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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR249
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Between:

JR249

Applicant

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Respondent

_____

Mr Steven McQuitty KC (instructed by Edwards & Co Solicitors) for the Applicant
Mr John Beggs KC with Mr James Berry (instructed by PSNI Legal Services Branch) for the Respondent

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COLTON J

Introduction

[1] This is a difficult, sensitive case with a chequered history and previous litigation.

[2] It involves an investigation into a police officer, JR249, under the Police (Conduct) Regulations (Northern Ireland) 2016 ("the Regulations").

[3] The principal decision for the court is whether the respondent should be permitted to bring misconduct proceedings against the applicant under the Regulations. The resolution of the question requires the court to analyse and interpret the Regulations against a complicated factual background with overlapping considerations of common law procedural fairness and the applicant's

rights under article 8 of the European Convention on Human Rights ("ECHR") as protected by the Human Rights Act 1998.

The Regulations

[4] Alleged misconduct by police officers is dealt with under The Police (Conduct Regulations) (Northern Ireland) 2016 ("the Regulations").

[5] Regulation 5(1) provides that the Regulations apply where an allegation comes to the attention of an appropriate authority which indicates that the conduct of a member may amount to misconduct or gross misconduct.

[6] An appropriate authority is defined under the Regulations as being either the Chief Constable or, for senior officers, the Policing Board Superintendents. In this case AA McCaughan and AA McGuigan were acting on behalf of the Chief Constable.

[7] Mr McQuitty places particular emphasis on Regulation 9 which deals with the scenario where there are outstanding or possible criminal proceedings. It provides:

> "9.—(1) Subject to the provisions of this regulation, proceedings under these Regulations shall proceed without delay."

[8] Regulation 10 deals with suspension:

> "**Suspension**
>
> 10.—(1) The appropriate authority may, subject to the provisions of this regulation, suspend the member concerned from his office as constable.
> …
>
> (3) A member concerned who is suspended under this regulation remains a member for the purposes of these Regulations.
>
> (4) The appropriate authority shall not suspend a member under this regulation unless the following conditions ("the suspension conditions") are satisfied -
>
> (a) having considered temporary redeployment to alternative duties or an alternative location as an alternative to suspension, the appropriate authority has determined that such redeployment

is not appropriate in all the circumstances of the case; and

(b) it appears to the appropriate authority that either –

(i) the effective investigation of the case may be prejudiced unless the member concerned is so suspended; or

(ii) having regard to the nature of the allegations and any other relevant considerations, the public interest requires that he should be so suspended."

[9] Part 3 deals with how investigations are to be conducted.

[10] Regulation 12(1) requires that the AA shall assess whether the conduct which is the subject matter of the allegation, if proved, would amount to misconduct or gross misconduct or neither.

[11] Regulation 12(4) provides that where the AA determines that the conduct, if proved, would amount to gross misconduct, the matter shall be investigated.

[12] Regulation 12(5) provides that at any time before the start of misconduct proceedings, the AA may revise its assessment of the conduct under paragraph (1), if it considers it appropriate to do so.

[13] Regulation 13 provides for the appointment of an investigator. Regulation 15 sets out the purpose of the investigation. Regulation 16 provides for the various notices to be provided to a person under investigation. Regulations 18 and 19 provide for representations to be made to an investigator and for interviews during investigation. Regulation 20 deals with the report of the investigation.

[14] Part 4 deals with misconduct proceedings.

[15] Importantly, Regulation 21 deals with the referral of a case to misconduct proceedings. It provides:

"21.-(1) Subject to regulation 42, and paragraphs (6) and (7), on receipt of the investigator's written report under regulation 20, the appropriate authority shall, as soon as practicable, determine whether the member concerned has a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer.
…

(3) Where the appropriate authority determines there is no misconduct case to answer, it may—

(a) take no further disciplinary action against the member concerned;

(b) take management action against the member concerned; or

(c) refer the matter to be dealt with under the Performance Regulations.

(4) Where the appropriate authority determines that there is a case to answer in respect of gross misconduct, it shall, subject to regulation 9(3) and paragraph (2), refer the case to a misconduct hearing.

…

(8) Where the appropriate authority fails to—

(a) make the determination referred to in paragraph (1); and

(b) where appropriate, decide what action to take under paragraph (5),

before the end of 15 working days beginning with the first working day after receipt of the investigator's written report, it shall notify the member concerned of the reason for this."

[16] Many of the arguments in this case relate to Regulation 22 which provides:

"**Withdrawal of case**

22.—(1) Subject to section 59(6)(b) of the 1998 Act, at any time before the beginning of the misconduct proceedings, the appropriate authority may direct that the case be withdrawn.

(2) Where a direction is given under paragraph (1)—

(a) the appropriate authority may—

(i) take no further action against the member concerned;

(ii) take management action against the member concerned; or

(iii) refer the matter to be dealt with under the Performance Regulations; and

(b) the appropriate authority shall as soon as practicable give the member concerned—

(i) written notice of the direction, indicating whether any action will be taken under sub-paragraph (a); and

(ii) where the investigation has been completed, on request and subject to the harm test, a copy of the investigator's report or such parts of that report as relate to the member concerned."

[17] The remainder of the Regulations deal with the procedure for the misconduct proceedings, the outcome of decisions and provisions for appeal.

The facts

[18] In July/August 2016, the applicant commenced an extra-marital affair with a female, K. The affair ended in August 2017 when it was discovered by the applicant's wife.

[19] On 24 August 2017, K approached the PSNI and made a statement of complaint against the applicant's wife alleging that she had been harassing her. A further interview with police was recorded on body worn video (BWV). In the course of making that complaint K made disclosures about the nature of her sexual relationship with the applicant. She said that she had unorthodox sexual preferences, some of which she played out with the applicant. These included sexual acts derived from the "Daddy Dom/Little Girl" community where the dominant character would play the part of "Daddy" and the submissive character would play the role of a little girl, who does what "Daddy" tells her to do. She also claimed that she had sustained injuries in the course of her sexual relationship with the applicant, including broken ribs, black eyes, being choked unconscious on a number of occasions, and sustaining cuts. She maintained that these actions including the assaults were entirely consensual and at her initiation for sexual pleasure.

[20] K's disclosures resulted in a criminal investigation in relation to potential assaults committed by the applicant. A PACE interview was conducted with him on 27 September 2017. The PPS decided not to prosecute him on 21 February 2018.

[21] Parallel with the criminal investigation a decision was made by the respondent to investigate the applicant for gross misconduct under the Regulations. On 11 October 2017, a Regulation 16 notice was served on the applicant giving him notice of the investigation and the related details.

[22] The applicant was interviewed on 28 June 2018 by the Professional Standards Department (PSD) under the Regulations. In that interview he confirmed that he had had a sexual relationship with K. He stated that K initiated the sadomasochism element of the relationship. He disputed several of the statements made by K in that while he accepted that he had consented to some of what she suggested, such as: role play, wrestling, handcuffing, he maintained that he had refused to participate in erotic asphyxiation or branding and cutting. He denied that he had caused any injuries to K. He maintained that he had been uncomfortable with this aspect of the relationship but went along with it because of a veiled threat by K that she would tell his wife about their relationship.

[23] He accepted that the "Daddy Dom/Little Girl" aspect of the relationship had occurred which, as he described it, involved K dressing up and his treating her like a little girl.

[24] On 27 September 2018, following the PSD investigation, the appropriate authority Superintendent McCaughan (AA McCaughan) determined the applicant had a case to answer and that the matter should be placed before a misconduct panel to determine whether he was guilty of gross misconduct.

[25] On 18 November 2018, the respondent received legal advice from Mr Beggs KC, who had been asked to draft potential misconduct charges.

[26] The court has seen the full opinion from Mr Beggs. The applicant has received a redacted version (with the approval of the court).

[27] After receiving that advice AA McCaughan reviewed his determination on 7 December 2018 and directed that the misconduct proceedings against the applicant should be withdrawn under Regulation 22(1) of the Regulations. The applicant was subsequently informed of the decision by his superior officer PS Young.

[28] AA McCaughan further determined that the applicant should be subject to the Service Confidence procedure and the matter was referred to Chief Superintendent Bond to establish a Service Confidence Panel (SCP).

[29] The outworkings of the panel's considerations resulted in very significant restrictions being placed on the applicant, commencing from early 2019 onwards.

[30] In short, the SCP made its recommendations on 18 February 2019. ACC Todd made a decision on 30 April 2019 essentially endorsing the recommendations of the panel. That decision was appealed but affirmed by DCC Martin on 11 July 2019.

[31] The applicant challenged the lawfulness of the decision made by the SCP. The decision was ultimately quashed by the High Court in a written judgment by Quinlivan J delivered on 8 April 2022 (JR91), following a successful judicial review.

[32] Despite this, the SCP restrictions were maintained by the respondent from the date of judgment on 8 April 2022 to 19 September 2022 when the applicant was suspended from duty. **The failure by the PSNI to give effect to that judgment is the second impugned decision in this application.**

[33] In the meantime, the respondent decided to "re-institute" the misconduct proceedings against the applicant that it had withdrawn in 2018. As a result, Superintendent McGuigan ("AA McGuigan") determined on 18 August 2022 that the applicant had a case to answer for gross misconduct under the Regulations based on the same material.

[34] As a consequence, the applicant now faces a misconduct hearing before a disciplinary panel convened under the Regulations.

[35] **This is the first impugned decision**.

[36] Further to the second decision to bring misconduct proceedings, on 31 September 2022, DCC Hamilton made the decision to suspend the applicant from duty pursuant to Regulation 10. The applicant remains suspended. **This is the third impugned decision.**

[37] The applicant challenged the three impugned decisions by way of judicial review. Leave was granted by this court with respect to each of the impugned decisions on 28 February 2023 - [2023] NIKB 25.

The leave judgment/alternative remedy

[38] When I first considered the application, I formed the preliminary view that the applicant should avail of an alternative remedy rather than seek judicial review in respect of the first and third decisions under challenge. Plainly, the first impugned decision is the primary target of the judicial review application. It appeared to the court that it was open to the applicant to advance applications to the misconduct panel to the effect that it had no jurisdiction to hear the charges brought against him and/or that they constituted an abuse of process and should be dismissed.

[39] I, therefore, invited the parties to submit written submissions on this issue and after an oral hearing granted leave to the applicant on 28 February 2023.

[40] The court gave its reasons in an ex-tempore judgment to the parties which has since been reduced to writing - citation number [2023] NIKB 25.

[41] I do not propose to rehearse the judgment but from the reading of that judgment it will be seen the court considered the cases of *Redgrave v Metropolitan Police Commissioner* [2022] EWHC 1074 (Admin), *R v Chief Constable of Merseyside Police ex parte Merrill* [1998] 1 WLR 1077, *R v Chief Constable of the Merseyside Police, ex parte Calveley* [1986] QB 424 and *R(On the Application of Short) v Police Misconduct Tribunal* [2020] EWHC 385 (Admin).

[42] The key passages of the judgment are at paras [36]-[40] as follows:

> "[36] At issue here is the validity of the proceedings themselves, which arguably gives rise to a question of substantive law suitable to judicial review.
>
> [37] What is contemplated by the proposed respondent in this case, is that the applicant should proceed to argue an abuse of process at the panel hearing, if necessary, proceed to the substance of the allegation, and again, if necessary, to pursue his right of appeal to the Appeals Tribunal.
>
> [38] I agree that issues raised in this judicial review in respect of the first decision challenged could be argued in front of the misconduct panel, on the basis of an alleged abuse of process. That could give rise to the disciplinary proceedings being dismissed at that stage.
>
> [39] However, I respectfully adopt the comments of Moses J in the Redgrave case as being apt here.
>
> [40] If the applicant's complaint in this case is well-founded, the court should protect him from the injustice he alleges, rather than compel him to go through the laborious stages of a hearing and then a potential appeal before the courts vindicate his right not to have to undergo an unjust hearing at all. His judicial review, if successful, would bring an end to the misconduct proceedings and avoid contested hearings and potential appeals. In the words of Saini J:
>
> > 'It is not difficult to identify why such facts might be said to give rise to exceptional circumstances.'"

Summary of the issues

The first impugned decision – decision of AA McGuigan to bring gross misconduct charges against the applicant.

[43] The applicant relies on multiple overlapping grounds in challenging the lawfulness of this decision. Distilling these grounds, it seems to the court that the applicant's starting point is that AA McGuigan had no authority under the regulations, to bring the charge. It is argued that that decision is *ultra vires* the 2016 Regulations.

[44] Allied to this is the argument that upon AA McCaughan making the withdrawal decision, the respondent became *functus officio* meaning that AA McGuigan had no power to make the decision.

[45] In addition, the applicant submits that the decision is premised on a misdirection/mistake of fact in AA McGuigan's assessment of AA McCaughan's decision. It is argued she made the erroneous assumption that AA McCaughan had to make a further "case to answer" determination in order to lawfully withdraw the case against the applicant under Regulation 22. Furthermore, it is argued that AA McGuigan mistakenly concluded that AA McCaughan did not change his mind as to whether there was a case to answer.

[46] The applicant further relies on procedural unfairness and delay. In particular it is alleged that the applicant was denied a range of safeguards that ordinarily arise under the regulations. In addition, it is argued that the delay in this case is of such order/magnitude as to be unfair to the applicant and is clearly contrary to the regulations. The applicant relies on the principle of legitimate expectation in that having been informed that the original investigation was concluded without a charge of gross misconduct this gave rise to a substantive, legitimate expectation which is unlawfully breached by this decision. Finally, the applicant alleges a breach of his rights under article 8 of the ECHR as enacted in the Human Rights Act 1998.

[47] Each of these arguments is resisted by the respondent.

[48] The respondent's primary case is that the withdrawal decision was unlawful and a nullity thereby permitting the respondent to take the impugned decision.

[49] The respondent's secondary case is that, if the withdrawal decision was not unlawful and a nullity then the effect of a withdrawal decision was not to make the respondent *functus officio* and the respondent was therefore able to revisit this decision making (by taking the impugned decision) in any event.

The arguments developed/considered

[50] An important initial issue for the court is how to treat the withdrawal decision of AA McCaughan.

[51] Mr McQuitty argues that the court has no jurisdiction to consider or determine the legality of that decision.

[52] The respondent has not brought a judicial review challenging the lawfulness of AA McCaughan's decision. Such a challenge would now be grossly out of time.

[53] In the absence of such a legal challenge, Mr McQuitty says that the court must proceed on the basis that the decision was and remains lawful. It is not for the respondent to make his own assessment of the validity of that decision.

[54] This issue was debated before the divisional court in *R (MacKaill and Ors) v IPCC and Ors* [2014] EWHC 3170 (admin).

[55] That case involved an investigation into the conduct of police officers who had made statements to the media. The matter had been referred to the Independent Police Complaints Commission ("IPCC"). The IPCC elected not to conduct its own investigation. Instead, it directed that there be an investigation by the relevant local police forces which the IPCC would supervise. In due course, a determination that there was no case to answer was issued by each of the appropriate authorities.

[56] After those determinations had been issued the IPCC purported to redetermine the mode of investigation into the conduct of the applicants by turning it into an independent investigation undertaken by the IPCC.

[57] The applicants sought to quash that decision on the grounds that the IPCC had no power to re-determine or justification in re-determining as it did. As part of its answer to the claim, the IPCC challenged the validity of the reported prior determinations of the appropriate authorities.

[58] The relevant applicable statutory provisions were the Police Reform Act 2002, which sets out the general functions of the IPCC and the Police Conduct (Complaints and Misconduct) Regulations 2012.

[59] The IPCC did not make any cross application for a declaration that the investigators report, and AAs' decisions had been unlawful until the second day of the hearing, after prompting from the court.

[60] As to the delay between the IPCC deciding for itself that the investigators report and the AAs' decision were unlawful and the IPCC seeking relief to that effect from the court, Davies LJ said:

"[88] That said, the essential reason why I regard this debate as somewhat arid is this. The fact is that the IPCC has (now) sought relief from the court and the fact is that the court necessarily has reviewed the whole matter and has judicially considered the validity of the acts in question. It seems to me to be somewhere between pointless and unhelpful for the court nevertheless to decline to assess or give effect to the asserted validity of the exercise of the power under paragraph 15(5) simply because the IPCC had not itself obtained an order from the court before exercising that power: when it can now be seen that the IPCC's stance was, in fact justified. Putting it another way, I do not see why the court should not, in the circumstances of this particular case, adopt using the erstwhile Latin legal maxim a *nunc pro tunc* approach.

[89] I found helpful in this regard the decision of Underhill J, as he then was, in *R (Bolt) v Chief Constable of Merseyside Police* [2007] EWHC 2607 (Admin), which Mr Owen drew to our attention. In that case, a disciplinary panel had found a police officer of the Merseyside Force to be in breach of the relevant code of conduct. It decided that he should be dismissed. On a review, an independent Chief Constable upheld the finding of misconduct; but he purported to set aside the sanction of dismissal and to substitute a fine of 13 days' pay. The Chief Constable of the Merseyside Police declined to accept that substituted penalty and maintained the dismissal directed by the panel. That was challenged by the claimant police officer. It was argued on his behalf that, under the applicable Regulations, the Chief Constable of Merseyside had no power himself to reject the decision of the independent Chief Constable a point the judge upheld. It was further argued (rather as in the present case) that unless and until the decision of the independent Chief Constable was first quashed, the Chief Constable of Merseyside had been bound to follow it and could not arrogate to himself a view that the decision was invalid: "a finding that only the court could make", as it was argued.

[90] Underhill J decided that the decision of the independent Chief Constable on sanction had been unlawful: it was not one to which he could properly have come, and it could not be sustained in law. As to the

point raised about the entitlement of the Chief Constable of Merseyside to act as he did, Underhill J, after considering Lord Irvine's speech in Boddington, said this at paragraph 31 of his judgment:

> "Whether or not it might have been better for the defendant to seek judicial review of the [independent Chief Constable's] decision I can see no real prejudice to any party in my considering its lawfulness in the present proceedings."

At paragraphs 36 and 37 he said this:

> "36. Whether those reasons amount in law to a finding of irrationality or a finding that [the independent Chief Constable] misdirected himself as to the limit of his powers under the review provisions, I am satisfied that his conclusion cannot be sustained in law. In my judgment the decision of the panel should not have been overturned on a review.
>
> 37. Having reached that point, in my view it follows that I ought not to grant the relief sought. If the Defendant had followed the arguably more formally correct course of seeking a judicial review of [the independent Chief Constable's] decision that decision would have been quashed, with the result that the decision of the panel stood (subject to appeal). If I refuse relief in the circumstances which have in fact occurred substantially the same result will be achieved."

[91] I see no reason not to adopt a like pragmatic approach in the circumstances of the present case."

[61] I accept that as a general principle, the public and in this case the applicant, must be entitled to rely upon the validity of official decisions. It is for this reason that there is such a strict time requirement built into the procedures for judicial review.

[62] That said, I too, like Davies LJ, have decided to adopt "a like pragmatic approach" in the circumstances of the present case.

[63] The court has all the relevant material before it to determine the arguments as to the lawfulness of AA McCaughan's decision.

[64] Ultimately, the court's role is to decide whether to interfere with the impugned decision. In doing so, it must consider AA McCaughan's decision and the lawful effect of that decision. Depending on the courts analysis, which is set out below, it may not be necessary to formally declare the decision unlawful in any event.

AA McCaughan's decision

[65] On 27 September 2018 AA McCaughan determined that there was a case to answer against the applicant and the matter should be placed before a misconduct hearing pursuant to the Regulations.

[66] In that decision, he notes that he is not making any moral judgment. His job is to consider whether the officer had a case to answer.

[67] He determined that the applicant did have a case to answer based on his admitted behaviour and "only the admitted behaviour."

[68] He considered that the applicant had a case to answer for discreditable conduct. He indicated that this behaviour "could be argued to represent pseudo paedophilia, though I do note his strong denial that he undertook any actual paedophilic behaviour or actions."

[69] Although he does not expressly describe this as gross misconduct the fact that he referred the matter to a misconduct hearing implies that this was his view.

[70] Having received the legal advice referred to above he revised his determination on 7 December 2018 and directed that the proceedings be withdrawn.

[71] The recorded reasons given at that time by AA McCaughan were as follows:

> "AA REVIEW – Having received legal advice and giving it due consideration, it is now my belief that misconduct proceedings should be withdrawn. The risks presented by the behaviour of the officer will be addressed via SCP.
>
> INSPECTOR LAW – The officer should be advised, and his duty status reviewed."

The legal advice

[72] As previously indicated the applicant has seen a redacted version of the legal advice. The court has seen the full advice.

[73] In the introduction to the advice Mr Beggs sets out the background.

[74] He refers firstly to the investigators interview and advice that in her view there was a case to answer against JR249 for misconduct or gross misconduct on the basis that his admitted behaviours mainly Daddy Dom, Little Girl fantasies; low level BDSM (involving blindfolding, spanking, play fighting, etc.); and puppy fantasies might bring discredit upon the PSNI.

[75] He understood the investigator's opinion was that there was no evidence to corroborate the serious assaults alleged by K; no medical evidence and no witness evidence.

[76] Whilst the investigator does not say why there is not "a case to answer" for the allegation of serious violence, he took it that the reason was because the investigator was doubtful as to the veracity of the allegations.

[77] Turning to the decision of AA McCaughan he notes that the decision is expressly predicated upon any charges and evidence being restricted to JR249's admitted behaviour and not the disputed (violent) behaviour.

[78] "As an aside", Mr Beggs says that whilst he understood why the investigator and AA did not credit K's allegations of violence against JR249 he stated that as a matter of law there is a case to answer against JR249 for those matters since the very fact that there is one word against another does constitute a case to answer. He then turns to the appropriate charge. Having considered the AA's decision, he advises:

> "[22] So if a misconduct charge is to be advanced it could, I advise read as follows:
>
> > 'Being a constable with the PSNI you did between about July 2016 and August 2017 misconduct yourself in that you engaged in "Daddy Dom, Little Girl" fantasies during an affair with female K which conduct you knew or were reasonably to have known was likely to bring discredit upon the Police Service.
> >
> > Such conduct is gross misconduct contrary to article 1.10 of The PSNI Code of Ethics Schedule to The Police (Conduct) Regulations (Northern Ireland) 2016.'
>
> [23] I have kept the charge somewhat generalised since I am not entirely certain as to the basis on which the AA consider this to be gross misconduct. We could, of course, firm up the charge, but I am not entirely comfortable

alleging "pseudo paedophilia" since that is a somewhat opaque concept."

He then gives some advice in relation to JR249's article 8 rights.

[79] He goes on to consider "what will the panel make of this?" This part of the advice has been redacted.

[80] The advice then gives directions in relation to further material in the following way:

"**Further material required**

50. If the AA wishes to proceed to place this matter before a gross misconduct panel, I would be happy to advise further, in particular upon receipt of two further matters;

51. First, further and better written instructions from the AA as to how he believes the submitted conduct should be characterised and why:

a. Is it gross misconduct or misconduct simpliciter, with reasons?

b. Is there any objective evidence (expert or otherwise) that JR249 poses any threat to members of the public, with children or vulnerable people?

c. Is this case purely about public perception?

52. Second, JR249's Reg.24 response, because at that point it would be easier to see how his lawyers intend to defend the matter. E.g. they might admit misconduct but not gross misconduct; or they might advise JR249 to deny any misconduct and seek to defend the charge on the basis of a breach of his article 8 rights. Or any combination thereof.

Conclusion

53. This is a complicated and sensitive case.

54. I have set out above a possible charge, for the AA's consideration.

> 55. I can advise further upon receipt of further instructions from the AA and JR249's Reg 24 response…"

[81] It is common case that the relevant test to be applied as to whether there is a case to answer is set out in the case of *R (Chief Executive of the IPCC) v IPCC and Begley* [2016] EWHC 2993.

[82] In the court's judgment Elias LJ referred to guidance issued subsequent to the decision in *R (Chief Constable of West Yorkshire Police) v Independent Police Complaints Commission* [2014] EWCA Civ 1367.

[83] In the West Yorkshire case it was held that it was not the role of an investigator to reach final conclusions as to whether misconduct had been committed, or to resolve conflicting evidence, but only to express an opinion whether there is a case to answer.

[84] In his judgment, Elias LJ discussed the appropriate test in the following way:

> "[21] New guidance issued in May 2015 replaces the earlier guidance to give effect to the West Yorkshire ruling. It provides, under the heading of "The 'case to answer' test":
>
> > '11.31 The investigator should indicate that in their opinion there is a case to answer where there is sufficient evidence, upon which a reasonable misconduct meeting or hearing could, on the balance of probabilities make a finding of misconduct or gross misconduct.
> >
> > 11.32 It follows from the case to answer test, that where the investigator's opinion is that there is a case to answer, a subsequent misconduct hearing or meeting may, nonetheless, make different findings of fact and/or about whether the conduct breached the Standards of Professional Behaviour. Therefore, although the investigators must still explain the evaluation of the evidence that has caused them to come to such a conclusion, they must be careful to stop short of expressing findings on the very questions that will fall to be answered by the disciplinary proceedings, court or tribunal which may consider the matter.'

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

[85] Mr Beggs argues that it is plain on the face of it that AA McCaughan has misapplied the test. He points to the fact that his advice expressly states, "as a matter of law", there is a case to answer against JR249 since "the very fact that there is one word against another does constitute a case to answer."

[86] In assessing this matter of course the court is at a disadvantage in that AA McCaughan did not give reasons for his decision to withdraw the case. That said, the court can understand why he did come to the decision after, in his own words, "due consideration."

[87] On any showing the legal advice he received was equivocal and must have raised a doubt in his mind about the decision to refer the matter to a misconduct hearing. Thus, the advice is that "if a misconduct charge is to be advanced it could" read as advised by Mr Beggs.

[88] He indicates that the charge is "somewhat generalised." He is "not entirely certain" as to the basis on which AA McCaughan considered the admitted conduct

to constitute gross misconduct. Mr Beggs was "not entirely comfortable" alleging "pseudo paedophilia" as that is a somewhat "opaque concept." He advises that further material is required, and he only puts forward a "possible" charge for AA McCaughan's "consideration."

[89] The further material required by Mr Beggs included further and better written instructions from AA McCaughan as to how he believed the admitted conduct should be characterised and why.

[90] I can well see how on receipt of these advises AA McCaughan could come to a different view than the one he originally reached.

[91] It will be seen that Regulation 22 provides that the AA may, at any time before the beginning of the misconduct proceedings, direct the case be withdrawn.

[92] The power to do so is expressed in broad terms. The regulation also provides for the AA to refer the matter to be dealt with under the Performance Regulations.

[93] Whilst on the face of it, the power to withdraw misconduct proceedings is a broad one it is not unfettered. There must be a rational basis for the withdrawal. It seems to the court that this could arise in a number of circumstances. It may be that there is a compelling reason justifying the withdrawal of misconduct proceedings even if the case to answer test remains satisfied, for example, if an officer was terminally ill. There is no such compelling reason put forward in this case. That being so, it seems to the court that the only circumstances in which the AA could lawfully exercise his or her power under Regulation 22 would be if he or she considered that the case to answer test was no longer satisfied. The contemporaneous documents suggest that this was the basis for the withdrawal.

[94] In this regard, the respondent focuses on Mr Beggs' advice in relation to there being a case to answer in respect of the assault allegations.

[95] On this issue, I consider that whilst it is not for an investigator or AA to make findings of fact, he or she must make some evaluative judgment as to the nature of any allegations made against an officer. There must be a sufficiency of evidence. The evidence must be credible. Within the Regulations themselves the AA has to make a determination as to whether the conduct alleged is capable of constituting gross misconduct or misconduct simpliciter. That decision in itself must involve an evaluative assessment by the AA. An investigator or AA would be in my view, failing in their responsibilities if they simply said an allegation has been made and that is sufficient even if they took the view that the allegations were not credible, or capable of being sustained on the evidence available.

[96] Given the background to this case, I consider that it was open to the AA to conclude as he did in his original view, that there was not sufficient evidence to meet the test of a case to answer in respect of the assault allegations. Equally, I consider

that it was open to him to take a different view about the admitted conduct in light of the legal advice he received.

[97] Whilst the test to be applied by the DPP in the criminal context is obviously a different one, it is also noted that a similar view was reached by that body.

[98] The court has received affidavit evidence from AA McCaughan and obviously must consider this issue in light of that evidence.

[99] In relation to his decision to withdraw the misconduct proceedings he avers as follows:

> "11. It is obvious to me now – with greater experience – that my decision was flawed, indeed unlawful. I have reflected carefully upon my decision to terminate the proceedings by this decision and I can only explain it as follows:
>
> 12. First, despite having applied the *Begley* formula in my decision dated 27 September 2018, in this "second" decision I plainly misapplied *Begley*. This is professionally embarrassing to me since:
>
> a. The *Begley* test was explained in paragraph 17(b) of the advice;
>
> b. The advice was to the effect that there was a case to answer against the applicant in respect of the draft charges set out in paragraph 22 namely; "*being a constable in the PSNI you did between about July 2016 and August 2017 misconduct yourself in that you engaged in "Daddy Dom, Little Girl" fantasies during an affair with female KS which conduct you knew or had reason to have known was likely to bring discredit on the Police Service…*
>
> 13. It is clear to me that instead of sticking to my 27 September 2018 decision and following clear legal advice, I mistakenly descended into the evidential merits of the allegation by putting myself into the mind of the Chair of the Misconduct Panel ('predicting' the outcome) rather than, as required restricting myself to the case to answer test set out in the regulations and in *Begley*."

[100] Later he avers:

> "17. I should add that it is also perfectly clear to me now that, given the admissions made by *JR249* in interview on 28 June 2018, that what I described as a "pseudo-paedophilic" activities, a reasonable misconduct panel, properly applying the law, could find this conduct to constitute gross misconduct. But instead, I think I applied my mind to "evidential" test and was concerned about what the panel might make of K's evidence when it was not corroborated. Of course, in this respect I was overlooking that JR249 himself provided the corroboration insofar as it related to the pseudo-paedophilia."

[101] This affidavit was sworn on 5 April 2023, some four and a half years after the decision in question.

[102] It is well established that a court should be cautious in assessing a decision maker's evidence provided years after the decision in question.

[103] Mr McQuitty refers the court to what he describes as *ex post facto* reasoning. He argues that the judgment in *R (Hereford Waste Watchers Ltd) v Hereford Council* [2005] EWHC 191 (Admin) at para 48 encapsulates the point well:

> "… the courts must be alive to ensure that there is no rewriting of history, even subconsciously… the truth can become refracted, even in the case of honest witnesses, through the prism of self-justification. There will be a particular reluctance to permit a defendant to rely on subsequent reasons where they appear to cut against the grain of the original reasons."

[104] The issue of *ex post facto* evidence was also recently considered by Mr Justice Humphreys in *No Gas Caverns Ltd and Friends of The Earth Ltd* [2023] NIKB 41 at paras 4-7 and 18, endorsing the approach of the English Court of Appeal in *R (UTAG) v Transport for London* [2021] EWCA Civ 1197:

> "[5] In *R (UTAG) v Transport for London* [2021] EWCA Civ 1197, the Court of Appeal in England & Wales outlined some of the principles relating to the admissibility of evidence in judicial review applications:
>
> > 'The law governing the admissibility of "ex post facto" evidence in proceedings for judicial review is already mature. There is an ample body of authority to indicate the correct approach. Without seeking to be exhaustive,

we can identify these seven points in the light of the relevant cases:

(1) The court will always be cautious in exercising its discretion to admit evidence that has come into existence after the decision under review was made, as a means of elucidating, correcting or adding to the contemporaneous reasons for it (see the judgment of Hutchinson LJ, with whom Nourse and Thorpe LJJ agreed, in *R v Westminster City Council, ex parte Ermakov* [1996] 2 All ER 302, at pp 315 and 316). The basis for this principle is obvious. Documents or correspondence or other explanatory evidence generated after the event cannot have played any part in the making of the challenged decision (see the judgment of Coulson LJ, with whom Lewison and David Richards LJJ agreed, in *Kenyon v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 302, at paragraphs 27 to 30). The same may be said of the professional views of officers who were not involved in advising the decision-making body when it took its decision, or of those who were, but seek later to add to the advice they actually gave. The court must avoid being influenced by evidence that has emerged after the event, possibly when proceedings have been foreshadowed or issued. So, the need for caution is plain.

(2) In the words of Green J., as he then was, in *Timmins v Gedling Borough Council* [2014] EWHC 654 (Admin), "[there] is no black and white rule which indicates whether a court should accept or reject all or part of a witness statement in judicial review proceedings." Witness statements can serve different purposes – making admissions, commenting on documents disclosed, explaining why an authority acted as it did or failed to act, or seeking, as Green J put it, "to plug gaps or [lacunae] in the reasons for the decision or elaborate upon reasons already given"

(paragraph 109). A claim for judicial review must focus on the reasons given at the time of the decision. Subsequent second attempts at the reasoning are "inherently likely to be viewed as self-serving" (paragraph 110).

(3) Evidence directly in conflict with the contemporaneous record of the decision-making will not generally be admitted (see the judgment of Jackson L.J., with whom Rimer and Lewison LJJ agreed, in *R v Cornwall Council, ex parte Lanner Parish Council* [2013] EWCA Civ 1290, at paragraph 64). But in the absence of such contradiction, there is no reason in principle to prevent "ex post facto" evidence being admitted if its function would be "elucidation not fundamental alteration, confirmation not contradiction" (see the judgment of Hutchinson L.J. in *Ermakov*, at p.315h-j). That is the touchstone. As Elias J, as he then was, said in *Hereford Waste Watchers Ltd v Herefordshire Council [2005] Env LR 29, at paragraph 46*, it is "proper to allow further explanation in an appropriate case", if the decision-maker's reasoning lacks the "clarity or detail which is desirable."

(4) Sometimes elucidatory evidence will be appropriate and necessary, sometimes not. But even where the evidence in question is merely explanatory, the court will have to ask itself whether it would be legitimate to admit the explanation given. Circumstances will vary. For example, as was emphasised by Singh LJ, with whom Andrews and Nugee LJJ agreed, in *Ikram v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 2, at paragraph 58, when the court is dealing with a challenge to a planning inspector's decision it will have in mind that "there is an express statutory duty … for a planning inspector to give reasons for his decision." Thus, in *Ioannou v Secretary of State for Communities and Local Government [2013] EWHC 3945 (Admin)* Ouseley J strongly discouraged the use of witness statements of

inspectors to amplify or enhance the reasons given in their decision letters. He stressed that "[the] statutory obligation to give a decision with reasons must be fulfilled by the decision letter, which then becomes the basis of challenge", that "[a] witness statement should not be a backdoor second decision letter" (paragraph 51), and that such a witness statement "would also create all the dangers of rationalisation after the event …" (paragraph 52). The Court of Appeal in the same case approved, obiter, Ouseley J's observation at paragraph 51 ([2014] EWCA Civ 1432, at paragraph 41).

(5) It is not likely to be appropriate for the court to admit evidence that would fill a vacuum or near-vacuum of explanatory reasoning in the decision-making process itself, expanding at length on the original reasons given. Such evidence may serve only to demonstrate the legal deficiencies for which the claimant contends (see *R. (on the application or Watermead Parish Council) v Aylesbury Vale District Council* [2017] EWCA Civ 152; [2018] PTSR 43, at paragraphs 35 and 36).

(6) When the admissibility of evidence is in dispute in a claim for judicial review, the court's approach should be realistic, and not overly exacting. Rarely will it be necessary for a judge to carry out a minute review of every paragraph and sentence of a witness statement, paring the statement down to an admissible minimum and formally excluding the rest, or admitting evidence for some grounds of the claim and ruling it out for others. The court should not be drawn too readily into an exercise of that kind. It finds no support in the case law. Excising passages of text from an otherwise admissible witness statement may be a somewhat artificial exercise to perform, and it may serve no useful purpose. It may make no difference to the judge's consideration of the issues in the claim. Or it may risk the loss of valuable context or clarification.

> (7) Judges will usually be able to distinguish between genuine elucidation of a decision and impermissible justification or contradiction after the event, without having to rule on applications to exclude parts of the opposing party's written evidence or documents it seeks to adduce. It follows that the best way for the court to proceed may be to receive the contentious evidence "de bene esse", and, having heard argument on the issues in the claim, simply to disregard any of the evidence that is irrelevant or superfluous, rather than embarking on a painstaking assessment of strict admissibility."

[105] To these I would add the propositions elucidated in the case of *R (on the application of Nash) v Chelsea College of Art and Design* [2001] All ER D 133 (Jul). There the court was considering a decision by a board of examiners. In the judgment of the court Burnton J reviewed the authorities on post decision reasoning and confirmed that the court will be cautious about accepting late reasons.

[106] At para 34 of his judgment he indicated that the relevant considerations included the following:

> "(a) Whether the new reasons are consistent with the original reasons.
>
> (b) Whether it is clear that the new reasons are indeed the original reasons of the whole committee.
>
> (c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision or are a retrospective justification of the original decision. This consideration is really an aspect of (b).
>
> (d) The delay before the later reasons were put forward.
>
> (e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully. Conversely, reasons put forward during correspondence in which the parties are seeking to elucidate the decision, should be approached more tolerantly."

[107] Bearing these principles in mind I have considerable reservations about the affidavit evidence of AA McCaughan on this issue.

[108] There has been a significant delay in providing this reasoning. As indicated it is advanced four and a half years after the relevant decision.

[109] In his affidavit he suggests that his error was to a large degree due to his inexperience at the time he made the decision. He avers that he was attached to the Professional Standards Department (PSD) from October 2016 to May 2019.

[110] That alleged lack of experience contrasts with the affidavit he swore in relation to the judicial proceedings before Quinlivan J, in standing over the decision to invoke the SCP. In that affidavit sworn in March 2021 he averred that the AA role is one that is specifically designed by the Chief Constable to ensure that "the decision maker is suitably experienced and knowledgeable to undertake the responsibilities associated with gross misconduct allegations." He further averred that he had received direct training from senior counsel with specific expertise before he commenced his role. He indicated that he had sat on the SCP panel whose decision had been challenged due to his "position, experience and knowledge of the sensitive issues in this matter."

[111] Turning to the contents of his affidavit, is it my view noteworthy that he is looking back at the decision he made and attempting to explain it rather than setting out his actual memory of events. He says that "it is obvious to me <u>now</u> – with greater experience – that my decision was flawed."

[112] At para 17 of his affidavit he says, "but instead I <u>think</u> I applied my mind to the "evidential test"…" (my underlining).

[113] This belated explanation for his decision has also to be seen in the context of previous correspondence on this issue in the course of the proceedings.

[114] In PAP correspondence in August 2019 the applicant asked the respondent to explain the 2018 withdrawal decision, but no meaningful response was provided at that time. The PAP response from the respondent in September 2019 simply stated that:

> "Consideration was given to whether or not the disciplinary process should go to a hearing. After considering the case and receiving privileged legal advice from senior counsel, the Appropriate Authority (2016 Conduct Regulations) decided not to move to the next step, namely a disciplinary hearing."

[115] Subsequently, in a memorandum from the respondent dated 31 August 2022 from the Deputy Chief Constable the respondent asserts that "1.8 I have been

advised that the decision to cease the gross misconduct hearing in 2018 was *ultra vires* because the AA had previously assessed that there was a case to answer and therefore had no power in law to withdraw those mandatory gross misconduct proceedings, see Reg 21(4) Police (Conduct) Regulations (Northern Ireland) 2016."

[116] This analysis is clearly wrong in law and differs from the case now made on behalf of the respondent.

[117] The first time the respondent indicated that the explanation for the withdrawal was that AA McCaughan had, in fact, applied the wrong legal test on the case to answer was in PAP correspondence in November 2022.

[118] Having carefully read the affidavit of AA McCaughan I consider that there remains a disconnect between his evidence and the legal submission on behalf of the respondent.

[119] Returning to Mr Beggs' advice it appears that the legal advice which was ignored or misunderstood related to the allegations of assault. In para 12 of his affidavit, set out above, when AA McCaughan addresses the *Begley* test, he says that "the advice was to the effect that there was a case to answer against the applicant in respect of the draft charge set out in para 22." That charge of course did not relate to any allegation of assault but rather to the misconduct in relation to the alleged sexual misconduct.

[120] The affidavit from AA McCaughan has also to be seen in the context of the circumstances in which the respondent moved from defending his position in relation to SCP, declining to implement the decision of Quinlivan J and then to "reinstate" the misconduct proceedings. This will be discussed further below.

[121] In considering AA McCaughan's affidavit evidence, I bear in mind that it is a "mea culpa" rather than an attempt to stand over what might have been a flawed decision. However, overall whilst I do not exclude the evidence from AA McCaughan as invited to do so by Mr McQuitty, it does not persuade me that the decision made by him on 27 September 2018 was unlawful.

[122] I consider that it was a lawful decision made intra vires the regulations and one which can be sustained in law.

[123] In that event, the important matter for the court, is whether notwithstanding the validity of the withdrawal decision it is open to the respondent to take the impugned decision of AA McGuigan.

Ultra vires the Regulations and Functus Officio

[124] Given the courts view that the initial decision from AA McCaughan to withdraw the proceedings was lawful is the respondent entitled to "reinstate" the proceedings under the Regulations?

[125] The applicant submits that AA McGuigan's decision is *ultra vires* the regulations and that the respondent is, in any event, now *functus officio* by the earlier decision of AA McCaughan. Mr McQuitty argues that AA McGuigan had no power to retake the decision.

[126] The starting point for consideration of this issue is the regulations themselves. Mr McQuitty argues that the effect of the decision by AA McCaughan to withdraw the proceedings under Regulation 22 means that AA McGuigan had no jurisdiction under the regulations to take any investigative or other steps in respect of the allegations that had already been investigated. This is because he argues that the regulations do not "apply" (within the meaning of Regulation 5) in those circumstances. Regulation 5 provides that the regulations only apply where an allegation "comes to the attention of an appropriate authority." In the context of this case, it is argued that the allegations cannot come to the attention of the AA more than once. Allegations that have already come to the attention of the AA cannot be brought to their "attention" again because the AA would already be aware of them and/or has already dealt with them under the scheme of the regulations.

[127] Mr McQuitty argues that the entire scheme of the regulations assumes a linear, investigative procedure concluding with a decision by the AA on a case to answer pursuant to Regulation 21. The regulations do not envisage more than one investigation of an allegation based on the same evidence, given the need for finality and legal certainty.

[128] In considering the regulations, the court must also look at Regulation 12(5) which provides:

> "[5] At any time before the start of misconduct proceedings, the appropriate authority may revise its assessment of the conduct under paragraph (1) if it considers it appropriate to do so."

[129] Mr Beggs points out that no misconduct proceedings had been commenced in the applicant's case. That being so, it is open to the respondent to revise its assessment "if it considers it appropriate to do so."

[130] Support for this proposition is found in the case of *R (Deputy Police Constable of Kent Police) v Chief Constable of Kent Police and Bowler* [2020] EWHC 2099 (Admin).

[131] In that case, the DCC challenged various of its forces own decisions (including the case of two officers where the AA decided that they had no case to answer) by way of judicial review on the basis that those decisions had been taken unlawfully. It was argued in the alternative that (if the impugned decision had been lawful or could not be challenged due to the lapse of time) the defendant was not *functus officio* and could revisit the decision making in any event. Laing J said at:

> "[161] In view of my clear conclusions about the lawfulness of the first investigation, the less I say about this, the better. Regulation 12 of the C Regulations permits the AA to revise its assessment of the conduct under regulation 12(1) at any time before the start of misconduct proceedings, if it considers it appropriate to do so. Detective Chief Inspector Somerville or Superintendent Very dropped out of the picture altogether when Detective Chief Inspector Swan found that they had no case to answer. Moreover, his assessment was that the conduct of the remaining officer IPs if proved, would amount to misconduct, not gross misconduct (an assessment which was not revisited by Detective Inspector Rose or by Detective Superintendent McDermott). I would be inclined to the view that it would be open to the Defendant to review all those assessments, as there have never been any misconduct proceedings involving any of the officer IPs."

[132] Mr McQuitty seeks to distinguish *Bowler* from this case, firstly on the grounds that in *Bowler* there had not been a decision to withdraw misconduct proceedings and secondly that Laing J's comments are *obiter* because they addressed the claimant's alternative ground after she had already allowed the claim on the primary ground in respect of which she had said "the less I say about this the better."

[133] Mr Beggs further directs the court to section 12(1) of the Interpretation Act 1978 which provides:

> "Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires."

[134] Section 12(1) was considered in the case of *R (Piffs Elm Ltd) v Commission for Local Administration* [2023] QB 60. The court identified nine non-exhaustive factors at para [74] of the judgment which were considered as likely to assist in determining whether a public authority has an implied power to re-take a particular decision or whether it is *functus*, having regard to section 12(1) of the Interpretation Act 1978. These principles can be summarised as follows:

(i) Whether the statutory provisions create a comprehensive and detailed code in respect of that function;

(ii) Whether the statutory scheme is consistent with re-taking the particular action or decision;

(iii) Whether a power of withdrawal would promote or undermine the legislative scheme;

(iv) Whether the function in question determines or impacts upon substantive rights;

(v) Whether a measure of discretion and/or informality is involved;

(vi) Whether express provision is made for more limited circumstances in which an action or decision may be withdrawn and re-taken;

(vii) Whether there is an apparent reason for the absence of an express power;

(viii) Whether the existence of absence of an implies power would result in practical difficulties and/or undue complexity, delay or expense; and

(ix) The extent to which attaining finality is of particular importance in that context.

[135] Considering these principles Mr Beggs argues that the purpose of the Police Misconduct Regime (to ensure public confidence in the police) and the express provision of Regulation 12(5) together with the ability of a Misconduct Panel to deal with any unfairness in the proceedings means that the withdrawal decision has not rendered the respondent *functus officio*.

[136] Mr McQuitty argues to the contrary. The fact that the regulations create a comprehensive and detailed code in respect of the function, in particular, the extent to which attaining finality is of particular importance in this context, defeats the respondent's argument that there is an implied power to reinstate the proceedings based on section 12(1) of the Interpretation Act 1978.

[137] On balance I conclude that the respondent does have the power to retake the decision within the context of the regulations. I consider that this is the logical outworking of Regulation 12(5).

[138] Whether that power has been properly exercised will depend on the actual circumstances being considered by the court.

[139] It is in this context that the court intends to examine the applicant's arguments in relation to delay and what I characterise as procedural unfairness.

They go to the heart of whether the power under Regulation 12(5) has been lawfully exercised.

Delay

[140] Delay is clearly a huge issue in this case. As a matter of common law fairness there is an implied obligation on the respondent to ensure that disciplinary proceedings in this context are conducted without culpable delay.

[141] That implied obligation is reflected and emphasised in the repeated references throughout the regulations requiring misconduct proceedings to be conducted expeditiously.

[142] This is plain from the provisions of Regulation 9(1) which provides:

> "Subject to the provisions of this regulation, proceedings under these Regulations shall proceed without delay." (my underlining).

[143] Subsequent regulations also point to the requirements for expedition. Thus, Regulation 16(1) provides that the investigator must give notice to the officer "as soon as is reasonably practicable" and any response to this notice must be made within 10 working days (unless extended), see Regulation 18(1).

[144] Where a notice of referral is made under Regulation 21 then an officer has only 20 working days to provide a formal response (unless extended), see Regulation 24(1).

[145] Regulation 26 in relation to the timing and notice of misconduct proceedings provides they shall take place in the case of a hearing, before the end of 35 working days (unless extended).

[146] Mr McQuitty draws the court's attention to the fact that the periods in the various stages are measured in days.

[147] The issue of delay in the context of Police Misconduct Proceedings was considered in the cases of *R v Chief Constable of the Merseyside Police, ex parte Merrill* [1989] 1 WLR 1077 and *R v Chief Constable of the Merseyside Police, ex parte Calveley* [1986] QB 424, both of which were discussed in the leave judgment.

[148] In *Merrill* a complaint was made to the Chief Constable in August 1984 alleging misconduct of a police officer who had conducted an arrest. The complainant was facing a criminal process which concluded in October 1985 with his acquittal.

[149] The officer who faced the original complaint was interviewed in January 1986 and served with a notice of complaint pursuant to the relevant regulations. Thus, there was a 15-month delay between the complaint and the service of the notice, and a two-month delay from the conclusion of the criminal proceedings to the service of the notice.

[150] In January 1987 the Police Complaints Authority agreed to the preferment of disciplinary proceedings against the officer. The officer contended, at a preliminary hearing, that there had been a breach of the Regulation 7 (our equivalent of Regulation 16). The Chief Constable rejected that submission, and the officer sought a judicial review.

[151] Ultimately, the Court of Appeal quashed the disciplinary proceedings.

[152] In his judgment, Lord Donaldson said of the decision at 1088A-B:

> "Furthermore, neither he nor for that matter the Divisional Court, appear to have given any weight or indeed consideration to the prejudice inherent in depriving a police officer for 15 months of the information to which he was entitled under regulation, namely notice that his conduct was formally under investigation."

[153] The court acknowledged at 1088E-F:

> "The public interest in complaints against police officers being fully investigated and adjudicated is undoubted, but it must be done speedily. I express no view whether Detective Constable Merrill was guilty of the offence charged but if he was, the course of these proceedings has been such that it will have provided neither him nor any other police officer with any encouragement so to attend. If he was not, he has already suffered an injustice which should not be increased."

[154] In *Calveley* complaints were made against five police officers on 21 June 1981. An investigating officer was appointed on 30 June 1981, where the officers were given no formal notice of the complaints under the relevant regulation until November or December 1983. At a disciplinary hearing in September 1984 the Chief Constable rejected a submission on behalf of the officers that the delay had been such that the officers had been irredeemably prejudiced in that records and logs relating to the period when the incident giving rise to the complaint had occurred had been routinely destroyed. He had proceeded to conduct the hearing. The officers were found guilty and dismissed from the force or required to retire.

[155] The officers applied for judicial review of the Chief Constable's decision. The Divisional Court refused the application on the grounds that the application was premature in view of an alternative appeal procedure which was available to the claimants.

[156] The claimants were successful on appeal. Again, the judgment of the court was given by Sir John Donaldson.

[157] On the facts he found at 432 paras G-H:

> "On the facts of this case, I can see no obvious justification or failing to give Regulation 7 notices in and about July 1981 and I regard it as self-evident that the applicants have been prejudiced by the delay. What is more difficult is to assess the degree of prejudice. At the time of the disciplinary hearing, they still had access to their notebooks, but the entries were not to sufficient detail to be of much assistance in refreshing their memories in the context of the charges. In addition, their witness statements prepared for the criminal proceedings were still available. Finally, the alleged factual basis of the complaints was no doubt put to them at the hearing in the Magistrates Court within six months of the incident, albeit nearly two years before they were told of the fact that the complaint was being investigated."

[158] In considering the merits of a case he went on to say at 434 paras F-H:

> "I acknowledge the specialised expertise in such a tribunal, but I think Mr Livesey's submission overlooks the fact that a police officer's submission to Police Disciplinary Procedures is not unconditional. He agrees to and is bound by these procedures taking them as a whole. Just as his right of appeal is constrained by the requirement that he gave prompt notice of appeal, so he is not to be put in peril in respect of disciplinary, as contrasted with criminal proceedings unless there is substantial compliance with the Police Disciplinary Regulations. That has not occurred in this case…"

[159] The court determined that the delay of over two years before the service of the Regulation 7 notices was a serious departure from the disciplinary procedure which had prejudiced the officers, and which justified the grant of judicial review.

[160] Mr Beggs points out that the delay in *Merrill* and *Calveley* related to the requirement to give the officer prompt written notice of investigation. Thus, the

officers in that case were able to point to obvious prejudice, which is absent in the circumstances of this case.

[161] He says that ultimately on the question of delay the court should look to the issue of prejudice. He refers to the obiter comments of Moses J in the case of *R (Redgrave) v Metropolitan Police Commissioners* [2002] EWHC 1074 where he said at para [25]:

> "[25] This case emphasises the importance of a disciplinary board focusing overall on fairness and recognising that prejudice may be inherent in excessive delay."

[162] He continued:

> "[38] …I find as a matter of practical approach little, if any, true conflict between *ex parte Merrill* and *Attorney-General's Reference* (No 1 1990). It is true that in *ex parte Merrill* the Master of the Rolls said there was no need to introduce the concept of abuse (see page 1085), but in *Attorney-General's Reference* (No 1 1990) the Lord Chief Justice emphasised the ultimate quest was to determine, having regard to the risk of prejudice, whether a fair trial could be held. That, as it seems to me, is exactly the same test as that applied in *ex parte Merrill.* Absent serious prejudice, it cannot be said that a fair trial would not be possible. Absent serious delays, it is unlikely that serious prejudice could be established. The burden clearly relies upon the police officer asserting such prejudice to establish it.
>
> [40] The correct approach is to consider whether a fair or just hearing is possible in light of such inexcusable delay and serious prejudice as the officer may establish. All delay will cause anxiety and possibly worse to an officer waiting a hearing, but not all delay will lead to the conclusion that a fair hearing is no longer possible. The disciplinary boards or other conducting disciplinary or others conducting disciplinary hearings focus on the concept of the possibility of a fair hearing, they will, in my view, be following the guidance given both by *ex parte Merrill* and *Attorney-General's Reference* (No 1 1990)."

The reference to the *Attorney General's case* relates to the test for abuse of process arising from delay in criminal cases. *AG's Ref 1* is the seminal judgment in relation to applications to stay proceedings for abuse of process in the criminal context. In

short, the Court of Appeal stated that the power to dismiss criminal proceedings should only be issued in exceptional circumstances.

[163] The court identified two categories of abuse of process, which sometimes overlap, namely irredeemable prejudice meaning that a fair hearing is no longer possible due to delay, regulatory departure or a myriad of other types of unfairness; and unconscionable conduct by the prosecuting authority, meaning that it would be unjust to proceed.

[164] Focusing on the facts of this case, Mr Beggs contends that the applicant has failed to establish irredeemable prejudice. The points he raises in relation to delay and the impact of any regulatory departure can all be dealt with within the ambit of a misconduct hearing. He further argues that prejudice cannot be inferred from delay alone and that the applicant must point to specific examples of actual prejudice, something he says is not established in this case.

[165] As for unconscionable conduct, whilst he accepts there has been culpable and inexcusable delay in this case, it would not be unjust to proceed given the overriding principle of the misconduct regulations, that is to ensure public confidence in the police.

[166] He does concede that there is a specific line of authority which has held in the context of police misconduct proceedings in circumstances where there has been a failure of a prompt notice of investigation to the officer concerned, that prejudice is established. This was the determining factor in the cases to which I have referred above.

[167] In the court's view, whilst *AG's Ref 1* provides useful guidance on the relevant principles, there is an important distinction between criminal proceedings where what is at stake is the punishment of crime and disciplinary proceedings under the Regulations.

[168] Indeed, this was recognised in the *Calveley* case where at 434F-H the court said that a police officer "is not to be put in peril in respect of disciplinary, as contrasted with criminal, proceedings unless there is substantial compliance with the Police Disciplinary Regulations."

[169] An important case cited by Mr McQuitty is that of *R(On the Application of Wilkinson and others) v Chief Constable of West Yorkshire* [2002] 2353 (Admin).

[170] In that case police challenged by way of judicial review the Chief Constable's refusal of their application for dismissal of the proceedings. The dismissal application in *Wilkinson* was based on delay in service of Regulation 7 notices together with delay in bringing the charges to a hearing and the lack of correspondence between the allegations and the charges and those in Regulation 7 notices.

[171] In the court's judgment, Davis J rejected counsel for the Chief Constable's argument that the test was that in *AG's Ref 1* rather than *Merrill* because:

> "It was not in his mouth to make that submission when the Chief Constable had, in fact, decided the officers' application for a stay under the test in *Merrill* had not been referred to by the Court of Appeal in *AG's Ref 1*, which was, in any event, a criminal not a disciplinary case, with the difference between the two being the existence of the Regulations."

[172] Davis J went on at para [56] of the judgment to refer to delay in the context of *Redgrave* and accept that the test was that in *Redgrave* saying:

> "Moreover, as pointed out by Moses J in the *Redgrave* case, both *Merrill* and the Attorney General's Reference case proceed on the basis that the ultimate quest having regard to the risk of prejudice was to determine whether a fair trial can be held and, as Moses J also pointed out, delay may be so great and so unjustifiable as to give rise to injustice to an accused, requiring a stay or dismissal of the proceedings, even in the absence of specific prejudice." [My underlining]

The extent of the delay

[173] On any showing the delay in this case is significant and inexcusable. The relevant period to be considered by the court is between the decision to bring misconduct proceedings against the applicant made in September 2018 and the misconduct hearing which would have taken place in late 2022/early 2023 but for these proceedings, a period of approximately four years. This in the context of the implied and express obligations on the respondent to bring proceedings "without delay."

[174] The delay occurred during a period in which the respondent was legally represented in respect of a challenge to the alternative approach taken by the respondent to deal with the applicant's conduct. It will also be noted that T/Chief Superintendent Bond swore an affidavit on 26 March 2021 in respect of the challenge to the SCP Procedure in which she averred that she had been provided with a copy of the opinion of senior counsel that led to the PSD decision to discontinue the original misconduct proceedings. In this context, it is noted that as far as the respondent was concerned the SCP was successful and was fulfilling its purpose.

[175] As a result of the impugned decision the applicant was to face misconduct proceedings in respect of conduct last said to have been committed in 2017, a period of six years.

Effect of delay

[176] Unsurprisingly, the relevant delay has had a devastating impact on the applicant.

[177] In his affidavit evidence the applicant sets out his background as a police officer since 2010.

[178] He avers that to his "profound personal regret" he entered into a consensual sexual relationship with K whom he met at his local gym, whilst off duty. He says that the sexual relationship developed over time from what he considered to be a normal sexual relationship into one that involved consensual BDSM type sexual activity and roleplay activity, carried out at the behest of K. The relationship lasted for around one year until their respective spouses discovered the existence of the relationship.

[179] At para 22 of his affidavit in support of the challenge to the SCP Procedure he avers:

> "[22] To say this affair was a personal disaster for me would be an understatement. It very nearly destroyed my marriage. I deeply regret this affair and the pain and upset that I have caused to my wife, and I only wish to put the entire matter behind me and to continue to rebuild my marriage. To her eternal credit, my wife has been willing to forgive me, and we have worked really hard, through relationship counselling to rebuild trust and to try and strengthen our marriage. This has not been easy – indeed it has been very painful – but we have managed, and our relationship is now stronger having been through a very difficult time…"

[180] In similar vein, in his affidavit dated 17 November 2022, in support of this application he avers at para 15:

> "[15] … I have worked under serious restrictions for years which will have, at best, stalled my career and limited my opportunities. Although I successfully challenged those restrictions, I have always fully abided by them (even after them being quashed) and even been commended for my approach to my restricted role. So far as the Police genuinely entertained concerns about me, I believe I have demonstrated, over a period of years, that they can again have confidence in me. I did not ever envisage that some five years after my affair had ended, I would be forced to go over the same ground again, with

the PSNI, via a second round of formal misconduct proceedings."

[181] Referring to his performance whilst subject to the SCP he avers at para 43:

> "[43] I have worked diligently, bar a period of sick leave since my return to work in January 2019 and have sought to demonstrate, notwithstanding restrictions on my work, my professional integrity and ability as a police officer. I believe that subsequent reports about my conduct as part of the SCP bear this out. I note, in particular, the minutes of an SCP meeting on 18 June 2020 which is already exhibited as part of the Service Confidence Material, and which can be specifically found at pages 802-806 of the exhibit bundle. It was during this meeting that Inspector Les Allen (who had oversight of me in my restricted role) stated that I had been with him since July 2019 and that he had no issues with me, that I was timely and professional with my manner. It was noted by C/Superintendent McVea that it was positive that I had settled into this role, embraced it and done it well. I believe that this assessment is also consistent with my past (unrestricted) performance as a police officer. For example, on or about July/August 2018 I was recognised via a Recognition Panel for demonstrating the highest standards and values of policing."

[182] Returning to the impact of the delay in this case he says at para 42:

> "[42] Understandably, I found the entire process to be incredibly stressful (having been subject to criminal and disciplinary processes) and was deeply relieved when I was advised that the investigation had concluded and that I could return to my work. I believe that the earlier impact of these various processes on me can be seen by the fact that, following the SCP Panel recommendation in February 2019 (suggesting significant restrictions be imposed), I then went on sick leave due to the extreme stress and distress I was under at that time. I was on sick leave from 22 February 2019 until 19 July 2019, returning to work to undertake restricted duties in line with the SCP that was, at that stage, enforced. I am concerned that this belated attempt to resurrect the earlier abandoned proceedings will have a similar impact on my mental health and wellbeing."

[183] He goes on to aver at para 44:

> "[44] I was therefore shocked and distressed to be informed that in September 2022, nearly four years after the original misconduct case was withdrawn that I was to be subject to a further disciplinary case against me based on the same evidence/investigation. I am concerned about whether, at this remove, I will be able to adequately recall events and access information that may be relevant to my defence. Not only was I expressly informed by a superior in December 2018 that no action would be taken against me (after the withdrawal of a disciplinary case) but there has since elapsed a period of years (from December 2018 to September 2022) during which it was never even suggested by police that this matter might be resurrected. By their conduct the police led me to believe, over a period of years, that the decision of Superintendent McCaughan in December 2018 was the end of the matter so far as misconduct issues were concerned. Moreover, I was then subjected to significant and sustained restrictions in lieu of that disciplinary process, under the SCP over a similar period where even that decision was ultimately found to have been unlawful. Given my belief that the decision to withdraw was the end of the matter, I did not further consider any defence or response to the (withdrawn) disciplinary case, though I did then pursue my challenge to the SCP restrictions. The delay to date is grossly prejudicial to any defence of the misconduct proceedings."

[184] Developing the theme of prejudice to the applicant Mr McQuitty points to examples of actual prejudice to the applicant should the misconduct proceedings take place.

[185] He says that the impugned decision subverts and contravenes the scheme of regulations, particularly safeguards afforded to the applicant thereunder.

[186] It is significant that there has been no further investigation in this case. This means that the applicant has not been provided with any notice under Regulation 16 describing misconduct and so has been unable to formally respond to this under Regulation 18. He has been deprived of the possibility of an interview by the investigator under Regulation 19.

[187] This is important because of the very different approach AA McGuigan has taken to the evidence which was available to AA McCaughan.

[188] Her initial involvement was in June 2022 when she received an email from an inspector in PSD drawing her attention to the fact that K had made a complaint to the Police Ombudsman for Northern Ireland in July 2021 (11 months previously), but the matter was considered outside the Ombudsman's remit. She avers that on 17 June 2022, she attended a meeting with Chief Superintendent Walls regarding the Service Confidence Procedure in relation to JR249 and the outcome of JR91. She was directed to review the case for "potential new evidence" from the reporting person K.

[189] It is clear from her evidence that in fact no new evidence was disclosed. She was unable to contact K as part of her review. Notwithstanding the absence of any new evidence, AA McGuigan went on to conclude that AA McCaughan had erred in law in withdrawing the misconduct charges.

[190] It is clear from her affidavit evidence that as a result of her review she came to a different conclusion than that of AA McCaughan and in particular she concluded that the legal advice from Mr Beggs did not provide any rationale for withdrawing the case. She therefore concluded that AA McCaughan made an error in withdrawing the case.

[191] Thus, the applicant now faces misconduct proceedings without any notice of these matters in advance. This is despite the fact that these proceedings appear to have been contemplated since June 2022.

[192] The new charges preferred against the applicant and the way in which they differ from the original charges is important.

[193] In my view it is clear from the charges drafted by AA McGuigan that K's alleged "vulnerability" is central to her conclusions and the framing of the charges. Thus, in her affidavit evidence she goes to considerable lengths to explain why in her view K was vulnerable. This is despite the fact that she has never spoken to K.

[194] The impugned decision refers the applicant to misconduct proceedings on two charges.

[195] The first charge is:

> "Being a constable within the PSNI you did between July 2016 and August 2017 misconduct yourself. This relates to the "Daddy Dom, Little Girl" activities with K."

In the particulars it is alleged at para 2 that "you knew or ought reasonably to have known that K was vulnerable."

[196] It is to be noted that the second charge relates to the infliction of injury on K and that again this is based on particulars that "you knew or ought reasonably to

have known that K was vulnerable." Again, in the context of prejudice, it is to be noted this was the first time the applicant had been informed that he was to face charges in relation to conduct other than his admitted conduct.

[197] From these charges and from the affidavit evidence from AA McGuigan it is clear that not only did she consider that K was vulnerable but, in her opinion, she was satisfied that JR249 knew she was vulnerable. Thus, at para 20 of her affidavit she asserts:

> "I was also satisfied that JR249 was fully aware of these vulnerabilities."

These vulnerabilities are based on her assessment of the video footage recorded of K's account, where she "presented as a confident and to an extent a coherent woman."

[198] Leaving aside the merits or appropriateness of this assessment the important point is that as per Quinlivan J's judgment at para [49]:

> "[49] … It is noteworthy, that those conducting the disciplinary reviews did not suggest that K was a vulnerable witness. In fact, the tone of the questioning is to the opposite effect. There are various references to K being described by the interviewing officers as "confident" and on one occasion it was expressly stated that she does not strike the interviewing officer as "in any way vulnerable"…"

[199] The applicant now faces charges based on the alleged vulnerability of K in circumstances where he has never had any opportunity to address this issue and, indeed, was misled about the police view.

[200] Furthermore, the applicant was not provided with relevant documentation on this issue. Again, as per Quinlivan J's ruling at para [49] she goes on to say:

> "[49] …Having access to this document, without access to the documents identified above, was apt, in my view to give the applicant a misleading view of how K was perceived by the PSNI."

[201] Importantly, the 2018 report from AA McCaughan concludes that K was not vulnerable.

[202] Put simply, the applicant has not been given an appropriate opportunity to deal with this issue in the process leading to the impugned decision.

[203] He has been denied protections to which he is entitled as a matter of fairness and importantly under the regulations.

[204] To this I would add that the notice containing the disciplinary charges the applicant now faces contains a warning that the person conducting the hearing "may draw adverse inferences" where any failure to mention any fact relied upon at the hearing which could have been mentioned in a Regulation 24 response.

[205] I might add that the tenor of AA McGuigan's affidavit evidence and report confirms that she has made the error of which AA McCaughan is accused, namely coming to actual conclusions adverse to the applicant rather than simply assessing whether there was a case to answer.

[206] It is important to note that this is not a case in which a police officer has abused his position as a police officer for sexual purposes. Notwithstanding this AA McGuigan in her affidavit expressly refers to guidance published by the National Police Chiefs' Council (NPCC) and to the policy declarations made in 2017 that such behaviour can never be justified or condoned and amounts to serious corruption. The issue of abuse of position appears to be a factor in her thinking, despite the fact that JR249's relationship with K did not involve abuse of his position as a police officer. It was a purely private matter between him and K.

[207] It seems to the court that this represents a significant departure from what is required under the regulations.

[208] This of course was an important factor in the decision in *Merrill* at para 1085G where the court concluded:

> "Unfairness in this context is a general concept which comprehends prejudice for the accused but can also extend to a significant departure from the intended and prescribed framework of disciplinary proceedings or a combination of both."

[209] In considering the merits of the applicant's submissions in relation to delay/procedural fairness, I must take into account all of the factors to which I have referred.

[210] In assessing the matter I take into account the magnitude of the delay, the reasons for the delay, the impact of the delay on the applicant personally, the circumstances in which the respondent chose to "re-institute" the conduct charges and, most importantly of all, the potential prejudice to the applicant in seeking to defend any misconduct proceedings.

[211] Taking all of these matters into account, I have concluded that it would be unfair to permit the respondent to proceed with the misconduct proceedings. I do so

based on the cumulative effect of the matters I have identified. Importantly, I consider that there has been a significant departure from the intended and proscribed framework of disciplinary proceedings.

[212] I do so conscious of the fact that the court should be very slow to interfere with proceedings before a Specialist Tribunal such as a Misconduct Panel constituted under the Regulations and should only do so in exceptional circumstances. However, I consider in the words of Saini J to which I have already referred that "it is not difficult to identify why such facts might be said to give rise to exceptional circumstances" in this case. The easy option would be for the court to simply say – "leave the matter to the Tribunal." However, in my view, to do so would be to abdicate its supervisory responsibility to protect the applicant's rights and avoid the imposition of an unjust hearing.

[213] **I, therefore, accede to the applicant's application for judicial review and I grant an order of *certiorari* quashing the first impugned decision.**

[214] I further direct that any restrictions to be imposed on the applicant under the SCP should be imposed in compliance with the High Court judgment of Quinlivan J quashing the decision of DCC Martin.

Legitimate expectation

[215] The applicant maintains that the promise of no further disciplinary action based on the same evidence which has led to the impugned decision was clear, unambiguous and void of qualification. He argues that it was underscored by the fact that he was then subject to the SCP to restrict his practice as an officer. They could only do so following the decision to abandon the disciplinary case.

[216] He argues that in those circumstances he enjoyed a legitimate expectation in law that he would not be subject to misconduct proceedings arising from the same evidence. He argues that it would be unfair to allow the respondent to depart from that expectation.

[217] Applying the appropriate legal principles I conclude that on balance the applicant does not establish his argument based on legitimate expectation. I say so because there was not a clear and unambiguous promise, void of a relevant qualification. I can understand the applicant's view that the representation by PS Young based as it was on a decision taken by AA McCaughan in accordance with the regulations, appeared to him to be the end of the misconduct proceedings, particularly having regard to the fact that he was subject to the SCP procedure. Nonetheless, as is apparent from the analysis above the court has concluded that in certain circumstances it would be open for the respondent to review the matter.

Article 8 ECHR

[218] In light of the court's decision I do not consider that the article 8 argument adds anything to the applicant's case. The regulations themselves in my view taken together with the court's supervisory role provide adequate protection to the applicant's undoubted article 8 rights in this context.

[219] In view of my findings I do not propose to make any findings under article 8 or any declarations as a result.

The decision to suspend – the third impugned decision

[220] In light of the court's findings in relation to the first impugned decision, I consider that the third impugned decision namely to suspend the applicant pursuant to Regulation 10 was unlawful. Clearly the decision to suspend was based on the fact that the applicant was facing misconduct proceedings. **In view of the court's conclusion that such misconduct proceedings were unlawful then the decision to suspend also falls.**

The second impugned decision – the failure to give effect to the order of Quinlivan J in JR91

[221] On 8 April 2022, the High Court in the case of *JR91* (as JR249 was then known) quashed the decision to impose SCP restrictions on the applicant.

[222] In accordance with the fundamental principles of the rule of law the respondent was bound by that decision.

[223] The court accepts that the respondent is entitled to a reasonable period to comply with the court's order. Faced with the decision the respondent had several options.

[224] The respondent could have appealed the decision of the High Court to the Court of Appeal and maintained the SCP restrictions in the meantime.

[225] Alternatively, the respondent could have complied with the direction of the court. This would have involved either removing the restrictions completely, or more probably, in light of the reasoning of the High Court, restarting the SCP process adopting a fairer procedure with the benefit of that judgment.

[226] As appears from the history of events, the respondent chose neither of these options but instead decided to reinstate the misconduct proceedings.

[227] The process undertaken and why it took so long to do so is set out in an affidavit sworn by Chief Superintendent Walls on 3 April 2023.

[228] At that time and since 13 June 2022, he was the Head of the Professional Standards Department and responsible for the Discipline Branch within the PSNI. He also performed the role of the delegated Appropriate Authority under the Regulations.

[229] He points out that the respondent was represented by the Crown Solicitor's Office ("CSO") at the time of Quinlivan J's judgment but that since April 2022, PSD had employed an embedded solicitor and since then has conducted its own litigation.

[230] The new PSD solicitor received the final written judgment in *JR91* from the CSO on 5 May 2022.

[231] He explains that steps were taken within the PSNI, including consultation with senior counsel to the CSO to consider the respondent's options following the judgment. The judgment itself was brought to his attention on his first formal day in the post, namely 30 June 2022.

[232] Having read the judgment he took the view that the applicant's conduct was "wholly at odds to a status as constable" and it "would be scandalous to the general public and undermine public confidence in policing."

[233] He considered that his obligation was to protect the public and the service from the applicant's admitted behaviour.

[234] At that stage he directed that a "protective notice to appeal *JR91*" should be issued and that steps should be taken to address the deficiencies identified in the SCP procedure. He also sought legal advice regarding available options in respect of the applicant.

[235] According to the affidavit filed by AA McGuigan, she became involved on 15 June 2022 when she was referred to a complaint to the Police Ombudsman for Northern Ireland by K on 7 July 2021 which had been deemed outside their remit. On 17 June 2022, she attended a meeting with Chief Superintendent Walls in which she was directed to review the case "for potential new evidence from the reporting person K."

[236] There was ongoing internal discussions within the PSNI about the SCP procedure and the liaison with the CSO.

[237] Ultimately, the respondent obtained advice from counsel through the PSD solicitor rather than through the CSO.

[238] On 18 August 2022, he received a duty status report signed by AA McGuigan which recommended that the applicant be suspended from duty which was forwarded to the Deputy Chief Constable who made the decision on 19 September

2022 to suspend the applicant. This decision was made in the context of the decision of AA McGuigan that the matter be referred to a misconduct panel.

[239] Chief Superintendent Walls justifies the decision not to comply with the direction of the court on the basis that the ongoing restrictions were necessary to protect the public and the reputation of the police service.

[240] From this it is clear that the SCP restrictions remained in place between 8 April 2022 and 19 September 2022 when the applicant was suspended, notwithstanding the direction of the court.

[241] In light of the suspension, Mr Beggs argues that the challenge is plainly academic as there is no case to be decided which will directly affect the rights and obligations of the parties to the claim.

[242] Realistically, the respondent accepts that whilst Chief Superintendent Walls' actions in seeking to protect the public and public confidence in policing were merited, he should have moved more swiftly in deciding whether to appeal Quinlivan J's judgment, restart the SCP process adopting fairer procedure with the benefit of that judgment or reinstituting the misconduct proceedings.

[243] I should add, at this stage, that in considering the period of delay and the reasons for it, the CSO had written to the applicant's solicitor as early as 25 May 2022 to say that it was the intention of the PSNI to undertake the SC procedure starting with a fresh panel and ACC decision, noting that the PSNI did not wish to delay progress on this issue. This correspondence was followed up by emails from the applicant's solicitor on 1 July 2022, 2 August 2022 and 9 September 2022, before being informed of his suspension and referral to misconduct proceedings.

[244] I consider that the delay between the decision in JR91 and the decision to suspend on 9 September 2022 was unacceptable. Despite the clear ruling of the court the respondent failed to take any action for approximately five months. During this time the applicant remained subject to SCP restrictions which were declared to be unlawful by the High Court. His solicitor wrote to the respondent's solicitors seeking compliance with the order.

[245] **In these circumstances, I consider that the applicant is entitled to a declaration in respect of the second impugned decision to the effect that the failure to comply with the judgment was unlawful.**