a payment out of public funds. It is another thing altogether for him to recommend the payment by a private individual out of his own pocket of a sum which that individual has no public or private law duty to pay. Articles 16 and 17, as I have pointed out, have been deliberately limited to investigations under article 7 into the conduct of one of the public bodies identified in Schedule 2. There is no statutory mode of enforcing a monetary payment against a private contractor to which the Complaints Commissioner's recommendation could be relevant. More generally, a private individual has no means open to him of challenging the Commissioner's findings before a court, such as a public body enjoys under article 16, except by way of judicial review, which offers only limited scope for a review of the merits. I can think of no rational reason why the draftsman of the 1996 Order should have intended that private individuals with no relevant duty of compliance should have a more limited right to challenge the Commissioner's report than a public body. On the contrary, the assumption must have been that the Commissioner would not make recommendations against private individuals of a kind which could have no legal effect directly or indirectly, either under the Order or under the general law. This is, in substance, what the majority of the Court of Appeal decided. In my opinion, as applied to investigations under article 8, their conclusion was correct.

Power to make a special report

25. The Complaints Commissioner's main response to this is that his recommendations do not depend for their efficacy on their legal enforceability but

on the power of publicity. By publicising a respondent's failure or refusal to comply with a recommendation, he can bring pressure to bear on him to comply notwithstanding the lack of any legal obligation to do so. This is what the Commissioner hopes to achieve by issuing a "special report". Mr McGleenan QC, who appeared for the Commissioner before us, drew our attention to the observations of Wade and Forsyth, *Administrative Law*, 11th ed (2014), p 69, about the Parliamentary Commissioner Act 1967:

"An ombudsman requires no legal powers except powers of inquiry. In particular, he is in no sense a court of appeal and he cannot alter or reverse any government decision. His effectiveness derives entirely from his power to focus public and parliamentary attention upon citizens' grievances. But publicity based on impartial inquiry is a powerful lever. Where a complaint is found to be justified an ombudsman can often persuade a government department to modify a decision or pay compensation in cases where the complainant unaided would get no satisfaction. For the department knows that a public report will be made and that it will be unable to conceal the facts from Parliament and the press."

26. I have no difficulty with this proposition as applied to a public body and to the scheme of the United Kingdom Act. The United Kingdom Parliamentary Commissioner for Administration is an officer of the legislature. The White Paper which preceded the passing of the 1967 Act (*The Parliamentary Commissioner for Administration*, Cmnd 1965/2767) observes at para 4, that his office was conceived as supporting the traditional constitutional function of Parliament of receiving the grievances of citizens and holding ministers individually and collectively accountable for their amendment. The Parliamentary Commissioner in the United Kingdom is empowered to investigate complaints referred to him by a Member of Parliament against government departments and other public bodies identified in Schedule 2: see sections 4 and 5 of the 1967 Act. He has no power to investigate complaints against private individuals providing services to government departments or public bodies. The Parliamentary Commissioner's practice is, in appropriate cases, to recommend that the department or public body provides financial redress, generally on a compensatory basis. If the department decides not to comply, he may make a "special report" under section 10(3), which provides as follows:

"(3) If, after conducting an investigation under section 5(1) of this Act, it appears to the Commissioner that injustice has been caused to the person aggrieved in consequence of maladministration and that the injustice has not been, or will

not be, remedied, he may, if he thinks fit, lay before each House of Parliament a special report upon the case.”

In all of these respects, the position of the Assembly Ombudsman for Northern Ireland under the Ombudsman (Northern Ireland) Order 1996 is the same. Section 10(3) of the 1967 Act of the United Kingdom is reproduced by section 10(3) of the Parliamentary Commissioner Act (Northern Ireland) 1969, and then by article 17(2) of the Assembly Ombudsman (Northern Ireland) Order 1996. But no corresponding power was conferred on the Complaints Commissioner either by the legislation of 1969 or by that of 1996.

27. The absence of a power in the Complaints Commissioner to make a “special report” of the kind which is expressly conferred on the Assembly Ombudsman was not an oversight. It reflects a significant difference in their constitutional status. The Assembly Ombudsman, like the United Kingdom’s Parliamentary Commission for Administration, is an officer of the legislature. Under the Ombudsman (Northern Ireland) Order 1996, he may investigate only such complaints as are made by a member of the public to a member of the Assembly and referred by the latter to him: article 9(2). He reports to the member in question or another appropriate member, as well as to the public body under investigation: article 16. In keeping with this scheme, the sole mode of enforcing his recommendations provided for by the legislation is a special report to the legislature under article 17(2). These had also been features of the Parliamentary Commissioner Act (Northern Ireland) 1969. Their effect is that the Assembly Ombudsman’s recommendations are enforceable politically, but they are not enforceable legally save arguably by way of judicial review. This reflects the fact that the bodies subject to investigation by the Assembly Ombudsman are government departments and public bodies for whom the relevant minister is responsible to the legislature.

28. The position of the Complaints Commissioner is different. He is a public officer but he is not an officer of the legislature in the same sense as the Assembly Ombudsman. Under the 1996 Order, he receives complaints directly from the public: articles 7(7) and 8(5). He reports to the complainant and to the bodies and individuals whose conduct is at issue: article 15. There is no power to make a special report to the legislature or to any one else on non-compliance with his recommendations. Instead, his recommendations and findings are legally enforceable by the court by the procedures set out in articles 16 and 17, but only as against public bodies investigated under article 7. In 1969 and 1996, it was evidently not considered appropriate to confer enforcement powers against private individuals with no relevant duties either in public or private law, whether by way of resort to the courts or by denouncing the recalcitrant party to the legislature.

29. I do not accept the Complaints Commissioner's submission that this deliberate scheme can be circumvented by resort to article 19 of the 1996 Order, which empowers him to lay before the Assembly an annual report on the performance of his functions and "such other reports ... as he thinks fit". Reports of his investigations are governed by article 15. The context and the scheme of the legislation, both in 1969 and in 1996, show that article 19 is concerned with general reports on his work, and not with reports on individual cases. The assumption of the Complaints Commissioner that he can make a special report to the legislature on a failure to comply with his recommendations confuses his two roles, which are legislatively distinct. The position of the new Public Services Ombudsman under the 2016 Act will be different, because his power to issue a special report is wider: see section 46(2). But that is not the legislation upon which this appeal turns.

The Commissioner's recommendation in this case

30. I have quoted para 70 of the Commissioner's report, in which he recommends a payment by the respondent of £10,000. The respondent challenges the rationality of that recommendation. On the view that I have reached about the limits of the Commissioner's powers, this question does not arise. However, I would not like to part with this case without commenting on the fact that the Commissioner thought it appropriate to make a recommendation in these terms, even on the footing that he was entitled to recommend monetary redress at all. The Commissioner's recommendations, in those cases where he is entitled to make them, are discretionary and he has more latitude in arriving at a figure than a court would have. But a monetary recommendation, like any other, must be rational, and it must be explained. The only explanation proffered is that the £10,000 should be paid "in respect of the clearly identified failings in the care provided to [the patient] and the events which consequently followed." The report does not explain why these failings warrant a payment of £10,000 or how that figure has been arrived at. It does not say whether Mr or Mrs R suffered any loss by the failings for which the £10,000 should be treated as compensation. Some of the failings, notably the failure to take more urgent action on 6 January 2009 are found to have made no difference and others, such as the events which followed R's death could not in the nature of things have done so. It is possible that the recommendation was intended as a solatium for injured feelings, but the report does not say so, and in the absence of explanation £10,000 seems to be an excessive amount to recommend on that basis. On the face of it, the figure has simply been plucked out of the air. If I had concluded that the Complaints Commissioner had power to recommend a payment by the respondent, I would have regarded this particular recommendation as lacking any rational basis.

Conclusion

31. For these reasons I would dismiss the appeal.