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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR249
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Mr McQuitty (instructed by Edwards & Co Solicitors) for the Applicant
Mr Beggs KC (instructed by PSNI Legal Services Branch) for the Respondent

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Ex Tempore

COLTON J

Introduction

[1] For obvious reasons this application is one which requires expedition. The applicant is a serving police constable with the Police Service of Northern Ireland (PSNI).

[2] By these proceedings he seeks to challenge three decisions, namely:

(i) The decision of the proposed respondent dated 18 August 2022 determining that the applicant has a case to answer for gross misconduct and so referring his case to a misconduct hearing based on an investigation from 2018.

(ii) The decision of the proposed respondent to refuse/fail to give effect to the High Court order of Quinlivan J (granting judicial review and quashing a decision of DCC Martin), and to do so within a reasonable period of time, related to the Service Confidence Procedure ("SCP") so that the applicant was subject to unlawful restrictions for a period in excess of five months.

(iii) The decision to suspend the applicant (in connection with the first impugned decision).

Background

[3] The background circumstances are unusual.

[4] In short, as a result of alleging an inappropriate sexual relationship with a woman known in earlier proceedings as K in 2017, the applicant was subject to a criminal investigation, suspension from duty, a police disciplinary investigation, and, finally, a SCP which resulted in restrictions in his work. The criminal investigation led to a "no prosecution" decision by the PPS in February 2018. The original misconduct investigation was formally withdrawn by the appropriate authority for prosecuting investigations under the Police (Conduct) Regulations (Northern Ireland) 2016 ("the Regulations") in December 2018. Subsequently, significant restrictions were placed on his work as a constable via the SCP from early 2019 onwards. That decision was ultimately quashed by the High Court in April 2022 following a successful judicial review. Despite this, the SCP restrictions were maintained by the PSNI from the date of judgment on 8 April 2022 to in or about 19 September 2022.

[5] On 19 September 2022, the applicant was, again, suspended from duty. On 18 August 2022, it was determined that there was a case to answer against the applicant for gross misconduct based on the same material and investigation as led to the misconduct proceedings which were withdrawn in December 2018.

[6] As a consequence the applicant faces a misconduct hearing before a disciplinary panel convened under the Regulations which govern the process of investigating and determining allegations of misconduct by police officers.

[7] The hearing is scheduled to commence on 27 March 2023, hence the requirement for expedition.

[8] When I first considered the papers, I formed the preliminary view that the applicant should avail of an alternative remedy rather than seek judicial review in respect of the first and third decision under challenge. Plainly, the first decision is the primary target of the judicial review application. It is open to the applicant to advance applications to the misconduct panel to the effect that it had no jurisdiction to hear the charges brought against him and/or that they constituted an abuse of process and should be dismissed.

[9] I therefore invited the parties to submit written submissions on this issue and convened a leave hearing on Tuesday 21 February 2023. I am grateful to counsel, for their written and oral submissions which were of great assistance to the court.

Legal principles

[10] The legal principles on alternative remedy in this context are well established and were most recently set out in the judgment of the Lady Chief Justice in the case

of *Alpha Resources Management Ltd* [2022] NICA 27. At para [20] the Lady Chief Justice summarised the principles in the following way:

> "[20] Drawing together the authorities and texts we have referred to above, we summarise the principles as follows:
>
> (i) Judicial review is a remedy of last resort and may not be the only available avenue of challenging a particular decision. That is because statute may have provided an appellate machinery to deal with appeals against decisions of public bodies.
>
> (ii) A court may, in its discretion, refuse to grant permission to apply for judicial review or refuse a remedy at the substantive hearing if an adequate alternative remedy exists, or if such a remedy existed but the claimant had failed to use it.
>
> (iii) The general principle is that an individual should normally use alternative remedies where these are available rather than judicial review. The courts take the view that save in the most exceptional circumstances, the judicial review jurisdiction will not be exercised where other remedies were available and have not been used.
>
> (iv) The rationale for the exhaustion of alternative remedies principle is that it is not for the courts to usurp the functions of the appellate body which has the expertise and ability to determine disputes.
>
> (v) The courts will not insist that claimants pursue an alternative remedy which is inadequate. The principle can be defined as one that requires the use of adequate alternative remedies, or the fact that an alternative remedy is inadequate may be seen as an exceptional reason why judicial review may be used.
>
> (vi) There may be other exceptional reasons why judicial review is the preferred course as each case is fact sensitive and the court must consider in exercising its discretion to hear a judicial review where an alternative remedy is available the overall circumstances including in some cases the

urgency of the case, delay, cost, or public interest concerns."

[11] It is worth commenting at this stage that the court is not dealing with an appeal from a decision which is the context for many of the leading authorities in this field. The challenge is to a decision to bring the proceedings themselves which the applicant says are unlawful and without jurisdiction.

[12] The relevant Regulations are Regulation 21 and 22. Regulation 21 provides:

"**Referral of case to Misconduct Proceedings**

21. (1) Subject to regulation 42, and paragraphs (6) and (7), on receipt of the investigator's written report under regulation 20, the appropriate authority shall, as soon as practicable, determine whether the member concerned has a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer. *(Regulation 42, and paras [6] and [7] are not relevant).*

…

(4) Where the appropriate authority determines that there is a case to answer in respect of gross misconduct, it shall, subject to regulation 9(3) and paragraph (2), refer the case to a misconduct hearing. (*Again, Regulation 9(3) and para [2] are not relevant)*."

[13] The proceedings under challenge have been brought after an investigator's report from a Superintendent McGuigan dated 18 August 2022.

[14] Regulation 22 deals with withdrawal of a case. It provides:

"**Withdrawal of case**

22. (1) Subject to section 59(6)(b) of the 1998 Act, at any time before the beginning of the misconduct proceedings, the appropriate authority may direct that the case be withdrawn.

(2) Where a direction is given under paragraph (1)—

(a) the appropriate authority may—

(i) take no further action against the member concerned;

(ii) take management action against the member concerned; or

(iii) refer the matter to be dealt with under the Performance Regulations; and

(b) the appropriate authority shall as soon as practicable give the member concerned—

(i) written notice of the direction, indicating whether any action will be taken under sub-paragraph (a); and

(ii) where the investigation has been completed, on request and subject to the harm test, a copy of the investigator's report or such parts of that report as relate to the member concerned."

[15] The allegations giving rise to the current proceedings were the subject matter of an investigator's written report which originally gave rise to a referral to misconduct proceedings, but which were withdrawn under Regulation 22 in December 2018. The applicant was then subject to the service confidence procedure.

[16] The applicant's essential point is that there is simply no jurisdiction under the regulations for the referral of these proceedings to a disciplinary panel.

[17] He argues that the decision to withdraw the proceedings against him in December 2018 was a lawful decision. There has been no new material or any new investigation into the events that form the basis of the charge which would permit the proceedings to be initiated. There is a clear public interest in the finality of administrative/quasi-judicial decisions and the applicant is entitled to regard the question of disciplinary proceedings as having been already determined.

[18] In short, the applicant contends that the proposed respondent is functus officio in terms of any disciplinary proceedings arising from the allegations which give rise to these proceedings. It is argued that the Regulations do not permit these proceedings to be brought. The decision was made in 2018 and there is no legal basis to bring these proceedings. It is argued that the decision is a nullity.

[19] Mr Beggs, on behalf of the proposed respondent, says firstly, that the misconduct panel plainly has jurisdiction to hear the allegations against the applicant. He is entitled to advance what can be categorised as "abuse of process" arguments to the disciplinary panel. Thus, the applicant has an alternative remedy

within the police misconduct regime and there are no special circumstances that justify the issues raised in this case being dealt with by judicial review.

[20] Both parties referred me to cases to support their submissions. Mindful that each case is fact sensitive, I will refer briefly to the most relevant cases which inform the court's decision on leave.

[21] In the case of *Redgrave v Metropolitan Police Commissioner* [2022] EWHC 1074 (Admin) the court dealt with an application to quash a decision of a Police Disciplinary Board to refuse to stay proceedings. The applicant relied on grounds of delay and double jeopardy. Therefore, the proceedings were at a stage further than in this case.

[22] Although, the applicant was ultimately unsuccessful, the court determined that the matter was suitable for judicial review despite the availability of an alternative remedy by way of appeal. In the court's judgment Moses J refers to para [11] of the judgment of Elias J granting leave where he said:

> "[11] The reasons which have led me to the conclusion that this is an appropriate case to have judicial review, notwithstanding the further delays that will now inevitably be caused to the timetable are these. First, if the substantive hearing goes ahead, there will plainly be not insignificant costs incurred by the parties preparing for that hearing (and the case is, in fact, due to take some eight or nine days I am told). In addition, depending on the outcome, there could be further appeals. … It would plainly be unsatisfactory for all those stages to be gone through if the right analysis is that the case should not go any further at this stage.
>
> [12] Secondly, it seems to me, that the nature of the issues raised are, as I have indicated, matters which can properly be considered by a court at this stage."

Moses J goes on say in the judgment at the substantive hearing:

> "[13] The critical time for reaching a conclusion as to whether the court is the appropriate court is at the permission stage: see *R v Falmouth and Truro Port Health Authority ex parte South West Water Ltd* [2000] 3 WLR 1464 at 1490, where Simon Brown LJ said:
>
> > 'The lesson to be learned is, I suggest, this. The critical decision in an alternative remedy case, certainly one which requires a stay, is that

> taken at the grant or permission stage. If the applicant has a statutory right of appeal, permission should only exceptionally be given … The judge should, however, have regard to all relevant circumstances which typically will include, besides any public health consideration, the comparative, speed, expense and finality of the alternative processes, the need and scope for fact finding, the desirability of an authoritative ruling on any point of law arising and, (perhaps), the apparent strength of the applicant's substantive challenge.'
>
> [14] Elias J adopted that approach, and, if I may say so, with respect, I agree with him.
>
> [15] At the heart of the complaint of delay lies the allegation that it is a manipulation of the process of disciplinary hearings to bring disciplinary charges before a disciplinary board after an unjustified lapse of a substantial period of time. If that is well-founded, courts should surely protect a claimant from that injustice. The protection is wholly inadequate if a claimant is compelled to go through the laborious stages of appeal before the courts vindicate his right not to have to undergo an unjust hearing at all. I do not understand that to be saying anything in conflict with that which fell from the judgments of Lord Donaldson MR or Simon Brown LJ. The court will carefully consider an alternative remedy, and possibly the strength of the assertion of delay, before accepting exceptional jurisdiction. That is what Elias J appears, to me, to have done."

[23] There are two significant decisions of the Court of Appeal in England & Wales, which dealt with equivalent provisions relating to police disciplinary hearings.

[24] In the case of *R v Chief Constable of Merseyside Police ex parte Merrill* [1998] 1 WLR 1077 the court quashed a decision of a Chief Constable not to stay proceedings for delay.

[25] In *R v Chief Constable of the Merseyside Police, ex parte Calveley* [1986] QB 424, the court was also dealing with the question of delay in bringing proceedings. The applicant challenged a decision by the Chief Constable to continue with and determine disciplinary proceedings.

[26] In both cases the respondent argued that the applicants should exercise their rights of appeal to an appeal tribunal, but in both cases the court was content to intervene.

[27] In *Calveley*, Sir John Donaldson MR, said the following:

> "Mr Livesey submits that the applicants' complaint of delay in serving the Regulation 7 notices and of consequential prejudice should be determined by the appeal procedure provided by Parliament. The appeal tribunal would have a specialised expertise rendering it better able than a court to assess the prejudice. Furthermore, the applicants would be able to raise new points and call fresh evidence directed to the summary charges themselves.
>
> I acknowledge the specialised expertise of such tribunal, but I think Mr Livesey's submission overlooks the fact that a police officer's submission to police disciplinary procedures is not unconditional. He agrees to and is bound by these procedures taking them as a whole. Just as his right of appeal is constrained by the requirement that he give prompt notice of appeal, so he is not to be in peril in respect of disciplinary, as contrasted with criminal proceedings, unless there is substantial compliance with the police disciplinary regulations. That has not occurred in this case. Whether, in all the circumstances, the Chief Constable, and the Secretary of State on appeal, is to be regarded as being without jurisdiction to hear and determine the charges which are not processed in accordance with the statutory scheme or whether, in natural justice, the Chief Constable and the Secretary of State would, if they directed themselves correctly in law, be bound to rule in favour of the applicants on the preliminary point, is perhaps only of academic interest. The substance of the matter is that, against the background of the requirement of Regulation 7 that the applicants be informed of the complaint and given an opportunity to reply within days rather than weeks, the applicants had no formal notice of the complaints for well over two years. This is so serious a departure from the police disciplinary procedure that, in my judgment, the court should, in the exercise of its discretion grant judicial review and set aside the determination of the Chief Constable."

[28] In his judgment in identifying the issue to be considered by the court May LJ says:

> "The principal ground upon which the court was asked to quash that decision was that there had been a breach of the rules of natural justice – in particular, it was said that the applicants would be denied a fair hearing by reason of the fact that they had not been served with notice of complaints made against them as a result of the relevant incident as soon as was practicable in accordance with Regulation 7 of the Police (Discipline) Regulations 1977."

[29] Like John Donaldson MR, May LJ considered this was a matter suitable for judicial review.

[30] Mr Beggs referred me to the decision of Mr Justice Saini in the Administrative Court in England & Wales in *R(On the Application of Short) v Police Misconduct Tribunal* [2020] EWHC 385 (Admin). That case involved a challenge to impending disciplinary proceedings. The primary ground relied upon by the applicant was that the Chair of the panel had been tainted by reading certain documents. The applicant challenged a refusal by the Chair to recuse himself because, in the applicant's view there was a real possibility of bias.

[31] The court looked at the question of alternative remedy and, in particular, the designated avenue of appeal to the Police Appeals Tribunal. Saini J took the view that the availability of a statutory process which included an appeal process was, on the facts of the particular case, fatal to his claim.

[32] He concluded that the statutory misconduct process was sufficiently robust to address all the issues that were raised by the applicant.

[33] At para [59] he says:

> "[59] It is clear in my judgment that the statutory framework is capable of giving rise to the same remedies of judicial review. The statutory route available is an adequate alternative remedy as a matter of substance: it is practically available, and there can be no suggestion, to my mind, that the procedure to which it is obtained is inadequate."

[34] He considers the cases of *Merrill* and *Calveley* at paras [64] and onwards of his judgment and says at para [65]:

> "Those cases do not advance the claimant's position. Each of these cases arose out of a refusal to stay

> misconduct proceedings for abuse of process. In my judgment, that is highly significant because it meant that the relevant judicial reviews, if successful, would bring an end to the misconduct proceedings and, thus, avoid contested hearings on the facts lasting weeks and followed by appeal processes. It is not difficult to identify why such facts might be said to give rise to exceptional circumstances."

[35] I consider this is an important passage in the context of this application.

[36] At issue here is the validity of the proceedings themselves, which arguably gives rise to a question of substantive law suitable to judicial review.

[37] What is contemplated by the proposed respondent in this case, is that the applicant should proceed to argue an abuse of process at the panel hearing, if necessary, proceed to the substance of the allegation, and again, if necessary, to pursue his right of appeal to the Appeals Tribunal.

[38] I agree that issues raised in this judicial review in respect of the first decision challenged could be argued in front of the misconduct panel, on the basis of an alleged abuse of process. That could give rise to the disciplinary proceedings being dismissed at that stage.

[39] However, I respectfully adopt the comments of Moses J in the *Redgrave* case as being apt here.

[40] If the applicant's complaint in this case is well-founded, the court should protect him from the injustice he alleges, rather than compel him to go through the laborious stages of a hearing and then a potential appeal before the courts vindicate his right not to have to undergo an unjust hearing at all. His judicial review, if successful, would bring an end to the misconduct proceedings and avoid contested hearings and potential appeals. In the words of Saini J:

> "It is not difficult to identify why such facts might be said to give rise to exceptional circumstances."

Conclusion

[41] Whilst finely balanced, I conclude that the applicant should not be refused leave on the grounds of the availability of an alternative remedy.

[42] In terms of the merits of the substance of the judicial review, I am satisfied that the applicant meets the threshold for leave in respect of all three decisions challenged.

[43] I did give consideration to separating a review of the individual decisions, confining the leave to the issue of whether or not the Tribunal had jurisdiction to hear the proceedings, but I consider that on balance, it is in the interests of justice to consider all issues arising and to provide the maximum guidance to the parties.

[44] For the reasons given, therefore, I grant leave in respect of each of the decisions challenged.

[45] I confirm that the interim relief previously granted in relation to staying the disciplinary proceedings pending the outcome of this application or further order of the court remains in place.

[46] I will reserve costs until the completion of the proceedings.