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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY THE POLICE OMBUDSMAN FOR NORTHERN IRELAND FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Simon McKay (instructed by Carson McDowell) for the Applicant
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Richard Smyth (instructed by Edwards & Co) for the first Notice Party
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HUMPHREYS J

Introduction

[1] By this application for leave to apply for judicial review, the applicant, the Police Ombudsman for Northern Ireland ('PONI') seeks to challenge the decision of the Chief Constable of the Police Service of Northern Ireland ('CCPSNI') to hold a misconduct meeting in respect of the conduct of a police officer known as Sergeant S. It is PONI's case that CCPSNI was obliged to hold a misconduct hearing in accordance with the direction given to him.

[2] The misconduct alleged against Sergeant S related to the death of an individual, Jamie Wilson, who had been arrested in relation to an alleged assault against a female on 30 April 2018. Sergeant S was the custody sergeant who authorised Mr Wilson's detention, including use of certain mechanical restraints. Mr Wilson was charged and released from custody later that day. The following day, 1 May 2018, he suffered a stroke and collapsed at home. He died in hospital on 7 May 2018.

[3] PONI was notified of the death on that day. A postmortem revealed the cause of death to be "infarct of left cerebral hemisphere due to thrombosis of left carotid and left middle cerebral arteries."

[4] Thereafter, PONI undertook an investigation into the circumstances surrounding the arrest and detention of Mr Wilson and the acts and omissions of six police officers, including Sergeant S, who had been in contact with the deceased.

[5] The investigation ultimately resulted in a recommendation being issued by PONI, under its statutory powers, that disciplinary proceedings should be brought against Sergeant S and that these ought to take the form of a misconduct hearing rather than a misconduct meeting.

[6] On 1 December 2023, Superintendent McGuigan, who was the appropriate authority and authorised delegate of the CCPSNI, determined that the case should proceed to a misconduct meeting rather than a misconduct hearing. It is the legality and rationality of this decision which is under challenge in these proceedings.

[7] Both the officer concerned, Sergeant S, and the next of kin of Mr Wilson were notice parties to this application and by direction of the court the matter proceeded by way of a rolled-up hearing.

The legal framework

[8] The Police (Northern Ireland) Act 1998 ('the 1998 Act') created the office of PONI. By section 51(4), PONI is obliged to exercise statutory powers:

> "… in such manner and to such extent as appears to him to be best calculated to secure—
>
> (a) the efficiency, effectiveness and independence of the police complaints system; and
>
> (b) the confidence of the public and of members of the police force in that system."

[9] By section 55(2) of the 1998 Act the CCPSNI is obliged to refer to PONI any matter which appears to him to indicate that conduct of a member of the police force may have resulted in the death of some other person. This then triggers a PONI obligation to investigate in accordance with section 56.

[10] Section 59 relates to steps to be taken after an investigation and provides:

> "(1) Subsection (1B) applies if—
>
> (a) the Director decides not to initiate criminal proceedings in relation to the subject matter of a report under section 56(6) or 57(8) sent to him under section 58(2); or

(b) criminal proceedings initiated by the Director in relation to the subject matter of such a report have been concluded.

(1A) Subsection (1B) also applies if the Ombudsman determines that a report under section 56(6) or 57(8) does not indicate that a criminal offence may have been committed by a member of the police force and—

(a) he determines that the complaint is not suitable for resolution through mediation under section 58A; or

(b) he determines that the complaint is suitable for resolution through mediation under that section but—

(i) the complainant or the member of the police force concerned does not agree to attempt to resolve it in that way; or

(ii) attempts to resolve the complaint in that way have been unsuccessful.

(1B) The Ombudsman shall consider the question of disciplinary proceedings.

(2) The Ombudsman shall send the appropriate disciplinary authority a memorandum containing—

(a) his recommendation as to whether or not disciplinary proceedings should be brought in respect of the conduct which is the subject of the investigation;

(b) a written statement of his reasons for making that recommendation; and

(c) where he recommends that disciplinary proceedings should be brought, such particulars in relation to the disciplinary proceedings which he recommends as he thinks appropriate.

(2A) In a case mentioned in subsection (1A)(b), the Ombudsman shall, in considering the recommendation to be made in his memorandum, take into account the conduct of the member of the police force concerned in

relation to the proposed resolution of the complaint through mediation.

(3) No disciplinary proceedings shall be brought by the appropriate disciplinary authority before it receives the memorandum of the Ombudsman under subsection (2).

(4) The Board shall advise the Ombudsman of what action it has taken in response to a recommendation contained in a memorandum sent to it under subsection (2); and nothing in the following provisions of this section has effect in relation to senior officers.

(5) If—

(a) a memorandum sent to the Chief Constable under subsection (2) contains a recommendation that disciplinary proceedings should be brought; but

(b) the Chief Constable is unwilling to bring such disciplinary proceedings,

the Ombudsman may, after consultation with the Chief Constable, direct him to bring disciplinary proceedings.

(6) Subject to subsection (7)—

(a) it shall be the duty of the Chief Constable to comply with a direction under subsection (5);

(b) the Chief Constable may not discontinue disciplinary proceedings which he has brought in accordance with—

(i) a recommendation contained in a memorandum under subsection (2); or

(ii) a direction under subsection (5).

(7) The Ombudsman may give the Chief Constable leave—

(a) not to bring disciplinary proceedings which subsection (6)(a) would otherwise oblige him to bring; or

(b) to discontinue disciplinary proceedings with which subsection (6)(b) would otherwise require him to proceed.

(8) Regulations made in accordance with section 25(3) or 26(3) may establish, or make provision for the establishment of, a special procedure for any case in which disciplinary proceedings are brought—

(a) where a memorandum under subsection (2) recommending the bringing of those proceedings contains a statement to the effect that, by reason of exceptional circumstances affecting the case, the Ombudsman considers that such special procedures are appropriate; or

(b) in compliance with a direction under subsection (5).

(9) The Chief Constable shall advise the Ombudsman of what action he has taken in response to—

(a) a recommendation contained in a memorandum under subsection (2);

(b) a direction under subsection (5)."

[11] Section 50 concerns interpretation for the purposes of Part VII of the 1998 Act, including:

"the appropriate disciplinary authority" means—

(b) in relation to any other member of the police force, the Chief Constable;

"disciplinary proceedings" means—

in relation to a member of the Police Service of Northern Ireland, proceedings identified as such by regulations under section 25."

[12] Section 25 empowers the Department of Justice to make regulations as to the government, administration and conditions of service of members of the PSNI, including conduct and discipline.

[13] The relevant regulations are the Police (Conduct) Regulations (Northern Ireland) 2016 ('the 2016 Regulations'). By regulation 3:

"disciplinary proceedings" means, other than in paragraph (8), any proceedings under these Regulations;

"directed proceedings" means disciplinary proceedings directed by the Ombudsman in accordance with section 59(5) of the 1998 Act;

"misconduct hearing" means a hearing to which the member concerned is referred under regulation 21 and at which he may be dealt with by disciplinary action up to and including dismissal;

"misconduct meeting" means a meeting to which the member concerned is referred under regulation 21 and at which he may be dealt with by disciplinary action up to and including a final written warning;

"misconduct proceedings" means a misconduct meeting or misconduct hearing."

[14] Regulation 21 governs the referral of cases to misconduct proceedings:

"(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.

(2) In a case where the disciplinary proceedings have been delayed by virtue of regulation 9(3), as soon as practicable after the appropriate authority considers that such proceedings would no longer prejudice any criminal proceedings, it shall, subject to regulation 42(3), make a further determination as to 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.

(5) Where the appropriate authority determines that there is a case to answer in respect of misconduct, it may—

(a) subject to regulation 9(3) and paragraph (2), refer the case to misconduct proceedings; or

(b) take management action against the member concerned.

(6) Where the appropriate authority receives a recommendation under section 59(2) of the 1998 Act (steps to be taken after investigation - disciplinary proceedings) that disciplinary proceedings should be brought the appropriate authority shall, if it accepts the recommendation, determine whether to refer the case to a misconduct meeting or misconduct hearing.

(7) In the case of directed proceedings, the Chief Constable shall refer the case to a misconduct hearing in accordance with regulation 27(5).

(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.

(9) Where under paragraph (5) the appropriate authority determines to take management action, it shall give the member concerned written notice of this as soon as practicable.

(10) Where the appropriate authority determines under paragraph (5) to refer the case to misconduct proceedings—

(a) where the member concerned had a final written warning in force at the date of the assessment of conduct under regulation 12(1) or at the date of the recommendation under section 59(2) of the 1998 Act that disciplinary proceedings should be brought, those proceedings shall be a misconduct hearing; and

(b) in all other cases those proceedings shall be a misconduct meeting."

[15] In summary, therefore:

(i) In a case where criminal proceedings have not been initiated, PONI must consider the issue of disciplinary proceedings and make a recommendation to CCPSNI (or his lawful delegate);

(ii) Such recommendation must indicate whether or not disciplinary proceedings should be brought;

(iii) The appropriate authority must then determine whether there is a case to answer and, if so, whether to refer to a misconduct meeting or a misconduct hearing;

(iv) A misconduct meeting can result in a sanction up to and including a final written warning whilst a misconduct hearing may result in dismissal;

(v) Where the CCPSNI is unwilling to bring disciplinary proceedings following a recommendation PONI may direct him to do so following consultation;

(vi) Where such a direction is issued, CCPSNI must follow it and the directed proceedings are referred to a misconduct hearing.

The investigation report

[16] On 25 April 2022, the Public Prosecution Service stated that there remained insufficient evidence to establish a causal connection between the actions of police and the death of Mr Wilson or in respect of any criminal offence.

[17] On 16 December 2022, PONI submitted to the PSNI its outline of case, including recommendations. The conclusion expressed was:

> "Sergeant [S] has a misconduct case in respect of:
>
> - His use of force on Jamie in the custody hatch area in that it would have better [sic] had he not been so involved and instead acted as the Safety Officer/Supervisor.
>
> - The decision to place Jamie in the prone position and to continue the use of mechanical restraints on Jamie for 1 hour 50 minutes.
>
> - Failure to have Jamie medically assessed until the following morning.
>
> - Failure to treat Jamie as a medical emergency at 0707 hours."

[18] The report continued:

> "Given the significance of the above matters and level of culpability in respect of Sergeant [S's] role and experience as a custody sergeant it is considered that these matters be addressed at a misconduct hearing."

[19] Pursuant to regulation 21(6) of the 2016 Regulations, Chief Superintendent Walls, who was the appropriate authority, issued a determination dated 22 February 2023. He concluded that there was a case to answer for misconduct but diverged from the PONI position by directing a misconduct meeting rather than a misconduct hearing. He stated:

> "In my view, the outcomes available to a conducting officer in a misconduct meeting are sufficient to properly account for the degree of seriousness should the facts of this case be admitted or proven."

[20] On 16 March 2023, PONI indicated that the "recommendation" in respect of Sergeant S was "not agreed" and therefore a meeting was sought. This took place on 12 April 2023. On 17 April 2023, Chief Superintendent Walls indicated by email:

> "I have reconsidered my determination. The revised Regulation 21 report should be on its way, misconduct hearing."

[21] Preparations were put in train for a misconduct hearing to take place on 22 to 25 January 2024.

[22] On 1 December 2023, an email was sent to PONI by Superintendent McGuigan, who had taken over as the appropriate authority from Chief Superintendent Walls. It stated that she had extensively reviewed the case and decided that the matter would not proceed to a misconduct hearing on the scheduled dates, but a misconduct meeting would be held on a date to be confirmed in January 2024. The communication stated:

> "I am happy to provide a more comprehensive report from the AA to PONI in terms of decision making to help to explain this decision."

[23] PONI wrote on 15 December 2023 making a number of points:

(i) The determination of Chief Superintendent Walls concluded the statutory process and therefore the CCPSNI was functus officio at that point;

(ii) The practical effect of the 1 December email was to discontinue the misconduct proceedings which was ultra vires in light of section 59(6) of the 1998 Act;

(iii) Had the previous decision maker maintained a decision which was inconsistent with PONI recommendation, PONI would have directed a misconduct hearing; and

(iv) The purported decision of 1 December 2023 was unlawful and ought to be disregarded.

[24] The PSNI legal advisor joined issue with these contentions, stating:

(i) The decision was not ultra vires;

(ii) The decision did not effect a discontinuance of the misconduct proceedings;

(iii) The decision was not prohibited by section 59(6) of the 1998 Act;

(iv) PONI does not have the power to direct a misconduct hearing;

(v) The AA was entitled to differ from the recommendation of the PONI investigator; and

(vi) The misconduct meeting would be proceeding on 22 January 2024.

[25] On 15 January 2024 PONI directed that the officer be put before a misconduct hearing. A pre-action letter followed on 19 January which identified the scope of the dispute to be the power of PONI to direct a misconduct hearing when CCPSNI had determined that a misconduct meeting was appropriate. It was indicated that an injunction would be sought restraining the misconduct meeting from taking place.

[26] In the event, no application was made for interim relief and the meeting proceeded on 22 January. The finding was that no misconduct on the part of Sergeant S had been proven and the charge was dismissed.

The grounds of challenge

(i) Illegality

[27] The kernel of the applicant's challenge is that, on the proper interpretation of the 1998 Act and the 2016 Regulations, where PONI recommends a particular mode of disciplinary proceedings, this can be enforced by way of direction pursuant to section 59(5). The case advanced by the PSNI is that it is only where the CCPSNI is unwilling to bring disciplinary proceedings at all, contrary to a recommendation made by PONI, that the power to direct exists. The nature of the proceedings, whether they should take the form of a misconduct hearing or a misconduct meeting, is a matter for the appropriate authority.

[28] The applicant seeks to derive support from the obiter comments of the Court of Appeal in *Re Hawthorne's Application* [2020] NICA 33:

> "In those circumstances the Ombudsman must send the appropriate disciplinary authority a memorandum containing:
>
> (a) his recommendation as to whether or not disciplinary proceedings should be brought in respect of the conduct which is the subject of the investigation;
>
> (b) a written statement of his reasons for making that recommendation; and
>
> (c) where he recommends that disciplinary proceedings should be brought, such particulars in relation to the disciplinary proceedings which he recommends as he thinks appropriate."

> This section has provisions to enable the Ombudsman to ensure that any recommended disciplinary proceedings are pursued."

[29] It is contended that the reference to "any recommended disciplinary proceedings" supports the argument that it is not merely the proceedings themselves which can be directed but the nature of them.

[30] Key to the applicant's position is the word 'such' in section 59(5)(b) of the 1998 Act. It is said that the use of this pronoun is indicative of the character of the proceedings which may be directed by PONI.

[31] As the Supreme Court recently confirmed in *R (O) v SSHD* [2023] UKSC 3, a court carrying out the exercise of statutory interpretation is seeking to identify the meaning of words used by Parliament in their particular context. Part of that context must be the statutory scheme when read as a whole. A proper understanding of the interaction between PONI and the CCPSNI in disciplinary matters requires the entire legislative scheme to be considered.

[32] PONI's function is to investigate and recommend, the CCPSNI remains the disciplinary authority. It is only in the circumstances prescribed by section 59(5) that PONI can direct proceedings. It is clear that a recommendation and a direction have quite different legal consequences. One is generally free to depart from the former but not from the latter.

[33] When PONI sends the CCPSNI a memorandum under section 59(2), this contains three things. Firstly, the recommendation as to whether disciplinary proceedings should be brought. Secondly, the reasons for that recommendation. Thirdly, such particulars in relation to the disciplinary proceedings which he recommends as he thinks appropriate. These particulars may, of course, include a recommendation as to the form of those proceedings.

[34] On receipt of this recommendation, the appropriate authority must then, in accordance with regulation 21(6), decide two things:

(i) Whether to accept the recommendation; and

(ii) If so, whether to refer to a misconduct meeting or a misconduct hearing.

[35] The express words of regulation 21(6) make it clear that these are separate and distinct determinations to be made.

[36] If the appropriate authority decides not to accept the recommendation or, in the language of section 59(5) is "unwilling" to bring proceedings, the power to direct lies. There is no provision to direct the form of proceedings as opposed to the proceedings themselves.

[37] This respects the differing roles of PONI and the CCPSNI. Parliament could have created a scheme whereby all matters of discipline were handled by an independent authority. It chose not to do so but, instead, placed disciplinary responsibility in the hands of the Chief Constable. It also created a safety net whereby an unwilling Chief Constable could, following consultation, be directed to instigate and maintain disciplinary proceedings. If Parliament had intended that PONI's powers of direction extended to the modality of the proceedings themselves then it would have expressly said so, since this constitutes an infringement on the general principle that discipline is a matter for the CCPSNI.

[38] The primary ground of challenge advanced by PONI therefore fails.

[39] It is also argued that the action adopted by the appropriate authority in changing the form of the disciplinary proceedings to a misconduct meeting effected a discontinuance of the proceedings which is expressly prohibited by section 59(7) of the 1998 Act.

[40] The obligation not to discontinue disciplinary proceedings only bites when there has been a direction made by PONI under section 59(5). For the reasons set out, it was not open to PONI in this case to make such a direction. The CCPSNI had not evinced an unwillingness to bring disciplinary proceedings. On the contrary, such proceedings were commenced and taken to a conclusion. They were not discontinued on any analysis, rather only the mode of proceeding was altered. This ground of challenge therefore also fails.

(ii) Articles 2 & 3 ECHR

[41] The engagement of Convention rights is said to be relevant in two ways. Firstly, the applicant says that articles 2 and 3 were engaged on the facts of this case and that a misconduct meeting could not satisfy the requirements of the investigatory obligation imposed by those articles. Secondly, it is argued that the legislative provisions under consideration ought to be 'read down' in a manner compatible with Convention rights pursuant to the obligation in section 3 of the Human Rights Act 1998 ('HRA 1998').

[42] For the purposes of this judgment, and in the circumstances where this death occurred shortly after a period in custody, I am prepared to accept that articles 2 and 3 ECHR are engaged. I also accept that article 3 ECHR imposes a similar investigative duty to that which arises under article 2 – see *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11.

[43] In *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, Lord Phillips set out the requirements of an article 2 ECHR compliant investigation:

(i) It must have a sufficient element of public scrutiny of the investigation or its results;

(ii) It must be conducted by a tribunal that is independent of the state agents who may bear some responsibility for the death;

(iii) The relatives of the deceased must be able to play an appropriate part in it; and

(iv) It must be prompt and effective. [para 64]

[44] The courts have recognised that PONI's investigative role can contribute to the state's fulfilment of its article 2 obligation – see, for example, the Court of Appeal in *Re Hawthorne* (supra) at para [47] and the Supreme Court in *Re Dalton's Application* [2023] UKSC 36 at para [320]. However, as the Supreme Court commented in *R (Maguire) v His Majesty's Senior Coroner for Blackpool & Fylde* [2023] UKSC 20:

> "The precise content of the procedural obligation on a state varies according to the context in which an issue regarding the application of article 2 arises. There is no simple monolithic form of procedural obligation which applies in every such case. Rather, the procedural obligation applies in a graduated way depending on the circumstances of the case and the way in which in a particular context the state may be called upon to provide due accountability in relation to the steps taken to protect the right to life under article 2. The graduated way in which the procedural obligation applies reflects the fact that this obligation, like the substantive positive obligations under article 2, is an implied positive duty which is not to be taken to impose an unreasonable or disproportionate burden upon the state."

[45] The applicant in this case points to the lack of family involvement and the limited powers of punishment enjoyed by a misconduct meeting as failures to contribute effectively to the article 2 (or 3) investigative duty.

[46] There was a PONI investigation in this case and a referral to the PPS. The independent prosecutorial authority took a decision that the test for prosecution was not met. Article 2 does not give rise to a right to have state agents prosecuted by reason of their involvement in circumstances which lead to a death. It suffices if the investigation is capable of leading to the punishment of those responsible in an appropriate case.

[47] In the circumstances of the death at issue, the coroner is due to hold an inquest but it has been placed on hold pending the outcome of the disciplinary proceedings and this application for judicial review.

[48] In *R (Birks) v Commissioner of Police of the Metropolis (no 2)* [2018] EWHC 807 (Admin), Garnham J held that there was nothing in the Strasbourg authorities to support the proposition that where there is an article 2 compliant inquest, a proper criminal investigation and a decision by an independent authority not to prosecute that disciplinary proceedings must be held in order to meet the article 2 requirements. Further, after reviewing the domestic authorities, he found:

> "Furthermore, it cannot properly be said, in my view, that the fact a disciplinary process is available in the police service means that its deployment is necessarily required by article 2. As it is commonly expressed, the Convention provides a floor not a ceiling … Accordingly, in my judgment, article 2 was satisfied in this case without a disciplinary hearing."

[49] In the instant case, there was a disciplinary process which ultimately concluded that Sergeant S was guilty of no misconduct. It was not, however, a necessary component of the article 2 obligation. There was a full and thorough investigation into the circumstances of the death of Mr Wilson and it was properly subjected to consideration and analysis by the PPS. An inquest will take place in the near future at which the family will be represented and can fully participate. There is no basis therefore to say that the article 2 investigative obligation imported an obligation to have any disciplinary proceedings, let alone disciplinary proceedings of a particular type.

[50] The engagement of articles 2 and 3 on the facts of this case does not mandate any disciplinary proceeding nor a particular interpretation of the 1998 Act.

(iii) Irrationality

[51] This ground is based on the alleged failure by the proposed respondent to take into account the engagement of articles 2 and 3 and thereby recognise that the nature of the conduct under scrutiny automatically entailed a misconduct hearing.

[52] This must fail for the same reasons as the primary Convention claim. The circumstances of this case did not require a misconduct hearing to be held and therefore it could not be irrational to fail to take this consideration into account.

(iv) Failure to give reasons

[53] The applicant has also sought to impugn the decision on the basis that there was a failure to give adequate reasons for the decision to change the form of the proceedings from a misconduct hearing to a misconduct meeting.

[54] This claim faces the rather formidable hurdle that Superintendent McGuigan offered to provide, in her email of 1 December 2023, a "comprehensive report" to

PONI "to help explain the decision." This was an invitation which PONI did not take up.

[55] It is difficult to conceive of why, if there was any doubt or issue around the legality of the decision-making process, PONI did not immediately seek the detailed reasons which were on offer. The deponent of the grounding affidavit has not sought to explain how or why this occurred, nor does it seek to say that somehow PONI has been materially disadvantaged by any lack of reasons. It is also noteworthy that this ground of challenge found no place in the pre-action correspondence.

[56] There is no express obligation in regulation 21(6) on the appropriate authority to give reasons for a determination made to pursue a particular form of disciplinary proceedings. In circumstances where an offer to provide such reasons was made, and not taken up, this cannot form a basis for a court to intervene and grant relief. This ground of challenge also fails.

Conclusion

[57] The applicant's case in relation to statutory interpretation meets the threshold for the grant of leave but the claims in respect of articles 2 and 3 ECHR, irrationality and reasons are unarguable and leave is refused in respect of these grounds.

[58] For the reasons set out above, the application for judicial review is dismissed.