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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

Pollocks' Application [2013] NICA 16

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

**AND THE MATTER OF DECISIONS OF THE POLICE SERVICE OF
NORTHERN IRELAND**

Before: Higgins LJ, Girvan LJ, Coghlin LJ

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal by a serving police officer ("the appellant") against the decision of Treacy J who on 4 October 2012 dismissed the appellant's judicial review challenge to the Chief Constable's allegedly improper failure to promote him under the Police Service of Northern Ireland (Promotion) Regulations 2008 ("the 2008 Regulations") and to the Chief Constable's allegedly unlawful removal of the applicant from the High Potential Development Scheme ("the HPDS").

[2] Mr Scoffield QC appeared for the appellant and Dr McGleenan QC appeared for the respondent. The court is indebted to counsel for their excellently prepared skeleton arguments and speaking notes, the well prepared and indexed documentation, the succinct core bundles of documents and the well marshalled and skilfully deployed oral submissions. This court has frequently stressed the

importance and utility of properly prepared core bundles and the utility of speaking notes. On occasions it has had to criticise parties for inadequately prepared bundles. Where, as is this case, the court's admonitions have been properly heeded it is only right to commend counsel and solicitors for their efforts to assist the court.

Factual Background

[3] The appellant joined the PSNI as a police constable in 2004. He joined the HPDS in 2006. The HPDS is a national scheme for police officers which was designed to develop the most talented individuals to become police leaders of the future. Those wishing to participate in the Scheme have to demonstrate their desire, commitment and potential to reach senior officer level and to progress to joining the Association of Chief Police Officers. The Scheme is open to serving police officers holding the ranks of constable and sergeant. To be allowed to participate in and remain on the Scheme an officer is subject to rigorous examination and scrutiny. There have never been more than 12 or 13 such officers in the Scheme in Northern Ireland at any one time.

[4] When the applicant joined the Scheme it was managed by the Home Office. The current scheme is managed by the National Police Improvement Agency ("NPIA"). When the appellant applied to join the Scheme the relevant Manual of Guidance was that published in 2002. The Scheme was expressed to replace the Accelerated Promotion Scheme and the Accelerated Promotion Course then in operation. The objectives of the Scheme are (inter alia) the identification of candidates of high potential, their development into high calibre future leaders, the producing of highly equipped officers and the affording to them of every opportunity to successfully complete the Scheme.

[5] The 2002 Guidance stated that where an individual officer provided evidence of competence against the generic rank profiles and satisfactorily demonstrated ability against the HPDS development activities, the officer's suitability for promotion to the next rank should be assessed. The Guidance contained complex provisions in relation to the consideration of whether a relevant officer had reached the point of being suitable for promotion. The section dealing with HPDS promotion assessments in paragraph 4 presupposes that the individual has achieved required examination results in an examination qualification known as OSPRE before he would be qualified for promotion.

[6] The appellant successfully sat the examination for promotion to the rank of sergeant. He became a sergeant in March 2007. Through no fault of the appellant his promotion was delayed as the result of administrative problems in relation to the holding of the examination.

[7] The HPDS was revised in 2008 by the NPIA. The 2008 Scheme now operates as a 5 year programme and it includes a period of academic study at Warwick Business School. The NPIA published on 31 March 2008 a policy for current HPDS members who had joined the Scheme prior to 2008 and this policy sets out the transitional arrangement for officers who were members of the pre 2008 scheme. The new policy was expressed to supercede all earlier policies and members of the pre-2008 scheme were to benefit from the policies set out in the new policy. For officers who were substantive constables and sergeants as at 1 April 2008 the pre 2008 scheme could be run in parallel with the 2008 scheme up until 31 March 2012 "subject to individual circumstances". It was planned that all officers in the existing scheme would cease to be on the HPD Scheme at that specified time but it stated that "exceptions can be made where that is appropriate due to individual circumstances." When the appellant joined the HPDS there was no timescale set for promotion of participants to the rank of Chief Inspector. The appellant understood from discussions with DCC Leighton in 2006 that he would remain on the Scheme until the stage of promotion from Chief Inspector to Superintendent although he understood that if he failed the relevant OSPRE examinations on two occasions he would have to leave the Scheme. Members would have their status as Scheme members regularly reviewed and would have to continue to demonstrate suitability to be on the Scheme. Paragraph 3.2 of the policy stated that "*all Forces will regularly review their current members status and be discerning about who remains on the Scheme.*"

[8] Part 4 of the 2008 policy states that promotion of HPDS officers is governed by Police Promotion Regulations. Prior to being promoted they must have passed any notional requirements and clearly demonstrated readiness for promotion to the higher ranks. Members of the Scheme should have their suitability for promotion considered by their Force. The NPIA provides advice and support but promotion decisions are solely the preserve of the relevant Force. The policy envisages a fairly complex scheme of assessment of an officer's demonstrated competence in core areas by the officer's line manager; discussions about improvement where the scheme member was not considered to be suitable for promotion; a review by the "Basic Command Unit" Commander and confirmation of a recommendation for promotion by the reporting officer; the making by him or the head of the unit of a recommendation as to suitability for promotion; a consideration of the recommendation by the advisor of the Association of Chief Police Officers ("ACPO") and, if appropriate, endorsement of the recommendation for promotion.

[9] Paragraph 4.8 of the policy for HPDS members who joined prior to 2008 is headed "OSPRE and the National Police Promotion Framework" ("NPPF") stated:

"The HPDS officer will undertake whichever promotion system their Force uses. Therefore where a Force uses OSPRE Parts I and II the officer will follow the OSPRE

Part II promotion route. Where a Force has implemented the National Police Promotion Framework (“NPPF”) the officer will follow this route. This applies equally to HPDS officers in both the current and revised schemes. This also applies where a HPDS officer has already passed OSPRE Part I unless it is the first year of their force adopting the NPPF in which case like all other officers with an OSPRE Part I pass they will have a one-off choice of carrying on with the OSPRE route or electing to continue to Step Three of National Police Promotion Framework. Once this choice has been made it is final.”

[10] It is not disputed that the appellant has carried out his policing functions with full commitment. In furtherance of his commitment he has undertaken various strategic projects and carried out additional work to justify his place on the Scheme.

The Regulations

[11] When the appellant joined the Scheme in 2006 the relevant promotion regulations were the Royal Ulster Constabulary (Promotion) Regulations 1995 (“the 1995 Regulations”). These provided that to be qualified for promotion the officers had to obtain a pass in the qualifying examinations in respect of the rank to which he was seeking promotion, had to have completed not less than 2 years’ service in his current rank and completed any requisite probationary period of service in that rank. The 1995 Regulations required the holding of a qualifying examination (Part 1 a written test and Part 2 a practical test) in each year from 1994 onwards. The RUC (and subsequently the PSNI) used the OSPRE examination (with suitable adjustments to take account of Northern Ireland law).

[12] Thus when the appellant joined the HPDS in 2006 the statutory requirement to hold annual examinations for promotion to the higher ranks ensured the availability of such examinations for someone in the position of the appellant. Thus he could, if he passed the relevant examination, satisfy the requirement of the Scheme to have passed the OSPRE examination.

[13] In 2008 new Regulations, the Police Service of Northern Ireland (Promotion) Regulations were enacted replacing the 1995 Regulations. The 2008 Regulations made a number of significant changes. Under Regulation 5 it is provided:

“(1) Subject to Regulation 8, promotion from one rank to another 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] Regulation 8 which is under the heading "High Potential Development Scheme" provides:

"(1) A constable ("C") who -

- (a) is qualified under regulation 4 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) and (3) –
 - (a) shall take place whether or not there is a vacancy for the rank in question;
 - (b) and does not affect any existing or subsequent vacancy unless the person promoted is designated to fill it.”

[15] Unlike the 1995 Regulations the 2008 Regulations no longer impose a duty to hold annual examinations. If an officer on the HPDS is required to sit the relevant promotion examinations before he can be considered for promotion it necessarily follows that his prospect of speedy promotion is considerably reduced if the examination is not held for protracted periods as has now happened. Para 5(1) of the Schedule relating to the selection examinations provides that a constable seeking promotion to the rank of sergeant and a sergeant seeking promotion to the rank of inspector must have completed his probationary period in his relevant rank before being promoted and before being able to sit the examination. An exception, however, is made in the case of HPDS members. Paragraphs 5(2) and (3) provide:

“(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.”

An HPDS officer is thus at an advantage compared to non-scheme officers. Clearly Regulation 5 envisages that HPDS members will be undertaking the relevant examination.

[16] The decision to move away from the annual promotion examination appears to have been driven by the concern that the annual examination, whether or not there were vacancies, was producing a large number of successful candidates staying in a pool awaiting promotion. It was also considered to be no longer cost effective to hold the examination on an annual basis.

The effect of the 2008 Regulations and the consequences

[17] When the applicant became aware of the proposal to do away with the annual OSPRE examination he was concerned about the effect that it would have on his ability to sit such examinations at regular or reasonable intervals if they were not to

be run annually. He was informed by Hazel Dolan, an occupational psychologist working with the PSNI, that she had discussed the issue with the Deputy Chief Constable and she assured him that the examination would be an annual process until at least 2011. Thereafter, if he needed to sit an examination in order to progress and if no examination was available in Northern Ireland he would be facilitated by being permitted to sit the same examination in England and Wales. In the event there were no OSPRE exams in 2009. He was not permitted to sit the last OSPRE examination which was held in March 2008 for the rank of inspector. As noted in late 2007 he had sat the sergeants' OSPRE examination but due to a breach of confidentiality it was decided to run the examination again. All the candidates had to re-sit the examination in March 2008. As a result the appellant was not promoted to the rank of sergeant until June 2008. In fact if he had had the opportunity to pass the examination which he sat in 2007 he could have sat the examination for the rank of inspector in March 2008. In view of his high standards of achievement there is every possibility that he would in consequence in fact have gained the rank of inspector.

[18] On 3 December 2008 the appellant received an email from Chief Inspector Emma Mooney expressed in the following terms:

*“Please see below decision of DCC re HPDS officers and OSPRE processes. This had been deliberated fully by the DCC before the decision set out below was reached. Having assessed the options raised, the DCC has decided to support option 1 ie *HPDS officers to be treated the same as other officers within PSNI whereby they can only undertake Parts 1 and 2 promotion assessments as and when held by the PSNI based on organisational need.**”

It was discussed how the HPDS rules stipulate that the ‘new Scheme’ would only live for 5 years. Given that PSNI would no longer be able to provide officers with the opportunity to apply for OSPRE processes annually the DCC deemed it fair to waive this rule in PSNI whereby he has given an undertaking that he will not remove officers from the PSNI HPD Scheme after 5 years (as national rules state) if they have not had the opportunity to participate in Part 1 and Part 2 promotion processes.”

This stance was subsequently repeated by Yvonne Cooke, a senior occupational psychologist employed in the Personnel Department of the PSNI with responsibility

for designing and delivering selection and promotion processes. In an email of 18 May 2009 she stated:

“I have spoken with the DCC and he stated as is the case with those officers who are currently on the new scheme, you will not be removed from being a PSNI HPDS officer in 2012 should you not be able to sit an OSPRE assessment in the interim.”

[19] The reference in Chief Inspector Mooney’s e-mail to option 1 is a reference to the first of three options considered by the PSNI when considering what was recognised to be a block on opportunities for promotion for HPDS members brought about by the new 2008 Regulations and a move away from annual OSPRE examinations. The post-Patten scenario with the substantial reduction in the Northern Ireland police establishment had led to a substantial reduction in the need to promote officers. The three options considered were:-

(1) First option

HPDS officers would be treated the same as other officers and could only take Part I and Part II promotion assessments as and when held by the PSNI based on organisational need. (It was recognised that this would result in PSNI HPDS officers being treated differently to their national counterparts and might hamper promotion opportunities due to the time limit imposed on the HPDS scheme. However the option would be viewed as more fair by officers on the mainstream promotion system who no longer were able to apply for Part I and Part II on an annual basis.)

(2) Option 2

HPDS officers would be permitted to undertake Part 1 and Part II assessment at the National Assessment Centre. This would require HPDS officers to undertake assessments designed for England and Wales. This would enable HPDS officers to apply for promotion as soon as they were eligible. At a time when promotion opportunities were slowing down for officers throughout the organisation such a stance could be argued to fly in the face of PSNI commitment to equality of opportunity. A counter argument could be made that all constables and sergeants would be eligible to apply to the Scheme. There was also a growing concern that PSNI might see an influx of officers applying for the Scheme as it would be viewed as a means to circumvent only being permitted to participate in Part I and Part II as

and when organisational need required. It might result in PSNI promotions being predominantly populated by HPDS officers in the future.

(3) Option 3

NPIA would be commissioned to design a Part I and Part II promotions assessment for PSNI HPDS officers. This would enable HPDS officers to apply as and when eligible and be assessed in a Northern Ireland context. However for the issues raised in option 2 this option would result in some members of PSNI being permitted access into Part I and Part II process while others not. Furthermore at a time when PSNI faced further financial reductions it would be argued that investing so significantly in such a design process for a small number of people would not be viewed as cost effective.

As the Mooney e-mail demonstrates, it was decided to adopt Option 1. It was recognised that the decision would impact on the escalated promotion element of the HPDS but the decision had to be balanced against the potential impact on the morale of the vast majority of officers outside the HPDS who had wished to participate in promotion assessment. It was considered that the organisation had to ensure a diverse mix of officers being promoted through the ranks.

[20] The PSNI have not held OSPRE examinations now for a number of years. The Chief Constable's stance is that he will not consider HPDS officers to be competent to perform the duties to be performed following promotion to a higher rank unless they have sat appropriate OSPRE examinations. He does not, however, make any such examinations available to HPDS officers or any other non-HPDS officers. He proposes to hold such examinations only when the need arises to promote officers. The reduction in the number of officers in the PSNI reduces the need to fill promotion vacancies. The appellant alleges and it appears to be borne out by the evidence that the Chief Constable is currently pursuing a policy of temporary promotions when the need arises. These temporarily promoted officers receive acting-up allowance though it is by no means clear that they receive additional pension accrual rights. The appellant has undertaken the duties of inspector on a basis of temporary promotion and asserts that this is clear evidence of his ability and competence to perform the duties of an Inspector. It is however to be noted that under Regulation 7 of the 2008 Regulations the Chief Constable may temporarily promote an officer when he "is required to perform the duties of a higher rank". This differs from previous provisions in Regulation 8 of the 1995 Regulations which provided that a member of the Force who was required to perform the duties of higher rank may be temporarily promoted provided that, in the case of promotion to the rank of sergeant or inspector, he was qualified therefore under Regulation 4.

This necessitated the member having passed the relevant qualifying examination and satisfied the years of service and probationary service requirements.

The appellant's claim

[21] The appellant seeks the following relief. He claims that the respondent's failure to promote him was unlawful and that he should be promoted to the rank of inspector or alternatively that a promotion process should be put in place whereby he can be so promoted. Alternatively he seeks a declaration that the respondent's failure to provide a process for his promotion within a reasonable time was unlawful and/or a declaration that the respondent unlawfully failed to provide adequate promotion opportunities in the context of the HPDS Scheme. Further or alternatively, when he issued his Order 53 statement on 26 July 2011, he sought a declaration that the respondent's removal of the applicant from the HPDS Scheme in March 2012 would be unlawful. Since he was in fact removed from the Scheme at that time he now claims that his removal was unlawful.

[22] The appellant's primary case is that the respondent's actions were in breach of the 2008 Regulations. As an alternative he contends that the respondent's failures to promote him and the appellant's removal from the HPDS Scheme breached his legitimate expectations and represented an abuse of power ("the legitimate expectation case"). We propose to consider his primary case first.

The appellant's argument on the primary case

[23] Mr Scoffield argued that the 2008 Regulations had two central purposes. Firstly the Chief Constable was no longer required to hold OSPRE examinations annually. He was thus permitted to run the examinations only when he had vacancies which he wished to fill. Secondly it was envisaged that the HPDS members were subject to a mechanism for promotion different from that applicable to non HPDS officers. It was clear that the promotion of HPDS members was not intended to be linked to or dependent on vacancies when the appellant joined the Scheme. It was recognised as an accelerated promotion course. This was borne out in the 2002 Manual of Guidance and the then PSNI General Order called a Fast Track Promotion Scheme. HPDS officers who were promoted were recognised as supernumerary. Regulation 5 of the 2008 Regulations was subject to Regulation 8. It was not the statutory intention that HPD officers should have to sit OSPRE (which is the normal route for promotion under Regulation 5). Under 1995 Regulations OSPRE Part I was the qualifying examination to be eligible for promotion and OSPRE Part II was the selection examination. Under the 2008 Regulations both parts are an extended selection examination. Counsel argued that both parts of the examination were about ranking and not qualification. While the Chief Constable was clearly not permitted to make HPDS promotion vacancy-dependent he has done

so by requiring the appellant to sit OSPRE which is only held when vacancies occur. There have been no such examinations for about four years. The Chief Constable's duty is to promote "as soon as" competence has been determined. This implies an obligation to determine competence within a reasonable period of time. In the circumstances it was not rationally open to the Chief Constable to say that the appellant is not competent. Accordingly, counsel argued, the appellant must be promoted. The appellant has been temporarily promoted for a period of nineteen months: he received exemplary feedback. At the time of the hearing at first instance he was an acting inspector. The Chief Constable could not have required the appellant to perform the duties of a higher rank unless he considered that the appellant was competent to perform the duties. If he was competent there was a legal obligation to promote whether there was a vacancy or not. It was irrational not to promote him.

[24] The appellant further argued:-

- (a) that the Chief Constable's reasoning for the approach that he had taken was flawed. The Chief Constable's case that it would be unfair to other officers seeking promotion to allow the HPDS officers the advantage of not having to submit to the OSPRE examination was misconceived. The HPDS clearly envisaged a different route to promotion. HPDS members would not be subject to a competitive promotion process and should have suitability for promotion assessed at least once a year (this did not apply to non-HPDS officers). Counsel referred to the NPIA Manual and the PSNI Service Procedure. There are 1,000 sergeants in the PSNI at the moment but only 11 HPD officers in the whole of the PSNI. Counsel contended that the Chief Constable's conclusion that it was unfair to treat the HPD members differently was a misdirection in law and was irrational.
- (b) that the Chief Constable misdirected himself in relation to the proper interpretation of the PSNI Service Procedure. He wrongly considered that it made promotion for HPDS officers contingent on completion of OSPRE.
- (c) that the Chief Constable mistakenly relied on what he considered to be NPIA national policy which he interpreted as requiring the use of selection examinations to determine the competence of HPDS officers. Practically speaking there are annual OSPRE exams in England. The Chief Constable did away with the annual exams in Northern Ireland. The English Regulations, unlike the Northern Ireland Regulations, specifically require HPDS officers to sit OSPRE before being qualified for promotion. It was argued that the national policy does support the

appellant's case in that there must be an annual opportunity to have a competence assessment. The respondent had not assessed the appellant's competence for promotion to the next rank as required by paragraph 8(2)(d) of the Service Procedure.

[25] Dr McGleenan countered Mr Scoffield's primary case, calling in aid the House of Lords decision in Re Shields [2003] UKHL 3, referring in particular to paragraphs [7] and [9] of Lord Bingham's speech.

"7. ... I readily accept, as did counsel for the Chief Constable, that 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 of 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 ...

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 details of management to the judgement 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."

Counsel argued that the Chief Constable is empowered by the 2008 Regulations to require HPDS officers to complete OSPRE Parts I and II before consideration for

promotion. Schedule 1, paragraph 5(3) expressly contemplated the use of OSPRE Part I examinations to determine promotions for HPD sergeants. The 2010 HPDS Service Procedure provided:

“An HPDS officer will be permitted two attempts at both the sergeants and inspectors’ OSPRE examination (Part I) an officer successful in Part I of the OSPRE process may attempt the second part on two occasions. Failure to successfully complete the OSPRE process within the requisite number of attempts will result in removal from the HPDS.”

The use of OSPRE to determine competency pursuant to Regulation 8(2), was entirely rational. The NPIA policy in relation to current HPD Scheme members, who joined prior to 2008 (which included the appellant), required the HPDS officers to follow the promotion process for their Force and pass OSPRE I. The promotion of an individual was a discretionary exercise under the 2008 Regulations (unlike the position under Regulation 9 of the 1995 Regulations). The approach taken by the Chief Constable did not frustrate the primary purpose of the HPDS, which was the officer’s professional development from which quicker promotion would hopefully arise.

The judge’s approach to the primary case

[26] Treacy J accepted the respondent’s contention that Regulation 8 provided no more than a general rule and was silent as to the considerations that the Chief Constable could weigh in determining whether or not an HPDS sergeant was ready for promotion to inspector. The judgement of competence was a discretionary decision by the Chief Constable. He had chosen to supplement the Regulations with a requirement outlined in a Force Order that HPDS officers complete OSPRE Parts 1 and 2. As in Shields, the Secretary of State had chosen to exercise his regulatory powers in a limited way and the Chief Constable was free to fill in the gaps. Where the Regulations do not constrain the Chief Constable’s freedom of action, it was open to him to supplement the Regulations by Force Orders or Service Procedures, provided they did not conflict with the Regulations. As long as the Chief Constable did not act contrary to the Regulations, his freedom of action was not otherwise restricted. Within the broad parameters of the Chief Constable’s obligations, enshrined in section 26 of the Police (Northern Ireland) Act 2000 and section 25 of the Police (Northern Ireland) Act 1998, he is free to supplement the terms and regulations in order to regulate promotions within the PSNI. The judge rejected the applicant’s submission that it was clear from the 2008 Regulations that HPDS officers must be excluded from the selection procedure or the OSPRE examinations. The reliance put on the opening words of Regulation 5 (“subject to

Regulation 8") was misplaced, as was the associated submission that it was inconsistent with the Schedule to the Regulations to require the applicant to sit the OSPRE examinations. The judge concluded that that submission was incompatible with paragraph 5 of the Schedule to the Regulations, which provided that HPDS sergeants were eligible to sit Part I of the selection examination. If the statutory Scheme was intended to exclude HPDS sergeants from the requirement to take examinations, then the inclusion of paragraph 5 of the Schedule did not make sense. The judge concluded that the Regulations plainly envisaged HPDS sergeants taking OSPRE examinations as required by the Chief Constable. The judge also rejected the contention that the approach adopted by the PSNI denied any material advantage to HPDS Scheme officers, who in fact has the benefit of career development. The appellant had the advantages of exposure to experiences and secondments that others sergeants had not enjoyed.

Conclusions on the primary issue

[27] When the appellant joined the HPDS in 2006, it was against a background of the 1995 Regulations which made provision for the annual OSPRE examinations and in the context of the Scheme which envisaged that officers seeking promotion must be qualified in terms of national OPSRE or NPPF requirements. When the Scheme was altered in 2008 for officers who joined the Scheme thereafter, it was made clear that HPDS officers had to be qualified in terms of National OSPRE or NPPF requirements. Paragraph 9(2) of the new Scheme states that "HPDS officers are therefore subject to the same standards as other officers."

[28] The NPIA policy for HPDS members who joined prior to 2008 stated that the promotion of such officers is governed by Police Promotion Regulations. Prior to being promoted they must have passed any national requirements to clearly demonstrate readiness for promotion to the higher ranks. Members of the HPD Scheme should have their suitability for promotion to the next rank assessed at least once in every year (see paragraph 4.1 of the policy). OSPRE Part I is clearly regarded as a demonstrator of the requirement of legal knowledge for the rank in question.

[29] The problem which has arisen in the present instance arises from the fact that, the facility to sit OSPRE each year has been removed from all officers, whether in the HPDS or not. If the Chief Constable is entitled to require officers to demonstrate legal knowledge under Part I of OSPRE to demonstrate competence, the appellant is unable to do so but he is unable to do so because the Chief Constable has made a policy decision not to hold the examination until there is an overall need within the PSNI to make promotions to posts requiring to be filled.

[30] Since the relevant 2008 policy makes clear that promotions of HPDS members are governed by Police Promotion Regulations, the question is whether the Chief Constable has lawfully interpreted and applied the 2008 Regulations which are the relevant current Regulations.

[31] Regulation 8(2) imposes on the Chief Constable a duty to promote an HPDS sergeant to the rank of inspector “as soon as the Chief Constable determines that he is competent to perform the duties of an inspector.” Although Mr Scoffield strongly contended that the appellant must be considered by the Chief Constable to be competent to perform the duties of an inspector because he has temporarily promoted the appellant to act as an inspector, the power of the Chief Constable to temporarily promote an officer to a rank is not dependant on the Chief Constable considering that the officer is competent to the extent that that officer should be promoted to the rank of inspector. If Mr Scoffield’s argument were correct, any HPDS officer required to act up in a temporary capacity, would have to be treated as immediately promotable and one who should be promoted. Such an approach would militate against the career development of HPD Scheme members, whose ability to take advantage of temporary promotion to a higher rank to demonstrate competences, may form part of his career development.

[32] What leads the Chief Constable to determine that an officer is competent to perform the duties of the relevant higher rank, must depend on the Chief Constable forming a judgement as to the capacities and abilities of the relevant officer. Regulation 8 does not spell out the criteria and qualifications which must be attained by the relevant officer to satisfy the Chief Constable of his competence. The legislative Scheme leaves that undefined and, in line with what was said in Re Shields, it is open to the Chief Constable to lay down what he considers to be the proper approach to deciding on the promotion of officers within the HPDS, provided that in doing so he does not act directly or indirectly inconsistently with the Secretary of State’s prescription. As Lord Hutton put it in Re Shields, provided an order issued by the Chief Constable does not conflict with the Regulations made by the Secretary of State, the Chief Constable has power to take any step which supplements the Regulations.

[33] The scheme of the 2008 Regulations was to give the Chief Constable the power to promote officers. In the case of HPDS officers, that is a power to promote as soon as the Chief Constable determines that the officer is competent to perform the duty in question. There is nothing inconsistent with the scheme of the 2008 Regulations for the Chief Constable to conclude that an officer should have passed an OSPRE examination before the Chief Constable could consider him to be competent to perform the duties of an inspector. The national HPDS proceeds on the basis that in line with all other promotions, HPDS officers should prove their competence in the fields covered by the OSPRE exams. Part I of the examination

demonstrates knowledge of the relevant law and practice, a matter of obvious importance in determining the competence of an officer to carry out his functions in the prescribed rank. Mr Scofield contended that Regulation 5, relating to the selection examination, is subject to Regulation 8 and that that necessarily indicates that HPD officers are not expected to sit the examination. However, the format of the 2008 Regulations clearly demonstrates that HPD officers may sit OSPRE with the HPDS officers benefiting from the ability to sit the examination even before they have satisfied the probationary service requirement. While HPDS officers are a separate cadre of officers and are covered by Regulation 8, the requirements of Regulation 5 are not wholly self-contained to deal exclusively with non-HPDS officers. Regulation 5(4) incorporates the Schedule relating to selection examinations for promotion and as stated, it does make provision for the examination being sat by HPDS officers.

[34] The Chief Constable under Regulation 8 is required to promote the HPDS officer as soon as he determines that he is competent to perform the relevant duties. At first sight this might suggest that the Chief Constable could lay down any criteria or qualifications (which may or may not exclude an OSPRE examination) as matters to be taken into account in determining the competence of an officer for promotion purposes. If this were so, it could be argued that it would have been open to the Chief Constable to decide on competence applying criteria which did not demand success in OSPRE. Regulation 8, however, refers to officers participating in the HPD Scheme and if the HPD Scheme, as applied to the appellant, did in fact envisage and require success in OSPRE, the Chief Constable could not, if acting consistently with the Scheme, treat an officer as competent for promotion if he did not pass the OSPRE examination. Ms Cooke in her affidavit asserted that promotion of HPDS officers was contingent on success in OSPRE. Mr Scofield submitted that there was no basis in the Service Procedure for such a claim. He points to section 8(d)(ii) of the Service Procedure providing for a procedure of an assessment and review similar to that in the 2002 and 2008 Manuals of Guidance.

[35] Reading together the admittedly often inelegantly and confusingly drafted pre- and post-2008 Schemes, Manuals of Guidance and Service Procedure, the unmistakable impression created is that success in OSPRE is a necessary qualification for promotion to the rank of inspector from the rank of sergeant. Since OSPRE demonstrates requisite legal knowledge for the rank, this is hardly surprising. Against the background of a Scheme requirement for success in OSPRE, the decision of the Chief Constable to require that as a mark of competence before an HPD officer could be promoted, is not contrary to law and it is founded on a rational basis. If the Chief Constable were to promote HPD officers who have not passed the relevant OSPRE exam, he would be promoting in disregard of the spirit and intent of the national HPD Policy.

[36] Mr Scoffield argued that the Chief Constable's approach has made the appellant's promotion, in fact, vacancy dependent. This counsel contends is a breach of Regulation 8(4)(a). If the Chief Constable is acting in accordance with Regulation 8(2) and in accordance with the spirit and intent of the HPD Scheme, the fact that promotion, if it happens, will only occur when a factual vacancy exists, does not render the Chief Constable's action unlawful. If in fact the Chief Constable's approach was merely a colourable device to postpone a promotion until a vacancy arises it may well be that he would be abusing his power. However, the decision not to hold an annual OSPRE examination was brought about not with the intention of frustrating the appellant's position as a member of HPD but for other rationally based service related reasons. The consequence has been that the appellant is unable to obtain a necessary qualification in the promotion process but it has not been demonstrated that the Chief Constable has deliberately pursued a course to make the appellant's promotion dependent on vacancy.

[37] What the appellant has not done in his pleaded grounds of challenge is to challenge (a) the Chief Constable's decision not to hold annual OPSRE exams or (b) his decision not to design and hold a specially adopted OSPRE examination for HPD officers. These, accordingly are not issues arising in the present proceedings.

[38] For these reasons we must reject the appellant's primary case and conclude that the judge was correct to reject the appellant's arguments on the primary case.

The legitimate expectation issue

[39] The appellant relied on four representations which Mr Scoffield asserted gave rise to legitimate expectations on the part of the appellant which should be vindicated by the court.

- (a) A July 2006 representation by DCC Leighton that the appellant would be on the Scheme until he was a Superintendent unless he failed certain exams.
- (b) A June 2007 representation by Ms Dolan on behalf of DCC Leighton that OSPRE exams would be available annually until at least 2011 and thereafter he could sit the exams in London.
- (c) The December 2008 statement made by Chief Inspector Mooney referred to at paragraph [18] above.
- (d) A confirmatory representation made by Ms Cooke on 18 August 2010 that the appellant would not be removed from being an HPD officer in 2012 if he was not able to sit an OPSRE assessment in the meantime.

[40] Mr Scoffield argued that even if the respondent is correct in saying that it is not possible to simply promote the appellant by an order of the court there was a breach of a substantive legitimate expectation in respect of:

- (a) the decision to take him off the HPDS;
- (b) the failure by the respondent to continue the PSNI Scheme until he had full opportunities to be promoted; and
- (c) the failure by the respondent to hold an annual OSPRE examination.
- (d) the failure to permit the appellant go to England to sit the examinations there.

Counsel argued that it is possible for the PSNI to continue with its own Scheme. He referred to the situation in Sussex where officers had been allowed to remain on the Scheme for two full years due to a hiatus in promotions. There was no reason why the PSNI could not have continued with its own arrangements as it proposed to do on foot of the Mooney representation.

[41] Dr McGleenan rejected the appellant's claim to a substantive legitimate expectation of promotion to the rank of inspector. It was a matter for the Chief Constable as to whether an officer should be promoted. Inferences and implied constructions of comments made in telephone calls and in third party e-mails could not meet the legal standard required to establish a substantive legitimate expectation. At the time of making the representation the decision-maker must have all the information available to him that would bear on the ultimate decision. A representation based on an understanding which no longer persisted (in this instance the belief that the PSNI could develop a specific HPDS scheme) could not bind a decision-maker for the future. The respondents have denied that ACC Kerr represented in the April and November 2010 documents that the appellant would remain on the HPDS after March 2012. The DCC Leighton representation about what would happen in respect of vacancies between 2008 and 2011 had to be read in the light of significant supervening legislative and organisational changes. The Dolan representation preceded the 2008 Regulations. The NPIA have indicated that they will not permit an extension. The appellant's contention that the Chief Constable had engaged in an abuse of power in failing to extend his membership of the Scheme had to be seen in the context of a conscientious and bona fide effort to determine whether the national authority could make an exception for the appellant on the national scheme.

Conclusions on the issue

[42] The 2008 Regulations set out the limited statutory powers of the Chief Constable to promote officers within the PSNI. In the case of officers outwith the HPDS promotion is by selection and subject to success in the selection examination for promotion to the relevant rank. In the case of officers in the HPDS as noted, promotion is “as soon as the Chief Constable determines the officer is competent to perform the duties”. For the reasons give above the decision by the Chief Constable to require that HPDS officers successfully sit the OSPRE examination was consistent with the Regulations and in fact effectively required by the HPDS. A promotion by the Chief Constable which disregarded the requirement of the Regulations and the Scheme would be ultra vires. The court could not by an order of mandamus require the Chief Constable to carry out an act beyond his powers even if the Chief Constable has given an expectation of promotion on the part of the appellant. Such an expectation could not be categorised as a legitimate expectation.

[43] At this juncture accordingly the appellant cannot expect or demand promotion since he has not done the OSPRE examination. The appellant, therefore, must fall back on the alternative argument that he had a legitimate expectation that he should continue to be considered as falling within the HPDS notwithstanding the change of the Scheme which led him to cease being an HPD officer after 31 March 2012.

[44] It is clear from the authorities that a legitimate expectation can only arise where there has been in Lord Bingham’s succinct terminology “a clear and unambiguous representation devoid of relevant qualifications” as to the decision-maker’s future conduct (see for example Attorney General for Hong Kong v Nyunyen Shieu [1983] 2 WLR 735, Bancoult [2009] 1 AC; Coughlin [2001] QB21, and Association of British Internees v Secretary of State for Defence[2002] EWHC. A legitimate expectation may arise from an express promise given by or on behalf of a public authority where it may arise from the existence of a clear and regular practice which a claimant can reasonably expect to continue. It has been stated, for example, in R v Falmouth and Truro Port Health Authority (ex parte Southwest Water Limited) [2001] QB 445 that “only the clearest of assurances can give rise to a legitimate expectation” (per Simon Brown LJ and Pill LJ). The promise or representation must come close to the character of a contract (Lord Wolff in R v North and East Devon Health Authority ex parte Coughlin [2001] QB 21.

[45] As this court pointed out in Re Loreto Grammar School [2011] NICA at paragraph [43]:

“The law of legitimate expectations is based on the principle that good government depends on trust between the governed and the Government and that trust must be sustained. But for a moral obligation to give rise to a legal one it is reasonable for the law to require a clear unequivocal representation devoid of qualification in the nature of a promise on the part of the Department to take a particular course. In procedural cases an assurance that the Department will follow a certain procedure does not fetter the decision maker to any great extent and certainly not to the extent that the imposition of a substantive legitimate expectation does. It is thus easier to find that a procedural assurance gives rise to a legitimate expectation than it would be to find that a substantive legitimate expectation has been created for it would be more common for a decision maker to intend to promise individuals that they will have an opportunity to make representations and state their case than to promise a substantive outcome.”

[46] Furthermore at paragraph [45] in Re Loreto Grammar School the point was made that enforcement of a legitimate expectation involved a restriction on the width of the decision-maker’s discretion. The legislature in conferring statutory discretionary powers cannot cater for all circumstances. The decision-maker will have to make decisions in the light of changing circumstances. The need for flexibility is the underlying rationale for the principle that decision-makers cannot lawfully fetter their discretion through inflexible policies. The court will thus lean against the finding of a fettering of discretion. If the doctrine of legitimate expectation were too loosely and widely interpreted and applied public authorities could too readily be disabled by their representations from acting subsequently in what they truly considered to be and in what may very well be the public interest. Different considerations arise however where the authority has undertaken responsibility by clear unambiguous, unequivocal representations made to an individual in circumstances in which it will be conspicuously unfair and hence an abuse of power to act contrary to the representation. In such a situation the balance must be struck differently.

[47] Detective Inspector Mooney’s e-mail expressed in clear terms what is described as an undertaking by the DCC that he would not remove officers from the PSNI HPD Scheme after five years (as National Rules state) “if they have not had the opportunity to participate in Part I and Part II promotion processes.” This undertaking was reiterated in Ms Cooke’s e-mail of 18 May 2010.

[48] The representations in those e-mails would appear to be clear and unambiguous on first reading. However, for such a representation to give rise to a legitimate expectation it must be devoid of relevant qualifications, express or implied. The question which arises is whether the representations were subject to the kind of implied qualification for which Dr McGleenan contended. The respondent's case is that any such assurance was subject to the proviso that the appellant could properly be kept on the HPDS consistently with the terms of the HPDS. He contends that the appellant could not and that the NPIA has made it clear that it would be contrary to the terms of the Scheme to retain him on the Scheme after 31 March 2012. Since the power of promotion vested in the Chief Constable is limited to making a promotion under Regulation 5 in the case of non-HPD officers and to making a promotion under Regulation 8 in respect of HPDS officers, if the appellant is to be lawfully and properly promoted otherwise than in accordance with Regulation 5 it must be on the basis that he qualifies as being an officer "participating in the HPDS". The HPDS is defined by reference to the Police (Promotion) Regulations 1996 as amended by the Police (Promotion) (Amendment) Regulations 2002. It is defined as "a scheme for the time being recognised by the Secretary of State for the purposes of those Regulations as the High Potential Development Scheme". This clearly refers to one national scheme.

[49] The policy in respect of HPDS members who joined prior to 2008 must clearly be regarded as part of the HPDS. The policy states that the pre-2008 HPD Scheme would run in parallel with the 2008 Scheme up to 31 March 2012 (subject to individual circumstances) in the case of constables and sergeants. Paragraph 3.1 states that while it is planned that all officers in existing schemes will cease to be HPDS members at the specified date "exceptions can be made where this is appropriate due to individual circumstances". Paragraph 3.2 deals with eligibility. Current Scheme members are permitted to remain members of the pre-2008 Scheme subject to on-going confirmation from their force ACPO HPDS Advisor. Members will have their status as scheme members regularly reviewed. All Forces must regularly review their current member status and be discerning about who remains on the Scheme. This provision appears to relate to the on-going review of Scheme members while the Scheme is on-going. Paragraph 3.2 ends with the words "Forces will be the final decision-maker. The role of the NPIA is to ensure consistency, provide advice and oversee policies and protocols".

[50] Ms Cooke in her e-mail of 13 October 2011 to the NPIA posed the question:

"I write to seek a final position from NPIA and ask the question can the officer be extended on the national HPD Scheme? I have asked the question about the officer however would appreciate NPIA's

position should other PSNI HPD officers seek extensions in the future. It is anticipated that this may occur if they view they have not had the opportunity to undertake the number of OSPRE assessments expected during the life cycle of the Scheme.”

In his reply Mr Phelps, Head of Leadership Services and Development in the NPIA stated:

“Unless there was a clear reason for an officer being extended such as to compensate for maternity or an injury on duty which had prevented them from progressing and which could be solved through an extension, we would not support such a request. The Scheme’s primary purpose is for development from which we hope the quicker promotion will come. The rules are designed to take away barriers which do not apply to Gerard as he has been a sergeant for a number of years. It is also completely at the discretion of the CC as to whether the delegate has reached the relevant standard but our rules also confirm that the person must be qualified to same as any non-HPDS officer. In short then we do not support extensions of the Scheme purely for the purpose of gaining further promotions; that is in the gift of individual forces in any event.”

[51] Dr McGleenan argued that it was thus clear that the respondent had sought to establish with the NPIA whether there was any scope to extend the appellant’s membership of the HPDS beyond 31 March 2012 and that the NPIA had indicated that they would not permit such an extension.

[52] Mr Scoffield relied strongly on the fact that the Sussex Police Force had made a decision to extend the terms and conditions of the HPDS officers who were in under the 2002-2006 Scheme. This was described as a local decision for Sussex police only so that transfers out of that Force would need to be discussed on an individual officer basis. In a letter of 10 October 2011 to officers in Sussex, DDC York stated that NPIA had been consulted and was supportive of the decision. Subsequent correspondence between Ms Cooke and NPIA Mr Phelps stated that what happened in Sussex related only to Sussex and it did not mean that they were extended into the NPIA Scheme as in Mr Phelps view there was nothing to extend into. Whether or not an officer was on a Scheme so long as the officer met national criteria it was in

the gift of the Force as to whether the person was promoted and through what mechanism. The correspondence in relation to the Sussex police indicates that the NPIA appeared to consider that it is for the NPIA to decide whether an officer is properly to be considered as falling within the national scheme.

[53] Any officer seeking to rely on the Regulation 8 route for promotion must be able to bring himself within the definition of being an officer “participating in the HPD Scheme” which by definition is the national HPD Scheme. If the appellant is to be able to rely on legitimate expectation entitling him to be treated as still participating in the HPDS he must be in a position to show that if the respondent is held to the undertaking to treat him as being within the Scheme if he has not had the opportunity to sit OSPRE he will thereafter fall to be considered as an officer still “participating in the national HPD Scheme” under the 2008 Regulations. If he does not so qualify the power to promote him under Regulation 8 would not be exercisable. If he cannot be so treated then enforcement of the alleged legitimate expectation would be of no assistance to the appellant in relation to his promotion prospects. He would not qualify under Regulation 8(2)(b) and any promotion would have to be under Regulation 5 by the ordinary route.

[54] The precise relationship between the local police force and the NPIA in relation to the decision whether to extend an officer beyond 31 March 2012 is not spelt out clearly in the wording of the Scheme. On the one hand the local Force is the ultimate decision-maker in relation to deciding whether an officer should remain on the Scheme while it is on-going (under paragraph 3.2). It is not spelt out clearly whether this is also so in relation to the decision whether an officer should be extended beyond 31 March 2012. The Sussex correspondence clearly indicates that the NPIA asserted a right not to recognise the extended officers as members of the national scheme. Paragraph 3.2 does make clear that the role of the NPIA is to ensure consistency, provide advice and oversee policies and protocols. The e-mail from Mr Phelps to the PSNI in effect asserted that. The NPIA did not wish to recognise extensions in cases such as that of the appellant. The NPIA is not a party to the present proceedings. The court could not definitively determine as against NPIA that it would be bound to accept the appellant as a recognised member of the national HPD Scheme if the alleged substantive legitimate expectation is enforced. If the NPIA is not bound to recognise him as such it leaves unresolved the question whether when the appellant does take the OSPRE examinations he would be bound to be found by the Chief Constable to be an officer “participating in the HPD Scheme” triggering his right to promotion. In view of the fact that the PSNI is a participant force within the HPDS the PSNI is bound to take and is entitled, if not bound, to act on the advice of NPIA (whose function is to ensure consistency provide advice and oversee policy and protocols). If it is bound or entitled to take advice from the NPIA and to pay regard to it, when the representation was made on behalf of the DCC in the Mooney e-mail the respondent could not fetter his

obligation to take into account the subsequent views and advice of the NPIA subsequently expressed. To enforce the substantive legitimate expectation in the manner contended for by the appellant would be to require the respondent to undertake a course of action which could bring the PSNI into conflict with the NPIA and affect the relationship between the Force and the NPIA in relation to the implementation of the HPDS with which the PSNI as a participant force, was bound to comply.

[55] Taking account of the NPIA views the respondent concluded that it could not give effect to the representation made by the DCC as recorded in the Mooney e-mail. The representations made by the PSNI must be read as having been made subject to the proviso that the respondent was bound to take account of and pay regard to the views and advice of the NPIA which was charged with the overall responsibility of ensuring a consistent application of the Scheme on a national basis. To hold otherwise would be to hold that the Chief Constable was bound to disregard a consideration relevant to the question whether the appellant's membership of the Scheme should be extended.

[56] In the result we conclude that the appellant's legitimate expectation argument must be rejected. We reach this conclusion with regret because the appellant's expectation of rapid promotion within the PSNI by reason of his participation in the Scheme was a reasonable one. The Scheme clearly did start off as one designed to enable successful and ambitious officers to work for and gain early promotion by dint of their efforts. The appellant entered the Scheme against the background of an annual OSPRE examination. He was delayed in taking the OSPRE examination for promotion to the rank of inspector by reason of a breach of confidentiality for which he bore no responsibility. The decision to discontinue the annual examination radically changed the goal posts and disappointed his expectations. The representations made to him misled him even if those who made them did not intend to mislead him. They could not bind the NPIA. In retrospect the PSNI should have clarified the position with the NPIA before making the representations which it made. We conclude, however, that as a matter of law the appellant's claim must be dismissed.