Neutral Citation No: [2024] NIKB 113	*Ref:*	**KIN12597**
	ICOS No:	**22/110745/01**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**20/09/2024**

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 ELIZABETH McGOWAN FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

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Mr Southey KC with Mr McGowan (instructed by KRW Law LLP) for the Applicant
Mr Skelt KC with Mr McEvoy (instructed by Crown Solicitor's Office) for the proposed Respondent
Mr McAteer (instructed by Departmental Solicitor's Office) for the proposed Notice Party DOJ
Mr Mulholland KC with Mr Gordon (instructed by Edwards & Co, Solicitors) for the proposed Notice Party Sergeant McKenna

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KINNEY J

Introduction

[1] The applicant is the mother of David McGowan who died whilst detained in police custody at Lisburn PSNI station on 30 May 2014. The custody sergeant in Lisburn station at that time was Sgt McKenna (the CS). He was subsequently prosecuted for gross negligence manslaughter in relation to the death of Mr McGowan but that prosecution was unsuccessful. The CS was then the subject of police misconduct proceedings. He was found guilty of gross misconduct and the sanctions imposed on him included a reduction in rank and a requirement for the CS to resign from his employment. The CS applied to the Chief Constable for a review of the decision. The Chief Constable revised the sanctions imposed and reduced them to a financial sanction.

[2] The applicant challenges the decision of the Chief Constable to depart from the sanctions imposed by the disciplinary panel and to impose a lesser sanction of a

monetary fine. The applicant also challenges the refusal of the Chief Constable to provide any reasons for his decision until after judicial review proceedings were commenced.

Background

[3] Mr McGowan's cause of death was recorded as being due to the toxic effects of alcohol, tramadol, diazepam and mirtazapine. It was noted that the drugs taken were within therapeutic ranges. As the death occurred in police custody it was reported to the Police Ombudsman and its file was passed to the Public Prosecution Service recommending the prosecution of the CS for gross negligence manslaughter. That prosecution was discontinued in October 2018 when the PPS decided to offer no further evidence against the CS, as it considered that the test for prosecution was no longer met. The trial judge directed the jury to enter a not guilty verdict against the CS.

[4] Misconduct proceedings were then commenced against the CS and a hearing was convened by a disciplinary panel comprised of temporary Assistant Chief Constable Roberts, Superintendent Marley and Superintendent Pollock. The panel was provided with a statement of agreed facts setting out the events leading up to the death of Mr McGowan. The CS faced four charges arising from the facts:

- Count 1 alleged breach of article 5.1 of the applicable code of ethics which required police officers to ensure that all detained persons for whom they have responsibility are treated in a humane and dignified manner.

- Count 2 alleged breach of article 8.1 of the code of ethics requiring police officers to ensure that property, monies or equipment entrusted to them in their role as police officers were handled and maintained as required by law and police service policy.

- Count 3 alleged breach of article 5.3 of the code of ethics which requires police officers to take every reasonable step to protect the health and safety of detained persons and to take immediate action to secure medical assistance for such persons were required.

- Count 4 alleged breach of article 6.1 of the code of ethics which required police officers to use appropriate language and behaviour in their dealings with members of the public, groups from within the public and their colleagues.

[5] A brief summary of the agreed facts is all that is required in this judgment. Mr McGowan was arrested and arrived at Lisburn PSNI station where he was presented to the CS at 23:08 on 29 May 2014. Mr McGowan was intoxicated. A forensic medical officer (FMO) was requested. The CS took Mr McGowan to a cell and removed his clothing. He observed a tablet fall from Mr McGowan's trousers.

Two other tablets were located in the custody suite which the CS attributed to Mr McGowan.

[6] Also in the custody suite at this time was the custody detention officer (the CDO), Mr McAllister. At 23:21 the CDO told the CS that Mr McGowan had told him he had taken a load of tablets. The CS commented that the doctor was coming and there was not much they could do. The CS accepted in the agreed facts before the disciplinary panel that he did not take appropriate action in respect of Mr McGowan at this time in relation to the information provided by the CDO. He accepted that he should have attended with Mr McGowan to make further enquiries and conduct a visual assessment of his condition. The CS placed Mr McGowan on general observation with 30 minutes checks. The FMO arrived at 23:47 and was briefed by the CS. The CS did not inform the FMO of the CDO's observations of Mr McGowan or his claim to have consumed a lot of tablets or the CDO's belief that Mr McGowan had concealed tablets within his body. The CS accepted that this was relevant information which may have assisted in the assessment and treatment of Mr McGowan. The FMO subsequently recorded that the impression provided by police was that this was not a high-risk case and that there was not anything out of the ordinary.

[7] At 23.52 there was a further conversation between the CS and the CDO during which the CDO told the CS that Mr McGowan said he had taken about 40 tablets. The CS did not act on this information and took no immediate action. The CS did not provide this information to the FMO.

[8] The FMO examined Mr McGowan at 00:05 and assessed him as fit to be detained, with 30 minute observations with rouse. At 00:37 the CDO told the CS that Mr McGowan was struggling to breathe. The CS did not ensure that urgent medical attention was provided for Mr McGowan. The CDO asked the CS if he should get the doctor again. The CS told the CDO to check Mr McGowan again. The CS accepted in the agreed facts that he should have immediately left his office at this point and ensured that the FMO attended to Mr McGowan without delay to provide immediate care or to further assess Mr McGowan's condition.

[9] At 00:42 the CS had a further conversation with the CDO and FMO but made no further enquiries regarding Mr McGowan's condition. At 00:47 the FMO entered the custody office and the CS then told him that Mr McGowan was breathing particularly strangely. The CS told the FMO there was no particular rush because the CDO had been in about five or six minutes previously.

[10] At 01:05 the CDO told the CS that Mr McGowan had been sick. The CS went to Mr McGowan's cell accompanied by the CDO and the FMO. When the doctor examined Mr McGowan, he failed to locate a pulse. He did not respond to CPR and the FMO pronounced him dead at 01:44 hours.

[11] The CS had previously thrown the tablets that he had found relating to Mr McGowan into the bin. He himself described this as "a reckless thing." The CS was in breach of the PACE Codes of Practice. The CS pleaded guilty to all counts.

[12] The disciplinary panel sat over five days. The parties were represented by experienced lawyers, including senior counsel. In its findings the panel accepted that there was no evidence to connect the actions of the CS to the death of Mr McGowan. The panel noted its task was to assess the agreed facts against the code of ethics and the breaches of that code of ethics. The panel applied a three-stage process, beginning with an assessment of the seriousness of the conduct, reminding itself of the purpose of the misconduct proceedings and finally choosing the sanction most appropriate to fulfil the objectives of the first two stages of the exercise.

[13] The panel noted that the CS held a position of particular trust and responsibility in respect of Mr McGowan in his role as custody sergeant. It noted that Mr McGowan was an obviously vulnerable person in custody and that he had been highlighted as an individual requiring medical attention. The panel noted the culpability of others including in particular the CDO, as well as the alleged corporate failings of the PSNI generally around the custody estate. The panel found that these did not materially affect the CS's culpability for his own conduct. The panel set out the aggravating and mitigating factors it had found. The panel considered that the misconduct of the CS demonstrated a high degree of culpability in respect of the first charge and a very high degree of culpability in respect of the third charge. The admitted breaches by the CS led to findings of gross misconduct in respect of the first and third counts facing the CS and misconduct on the second and fourth counts. The panel considered the personal mitigation provided by the CS including character evidence. It then confirmed that it had regarded the full range of sanctions, working its way up the scale of gravity, only ruling out a less grave sanction where it was proportionate and appropriate to do so. As a result of this exercise the panel determined that the outcome in relation to the four counts was that there should be a reduction in rank and count 1, reprimands on counts 2 and 4 and a requirement that the CS resign on count 3.

[14] The CS then sought a review of the disciplinary panel's findings by the Chief Constable as he was entitled to do under the regulations then in force. The Chief Constable had available to him all of the information that was before the disciplinary panel. The Chief Constable held a meeting with the CS on 22 April 2022. Also present at that meeting were representatives from the PSNI Professional Standards Branch. They played no part in the meeting and the only person who spoke at the meeting was the CS's representative, apart from questions and observations from the Chief Constable.

[15] The Chief Constable provided his review findings on 5 May 2022. In those findings the Chief Constable set out a number of areas of concern arising from the panel's final determination.

[16] The Chief Constable considered that it was not clear to him how the panel had taken into consideration the facts admitted by the CDO. The Chief Constable said that this weighed heavily in his own assessment of the reasonableness of the panel's decision-making. The Chief Constable said it was not clear what relevance had been placed on the failures in the actions of the CDO.

[17] The Chief Constable also said he was not persuaded the panel had given appropriate weight to systematic failings in the PSNI. The Chief Constable did not consider that the panel had provided sufficient details to support their conclusions to differentiate between a finding of high culpability in respect of count 1 and a very high degree of culpability in respect of count 3.

[18] The Chief Constable also asserted that the panel found as an aggravating factor that the CS failed to treat Mr McGowan as "especially vulnerable." The Chief Constable noted that the CS had been criticised for failing to raise concerns or seek advice from a colleague or senior officer and in particular from the FMO. The Chief Constable considered that it was unclear who may have been available in the early hours of the morning to seek advice from. The Chief Constable also noted that the FMO was present and had examined Mr McGowan and that the CS was also assisted by an experienced colleague, being the CDO.

[19] The Chief Constable considered that the panel had given little weight to the letter from the CS which was dated 31 January 2022 where he reflected on his mistakes and lack of intrusion.

[20] The Chief Constable stated that:

> "The facts presented paint a grave factual matrix of failings in policing and public confidence. However, the particular role played by the member, despite his admissions, is not sufficiently articulated when balanced against the systematic failings and role of his CDO whom he should have been able to rely on to perform his duty competently and reliably. I have balanced the context, the clear systematic failings in relation to infrastructure, level and frequency of training and the admissions by Sgt McKenna, against the actions of the FMO and the admitted mistakes by CDO McAllister, as referenced in his criminal trial."

[21] The Chief Constable concluded that he was not satisfied that the decision of the panel justified the final determination and sanction. The Chief Constable rescinded the panel's determination on sanction and imposed a monetary penalty by reverting the CS's rate of pay to that of a sergeant for a period of one year.

The law

[22] The original disciplinary panel was convened under the Royal Ulster Constabulary (Conduct) Regulations 2000/315 (the 2000 Regulations). The provision for both review and appeal are also contained in the regulations. Regulation 34 provides that the officer who is the subject of a sanction, called a member in the regulations, is entitled to request the Chief Constable to review the finding or the sanction imposed or both. The conduct of the review is governed by regulation 35 which provides:

> "(1) The Chief Constable shall, subject to paragraph (2), hold a meeting with the member concerned if requested to do so.
>
> (2) Where the Chief Constable has imposed a sanction following a directed hearing the review will be conducted by a Chief Constable of a police force of Great Britain who has agreed to act in that capacity.
>
> (3) Where a meeting is held the member concerned may be accompanied by a member and in the case were regulation 16 applies, by a solicitor or counsel."

[23] Regulation 36 deals with the findings of any such review. It provides:

> "(1) The member concerned shall be informed of the finding of the Chief Constable in writing within three days of completion of the review.
>
> (2) The Chief Constable may confirm the decision of the hearing or he may impose a different sanction or, in the case of a sanction of a fine, may vary the degree of the sanction, but he may not impose a sanction greater than that imposed at the hearing.
>
> (3) The decision of the Chief Constable shall take effect by way of substitution for the decision of the hearing and as from the date of that hearing."

[24] The Northern Ireland Office has issued guidance on regulations 34 to 36 of the 2000 Regulations. Section 4 of the guidance considers the Chief Constables review. Para 4.2 provides:

> "The review will provide the opportunity for the Chief Constable to take quick action to rectify clear errors or

> inconsistencies in process or determination by the earlier hearing."

[25] Paragraph 4.8 makes it clear that if the review is conducted by way of a hearing it is not to be a rehearing but is an opportunity for the member to state the grounds for seeking a review of the original disciplinary panel's decisions in person and to allow the Chief Constable to question the member about those grounds or any other relevant points.

[26] Para 4.12 sets out the purpose of the review.

> "The task of the Chief Constable in conducting the review will be to determine whether the original hearing was conducted fairly and whether the outcome decided upon appears to have been justified and appropriate to the nature of the case. Reviews must be carried out fairly and in accordance with the principles of natural justice. The Chief Constable will be responsible for determining the course of the review."

[27] Only the member can seek a review by the Chief Constable. The member has a further right of appeal to the Police Appeals Tribunal.

[28] The equivalent regulations were considered by the High Court in England and Wales in two cases in 2007. The first is the case of *R (Independent Police Complaints Commission) v AC Hayman, PC Bell and PC Wakeling* [2007] EWHC 2136 (admin) ("*Hayman*"). In *Hayman* the court referred to the further right of appeal to a tribunal with wide-ranging powers after an officer has sought a review and the review has been determined against them. Wyn Williams J commented:

> "It seems to me to be unlikely that when Parliament provided for reviews in the 2004 regulations it intended that the reviewing officer should approach the review and exercise his powers as if there was no difference between his role in conducting a review and the role of an appeals tribunal when hearing an appeal."

[29] The court on to say at para [30]:

> "Support for the view that a review is intended to be far less extensive in its scope than an appeal under section 85 of the Act is to be found in the Regulations themselves. A review must be sought within 14 days of the receipt of the written decision of the panel. The review can take place only on the papers or at a 'meeting.' If a meeting is held the officer may be 'accompanied' by a fellow officer

> and/or by a lawyer. The words 'meeting' and 'accompanied' are not usually those chosen when what is contemplated is that a rehearing is to take place or even a detailed reappraisal. Importantly, in my judgement, the Regulations are silent upon the topic of whether anyone is to be present who is in the category of a 'prosecutor.' While it may be that such a person may be permitted to be present by a reviewing officer as a matter of discretion, the fact that the Regulations make no provision for presence as of right is a strong indicator that what is to occur at a review is intended to be limited. The reviewing officer is expected to inform the officer who has sought the review of its outcome in writing within three days of the completion of the review. On any view that is a limited timescale and one which militates against the notion that a review would be a detailed reappraisal."

[30] Wyn Williams J also noted that the regulations provided no guidance on the extent of documentation, which is before the reviewing officer, regarding this to be a further indication that the process was intended to be limited in nature. He then said at paragraph 35:

> "…The reviewing officer's obligation is to have proper regard to the guidance as written. That said it does seem to me that the following emerges clearly from the guidance and cannot sensibly be contradicted. First, a review provides an opportunity 'to take quick action to rectify clear errors or inconsistencies in process or determination by the earlier hearing.' Secondly, a personal hearing 'will not amount to a fresh rehearing of the case.' Thirdly the task of the reviewing officer is to determine 'whether the original hearing was conducted fairly and whether the outcome decided upon appears to have been justified and appropriate to the nature of the case.' In my judgement the use of the word 'appears' is deliberate and it militates against the notion of an in-depth reappraisal of the issues before the panel. Fourthly, the review must be conducted fairly which, obviously must mean fairly both to the officer seeking the review and to those who have laid the disciplinary charge against him.
>
> 36. It should not be thought, however, that a reviewing officer who embarks upon a detailed reappraisal of the evidence at the hearing or who, in effect, turns a review into a rehearing necessarily acts

> beyond his powers. To repeat he is given the express power of 'overturning' the decision of the panel and it may be that circumstances will arise in which it is not just permissible but desirable that a review should be a much more detailed process than is contemplated by the guidance. It is neither desirable nor possible for me to lay down what the circumstances might be which would justify a departure from the guidance. If such a departure does take place, however, it will be necessary for the reviewing office to explain why and to identify clearly the 'good reason' which justifies a departure from the approach set out in the guidance."

[31] *Hayman* was followed some two months later by the case of *R (Bolt) v Chief Constable of Merseyside Police and Chief Constable of North Wales Police* [2007] EWHC 2607 (QB) ("*Bolt*"). In that case Underhill J quoted from and agreed with the comments made by Wyn Williams J in *Hayman*. Underhill J added at para [31] of Bolt:

> "It must be in the nature of a review – as opposed to a full appeal – that the chief officer conducting it should not overturn the decision of the original panel as to the appropriate sanction simply because he would have taken a different view, but only where the sanction imposed by the panel was so plainly excessive as to be properly characterised as unfair."

Submissions

[32] The applicant does not challenge the disciplinary panel, its composition, its findings or its sanction. The applicant does not challenge the fact that she was not provided with the outcome of the panel's decision or the reasons for its decision. Similarly, the applicant does not challenge the conduct regulations per se, but rather challenges their implementation. The applicant argues that the Chief Constable's review should only have been carried out in accordance with public law standards and that any finding then needed to be based on public law principles such as irrationality, that the disciplinary panel either took into account irrelevant matters or left out of account relevant matters or that it misdirected itself in law. The Chief Constable should not have interfered with the disciplinary panel's decision simply because he disagreed with it. He should only have intervened where there was a clear and obvious error.

[33] The applicant argues that the Chief Constable has not respected the relevant guidance and the review was not carried out in accordance with the principles set out in *Hayman* and *Bolt*. At the core of the applicant's argument is that the review was not a mechanism by which the Chief Constable could set aside the panel

decision simply because he took a different view. To be set aside, the decision of the panel must have been unjustified and inappropriate. Findings of fact should have been respected. Many of the grounds the Chief Constable relied upon to change the sanction relied on a different weighting being applied to various considerations.

[34] The applicant also argued that Article 2 procedural rights were engaged in the disciplinary process. The Chief Constable lacked the necessary independence to carry out the review and this should have been delegated to a different Chief Constable of another police service. His decision should have been provided in public along with his underlying reasoning.

[35] The applicant also argued that she was entitled to the reasons for the Chief Constable's decision as an interested party. Those reasons should have been provided promptly. The reasons were ultimately provided during the course of the judicial review proceedings before this court.

[36] The respondent argued that the initial basis of the judicial review was the absence of reasons for the Chief Constable's decision. The reasons were provided after proceedings had commenced. This was the last review carried out by the Chief Constable under the 2000 Regulations. New regulations were brought into effect in 2016 which are more extensive in their provisions. They introduced the concept of an interested person who could attend certain hearings, had more extensive requirement for notification and there was a complete removal of the review process which was engaged in this case. As reasons were provided there is no utility in making a declaration about the superseded regulations.

[37] The respondent argued that the Chief Constable enjoyed a wide discretion in the conduct of the review process and that the review process in this case was well within the bounds of what he was legally entitled to do. The Chief Constable had a very broad discretion. It is not appropriate to apply a judicial review test for the review. This is supported by the regulations, the guidance and the authorities.

[38] The respondent denied there was any breach of the Article 2 requirements. There is an ongoing wider assessment into the circumstances of Mr McGowan's death and this disciplinary process was only one part of the overall process of investigation. In any event there is no utility in any declaration about non-compliance with Article 2 as the regulations were repealed many years ago and the repeal effectively removed the review aspect of proceedings. Police officers are officeholders not employees. The regulatory regime applicable to them requires express statutory provisions. This should not mean that broader concepts of statutory regulation should be imported.

[39] The respondents argued that there were mandatory provisions in the 2000 Regulations which required privacy in the disciplinary process. The disciplinary panel heard the matter in private and this was not challenged. The Chief Constable took the view that if the proceedings were private that should also apply to his

decisions. The Chief Constable's reasons were subsequently provided to the applicant and she was able to amend her Order 53 application accordingly. There was no obligation to provide reasons. The Chief Constable was not exercising a judicial function in the review process. It was more akin to a workplace employer/employee review. It involves statutory regulation only because a police officer is an officeholder. There was the right to a full rehearing by an appeal tribunal. The respondent contended that the applicant's argument was in effect that the Chief Constable was too lenient. That is not the basis for a judicial review complaint. The Chief Constable's decision was within his discretion.

Consideration

[40] The Chief Constable conducted a review which he considered was conducted in accordance with the 2000 Regulations. In his affidavit before this court the Chief Constable said he considered that this confined the way in which he could conduct the review. He could only hear from the CS or his representative and his function was to determine whether or not the outcome of the panel hearing was justified and appropriate. The Chief Constable criticised the findings and the methodology of the panel. He did not upset the determination of gross misconduct but he did revise the sanction to make it a monetary one.

[41] The nature of the review process was examined in the cases of *Hayman* and *Bolt*. There is no material difference in the substance of the regulations or the guidance and so the analysis carried out in those cases is entirely apposite. I agree in particular with the analysis set out at paragraphs 28 to 36 of *Hayman* as adopted in *Bolt*.

[42] In summary form the relevant factors are:

- The power conferred on a reviewing officer should be used sparingly and with caution.

- It is significant that there was a separate right to a full appeal before an appeal tribunal which had wide-ranging powers. That appeal is only available after a review and it is unlikely that Parliament intended that the review should be approached as if there was no difference between the review and the full appeal.

- The regulations which govern the use of a review make it clear that it must be dealt with expeditiously and uses language such as "meeting" with the reviewing officer and "accompanied" by a colleague or lawyer. This language is not consistent with a detailed rehearing.

- There is no right for a prosecutor or other interested party to be present and that is a matter of discretion for the reviewing officer. The absence of a

provision for the presence of others as of right is a strong indicator that the scope of the review is limited.

- It is not for the court to lay down prescriptive rules about the circumstances in which the reviewing officer's powers should be invoked but the reviewing officer has an obligation to have proper regard to the guidance provided for the review process. However, if a reviewing officer embarks upon a detailed reappraisal of the evidence they do not necessarily act beyond their powers. It may be that circumstances could arise where it is not just permissible but desirable that the review should be a more detailed process than is contemplated by the guidance. However, it will be necessary for the reviewing officer to explain why and to clearly identify the good reason which justifies a departure from the guidance.

[43] In applying these principles it is clear that the Chief Constable on this occasion went beyond the guidance in carrying out an extensive reappraisal of the evidence. This raises the question then of whether or not the Chief Constable has clearly identified a good reason to justify such a departure.

[44] In his written findings the Chief Constable set out several areas of concern arising from the panel's final determination. The first was his analysis of the importance of the role of the CDO. The Chief Constable sets out the failures of the CDO and states that it is not clear what relevance was placed on those failures. The Chief Constable said that this "weighs heavily on my own assessment of the reasonableness and their decision-making."

[45] The disciplinary panel heard from a range of witnesses. The relevant parties were represented by senior counsel. Although there were agreed facts placed before the disciplinary panel the hearing lasted some five days and extensive submissions and documentation were provided. The panel then gave a five page summary of their findings. The panel made it clear that it assessed the level of culpability from the agreed facts. Whilst accepting the conduct in question was not intentional, they found there was "an obvious and alarming complacency" in the actions of the CS. Examples of those factors were set out from the agreed facts. The panel noted the particular trust and responsibility the CS held in respect of Mr McGowan. The panel also expressly referred to the culpability of others, including the CDO, and found that those did not materially affect the CS's culpability for his own conduct. The Chief Constable's finding therefore in relation to this aspect of the panel's decision making is simply one of weight. The Chief Constable in turn does not explain why he is giving more weight to the actions of the CDO and less weight to the actions of the CS who was the person who was in the position of trust and responsibility.

[46] In a similar way the Chief Constable said he was not persuaded the panel had given appropriate weight to evidence of systematic police failings. The panel expressly considered these corporate failings and referred to them in their written

summary. The Chief Constable has not expanded on why he felt the panel did not give appropriate weight to these matters.

[47] As soon as the Chief Constable started to consider the weight to be provided to particular pieces of evidence, he risked simply replacing his decision for that of the panel's, even if the panel's decision was entirely appropriate and within a spectrum of reasonable decisions. There is nothing to suggest that the findings made by the panel were not open to them on the basis of the extensive evidence that they had considered, not just in the form of the agreed facts but on the submissions and arguments made by very experienced lawyers before them. The panel set out their findings and their reasoning in considerable detail in the summary provided of their decision. I am satisfied that the Chief Constable has simply substituted his view for that of the disciplinary panel on questions of the appropriate weight to be attached to aspects of the evidence. The disciplinary panel was clear that it was assessing the precise role and behaviour of the CS and set out clearly the basis on which they had carried out that task. The Chief Constable appears to be motivated by the weight he feels should have been given to external factors such as systematic police failures and the actions of other individuals in mitigating the role of the CS.

[48] The Chief Constable also criticised the fact that the panel differentiated in making findings of high culpability in relation to count 1 and a very high degree of culpability in relation to count 3. The Chief Constable states that the panel did not particularise why they drew this important conclusion. However, on any sensible reading of the panels summary it is clear that the particular role of the CS was a factor in determining culpability. There is also a distinction between the nature of count 1 (which is in essence to ensure that the detained persons are treated in a humane and dignified manner) and count 3 (which is to take every reasonable step to protect the health and safety of detained persons and take immediate action to secure medical assistance for such persons were required). On the agreed facts as presented to the panel it was entirely open to them to consider that the culpability of the CS in respect of count 3 was very high.

[49] He also criticised the panel in finding as an aggravating factor that Mr McGowan was an "especially vulnerable" individual. The Chief Constable said that what underpinned that conclusion was not clear given that the drugs he had used were not causationally linked to his death. On this point the Chief Constable himself simply fell into significant error. The aggravating factor as set out in the summary was "the obviously apparent vulnerability of Mr McGowan." The Chief Constables reasons appeared to connect vulnerability to the cause of death. The panel did not find Mr McGowan to be "especially vulnerable" but considered the clear picture of his presentation on the night in question. The panel simply cannot be criticised for pointing to the obvious apparent vulnerability of Mr McGowan in those circumstances.

[50] The Chief Constable also criticised the panel in finding as an aggravating factor that the CS failed to raise concerns or seek advice from a colleague or senior

officer and, in particular, the FMO. The Chief Constable was concerned as to who might have been available in the early hours of the morning to seek further advice from. However, he did not address the clear failures by the CS to raise concerns with the FMO as set out in the agreed facts and it is entirely unclear precisely what point the Chief Constable seeks to make in raising this matter or the weight he has attached to it.

[51] The Chief Constable was critical of the credit given by the panel to the CS for his insight and apology and in particular the letter written by the CS on 31 January 2022. This letter was written as part of the disciplinary panel process. Misconduct documents were served on the CS on 18 March 2021 and the agreed statement of facts was dated 20 January 2022 and therefore before the letter which the Chief Constable points to as evidence of insight shown by the CS. He had already made significant admissions through the agreed facts. It is entirely unclear why the Chief Constable attached such significance to a very belatedly written letter. The Chief Constable then went on to state that the CS may not have provided earlier evidence of insight as a result of legal advice or delay. That is simply speculation on the part of the Chief Constable and there was no basis either for making that conclusion or indeed for attaching significant weight to it.

[52] Finally, the Chief Constable considered that the mitigating factors set out by the panel paid little heed to the role of the CDO. However, the panel clearly set out in their summary that the actions of the CDO did not significantly reduce or diminish the CS's role as he was ultimately the responsible custody sergeant.

[53] The Chief Constable then concluded that the particular role played by the CS "despite his admissions" was not sufficiently articulated when balanced against the systematic failings and role of his CDO and he then reduced the sanctions. I am satisfied that the Chief Constable's conclusion is not borne out by the careful consideration of the evidence by the disciplinary panel and the detailed exposition of its reasoning provided in its summary. It also frankly flies in the face of the evidence provided by way of the agreed facts. The role of the CS was clearly set out.

[54] I have therefore come to the conclusion that the Chief Constable's decision to overturn the decision of the disciplinary panel was ill founded and not one to which he could properly have come. A requirement to resign was clearly an appropriate penalty in light of the disciplinary panel's findings. I accept that it may not be the only possible penalty and I am conscious that there may still be appeal processes to complete. However, this was a review as opposed to full appeal and the decision of the disciplinary panel should not have been overturned simply because the Chief Constable would have taken a different view.

[55] In *Hayman*, the court acknowledged that there may be circumstances where the review should be a much more detailed process than is contemplated by the guidance. However, if that was to be the case it is clear that it is for the Chief

Constable to explain why there should be a departure from the guidance and identify clearly the good reason. That has not been done in this case.

Duty to give reasons and delay

[56] The applicant was informed of the outcome of the Chief Constable's review through the Police Ombudsman's office on 10 May 2022. The applicant was not informed of the detailed reasons for the Chief Constable's decision. The applicant then sought the reasons for the decision. The correspondence between the parties culminated on 23 September 2022 when the Chief Constable's lawyers refused to provide reasons on the basis that the hearing was in private and the CS had refused consent for reasons to be provided to the applicant. A pre-action letter was then sent on 9 November 2022 and the Crown Solicitor's office wrote the applicant's solicitors indicating that they intended to respond to the letter. Judicial review proceedings were issued on 22 December 2022 and a response to the PAP letter was ultimately received by the applicant's solicitors on 23 January 2023. A principal criticism underpinning the judicial review proceedings was the failure to provide reasons. The reasons were ultimately provided on 22 May 2023 which led to the filing of an amended Order 53 statement on 26 July 2023.

[57] The applicant argued that she was entitled to the reasons for the Chief Constable's decision. Those reasons should have been provided promptly. The delay in providing reasons caused a delay in preparing the judicial review application and made access to judicial review much more difficult for the applicant as there was no clarity as to what they were potentially objecting to. The respondent did not raise argument in relation to the delay but simply queried whether there had been a satisfactory explanation. In this case I find that there is a satisfactory explanation. I am also satisfied that there is no utility in making any declaration in relation to the provision of reasons. Those reasons have been provided. They relate to old legislation and I have been told that this was the last review carried out under the old legislation. The new regulations promulgated in 2016 deal with the issue of reasons in a different way.

Article 2

[58] The parties agreed that Article 2 is engaged in this matter. However, there was disagreement as to how those rights were to be protected. The applicant argued that the Chief Constable lacked the independence necessary to conduct the review and that it should have been delegated to another Chief Constable under regulation 37. The applicant also argued that the review process was a breach of Article 2 because it was conducted in private. That was a requirement of the regulations then in force.

[59] I do not need to consider these submissions in light of my earlier findings and I prefer not to express any concluded view. The issues regarding representation at review hearings also lacks utility as those regulations no longer apply.

[60] I, therefore, make an order quashing the Chief Constables review decision of 3 May 2022.