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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND (JUDICIAL REVIEW)

BETWEEN:

JR296

Appellant:

and

POLICE APPEALS TRIBUNAL AND CHIEF CONSTABLE OF PSNI

Respondents:

_____

_____

Before: The Rt Hon McCloskey LJ, the Rt Hon Horner LJ and the Hon Colton J

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Representation

The Appellant: Self-representing

The Police Appeals Tribunal: Ms Laura Curran, of counsel, instructed by the Crown Solicitor's Office

The Chief Constable of PSNI: Mr Ian Skelt KC and Ms Sophie Briggs, of counsel, instructed by PSNI Legal Services

McCLOSKEY LJ (*delivering the judgment of the Court*)

Anonymity and Legal Representation

The court maintains the anonymity order made at first instance, there being no reason to depart from it. Some consequential anonymisation by the use of ciphers is reflected in this judgment. The appellant was legally represented at all stages of the disciplinary panel proceedings. He was represented by senior and junior counsel before the High Court. He presented his appeal to this court unrepresented.

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Introduction

[1] The appellant was formerly a constable in the Police Service of Northern Ireland (the "Police Service"). This appeal has its origins in the decision of the Police Appeals Tribunal (the "Tribunal"), dated 13 March 2023, determining an appeal by the appellant against a decision of a Police Service Misconduct Panel which had found him guilty of gross misconduct consisting mainly of instances of violence perpetrated against a former female partner. The penalty imposed was dismissal from the Police Service. By its decision the Tribunal in essence affirmed the aforementioned decision. The decision of the Tribunal is what is impugned in these proceedings. The appellant's ensuing application for judicial review was dismissed by Humphreys J ([2024] NIKB 27). The appeal to this court follows.

[2] This court, following the substantive hearing of the appeal, identified a number of matters requiring clarification. These related particularly to whether certain materials were before the disciplinary panel and/or the Tribunal chair. This gave rise to a further detailed case management order, the parties' joint response thereto, a further bundle of documentary materials and a further *inter–partes* listing. These steps ensured that this court was fully informed in its determination of the issues. The court commends the parties for their co-operation in this exercise.

Parties

[3] The Order 53 Statement identified the Chair of the Tribunal and the Police Service as respondents. The decision to proceed against these two agencies was

nowhere addressed or explained in the pleading. It seems unlikely that the appellant's legal representatives had in mind the *Darley* principle (*infra*) and this does not appear to have been aired at the leave stage.

[4] The trial judge, however, was alert to the circumstance of the case proceeding against the two respondents, each separately represented, as para [3] of his judgment confirms:

> "The respondents to the application are the PAT and the Chief Constable of the PSNI. In accordance with the principle in *Re Darley's Application* [1997] NI 384, the PSNI took the lead role in responding to the applicant's case, although the court received both evidence and submissions from the PAT."

At the case management review stage, this court expressed surprise that neither respondent was alert to the need to proactively address afresh the issue of active participation by both at the appellate level, taking into account the material intervening development of the judgment at first instance and re-examining afresh whether there was any real need for both the Tribunal and the Police Service to be separately represented and actively involved. This court also drew to the attention of the parties its recent decision in *Wilson v Alliance Party of Northern Ireland* [2024] NICA 12, at para [4]ff. Directions for further submissions on this issue were made.

[5] In the event both respondents recognised the good sense of the court's provisional stance on this issue. The court ruled, uncontroversially, that the Police Service would be the legitimus contradictor, while the Tribunal would be at liberty to provide a written submission. In the event a helpful such submission was received from Ms Curran, of counsel.

[6] There is a recent and notable addition to the jurisprudence on this topic in the recent decision of the Privy Council in *The Special Tribunal v The Estate Police Association* [2024] UKPC 13. In this case the issue arose in relation to the Special Tribunal of Trinidad and Tobago, the body responsible for determining disputes between estate constables and an employer (in this instance a bank). The decision of the employer to dismiss 42 estate constables from its employment on the ground of redundancy was referred to the Tribunal, which decided that it had no jurisdiction. The constables challenged this by an application for judicial review. A question arose concerning the active participation of the Tribunal in those proceedings. Historically, there had been cases in which the Tribunal was the sole respondent, whereas in others it had joined the other party to the dispute.

[7] Lord Leggatt, delivering the unanimous judgement of the Board, described the normal practice in England and Wales at para [50]:

> "… the normal practice in England and Wales when a decision of a court or tribunal is challenged in proceedings by way of judicial review or statutory appeal is that the tribunal takes no active part in the proceedings and leaves it decision to be defended by the party in whose favour it was given."

As the remainder of this paragraph indicates, one of the consequences of this established practice is that the court or tribunal concerned is normally not exposed to the risk of an adverse costs order. As the relevant jurisprudence, including a decision of the UK Supreme Court in *R (Gourlay) v Parole Board* [2020] UKSC 50, makes clear, an important feature of non-participation is the maintenance of impartiality and independence on the part of the lower court or tribunal. Notably, this practice is foreshadowed in the Bangalore Principles of Judicial Conduct: See Principle 2.4 and para 72 of the Commentary. An example of a court taking the exceptional course of directing the tribunal concerned (in this case a County Court) to participate actively in a judicial review appeal and, further, positively welcoming the assistance thereby provided is found in *R (Koro) v County Court at Central London* [2024] EWCA Civ 94.

[8] The Privy Council resoundingly affirmed the practice noted. Lord Leggatt stated at para [57]:

> "A court or tribunal has no interest of its own, any more than does an individual judge, in trying to prevent a successful challenge to its decision. Its sole function is that of an independent and impartial adjudicator of disputes that come before it. A tribunal acts inconsistently with that function and compromises its independence and impartiality if it takes part in proceedings brought to challenge its decision in an adversarial way, in effect aligning itself with the interests of the successful party to the dispute on which it has adjudicated. A further violation of these principles occurs if the tribunal seeks to defend its decision by adding to the reasons that it gave when the decision was made rather than leaving those reasons to speak for themselves."

In the next ensuing paragraph, the Board declined to prescribe any absolute rule, recognising the possibility of the lower court or tribunal participating in certain cases. In doing so the Board emphasised the proactive role of the superior court in the relevant proceedings, stressing further, at para [58]:

> "In providing any assistance, however, the tribunal and its advocate should view their role as similar to that of an **amicus** or advocate to the court."

[9] While the Board instanced the illustration of a case in which the superior court required to be more fully informed of relevant law and potential arguments, at para [58], we would add two further illustrations for guidance. It is the experience of certain appellate courts, including this court, that challenges based on procedural unfairness or other kindred impropriety on the part of certain courts or tribunals, or indeed advocates, sometimes raise special issues. For example, there might be contentious issues about the conduct of proceedings at first instance in a court or tribunal that is not a court of record or a tribunal of record. Of course, given the growth of recording, this feature is much more unlikely to arise nowadays than previously.

[10] Notwithstanding, an illustration is provided by an appeal from the First-tier Tribunal to the Upper Tribunal (Immigration and Asylum Chamber). The aforementioned first instance tribunal was not at the material time a tribunal of record. The case is BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC). There the issue arising out of the first instance is described at para [3]:

> "One of the grounds of appeal to which the concession related was based on the Judge's statement at the conclusion of the evidence, when the closing submissions of the Appellant's Counsel were about to begin, that he had effectively made up his mind on the issue of whether the Appellant was the person depicted in a series of photographs adduced in evidence. This was not disputed. This issue was one of not less than fundamental importance: if the photographs were found to depict a person other than the Appellant, his appeal was almost certainly doomed to fail."

There was no recording of the first instance hearing, nor was there a written decision or judgment containing the offending judicial statement. In these circumstances, a witness statement from the appellant's advocate – who could not in consequence present the appeal – was necessary.

[11] A second illustration is apposite. There may be appellate or judicial review challenges in which, for whatever reason, materials generated at first instance are not before the appellate or reviewing court. These could encompass case management orders, judicial directions or items of documentary evidence. This lacuna could well arise in cases where there has been a change of legal representative or, alternatively, where the litigant is self-representing. In a case of this kind the superior court may wish to give the kind of direction found in *Koro*, where the Court of Appeal directed the County Court to participate in the appeal.

[12] Finally, it appears that the researches of the parties' legal representatives in the *Special Tribunal* case apparently did not extend to uncovering the two leading

decisions in this jurisdiction, namely *Re Darley* and *Wilson*, noted above. That said, we take the opportunity to make clear that there is no identifiable inconsistency.

The gross misconduct alleged

[13] The misconduct charges preferred against the appellant and of which he was found guilty by the disciplinary panel were the following:

(i) On 13 October 2018 the appellant placed his partner in a head lock and, following her notification to police, guided her on what to say to ensure that no action would be taken against him.

(ii) On 11 March 2019 he punched his partner in the mouth, causing swelling and bleeding to her lips.

(iii) On 2 November 2019 the appellant pushed his partner through a glass pane at her home thereby inflicting injuries to her arms and hands requiring treatment by six stitches to her left elbow and four stitches to her right finger, together with a dressing for an abrasion to her left hand.

(iv) On 11 January 2020 he forced his partner to engage in oral sex, the formal Notice reciting that this conduct constituted gross misconduct being in breach of Article 1(10) (Conduct likely to bring Discredit upon the Police Service) and Article 7.1 (a failure to act with integrity towards his partner and engaging in conduct which could reasonably be perceived as abuse, harassment or bullying) of the Police Service Code of Ethics.

The underlying decisions

[14] The impugned decision of the misconduct panel was promulgated following a contested oral hearing on 17 and 18 October 2022. Evidence was given by, amongst others, the injured party and the appellant. In its decision the panel addressed, *inter alia,* issues of conflicting evidence and made appropriate findings.

[15] The appellant promptly exercised his right of appeal to the Tribunal, unsuccessfully so. Before considering further the grounds of appeal and the impugned decision which materialised, it is necessary to turn to the statutory framework.

Statutory Framework

[16] The disciplinary regime giving rise to the misconduct charges against the appellant is constituted by the Police (Conduct) Regulations (NI) 2016 ("the Conduct Regulations"). These stipulate, *inter alia,* the procedures to be followed at the initial assessment stage, the further investigative stage (if any) and the initiation of

misconduct proceedings. In the context of this litigation nothing of substance turns on these provisions.

[17] There is a second material statutory code, namely the Police Appeals Tribunal Regulations (NI) 2016 (the "Appeals Regulations"). The appellant's case engages regulation 4 and, more particularly, regulation 12(1):

> **"Regulation 4**
>
> **Circumstances in which a member may appeal to a tribunal**
>
> **4.**—(1) Subject to paragraph (3), a member to whom paragraph (2) applies may appeal to a tribunal in reliance on one or more of the grounds of appeal referred to in paragraph (4) against—
>
> (a) the finding referred to in paragraph (2)(a), (b) or (c) made under the Conduct Regulations; or
>
> (b) the disciplinary action, if any, imposed under the Conduct Regulations in consequence of that finding,
>
> or both.
>
> (2) This paragraph applies to—
>
> (a) a member other than a senior officer against whom a finding of misconduct or gross misconduct has been made at a misconduct hearing; or
>
> (b) a senior officer against whom a finding of misconduct or gross misconduct has been made at a misconduct meeting or a misconduct hearing; or
>
> (c) a member against whom a finding of gross misconduct has been made at a special case hearing.
>
> (3) A member may not appeal to a tribunal against a finding referred to in paragraph (2)(a), (b) or (c) where that finding was made following acceptance by the member that his conduct amounted to misconduct or gross misconduct (as the case may be).
>
> (4) The grounds of appeal under this regulation are—

(a) that the finding or disciplinary action imposed was unreasonable; or

(b) that there is evidence that could not reasonably have been considered at the original hearing which could have materially affected the finding or decision on disciplinary action; or

(c) that there was a breach of the procedures set out in the Conduct Regulations or other unfairness which could have materially affected the finding or decision on disciplinary action."

"Regulation 12

Review of appeal

12.(1) Upon receipt of the documents mentioned in regulation 9(4) and (8), the chair shall determine whether the appeal should be dismissed under paragraph (2).

(2) An appeal shall be dismissed under this paragraph if the chair considers that—

(a) the appeal has no real prospect of success; and

(b) there is no other compelling reason why the appeal should proceed.

(3) If the chair considers that the appeal should be dismissed under paragraph (2), before making his determination, he shall give the appellant and the respondent notice in writing of his view together with the reasons for that view.

(4) The appellant and the respondent may make written representations in response to the chair before the end of 10 working days beginning with the first working day after the day of receipt of such notification; and the chair shall consider any such representations before making his determination.

(5) The chair shall give the appellant, the respondent, the Board and, where the appeal is a specified appeal, the Ombudsman notice in writing of his determination.

(6) Where the chair determines that the appeal should be dismissed under paragraph (2)—

(a) the notification under paragraph (5) shall include the reasons for the determination; and

(b) the appeal shall be dismissed."

The Tribunal's decision

[18] The appellant's grounds of appeal to the Tribunal were somewhat diffuse. Their essential elements were gender bias on the part of the investigating police officers and the misconduct panel; disregard of the PPS assessment of the available evidence in determining not to prosecute him in relation to the complaints of his former partner underpinning the four misconduct charges noted in [13] above; disregard of the ex parte nature of two non-molestation orders ("NMOs") procured by the injured party against him; and inadequate consideration of the evidence (unparticularised) and his self-defence claim. A further discrete cohort of the grounds of appeal related to evidence not received, coupled with asserted police failures (a) to receive evidence from relevant witnesses (unparticularised) and (b) to gather relevant evidence (also unparticularised). On behalf of the Police Service, grounds of resistance were formulated. The impugned decision of the Tribunal Chair followed.

[19] It is uncontentious that the Tribunal Chair conducted the exercise specified in regulation 12(3) of the Appeals Regulations. The materials considered included a transcript of the misconduct panel proceedings. In accordance with the "minded to dismiss" procedure the Chair provided formal written notice to the appellant. This generated further written representations from both the appellant and the Police Service. Following further consideration, the final decision of the Chair affirmed the initial, provisional decision under regulation 12(2).

[20] The twin components of the impugned decision are the Chair's initial, provisional decision and the final decision which eventuated. These must be considered together. The salient features of the initial, provisional decision are the following. First, expressing impeccably the statutory language, the Chair stated:

> "I am inclined to the view that this appeal should be dismissed under Regulation 12(2) as having no real prospect of success and there is no other compelling reason why it should proceed."

The essential elements of the text which followed are the following: the injured party was "not without fault in her own behaviour", a significant contextual factor; the appellant's case was that any injuries sustained by her were caused accidentally or in self-defence of himself or the children and that the sexual contact was consensual; the injured party's case was that she was deliberately assaulted and raped by the

appellant; while the PPS had determined not to prosecute the appellant, that decision belonged to a context of proof beyond reasonable doubt, whereas the standard of proof in the disciplinary proceedings was the balance of probabilities; the allegation of gender bias against the panel had no discernible foundation; there was a direct conflict of evidence between the two protagonists; the panel had carefully assessed that evidence and the credibility of the witnesses; by established principle the scope for interference by an appellate court with the factual findings of a first instance court is limited; the findings of the panel were not unreasonable; nor were they grounded on any misunderstanding; the panel had diligently resolved the conflicting evidence; its reasoning betrayed no illogicality or fundamental flaw; and in consequence –

> ".. the factual determinations made by the Panel are [nowhere] near the threshold by which an appeal tribunal could properly interfere."

[21] In the paragraphs which follow we shall outline the material components of the impugned decision of the Tribunal Chair and, seriatim, provide our assessment of each.

[22] The Tribunal Chair addressed the new evidence issues in the following way. This was in three parts. First, the grounds of appeal included this passage:

> "When asked to supply witnesses for the misconduct hearing I in turn requested the attendance of officers who had omitted material from their witness statements or who could provide additional evidence. These officers were not called to provide evidence and therefore could not be questioned."

What was the issue? It concerned the actions of two "responding" police officers and the following assertions: each had attended in response to the injury party's allegations of domestic abuse, neither had in their witness statements described the circumstances prevailing when they attended and neither had made bodycam evidence of this initial interaction. The Tribunal Chair reasoned thus: while the appellant had, without success, requested the attendance of "other police officers" as witnesses at the hearing, this issue did not feature in the course of the hearing and "… more importantly it is difficult to see what evidence such witnesses could give which would materially affect the findings or decision."

New Evidence [1]: Our Assessment

[23] The further steps taken by this court, noted in para [2] above, resulted in the following clarification. In advance of the disciplinary panel hearing, a letter from the appellant's solicitors addressed a series of requests to the Police Service solicitor. These included a request for certain "body worn video evidence" which they had identified in what was evidently a bundle of evidence prepared for the hearing. It is

evident from the replying letter that this request was met. Neither of these letters featured in either the hearing bundle or the evidence at the hearing. The letter from the appellant's solicitors did not request the attendance of any witness.

[24] However, the replying letter proactively addressed the issue of witnesses in the following way. Drawing attention to Regulation 25(2) and (3) of the Appeals Regulations, the Police Service solicitor stated that it was for the Panel chair to list the witnesses who should attend the hearing, the criterion being "necessary in the interests of justice." The Police Service view was that the attendance of the following five witnesses would be appropriate:

(i) The complainant.

(ii) JN: "evidence of recent complaint".

(iii) EN: "ditto; and speaks of [the appellant's] alleged comment 'It can't be rape because it's spousal 'privilege.'"

(iv) "Evidence of recent complaint by [the Complainant] in relation to [the appellant] choking [the Complainant]; the punch to the lip; the push through the glass and the oral rape incident."

(v) Detective Sergeant Brissaud, the suggestion being that this witness should be called by the defence.

[25] To complete this sub-plot, at the time when this exchange of correspondence took place the appellant's solicitors had served a "Regulation 24" Notice. This evidently followed from consideration of the bundle noted above. One discrete section of this Notice begins with the words "The following witness evidence is not agreed …" The names of eight witnesses were then specified. Five of these names featured in the replying letter from the Police Service solicitor. Subsequently, the witness attendance list promulgated by the Assistant Chief Constable appointed to chair the disciplinary panel included all five names and added a sixth, namely Detective Sergeant Mullan who had the designation of investigating officer with regard to the allegation of rape. This court will assume that all six witnesses duly attended the hearing and gave oral testimony and/or were available to be cross examined by the appellant's legal representatives.

[26] What, therefore, is the nub of this discrete complaint on the part of the appellant? The following observations are apposite: in his written representations to the Tribunal the appellant failed to provide the names of the police officers concerned; failed to specify the number of officers concerned; made no attempt at cross referencing to the panel hearing bundle; and failed to particularise the "request" for their attendance which he claimed to have made. While the appellant has been given abundant opportunity by this court to address these issues he has failed to do so. Furthermore, he has not claimed that this issue was raised on his behalf at any stage

of the disciplinary panel hearing. In addition, it is clear to this court that the appellant and his legal representative were at liberty to canvas before the panel any arguments or concerns which they wished to pursue bearing on this issue. Having regard to all of the foregoing, this court is unable to identify any material error in the Tribunal Chair's treatment of this discrete issue.

[27] Second, in another part of his grounds of appeal the appellant claimed that there had been a pattern of behaviour by the injured party whereby she would contact either the Police Service or Social Services and, upon the consequential attendance of these agencies, she would refuse them entry and refuse to engage with them. During the police investigation of the misconduct allegations, the appellant (he claimed) "… asked the investigators at each stage to gather the social services notes relating to my relationship with my ex-partner and to her mental health during our relationship." Immediately prior to the hearing the Police Service informed him that they would not be doing so. It was (he further claimed) "impossible" for him to do so within the limited period available and in any event this would have entailed a subject access request resulting in the provision of redacted materials.

[28] The steps taken by this court, noted in para [2] above, have elicited the following clarification. First, the appellant's solicitors did not request the attendance of any social services personnel in either the letter or the Rule 24 Notice noted above. Second, the aforementioned replying letter from the Police Service solicitor stated, *inter alia*:

> "We have provided you with all of the reports provided by Social Services and we will not be requesting any further reports. Should your client wish to rely upon any further Social Services it is a matter for him to request directly with Social Services."

This response must be considered in conjunction with regulation 23(1) of the Appeals Regulations which obliged the Police Service to provide the appellant with, *inter alia*:

> "… a copy of any statement he may have made to the investigator … a copy of the investigator's report … and …. any other relevant document gathered during the course of the investigation."

This is in effect repeated by Regulation 29.

New Evidence [2]: Our Assessment

[29] Properly analysed, the substance of the appellant's complaint pertaining to this particular issue is one of lack of time. In evaluating this complaint, it is appropriate to reflect on certain aspects of the history of the disciplinary proceedings (and we refer also to para [39] i*nfra*): the first of the Regulation 16 Notices was served on the

appellant on 16 November 2020; he was suspended from duty on 8 January 2021, following which a period of some 21 months elapsed prior to the commencement of the disciplinary proceedings (17 October 2022); the PPS "no prosecution" decision was made on 19 May 2021; the second Regulation 16 Notice followed on 16 July 2021; there was a misconduct interview of the appellant on 17 August 2021; the investigator's report was provided to the Police Service in October 2021; the Police Service Regulation 21 decision was made on 21 December 2021; and the first of several formal notifications to the appellant regarding the scheduled disciplinary proceedings was made on 6 June 2022. The Regulation 24 Notice from the appellant's solicitors followed. The above noted letter from his solicitors did not materialise until some four months later. The response from the Police Service solicitor was made within eight days, being 18 days prior to the scheduled commencement of the disciplinary panel hearing. There was no request/application to the Panel to adjourn the hearing to enable the appellant to assemble further evidence (or for any other purpose). Furthermore, there is no indication that any issue of this kind was raised during the hearing.

[30] There are further ingredients in this discrete equation. First, it is clear that the Police Service acted in accordance with the relevant requirements of the Regulations noted above. This court recognises that, in the abstract, legal duties over and above those specified in the Regulations, deriving from the common law or the Human Rights Act, may be owed by the Police Service in certain circumstances. However, the appellant has at no time made the case that any such duty arose and, independently, this court is unable to identify a duty of this kind. Finally, the appellant and his legal representative were at liberty to make such case to the disciplinary panel bearing on this issue as they considered appropriate.

[31] The Tribunal Chair's response to the issue of unavailable social services records at the disciplinary hearing was this:

> "… it is not entirely clear what records or why they were not shared. Even if such documents had been available however I doubt we would have learned anything significantly new about the very unhappy state of the relationship and concerns about the children. [The appellant's] own legal representative even refers to the undisclosed documents being in 'a similar vein' to those which were disclosed. So essentially it seems such records could at their height only offer more illustrations of what is already evident with nothing to explain how they could materially affect the findings or decision."

At the beginning of the preceding passage the Tribunal Chair noted that this discrete issue had been raised in the evidence of Sergeant Mullan, the investigating officer (evidently in cross–examination). Importantly, the Chair did not question the appellant's assertions about the existence of the records. Furthermore, the Chair

evidently accepted that the first limb of the statutory ground of appeal enshrined in Regulation 4(4)(b) ("evidence that could not reasonably have been considered at the original hearing") was satisfied. The Chair then clearly applied the second limb ("which could have materially affected or made disciplinary action"), noting in particular a phrase used by the appellant's legal representative ("in a similar vein") taken from the transcript.

[32] Giving effect to our analysis in paras [27]–[31] above, we are unable to diagnose any material error in the Tribunal chair's treatment of this particular issue. The assessment of the Tribunal Chair, reproduced above, is in our view unimpeachable.

[33] Third, the appellant's grounds of appeal complained of inaccuracies and omissions in a "Chronology" provided to the panel in the course of the hearing. In a later part of the grounds, he formulated the phrase "the failure in fair disclosure …." The Tribunal Chair dismissed this ground of appeal in these terms:

> "Any errors or omissions in the chronology which [the appellant] has identified do not strike me as significant and certainly not to the extent of having the potential to materially affect the findings or decision."

New Evidence [3]: Our Assessment

[34] The further steps taken by this court, noted in para [2] above, resulted in the following clarification. The "Chronology" document was prepared by senior counsel for the Police Service. It first emerged at the commencement of the disciplinary panel hearing. We would observe that this timing was unfortunate. The Police Service and their counsel will hopefully take note of this. However, the question which arises is whether the appellant suffered any material procedural unfairness or other material disadvantage in consequence. There is not the slightest indication of anything of this kind. It follows that we can identify no material error in the Tribunal chair's evaluation of this issue.

Our assessment of the Tribunal Chair's decision continued

[35] We now turn to consider the final determination of the Tribunal chair. The essential elements of this were these: none of the grounds of appeal convincingly challenged the reasoning of the misconduct panel or disturbed the evidence to the extent required; the Chair adopted her initial reasoning; the appellant's complaints that two constables had not given evidence at the misconduct hearing was confounded by his failure to call either of them in circumstances where he could have done so, suggesting that they had no relevant evidence to give; the non-adduction of any additional social services records could not materially affect the panel's findings as these were described by the appellant's legal representative as being "in a similar vein" to other records disclosed; a photograph provided by the appellant said to undermine the panel's findings rejecting his claim that an injury sustained by the

injured party was caused by him "bouncing off" a wall failed to satisfy Regulation 4(4)(b) and was considered to be of no probative value in any event; and while the newly provided text messages (nb: a fourth component of the fresh evidence ground of appeal) may not have been reasonably available at the misconduct hearing ".. the point made was too weak to impact upon the totality of the evidence" (from the affidavit of the Chair).

[36] The Chair, accordingly, determined that the appellant's appeal had no real prospect of success and there was no other compelling reason to allow the appeal to proceed. Invoking Regulation 12(2) of the Appeals Regulations (para [17] above), the Chair dismissed the appeal. The appellant's unsuccessful judicial review challenge followed, resulting in this appeal.

[37] This court is unable to diagnose any material error in our digest of the final decision of the Tribunal Chair in para [34] above.

The judicial review grounds

[38] Humphreys J distilled the judicial review grounds of challenge thus:

(a) A misdirection in law by the Tribunal.

(b) A failure by the Tribunal to recognise that certain new evidence, namely text messages, satisfied the threshold of a realistic prospect of success for the appeal.

(c) A kindred failure by the Tribunal regarding an asserted unfair failure by the Police Service to disclose specified social services reports.

The judge found each of the grounds to be without merit. The appeal to this court follows.

The fresh evidence application to this court

[39] In order to understand the fresh evidence issues and place them in context it is necessary to both augment and highlight certain aspects of the timeline in para [29] above thus:

(a) The offences alleged to have been committed by the appellant occurred between March 2019 and January 2020.

(b) The first tranche of the "new evidence", consisting of nine items of social services records, span the period November 2020 to February 2021 and were first received by the appellant in July 2024 (*supra*).

(c) The misconduct hearing unfolded on 17/18 October 2022 and the panel's decision followed on immediately.

(d) The initial and final determinations of the Tribunal were in February and March 2023.

(e) The judicial review proceedings were initiated in June 2023.

(f) The High Court hearing was conducted on 19 February 2024.

(g) Humphreys J delivered judgment on 8 April 2024.

(h) Notice of Appeal followed.

[40] At the first of the case management review listings noted above this court drew attention to the intention evinced by the appellant to adduce fresh evidence at this stage. Appropriate procedural directions were made. These gave rise to the appellant's formal application to adduce the following items of additional evidence (employing his terminology).

[41] [1] "DCC Respondent's Discovery." This consists of certain materials disclosed to the appellant by the Police Service solicitor some four months ago in the context of Employment Tribunal proceedings initiated by him, namely nine social services records generated between November 2020 and February 2021. They originate from DS Mullan (*supra).* They are expressly linked to a witness statement of a social worker ("AC") dated 14 December 2020. The Police Service solicitor confirms that they were provided to DS Mullan by AC on 26 March 2021 in response to a verbal request.

[42] This evidence (uncontroversially) was not available to the appellant at either stage of the underlying proceedings and was not considered by either the misconduct panel or the Tribunal. The appellant contends that (a) it contains material undermining the allegations of the injured party, (b) the timing of its very recent disclosure indicates that the police officer concerned made no effort to secure and preserve relevant evidence and (c) the availability of this material at the panel proceedings would have supported his account and enhanced his credibility, while diminishing that of the injured party.

[43] [2] The second item of new evidence which the appellant seeks to present to this court consists of two *ex parte* non-molestation order applications made by the injured party, in November 2020 and June 2021 respectively. Each gave rise to an *ex parte* NMO which did not endure beyond the ensuing contested hearing stage. Upon careful analysis of the appellant's affidavit and related evidence the following picture emerges. He claims that he was not initially in possession of the affidavits/witness statements underpinning the two NMO applications. He adds that he had made the case to the Police Service that the injured party had been dishonest in her NMO applications. When he received the misconduct panel hearing bundle (at some unspecified stage) he became aware of the absence of these two items. However, neither he nor his solicitor took any action.

[44] When the appellant first canvassed the issue of adducing further evidence before this court he did so in terms suggestive of evidential materials further to those identified in the immediately preceding paragraphs. However, the supporting affidavit sworn by the appellant, required by this court, does not extend beyond the two categories of documents identified above, as confirmed by the further hearing convened in the wake of the main hearing

[45] The proposed "new evidence" subdivides neatly as follows. The first category comprises the nine items of social services records spanning the period November 2020 to February 2021 noted above. This description is taken from the electronic communication dated 26 July 2024 from the Crown Solicitor to the appellant (para [41] above).

[46] The second category comprises the two witness statements (not affidavits) provided by the injured party in support of her two *ex parte* NMO applications. The first of these (manifestly in conflict with elementary good practice) is neither signed nor dated. According to certain documents the first *ex parte* NMO application was made in November 2020. It contains, *inter alia,* allegations against the appellant which can be linked to the third and fourth of the four misconduct charges.

[47] The second statement of evidence of the injured party (again lamentably neither signed nor dated) is evidently linked to a second NMO order application made on an unspecified date, probably in June 2021. This describes, *inter alia,* alleged misconduct by the appellant on 1 June 2021. It cannot be linked to any of the four misconduct charges.

[48] Summarising, as a result of the further procedural steps noted in para [2] above, the following matters are now clear beyond peradventure. First, at the stage of the disciplinary panel hearing the appellant had in his possession the two *ex parte* – non-molestation order applications and the witness statements of the injured party grounding each application but did not seek to deploy any of this material. Second, the appellant did not then have in his possession any of the nine items of social services records and none of these featured in either the disciplinary panel hearing or at the ensuing appellate stage. Third, the photograph noted above was provided by the appellant in the Tribunal appeal process. Fourth, *ditto* the text messages noted above. Fifth, the "Chronology" document formed part of the materials in the arena of the disciplinary panel proceedings and provided to the Tribunal Chair. Sixth, *ditto* the PPS "no prosecution" decision. Finally, the letter from the appellant's solicitors dated 26 September 2022 did not feature in the materials before either the disciplinary panel or the Tribunal Chair.

New evidence: Governing principles

[49] By long established practice, the Northern Ireland Court of Appeal in determining applications to adduce fresh evidence in civil appeals applies the criteria specified in *Ladd v Marshall* [1954] 1 WLR 1489 at 1491:

(i) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial (denoting, in this context, the underlying proceedings).

(ii) The evidence must be such that, if adduced, it would probably have an important – though not necessarily decisive – influence on the outcome of the appeal.

(iii) The evidence need not be incontrovertible but must be apparently credible.

These are cumulative requirements.

[50] In determining this application to adduce fresh evidence this court acknowledges that while the governing principles are of incontrovertible importance, the administration of justice requires that they should not be applied slavishly and inflexibly. In this respect we adopt the approach of the English Court of Appeal in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 at para [82]. Thus, the governing principles may be relaxed or even disapplied "… in exceptional circumstances where the interests of justice require ……."

The merits of this appeal

[51] At this juncture we resume our consideration of the merits of the appellant's case, having regard particularly to the second and, to a lesser extent, the third of the *Ladd v Marshall* principles. This exercise requires the court to examine the legal standards applicable to the impugned decision of the Tribunal, the decision of the High Court at first instance and the appeal to this court.

Appeals to the Tribunal: Legal framework

[52] The starting point must be Regulation 4(4) (*supra*), which confers no automatic right to a re-hearing and limits the permissible grounds of appeal to unreasonableness, material new evidence and procedural unfairness. The correct approach in cases where there is an appeal to the Tribunal against a decision of a misconduct panel was considered by the English High Court in *R (Commissioner of the Police for the Metropolis) v Police Appeals Tribunal* [2022] EWHC 2711 (Admin) at para [57]:

> "(i) The PAT must ask itself whether this finding was one that was within or outside of the range of reasonable findings that the Panel could have made;
>
> (ii) The PAT should keep in mind that the rule 4(4)(a) test is not met simply by showing a deficiency in the Panel's reasoning or a failure to consider a particular piece of evidence or similar error, if the finding of misconduct/

> gross misconduct was nonetheless one that the Panel could reasonably have arrived at. The question is whether that finding is unreasonable;
>
> (iii) The PAT will be careful not to substitute its own view as to what should have been the outcome of the charges. Whether the PAT agrees or disagrees with the Panel and whether it thinks it would have found the allegations proven if it had been hearing the disciplinary proceedings is not in point, as this in itself does not indicate that the Panel's finding was "unreasonable." In many circumstances, different and opposing views can both be reasonable; and
>
> (iv) The PAT should consider all of the material that was before the Panel, whether or not the Panel made express reference to it in the decision."

The circumscribed scope of an appeal to the Tribunal is obviously material to the limits of the review exercisable by the High Court in a subsequent legal challenge.

[53] The English Court of Appeal has also contributed to the jurisprudence belonging to this sphere. In particular, it has emphasised that appeals from misconduct panels are not re-runs of the original misconduct hearing. The misconduct hearing "… is not a dress rehearsal. It is the first and last night of the show" (*Fage UK v Chobani UK Limited* [2014] EWCA Civ 5, [2014] FSR 29, per Lewison LJ at [114]).

[54] The proper approach to be taken to a claim for judicial review of a decision of the PAT was explained by Burnett J in *R (Chief Constable of Dorset) v Police Appeals Tribunal* [2011] EWHC 3366 (Admin), at §§19, 25:

> "19. … Proceedings in the Administrative Court seeking to challenge the decision of a Police Appeals Tribunal do not arise by way of appeal, but by way of a claim for judicial review. In those circumstances, a claimant in judicial review proceedings must establish a public law error before the decision of that Tribunal could be quashed. […]
>
> 25. At each level in the disciplinary process, the decision maker or decision making body is expert in nature. It knows and understands how the police service works. It knows and understands the importance of maintaining integrity amongst police officers. It knows and understands the impact that serious misconduct can have on the force concerned and the police service in general.

> Parliament has provided that the Tribunal is the appellate body for these purposes. There is no further appeal to the High Court. The Tribunal is subject to the supervisory jurisdiction of this court. I have already observed that the approach of this court in judicial review is different from the approach adopted when sitting in an appellate capacity from the Solicitors Disciplinary Tribunal. Absent another error of law on the part of the Police Appeals Tribunal its decision on sanction could be interfered with only on classic Wednesbury grounds, in short that on the material before it no reasonable Tribunal could have reached the conclusion that it did."

[55] In *R (Chief Constable of Northumbria) v Police Appeals Tribunal* [2019] EWHC 3352 (Admin), the court emphasised that the specialist institutional competence of the PAT justified a cautious approach from a reviewing Court:

> "29. The PAT's decision is entitled to 'deference' such that the court should be slow to interfere with it. The PAT is a specialist appellate tribunal, experienced and expert in assessing police misconduct, including the impact of an officer's misconduct on public confidence in and the reputation of the police. Although he deprecated the use of the term 'deference' in Salter [ie, Chief Constable of Dorset, supra] Burnett J (as he then was) said at [33]:
>
> > '…The reason why the court is slow to interfere with the decision of an expert tribunal is that the court does not share the expertise. It is not 'deference' but a proper recognition of the need for caution before disagreeing with someone making a judgment on a matter for which he is especially well qualified, when the court is not.'

This philosophy resonates in three first instance NI decisions concerned with other types of misconduct tribunal: *Twibill v Pharmaceutical Society of NI* [2010] NIQB 41, *Rogan v Nursing and Midwives Council* [2011] NIQB 12 and *Casey v General Medical Council* [2012] NIJB 248.

[56] The English equivalent of Regulation 12(1)(a) of the NI Appeals 2016 Regulations is Regulation 11(5) of the Police (Conduct) Regulations 2012. This provides for an appeal to be dismissed "…if the Chair considers that (a) the appeal has no real prospect of success; and (b) there is no other compelling reason why the appeal should proceed." As regards the initial misconduct hearing stage, Regulation 4(4) (read with Regulation 4(1)) provides for an appeal, whose "grounds of appeal" may be "(a) that [a] finding [made under the Regulations] or disciplinary action

imposed [under the Regulations in consequence of that finding]; or … (c) that there was a breach of the procedures set out in the … Regulations …, or other unfairness which could have materially affected the finding or decision on disciplinary action."

[57] Regulation 11(5) of the English Regulations was considered by the English High Court in *R (Raza Ali) v Police Appeals Tribunal and Chief Constable of North Yorkshire Police* [2022] EWHC 646 (Admin). The material passage in the judgment of Fordham J is at para [22](i):

> "A further ground for judicial review was an argument developed briefly in the pleaded judicial review grounds and the Claimant's skeleton argument, but not developed orally, that the Chair misdirected herself as a matter of law as to the Rule 11(2)(a) test: "the appeal has no real prospect of success". The argument is that the Chair went wrong in law in saying that "the appeal must be more than arguable. In deciding whether the appellant has a real prospect of success, he must have a 'realistic' rather than 'fanciful' prospect of success". The argument rests on the negative language in Rule 11(2)(a) ("no real prospect of success"), the positive language used by the Chair ("whether the appellant has a real prospect of success"), and the discussion by Moore-Bick J in International Finance Corp v Utexafrica Sprl [2001] CLC 1361 at §8, distinguishing a "no realistic prospect of success" formulation with the "real prospect of success" formula for setting aside a default judgment, a test involving "a realistic prospect of success" carrying "a degree of conviction". On careful examination, the point that Moore Bick J was making was that the established "degree of conviction" threshold, in the application of the default judgment "real prospect of success" test, was different from the "ordinary language" of "no realistic prospect of success" which would exclude only a "hopeless' case and would allow a case which was "merely arguable". Moore-Bick J was not saying that there is some magic in whether the test is formulated or applied using the positive or negative formulation. In the present case, there either was or was not a real prospect of success. In the present context, the Chair unassailably recognised that a "real prospect" would need to be "realistic" and not "fanciful", a truth equally applicable whether asking whether there was – or whether there was not – such a "real prospect". This ground, while impressive in its industry and ingenuity, is ultimately invisible."

In short, an appeal which has a merely fanciful prospect of success does not have a real prospect of success. We would add that, as the quoted passage demonstrates, there are potential hazards in comparisons with similarly worded statutory criteria belonging to different contexts.

[58] While none of the decisions quoted above is, as a matter of precedent, binding upon this court we are satisfied that it is appropriate to adopt them.

[59] The language of Regulation 12(2) invests the decision maker with an unmistakable margin of appreciation in what is an exercise of evaluative judgement. This is of obvious significance when one turns to consider the next level of legal challenge, namely the application for judicial review to the High Court. Humphreys J was alert to this, as paras [22] – [23] of his judgment confirm. The High Court must, *inter alia*, bear in mind the specialist character of tribunals of this kind. Fundamentally, the jurisdiction exercisable by the High Court is one of supervisory superintendence.

[60] Notwithstanding, where there is a contention in a judicial review challenge that any lower court or tribunal has erred in law, the exercise to be performed by the High Court is one of forensic examination and assessment, unrestricted by any of the foregoing considerations. In the present case, there was a contention of this kind (see above). We adopt without qualification Humphreys J's exposition of Regulation 12(2) in para [21] of his judgment:

> "The test under regulation 12(2) ought not to the subject of over-analysis. These are straightforward words, familiar to most lawyers, and which are capable of application without resort to alternative phraseology. The Regulations intend to operate a filter which identifies at an early stage appeals which do not have a realistic prospect of success and mandates their dismissal. It is not intended to present a significantly high hurdle for appellants to surmount but it is designed to subject every appeal to early evaluative assessment in order to determine whether it ought to be permitted to proceed. Once the PAT determines that an appeal has no realistic prospect of success then it must be dismissed, unless there is some other compelling reason for it to proceed."

[61] At this juncture, it is appropriate to turn to the central elements of what Humphreys J decided. For this purpose, there is a convenient summary in the skeleton argument of Mr Skelt KC and Ms Briggs, of counsel, which we are content to adopt:

(i) On consideration of her letters of 9 February 2023 and 13 March 2023, there was no basis for the claim that the Tribunal Chair had misdirected herself in law (paras [26]-[28]);

(ii) The remaining question was "whether the PATs assessment of the grounds advanced by the appellant [in his appeal to the PAT] can be impugned as being perverse or irrational" (para[29]);

(iii) Regarding the text message, the PAT (Tribunal) considered the point on the basis put forward in the appellant's regulation 12(4) representations. Of the PAT's decision Humphreys J held "… it cannot be said that her decision on that issue was one which no reasonable decision maker could have arrived at". It is not the function of the court to substitute its view for that of the decision maker (para [31]-[34]);

(iv) The non-disclosure of Social Services reports was raised at the misconduct hearing by the appellant only in the context of their alleged importance to the PPS decision and not in relation to any alleged material unfairness in the misconduct process, nor had the appellant raised any basis for the claimed unfairness to date (paras [36]-[37]).

(Ms McAlpine is the Tribunal Chair who made the impugned decision.)

[62] Humphreys J rejected the misdirection in law ground of challenge at paras [26] – [28] of his judgment. In essence, he concluded that the Tribunal's consideration and application of the Regulation 12(2) test was compliant with the statutory language. The impugned decision of the Tribunal Chair is rehearsed at paras [9] – [11] of the judgment. Echoing our approach in para [61] above, the first ground of challenge before the High Court being that of misdirection in law, this court has conducted the same exercise as the trial judge. Having done so, we can identify no basis for disagreeing with his analysis and conclusion.

[63] As regards the judge's dismissal of the second and third grounds of challenge, we remind ourselves of the exhortation in *Re DB's Application* [2017] UKSC 7, at paras [78] – [80] that even where the first instance court has based its decision upon a consideration of affidavit evidence and documentary evidence, to be contrasted with oral evidence, some "reticence" on the part of the appellant court is appropriate. We have nonetheless asked ourselves whether there was any legal error in the standard of review identified by Humphreys J at para [29], namely (in substance) *Wednesbury* irrationality. We are satisfied that this was plainly correct. In particular, in his consideration of the Tribunal's evaluation of the new evidence constituted by the text messages, the judge in effect recognised that this belonged to a range of approaches, none of which could be condemned as irrational and, further, reminded himself that it was not the function of the High Court to form its own view. In this context, we would add that the judge's formulation of this ground of challenge, at para [25](ii) of his judgment, discloses a thinly disguised impermissible attempted appeal on the merits.

[64] Finally, in his evaluation of the third and final ground of challenge, at paras [35] – [37], the judge correctly analysed the purpose for which the issue of possibly missing social services reports was deployed by the appellant's legal representative at the misconduct hearing. In assessing that this did not raise any issue of procedural fairness, he added that no such issue had been clearly formulated in the High Court challenge. We consider the judge's treatment of this ground to be unassailable.

Our conclusions

[65] We have considered it appropriate to concentrate on the merits of the appeal in our consideration of the merits of the application to adduce fresh evidence before this court. We turn, therefore, to address the two categories of the proposed new evidence. Our unqualified endorsement of the judgment of Humphreys J provides an unpromising starting point for the appellant.

[66] The first category comprises the nine social services records identified in para [42] above. As regards this material, the appellant has not addressed in any meaningful way the first of the *Ladd v Marshall* principles. Furthermore, we refer to, but do not repeat, the chronologies in paras [29] and [39] above. The conclusion that this principle is not satisfied follows inexorably. This court has given the appellant ample opportunity to make his case regarding the application of the second and third of the *Ladd v Marshall* principles. He has singularly failed to do so in any meaningful or coherent way and, independently, we are unable to identify anything persuasive in this respect.

[67] The second category consists of the two witness statements of the injured party underpinning her two NMO applications against the appellant. The first of the *Ladd v Marshall* principles is manifestly not satisfied, as our enquiries have established unequivocally that this evidence was available to the appellant as long ago as prior to the disciplinary panel proceedings. This court inevitably takes into account that, as demonstrated above, this evidence pre-dates the initial stage of the proceedings under scrutiny, namely the misconduct panel proceedings. There have been two further stages since then, being the appeal to the Tribunal and the application to the High Court for judicial review. The appellant has not sought to adduce any of this evidence at any of these stages.

[68] Furthermore, the appellant has failed at every stage to explain how this evidence would probably have an important influence on the outcome of this appeal.

[69] This court, being at all times mindful of what is at stake for the appellant, namely the loss of his career in the Police Service, has conducted a rigorous and proactive examination of the disciplinary panel proceedings, the impugned decision namely that of the Tribunal Chair, the decision of the High Court under appeal and the appellant's application to adduce fresh evidence. Having done so, we have no reservations about our omnibus conclusions, namely (a) the application to adduce

fresh evidence has no merit and is dismissed accordingly and (b) the judgment and ensuing order of Humphreys J are affirmed.

Postscript: Costs

[70] Having promulgated this judgment and considered the parties' written representations, in the exercise of our discretion we apply the general rule. Thus, the appellant will pay the Tribunal's costs above and below, to be taxed in default of agreement the Police Service will bear its costs.