

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

Pollock's Application [2012] NIQB 67

**IN THE MATTER OF APPLICATION BY GERARD POLLOCK
FOR JUDICIAL REVIEW**

TREACY J

Introduction

[1] The applicant, a sergeant in the PSNI, challenges the Chief Constable's failure to (1) promote him and, alternatively, (2) to provide him with adequate opportunities for promotion in the context of his participation in the PSNI's High Potential Development Scheme ('the HPD Scheme').

[2] The applicant seeks an Order of Mandamus promoting him "forthwith" to the rank of Inspector or to put in place a process of promotion whereby he can be so promoted. He contends:

- (i) his promotion to the rank of Inspector is required by the Police Service of Northern Ireland (Promotion) Regulations 2008 ("the 2008 Regulations").
- (ii) that various representations made to him have generated a substantive legitimate expectation that he will be promoted to the rank of Inspector.
- (iii) that the Chief Constable is acting irrationally in failing to promote him.

Background

[3] The applicant joined the PSNI in 2004 and was admitted to the PSNI's HPD Scheme in 2006. At that time the relevant regulations, the Royal Ulster Constabulary (Promotion) Regulations 1995, recognised the scheme as an accelerated promotion course offering a prospect of accelerated promotion to those on the scheme.

[4] The applicant was informed that he would remain on the HPD Scheme until he was at the stage of promotion from Chief Inspector to Superintendent (provided he did not fail relevant examinations, which he has not). Accordingly, he expected the Scheme to assist him in achieving four promotions over the course of his time as a Scheme participant (Constable to Sergeant; Sergeant to Inspector; Inspector to Chief Inspector; and Chief Inspector to Superintendent).

[5] The applicant passed his Sergeant's exams in March 2008. Thereafter there have been no OSPRE examinations to allow him to progress any further through the ranks. When the prospect initially arose (in May 2007) of the PSNI moving away from the annual holding of such exams the applicant raised concerns about this. He was told ('the Dolan representation') that there would be an annual exam process until at least 2011 and that, thereafter, if the applicant needed to sit an exam in order to progress, he would be facilitated in doing so in England. There have been no further OSPRE exams since 2008 and he has not been permitted to undertake such exams in England to enable him to progress, notwithstanding requests that he be permitted to do so.

[6] During 2008 a 'time-limit' was introduced into participation on the HPD Scheme meaning the applicant would be removed from the Scheme on 1 April 2012. Since the PSNI had stopped offering OSPRE exams there was little prospect of any significant advancement in his remaining four years on the Scheme. This he avers is in breach of assurances ('the Mooney representation' and 'the Cooke representation') that he would not be removed from the Scheme until he had had an opportunity to sit further exams.

[7] In 2010, after the coming into force of the Police Service of Northern Ireland (Promotion) Regulations 2008, the applicant contended that the Regulations did not require HPD Scheme officers to sit OSPRE exams as a precondition to promotion. Accordingly, the lack of such exams should not be an impediment to his promotion. He therefore contends the PSNI is acting unlawfully in insisting on him sitting OSPRE exams for further promotion as a means of assessing his 'competence' to perform the duties of the next rank.

[8] The applicant characterises his position thus:

"Accordingly, I am left in the invidious position that the PSNI is, on the one hand, insisting on my taking OSPRE examinations to progress within the Service

(although I contend this should not be necessary...); and, on the other hand, failing to make any arrangements to permit me to do so; whilst also terminating my membership of the HPD Scheme early, without providing me the opportunities intended to have been provided through the Scheme.”

Statutory Framework

[9] S25 of the Police (Northern Ireland) Act 1998 (“the 1998 Act”) (amended by section 78 of the Police (Northern Ireland) Act 2000) provides:

25 Regulations for RUC

(1) Subject to the provisions of this section, the Secretary of State may make regulations as to the government, administration and conditions of service of members of the PSNI.

(2) Without prejudice to the generality of subsection (1), regulations under this section may make provision with respect to –

(a) the ranks to be held by members of the Police Service of Northern Ireland;

(b) the qualifications for appointment and promotion of members of the Police Service of Northern Ireland;

(c) periods of service on probation;

...

(5) In relation to any matter as to which provision may be made by regulations under this section, the regulations may, subject to subsection (3)(b) –

(a) authorise or require provision to be made by, or confer discretionary powers on, the Secretary of State, the Board, the Chief Constable or other persons; or

(b) authorise or require the delegation by any person of functions conferred on him by or under the regulations.”

[10] The 1998 Act had contained provisions in s19 and s22 that provided for promotions to ranks other than senior ranks to be made by the Chief Constable. These provisions were replaced by s36 of the Police (Northern Ireland) Act 2000 (“the 2000 Act”) which provides:

36. Appointment and promotion of other police officers in the Police Service of Northern Ireland.

(1) This section applies to the Police Service of Northern Ireland.

(2) Subject to subsection (3), appointments and promotions to any rank other than that of a senior officer shall be made, in accordance with regulations under section 25 of the 1998 Act, by the Chief Constable.

...”

[11] The Police Service of Northern Ireland (Promotion) Regulations 2008 (“the 2008 Regulations”) replaced the Royal Ulster Constabulary (Promotion) Regulations 2005 (“the 2005 Regulations”). The background to this legislation is set out in the Explanatory Memorandum that accompanies the Regulations. It provides under the heading “What is being done and why” that:

7.1 Under s25 of [“the 1998 Act”], the Secretary of State may make regulations as to the government, administration and terms and conditions of the PSNI. S25(2)(b) of the Act allows regulations to be made which make provision with respect to the qualifications for promotion in the PSNI.

7.2 The current promotion regulations used by the PSNI [the 2005 Regulations] ... are out of date in a number of respects and are being revoked and replaced. The desired changes to promotion processes cannot be introduced until the legislative basis has been amended.

7.3 Following a detailed review of current policies and processes, as recommended in the HMIC review of promotional career opportunities within the PSNI, the PSNI has been assessing their procedures for promotion to devise appropriate arrangements for promotions to sergeant and inspector which meet current needs and implement relevant developments elsewhere in UK policing. A key change is that there will no longer be annual qualifying examinations for promotion to sergeant and inspector. Instead, each selection process for promotion to those ranks must include a selection examination. Examinations will not be held annually, but when requested by the Chief

Constable. From 1 January 2009, a promotion process to those ranks will be called by the Chief Constable only when there is a need for officers at those ranks.

7.4 This instrument sets out mandatory minimum requirements for promotion to sergeant and inspector in the PSNI, including the qualifications required to be eligible for promotion (including from GB and Isle of Man police forces), that promotion shall be by selection which will include a selection examination, and the introduction of a new probationary period for newly-promoted inspectors.

[12] Para8 of the Explanatory Memorandum records that various bodies, including the Police Federation, were consulted about the proposed Regulations and all parties accepted the proposed changes.

[13] The 2008 Regulations were made by the Secretary of State on 1 December 2008 pursuant to the power in s25 of the 1998 Act. Reg5 makes general provision for promotion from the ranks of constable and sergeant. It provides:

5. – (1) Subject to Regulation 8, promotion from one rank to another rank shall be by selection.

(2) Each selection process for promotion to the rank of sergeant shall include a selection examination for promotion to that rank.

(3) Each selection process for promotion to the rank of inspector shall include a selection examination for promotion to that rank.

(4) The Schedule has effect in relation to selection examinations for promotion to the rank of sergeant, and selection examinations for promotion to the rank of inspector.

[14] Reg 8 of the 2008 Regulations makes provision for promotion of officers on the High Potential Development Scheme (“HPDS”) which provides:

High Potential Development Scheme

8. – (1) A constable (“C”) who –

- (a) is qualified under regulation 4¹ for promotion to the rank of sergeant; and
- (b) is participating in the HPD scheme,

shall be promoted to the rank of sergeant as soon as the Chief Constable determines that C is competent to perform the duties of a sergeant.

- (2) A sergeant ("S") who –
 - (a) is qualified under regulation 4 for promotion to the rank of inspector; and
 - (b) is participating in the HPD scheme,

shall be promoted to the rank of inspector as soon as the Chief Constable determines that S is competent to perform the duties of an inspector.

- (3) An inspector ("I") who is participating in the HPD scheme, shall be promoted to the rank of chief inspector as soon as the Chief Constable determines that I is competent to perform the duties of a chief inspector.

- (4) Promotion under paragraphs (1), (2) or (3) –
 - (a) shall take place whether or not there is a vacancy for the rank in question; and
 - (b) does not affect any existing or subsequent vacancy unless the person promoted is designated to fill it." [applicant's emphasis]

[15] The Schedule to the 2008 Regulations makes provision for Selection Examinations. It provides:

Selection Examinations

- 1. – (1) The selection examinations referred to in this Schedule are examinations held under arrangements approved by the examinations board, on syllabuses

¹ The qualification for promotion in reg4 is completion of the relevant probationary period in the lower rank.

prepared by the examinations agency in consultation with the examinations board.

(2) Each of the selections examinations shall comprise –

(a) Part I – a written paper; and

(b) Part II – practical tests,

and subject to subparagraphs (3) and (4) Part II of a selection examination may be taken only if a pass has been obtained in Part I.

...

2. ...

3. ...

4. ...

5.–(1) Subject to sub-paragraphs (2) and (3) a constable who will on the date the examination is held have completed his probationary service will be eligible to take Part I of the selection examination for promotion to the rank of sergeant and a sergeant who will on the date the examination is held have completed his probationary period in the rank of sergeant will be eligible to take Part I of the selection examination for the rank of inspector.

(2) A constable on probation who is participating in the HPD Scheme is eligible to take Part 1 of the selection examination for promotion to the rank of sergeant.

(3) A sergeant on probation who is participating in the HPD Scheme is eligible to take Part 1 of the selection examination for promotion to the rank of inspector.

..." [my emphasis]

Policy Framework

[16] In May 2010 Assistant Chief Constable Kerr introduced Service Procedure 15/2010 which made provision for the HPDS. The aim of the Service Procedure was described as to:

“Ensure that the national High Potential Development Scheme (HPDS) is fully utilised within Police Service of Northern Ireland as a talent management tool, and to put in place a structured framework for managing the scheme within PSNI.”

[17] Para8 of the Service Procedure outlines the procedure for the development of officers on the scheme. S8(2)(a) describes the PSNI’s internal processes for managing the development of individual officers. It outlines a six monthly regime of assessments and review with the ACPO lead for HPDS (ACC Kerr) and states at para8(2)(a)(viii) that:

“this process will also constitute PSNI’s internal process to review an officer’s suitability to remain on the scheme – as set out in the NPIAs Manual of Guidance.”

[18] S8(d)(v) refers to the OSPRE examination. It provides that:

“An HPDS officer will be permitted 2 attempts at both the Sergeants and Inspectors OSPRE examination (Part 1). An officer successful in Part 1 of the OSPRE process may attempt the second part on 2 occasions. Failure to successfully complete the OSPRE process within the requisite number of attempts will result in removal from the HPDS.”

[19] The PSNI Service Procedure cross-refers with the National Policing Improvement Agency Manual of Guidance. The Manual states that HPDS is a revision of the 2002 HPD Scheme which replaced accelerated promotion schemes. Para4 of the Manual provides that:

“The primary aim of the revised HPDS, which began life on 1 April 2008, is to identify officers with the potential to achieve the highest ranks in the service (at least superintendent rank), and to ensure they are equipped with the required skills to become highly

effective in senior and executive management and leadership roles.”

[20] The HPDS promotion process is outlined in detail in paras28 *et seq* of the 2008 Manual of Guidance. It states that members of HPDS should have their suitability for promotion to the next rank assessed at least once per year. Para28 provides:

“Where the PDR [Performance Development Review] process indicates that an individual has provided clear evidence of their competence against the core responsibility areas and has also evidenced their potential against the ICF requirements for the next rank, their suitability for promotion should be considered by their force.”

[21] The applicant complains that the PSNI has been in breach of this assessment requirement since 2008. However, his personnel file discloses that he has been subject to PDR on a six monthly basis under the superintendence of ACC Kerr. This accords with both the requirements of the Manual of Guidance and s8(2)(a)(viii) of the Service Procedure. Furthermore, even when an officer is, pursuant to the Manual of Guidance, found to be suitable for promotion it does not follow automatically. Individual forces are simply required to give consideration to promotion.

[22] The NPIA published a specific policy document for HPDS members, such as the applicant, who had joined prior to 2008. Para4.8 states that:

“The HPDS officer will undertake whichever promotion system their force uses. Thus where a force uses OSPRE Part I and II the officer will follow the OSPRE Part II promotion route.”

Relevant Law

[23] The construction of promotion regulations made pursuant to s25 of the 1998 Act was considered by the House of Lords in Re Shields [2003] UKHL 3. The case concerned the application of provisions of an RUC Force Order to a promotions process. The Northern Ireland Court of Appeal had held that the Chief Constable had acted *ultra vires* the 2008 Act in introducing criteria for promotion which did not appear in the Regulations made pursuant to s25 of the 1998 Act.

[24] Lord Bingham disagreed with this analysis. At para7 of the judgment he stated:

“7. ... if and to the extent that the Secretary of State has exercised his power to make regulations governing promotion the Chief Constable may not make any direction which would contradict or undermine the Secretary of State's prescription. But the obligation on the Chief Constable is, in my opinion, to make promotions in accordance with regulations made by the Secretary of State under section 25 if and to the extent that the Secretary of State has made such regulations. Where, as here, the Secretary of State has chosen to exercise his regulatory powers in a very limited way, it is open to the Chief Constable to fill in the gaps provided he does so in a way which is not, directly or indirectly, inconsistent with the Secretary of State's prescription: see, for example, Taylor v Chief Constable of the Royal Ulster Constabulary (unreported, 26 September 1986, Hutton J). If the Secretary of State is unhappy with the Chief Constable's direction, he has the power to override it by regulation.

8. I consider this to be the correct interpretation of this legislation. It also seems to me to yield the best administrative solution. It permits the Secretary of State to lay down what he or she considers to be the important ground rules, while leaving questions of detailed management to the judgment of the officer responsible and accountable for the performance of the force. In the present case, it enables what might otherwise be unarticulated bars to promotion to be the subject of consultation, debate and clear public statement. It enables the Chief Constable to tackle, openly, a problem which any conscientious chief officer of police would wish to address.”

[25] In his speech Lord Hutton identified the core issue in the appeal as the correct interpretation of s22 of the 1998 Act (now re-enacted in broadly similar terms in s36 of the 2000 Act). S22 provided that appointments should be made “in accordance with” Regulations made pursuant to s25 of the 1998 Act. Addressing the meaning of “in accordance with” Lord Hutton said:

“27. In some contexts the words "in accordance with" are properly understood to mean that a person must only act as he is instructed to act and within the ambit of those instructions. But in other contexts where a person has a power to act the words will mean that he is to act in compliance with such directions or instructions or regulations as are given or made, but provided he does not act in a way which is contrary to those directions or instructions or regulations, his freedom of action is not otherwise restricted.

28. The Court of Appeal gave the former meaning to the words "in accordance with" and Carswell LCJ stated at page 8 of their judgment:

"The present issue is concluded in favour of the appellant by section 22 of the 1998 Act (and now section 36(2) of the 2000 Act). Promotions are to be made in accordance with regulations under section 25. That in our view is intended to be exclusive, and Force Orders cannot validly prescribe matters relating to promotion. Paragraph 9 of the Force Order in question purports to do just that, by making officers with a sickness record of a certain level ineligible for promotion. We do not consider that the Chief Constable had power to issue a Force Order containing such provisions. If they are to be put into force, it will have to be done by regulation made under section 25."

29. I respectfully differ from this conclusion. The Promotion Regulations made by the Secretary of State contain virtually no guidance as to how the decision whether or not to promote an officer is to be made. Regulation 4 merely lays down certain conditions which have to be satisfied before a candidate is qualified for promotion, and Regulation 6 states that promotion shall be by selection, but does not state what the criteria are for selection. I do not consider that Parliament intended that the Chief Constable should have no power to supplement by a Force Order whatever provisions relating to promotion the

Secretary of State decided to make by way of regulations under section 25(2)(b).

.....

32. I further consider that the powers of the Chief Constable under sections 19 and 22 include power to give directions on matters relating to eligibility for, and selection for, promotion, and as I consider that subparagraph 9(2), (3), (4) and (5) of the Force Order do not conflict with, but rather supplement, the Promotion Regulations made by the Secretary of State, I would hold that the subparagraphs were lawful and were not *ultra vires*, and I am in full agreement with the observations made by my noble and learned friend Lord Bingham of Cornhill in paragraph 8 of his opinion. Therefore, for the reasons which I have given, I would allow the appeal and set aside the judgment of the Court of Appeal.

Discussion

Is the applicant's promotion to the rank of Inspector required by the 2008 Regulations?

[26] The 2008 Regulations dispensed with annual *qualifying* examinations. Such annual *qualifying* examinations were replaced by a selection process involving a selection examination which would not be held annually but when requested by the Chief Constable and that from the 1 January 2009 a promotion process would only be called by the Chief Constable when there is a need for officers at those ranks [see, for example, para11 above]. At the heart of the present complaint is the applicant's contention that the 2008 Regulations distinguish HPD Scheme officers from non-scheme officers. The applicant's complaint centres on the Chief Constable's decision to treat HPD Scheme members on the same basis as non-scheme members for the purposes of promotion and the related requirement to therefore complete an OSPRE examination as a means of determining competence to be promoted from sergeant to inspector.

[27] In relation to the applicant's complaint of misconstruction of the statutory scheme by the Chief Constable the respondent relies upon Re Shields [2003] UKHL in support of the argument that the Chief Constable is not, on any reasonable construction of the 2008 Regulations, required to promote a sergeant to the rank of inspector solely because he was selected as a candidate for the HPDS. In the Court's view the respondent is correct in its contention that reg8 provides no more than a general rule and is silent on the considerations that the

Chief Constable can weigh in determining whether or not a HPDS sergeant is ready for promotion to inspector. The judgment of competence is a discretionary decision by the Chief Constable. He has chosen to supplement the regulations with a requirement, outlined in a force order, that HPDS officers complete OSPRE Parts 1 and 2.

[28] As in Shields the Secretary of State has chosen to exercise his regulatory powers in a very limited way and the Chief Constable is accordingly free to “fill in the gaps” as Lord Bingham put it provided he does so in a way that is not directly or indirectly inconsistent to the Secretary of State’s prescription. The Chief Constable may not make any directions which would contradict or undermine the Secretary of State’s prescription for promotion as contained in the 2008 Regulations. But where the regulations do not constrain the Chief Constable’s freedom of action it is open to him to supplement the regulations by force orders or service procedures provided they do not conflict with the regulations. As long as the Chief Constable does not act contrary to the regulations his freedom of action is not otherwise restricted. As Lord Bingham observed at para8 of his judgment in Shields [set out at para24 above] this is the best administrative solution since it allows the Secretary of State to lay down important ground rules whilst leaving questions of detailed management to the judgment of the officers accountable and responsible for the performance of the force.

[29] Within the broad parameters of the Chief Constable’s obligations enshrined in s36 of the 2000 Act and s25 of the 1998 Act [set out respective at paras9 and 10 hereof] he is free to supplement the terms of the regulations in order to regulate promotions within the PSNI in the manner adumbrated above.

[30] I reject the applicant’s submission that it is clear from the 2008 Regulations that HPDS officers must be excluded from the selection procedure or the OSPRE examinations. In support of this submission the applicant prays in aid the opening words of reg5 “subject to Regulation 8”. The reliance on the opening words of reg5 is misplaced as is the associated submission that it is inconsistent with the scheme of the regulations to require the applicant to sit the OSPRE examinations. That submission is incompatible with para5 of the Schedule to the Regulations which provides that HPDS Sergeants are eligible to sit Part 1 of the selection examination. If the statutory scheme was intended to exclude HPDS sergeants from the requirement to take examinations then the inclusion of para5 of the Schedule makes no sense. The Regulations plainly envisages HPDS Sergeants taking OSPRE examinations and that is what the Chief Constable requires.

[31] In his argument concerning reg5 the applicant referred to communications with Mr Walter Myles of the NIO Policing Division. In his e-mail of 14 October 2011 Mr Myles stated:

“I think, unfortunately, your correspondent is confusing two separate issues.

1. The current use of OSPRE in the “normal” promotion process and
2. The Chief Constable choosing to use OSPRE as part of the HPDS process.

I advised him of the content of Reg 8 and 5 PSNI (Promotion) Regulations 2008, and alongside this clearly stated in my e-mail, that the regulations (regarding HPDS) state that an officer *shall be promoted if the Chief Constable thinks the constable or sergeant is up to the job.*

It is not my place, and I did not attempt, to tell your correspondent the content of the HPD scheme, nor what the Chief Constable considers appropriate in promoting his officers through the HPD scheme.”

[32] I agree with the respondent that this communication does not support the applicant’s contention that the NIO advised the applicant that OSPRE examinations were “not relevant” to HPDS officers. The NIO envisaged that the Chief Constable could choose to use OSPRE as part of the HPDS process and this is what the Chief Constable has done. The use of such examinations as a means of determining competence for a promotion is lawful and in accordance with the reasoning in Shields.

[33] The applicant contends that the approach adopted by the PSNI denies any material advantage to HPDS scheme officers. This argument is based upon the misconception that the Scheme is currently directed towards accelerated promotion. Such schemes did exist in policing in the past but the modern scheme is directed at increasing development opportunities for officers identified as having “high potential.” The modern HPDS scheme is expressly not an accelerated promotion scheme.

[34] Moreover the contention that the applicant has derived no material benefit from HPDS membership is erroneous. He has had the advantages of exposure to experiences and secondments that other Sergeants have not enjoyed – benefits as envisaged by the HPD Scheme.

[35] The means by which the Chief Constable has chosen to determine competence through the OSPRE exams is not, I have already held, inconsistent with the 2008 Regulations. Indeed, for the reasons already given, the 2008 Regulations expressly envisage just that. The fact that the applicant has been offered “acting up” opportunities to facilitate his career progression does not diminish the lawfulness of the Chief Constable’s approach.

Has the applicant established a substantive legitimate expectation?

[36] I reject the applicant’s argument that he enjoys some form of substantive legitimate expectation and that he would be promoted to the rank of Inspector prior to March 2012 or that he would be permitted on what Mr McGleenan QC characterised as an extinct scheme solely for the purpose of facilitating his promotion.

[37] The applicant has failed to establish that he enjoys such an enforceable substantive legitimate expectation because he does not meet the criteria set out by the House of Lords in *Re Bancoult (No 2)* [2009] UKHL. He cannot identify a representation that has the legal effect of imposing a binding commitment upon the Chief Constable that he be promoted or that a bespoke facility be created to permit his promotion.

[38] He asserts an enforceable assurance about a substantive outcome (promotion to the rank of Inspector) when that outcome is subject to a discretionary decision-making process within the confines of Reg8 of the 2008 Regulations. Within the statutory boundaries identified above it is a matter for the Chief Constable to determine how promotions should be effected.

[39] A substantive legitimate expectation must be grounded on a representation that is clear, unambiguous and devoid of relevant qualification. The representations relied upon by the applicant, in my view, conspicuously fail to meet the legal standard required to establish a substantive legitimate expectation binding in law. The representations relied upon were made by different people at different points in time. None were made by the Chief Constable.

[40] The representations relied upon by the applicant have been addressed in factual averments by the respondents. It is denied that ACC Kerr represented in April and November 2010 that the applicant could remain on the HPDS after March 2012. DCC Leighton’s representations in 2008 about what would happen in respect of vacancies between 2008 and 2011 must be read in light of the fact that legislative and organisational changes intervened.

[41] While rejecting any legitimate expectation argument, the respondent has sought to establish with NPIA whether there was any scope to extend the

applicant's membership of their HPD Scheme beyond March 2012. The issue has been pursued with NPIA in correspondence who have indicated that they will not permit an extension.

Irrationality Challenge

[42] In my judgment the Chief Constable is properly exercising the discretion afforded to him within the terms of the 2008 Regulations in accordance with the ruling of the House of Lords in Shields. His decision to treat HPDS sergeants on the same basis as non-HPDS sergeants for the purposes of promotion is not irrational and was agreed during a consultation process by the Police Federation of Northern Ireland.

[43] The House of Lords in Shields determined that within the boundaries of the statutory framework the Chief Constable enjoyed a broad discretion in respect of promotions within his police force. I agree with the respondent that that broad discretion includes a discretion not to make appointments for reasons of resource constraint and organisational need. It is not irrational to decide not to promote a HPDS Sergeant when there are no promotions ongoing and he has not obtained the qualifications required of all other sergeants.

Conclusion

[44] Accordingly, for the reasons given above I reject all the grounds of challenge and dismiss the judicial review.