

**Neutral Citation No. [2008] NIQB 159**

Ref: **GIL7063**

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

Delivered: **14/3/08**

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

---

**Re AN APPLICATION BY CONSTABLE SEAN FARRELL AND  
CONSTABLE GORDON WILLS FOR JUDICIAL REVIEW**

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

---

**GILLEN J**

**Applications**

[1] These are applications by two serving police officers to quash decisions made on 6 November 2007 to transfer them from duty at Dungannon PSNI station to duty at Enniskillen and Omagh PSNI stations. In addition, to quash decisions of Chief Superintendent Skuce and Ms Gillian McDowell, Head of Human Resources, made on 8 November 2007 whereby they declined to allow the applicants' appeals against their transfer.

[2] The grounds upon which the relief is sought in each instance are as follows

- (1) Breach of the applicants' substantive legitimate expectation of remaining in Dungannon.
- (2) Failure to apply the PSNI's own transfer policy in respect of the duration of the transfer, selection for transfer and appeal of transfer.
- (3) Procedural unfairness.
- (4) Use of a transfer in a punitive manner.

- (5) Wednesbury irrationality.
- (6) Breach of the applicants Article 8 rights under the European Convention of Human Rights and Fundamental Freedoms ("the Convention").
- (7) Failure to give adequate reasons.

Leave was granted on the 13<sup>th</sup> December 2007 by this court.

## **Background**

[3] The applicants allege that on 25 June 2007 two female police officers ("the complainants") made a number of allegations against them in relation to alleged impropriety in dealing with detained prisoners on 20 June 2007. As a result an investigation was commenced by the Police Ombudsman for Northern Ireland ("PONI") which is still ongoing. At the time the allegations surfaced the applicants and the two complainants worked in F district D section at Dungannon.

[4] The applicants assert that at that stage both themselves and the complainants were offered transfers which would have permitted them to move to a position of their choosing. The applicants had refused the option and remained in Dungannon. The complainants had been transferred to a place of their choice.

[5] It is the applicants' case that in October 2007, PONI staff conducted interviews with them. Shortly thereafter they were summoned to a meeting with Human Resources and advised that a male complainant had now also made allegations of bullying against them. They were informed there would be a Human Resources investigation into this matter and a notice to this effect was served upon them.

[6] On Tuesday 6 November 2007 the applicants allege they were summoned to a further meeting on the direction of Chief Superintendent Michael Skuce ("CS Skuce"), District Commander to F District (comprising Cookstown, Omagh, Fermanagh, Dungannon and South Tyrone command areas). At that meeting Chief Inspector Tom Sinclair and Ms Gillian McDowell the Human Resources Manager for F District were present together with Inspector Bond who was there at the applicants' request. Inspector Bond attended rather than a Police Federation representative because the applicants allege they were told of the meeting without any notice. At that meeting Constable Farrell was informed that he was being transferred to Enniskillen and Constable Wills was told he was being transferred to Omagh "in the interests of fairness to all concerned" and also "in the interests of themselves

and the Service". The transfer was to take immediate effect and the officers were to begin duties the next day ie 7 November 2007.

[7] The applicants assert that CS Skuce informed them that they ought to have been moved at the time the complaint was made against them in June 2007. Whilst the transfer was to be temporary Chief Inspector Sinclair was unable to give them any time period. They were further informed that they were not being held guilty of anything, that their transfers were not a punishment and were simply "in the interests of fairness". Thereafter by way of letter dated 7 November 2007 from Gillian McDowell, the applicants were informed of the decision in writing stating that the transfer "is due to the ongoing investigation into the incident in Dungannon on 20 June 2007". The letter continued:

"The reasons for this are:

- The matter has been reviewed and it is concluded that the decision to move only Constable Wright and Constable Martin was wrong. In the interest of fairness it is felt necessary to temporarily transfer you until the PONI investigation has concluded.
- Further incidents have come to light, which require investigation concerning your behaviour such as the NICHE training incident and the alleged bullying/harassment made by Constable McVeigh.
- Senior management has a duty of care to protect all officers in the workplace to ensure a harmonious working environment".

[8] The applicants indicate that the "NICHE training incident" refers to training which took place at Gough Barracks in Armagh on the NICHE computer system. Civilian trainers complained that the class had been disruptive during the training and that both the applicants were part of that class but not, as they understood it, singled out for complaint. They were unaware that there had been any formal complaint about the training, any official investigation into it and they failed to see how it could have relevance to the decision to transfer them.

[9] The applicants at this stage draw attention to the fact that the letter made no reference to a further allegation of racial policing which, they argue, has subsequently emerged as a reason for the transfer in this case.

[10] Subsequent to the meeting of 6 November 2007 the applicants invoked the assistance of their Police Federation representative.

[11] The applicants were informed by their Police Federation representative that during discussions with Chief Superintendent Skuce he indicated that there were “some further allegations against Constable Wills and (Farrell) but that these were of a nature that could not be discussed.” Chief Superintendent Skuce refused the request of the Police Federation representative to suspend the transfers to enable the applicants to obtain legal advice before they would come into effect.

[12] On 7 November 2007 the applicants lodged written appeals against the transfer decision. It is common case that the PSNI’s transfer policy, Service Procedure 58/2007, (“the Service Procedure”) a copy of which had been sent to the applicants by Ms McDowell in her letter of 7 November 2007, governed the transfer procedure and appeal process.

[13] On 8 November 2007 Ms Gillian McDowell sent a letter to the applicants which stated inter alia:

“In response to your appeal, Chief Superintendent Skuce and myself have reviewed the original decision and in the interests of reasonableness 15 days notice will now be given. Therefore you will commence in Enniskillen on 26 November 2007.”

A similar letter was sent to Constable Wills re his transfer to Omagh. The letters went on to say:

“The organisational need was identified in the letter dated 7 November 2007 notifying you of the transfer decision.”

The bullet points set out in the letter of 7 November 2007 and quoted above in paragraph 7 of this judgment were then repeated.

### **Service Procedure 58/2007**

[14] Where relevant the contents of this Service Procedure are as follows:

#### **“17. Non Voluntary Transfers**

(1) The District Commander or Department has the authority to direct or order where an officer must serve within their area of command. Consequently, the PSNI continues to reserve the right to manage the transfer of officers if it is in the best interests of the Service and/or the officer.

(2) Following consultation with the HR Department the District Commander/Head of Department will assess if an identified organisational need exists within their District or Department.

(3) Once the need to conduct non voluntary transfers has been established, the Head of HR will assess if one of the following solutions could be implemented prior to instigating a selection process:

- (a) ask for volunteers;
- (b) consider temporary transfers;
- (c) seek mutual aid from other areas.

(4) Should none of the above options provide suitable officers for transfer the head of HR may instigate one of the following selection methods:

- (a) ask for evidence of compelling circumstances which may preclude an officer from moving posts/location;
- (b) require all eligible officers to complete a pro forma stating their reasons why they should remain in the particular post/location . . .
- (c) random selection conducted by the head of HR . . .
- (d) in respect of internal transfers the district commanders/head of department to make the decision and record the rationale for the method of selection and the process used.

(5) Where a non voluntary transfer has taken place the local Head of HR will provide the officer with written notification. This notification will state the date, the location and the reasons for the transfer along with the specific grounds for selection. These details will be retained on the officer's personal file.

...

**20. Notice of Internal Transfer (voluntary and non voluntary)**

(1) 15 days notice will normally be given to the officer being transferred.

(2) This notice will not be necessary if there are exceptional organisational requirements . . .

**22. Internal Transfer Appeals Process**

(1) The appeals process will apply to:

(a) refusal of a voluntary transfer request;

(b) non voluntary transfer.

(2) An appeal can only be lodged -

(a) when an officer considers there have been procedural flaws in the transfer process;

(b) when an officer considers that they have not been treated equitably;

(c) where there are compelling circumstances which have not previously been considered;

(d) in each case it is the officer's own responsibility to provide specific evidence to support the appeal within the set time limits . . .

**23. Internal Districts/Department Appeal process**

(1) General

(a) in considering the appeal the appellant authority must consult with the officers Staff association;

- (b) at every stage the appellant will be provided with a written copy of the appellant authority's decision;
- (c) the HR Manager will be responsible for ensuring that all stages of appeal are conducted in compliance with the specified time limits and the officer is notified of all decisions in writing.

...

(2) Stage One

- (a) An officer who wishes to appeal their transfer or transfer refusal must submit the full grounds for appeal in writing to their HR Manager within 14 days from notification (*it is accepted that this was done in this instance*).

- (b) Within 7 days of receiving the appeal papers from the appellant the individual who made the initial transfer or refusal will examine the facts and conduct a review of their decision. Where there is no change to the decision they will prepare the appeal papers.

(3) Stage Two

- (a) Appeal papers will be forwarded to a Chief Inspector within the district/department, not previously connected to the transfer decision.

- (b) Within 7 days of receiving the appeal papers the Chief Inspector shall make a decision. The HR Manager must then inform the officer of the decision within the 7 day time limit.

(4) Stage Three

- (a) If the appeal is not upheld at the appellant considers:

- (i) they can provide new evidence not previously available to the appellant authority; or
- (ii) there have been procedural flaws.

...

#### **24. Temporary Transfers**

(1) A temporary transfer is defined as the movement of personnel within the Service from their permanent post to different duties for a limited period.

(2) A temporary transfer shall be for a pre-determined period that will not normally exceed 12 months. HR department must review such transfers on a 3 monthly basis.

(3) If there is a requirement to exceed the 12 month period, the host must submit a business case to a member of the Senior Management Team for that District/Department not below the rank of superintendent or police staff equivalent before being submitted to HR."

Appendix A, paragraphs 1 and 2 states:

#### **"1. Compelling circumstances**

Where there are compelling circumstances it may be necessary to transfer an officer. This transfer request could be initiated on behalf of the Service on an individual's request for one of the following documented reasons -

- (1) Organisational requirement.
- (2) Security threat.
- (3) Compelling welfare.

#### **2. Organisational requirement**

(1) The transfer of an officer following the initiation or completion of criminal or disciplinary



investigations, or in compliance with obligations associated with other Service Policies such as Bullying and Harassment, Policy Directive No 01/05 or Service Confidence Procedures should not be construed as being in place of any prescribed punishment”.

## **Justiciability**

[15] It was the respondent’s case that this was a matter of private law between employer and employee in relation to operational decision making. Mr McGleenan, who appeared on behalf of the respondent, relied on the authority of R (Tucker) v Director General of the National Crime Squad (2003) EWCA 2 (“Tucker’s case “). In that case a Detective Inspector challenged a decision to terminate a secondment to the national crime squad by way of judicial review. Three citations at paragraphs 22, 27 and 32 from the judgment of Scott-Baker LJ are relevant:

“22. The present case is not about dismissal. The impugned decision did not affect the appellant’s status as Detective Inspector. While it is true that the NCS performs an important public function, as to police forces generally, that does not mean that every decision personal to an individual officer engages public law remedies. There is a line over which the courts cannot go. It is impermissible to trespass into the management of police forces generally or the NCS in particular.

27. A police officer is in a different position from other employees. On becoming an officer he forfeits certain advantages, for example, the right to strike or bring proceedings for unfair dismissal. He is subject to the discipline of his force and has by and large to go where and do what he is told. On the other hand he gains certain advantages for example the right to remain in service, health permitting, and to ill health and injury pensions. Dismissal or other disciplinary punishment is governed by statutory procedures that are amenable to judicial review in the event of any breach of public law principles such as fairness.

32. In contradistinction to the decision with regard to the other officers, there was no disciplinary element to the decision in the

appellant's case. He was returned to his force because the respondent had lost confidence in his ability to carry out his responsibilities. It seems to me that this was an entirely operational decision similar to the kinds of decision that are made with officers up and down the country every day of the week. Examples are transferring officers from uniform to CID or from traffic to other duties. These, to my mind, are run of the mill management decisions involving deployment of staff or running the force. They are decisions that relate to the individual officer personally and have no public element."

[16] While I respectfully adopt the principles set out by Scott-Baker LJ, I consider the current case is distinguishable from Tucker's case because of the disciplinary element present. These men are not being transferred because of operational needs as opposed to organisational requirements in a disciplinary setting. On the contrary, they are being transferred because of a number of disciplinary matters involving them are being investigated. The disciplinary investigations have not been completed. Nevertheless I am satisfied that the investigations themselves invest this matter with a sufficient "disciplinary element". It was complaints about the conduct of these men that clearly gave rise to the transfer decision and are the subject of on-going disciplinary investigation.

[17] I find further reassurance on my conclusion on this aspect to the law in R (On the application of O'Leary) v Chief Constable of Merseyside Police [2001] EWHC Admin 57 ("O'Leary's case"), where a serving police officer had sought judicial review of a decision to transfer him to uniform duties rather than the CID in light of a background of disciplinary charges. He successfully obtained judicial review of a decision to restrict his deployment on the basis that he had not been afforded an opportunity to make further representations on a report that had not been disclosed to him. At paragraph 16 Scott-Baker LJ said:

"In the particular circumstances of this case, I consider that there was procedural unfairness in procuring a change of mind on the part of the Chief Constable on the basis of a report that was not disclosed to the claimant. The Chief Constable, having come to a decision at the end of a fair hearing, then proceeded to alter a part of it to the detriment of the claimant on the basis of a report which contained errors and in relation to which the claimant was not given the opportunity

to make representation. Again, I do not think that this can be justified by seeking to identify the report as an operational rather than a disciplinary matter. It is too closely connected with the disciplinary hearing”.

I have concluded that the instant case too is closely connected with disciplinary elements.

[18] Mr McGleenan relied upon the fact that there is a source of statutory power for disciplining police officers in Northern Ireland which derives from regulation 9 of the RUC (Conduct) Regulations 2000. This sets down the procedure for the giving of notice when a police officer is being investigated for breach of a code of conduct. These Regulations were updated in the Police Service of Northern Ireland (Amendment) Regulations 2003. Mr McGleenan argued that there is only a disciplinary context if a Regulation 9 notice is issued. That has not occurred in this case at this stage. Accordingly he argued that until Regulation 9 is invoked and the statutory discipline process brought into play, Tucker does not apply. However this ignores the fact that there was an ombudsman investigation in this matter with the requisite notices served in June 2007. This transfer was clearly initiated in the wake of disciplinary investigations and in accordance with the transfer procedures for police officers under the Service Procedure at appendix A paragraphs 1 and 2. I therefore am not persuaded that a Regulation 9 Notice is necessary before there can be a disciplinary element in this matter.

[19] The findings that I have made above are sufficient in my view to dismiss Mr McGleenan’s contention that this matter is not justiciable. Mr Scoffield, who appeared on behalf of the applicants, sought to persuade me that in any event I should not follow the authority of Tucker’s case which, being a decision of the Court of Appeal in England and Wales, is purely of persuasive authority. It was Mr Scoffield’s contention that Tucker’s case ran contrary to the decision of Kerr J in Re Aitken’s application (1995) NI 49 which he submitted was authority for the proposition that judicial review of the removal of police officers is not confined to disciplinary proceedings. In light of my finding in paragraph [18] above, it is unnecessary for me on hearing this matter at first instance to determine that issue save to add that the decision in Tucker appears to me to have a practical and logical resonance which chimes with the distinction between private/public law matters based on the nature of the function being carried out.

### **Legitimate expectation**

[20] Mr Scoffield asserted that the applicants had been permitted to remain on duty in Dungannon for approximately 4 ½ months or thereabouts after the circumstances now relied on as justifying their transfers. It was the

applicants' contention that this engendered a legitimate expectation that they would not be transferred. Concerns had been raised about the applicants' transfers on 5 July 2007 and CS Skuce had indicated that he became aware that the applicants had not agreed to their transfers by 18 July 2007. Mr Scoffield asserted that nothing had occurred to change those circumstances prior to the decision to transfer them. The original complainants were no longer in Dungannon and the NICHE allegation of misbehaviour at a training session should not have precluded them remaining in Dungannon. The allegation of bullying was in relation to a police officer no longer serving in Cookstown/Dungannon and the applicants had not been informed of the racial abuse allegation.

[21] A decision maker exercising discretionary powers in the area of public law may create a legitimate expectation on the part of a person affected by the exercise of that power as to the manner in which the power will be exercised. This may occur on the basis of a promise or a representation about treatment made by the decision maker. In Council of Civil Service Unions v Minister for the Civil Service ("the GCHQ case") Lord Fraser indicated that the two ways in which a legitimate expectation may arise were "either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue". The representations which induce a legitimate expectation can thus be expressed or implied. However there is clear authority that such a representation must be clear, unambiguous and devoid of relevant qualification. (See ex p.MFK Underwriters (1990) 1 WLR 1545 at 1570). Moreover the legitimate expectation must be induced by the conduct of the decision maker. The expected benefit or advantage must be more than a mere hope.

[22] I find nothing in this case which suggests that there has been a clear unambiguous or unqualified representation express or implied given to these police officers that they would remain in Dungannon. The fact that they were permitted to remain between June 2007 and November 2007 can provide no such foundation for such an expectation. Police officers are always subject to the possibility of a transfer irrespective of whether or not a complaint is made.

### **Punitive Element**

[23] I pause to observe at this stage that the applicants also asserted that they had been transferred in a manner which was punitive in intention or effect and was thus unlawful. The transfer was asserted to have constituted an improper use of the Chief Constable's power to direct where an officer must serve. I reject this submission. Paragraph 2 of appendix A of the Service Procedure to which I have earlier referred expressly indicates that the transfer of officers following initiation of disciplinary investigations should not be construed as being in place of any prescribed punishment. The policy itself provides for temporary transfers as an interim measure to be utilised during investigations.

As Mr McGleenan has pointed out, these men retained their rank, salary and emoluments with their terms and conditions unchanged being engaged, in like work of equal value to that which they performed in Dungannon. Hence I find no basis for a punitive aspect to this transfer. Paragraph 17 of Chief Inspector Sinclair's affidavit of 16 January 2008 refers to CS Skuce stating that the decision to move Wills and Farrell to Omagh and Enniskillen still stood as he believed they would be more closely supervised in a section that does not in my view amount to a punitive transfer.

### **Legitimate expectation and the failure to adhere to the PSNI transfer policy**

[24] Mr Scoffield submitted that the Respondent had failed to adhere to the letter of the PSNI transfer policy. The applicants were entitled to the protection of the Service Procedure Policy which governed the discretion which might be exercised in relation to transfers by the Chief Constable. A policy statement issued by a decision maker as to the procedures to be adopted before a power is exercised can amount to a typical example of the creation of a legitimate expectation on the part of the person affected by the exercise of that power as to the manner in which the power will be exercised. Mr Scoffield drew my attention to the fact that the transfer policy at paragraph 2(3) declares:

“Commanders/Heads of Departments must comply with the provisions of this Service Procedure and any guidelines as agreed by the Senior Command Team.”

[25] Moreover Ms McDowell, Head of Human Resources in the PSNI, made an affidavit on behalf of the respondents on 16 January 2008. At paragraph 14 she asserts that the applicants “temporary transfers were considered in line with the Service Procedure 58/2007”.

[26] At paragraph 22 (iii) she states -

“There was an organisational need for these transfers as I have indicated above. This was identified in accordance with Appendix A, paragraph 2(1) of the Procedure 58/2007 I can confirm that the procedure for temporary transfers was followed in these cases.”

[27] In the matter of an application by Astrit Zekaj for judicial review (unreported GILF5733), in the context of an immigration case, I reviewed the principles governing policy statements at paragraph 5 as follows:

“It is important to appreciate that this document is a policy set out in a document and is not an Act of Parliament. I consider that the approach to be adopted is that taken by Auld J in R v Secretary of

State for the Home Department ex parte Engin Ozminnos (1994) Imm AR 287 at 292 where he said:

“The internal policy document against which the exercise of this discretion is to be measured, is not a statutory document. It is not to be subjected to fine analysis so as to interpret it in the way one would a statute”.

[28] On the other hand this must be tempered by the proposition that consistency and the avoidance of arbitrariness are basic principles of good administration. Decision makers cannot ignore policy with impunity. In R v Secretary of State for the Home Department ex parte Urmaza (1996) COD 479 Sedley J said:

“A decision maker can be held in public law to his policy with departure requiring the articulation of a good reason, given –

- (i) the principle of consistency (and avoidance of arbitrariness),
- (ii) the duty to have regard to relevancies,
- (iii) the avoidance of over rigidity, and
- (iv) the need to give effect to legitimate expectations”.

[29] Accordingly I consider that the applicants do have a legitimate expectation that the Chief Constable in reaching decisions on transfers will not stray outside the general terms of this policy or make a decision based on grounds not included in the criteria therein set out in the absence of a good reason.

[30] It was the applicants’ contention that there had been a breach of paragraph 24(1) and (2) of the Service procedure in that the temporary transfer of these applicants had not been for a limited period or a predetermined period. It was Mr Scoffield’s contention that in respect of a temporary transfer, the PSNI, in order to comply with the policy, was obliged to determine in advance the length of time for which the temporary transfer would last. In this instance the applicants had not been informed as to what length of time their transfers would last save that Ms McDowell had confirmed that the transfers would be temporary “until the conclusion of the investigations”.

[31] I consider that Mr Scoffield is lending to this policy document ie the Service Procedure, the precision of an Act of Parliament. This document sets out in layman's language and in broad terms the policy which is to be followed in a temporary transfer. It is clear that temporary transfers may well be required for specific occupational needs e.g. a period of unrest in a certain part of Northern Ireland. It would be unreasonable to expect a set time to be given other than to specify that the transfer is for the period of unrest, shortage of manpower etc. There is nothing in the phrases "limited period" or "predetermined period" that indicates the period must be defined by time rather than circumstances. The temporary transferee is well protected by virtue of the fact that the transfer will not normally exceed 12 months (see paragraph 2(2) and will be reviewed on a 3 monthly basis. To require Commanders to specify a precise period in terms of days or weeks would be artificially restrictive and unrealistic given the organisational requirements that may be thrown up from time to time. Legitimate expectations must be reasonable (see Att-Gen (Hong Kong) v NG Yuen Shiu (1983) 2 AC 629) since the doctrine operates so as to maintain a fair and reasonable balance between the public and private interests at stake. I consider it unreasonable to expect Commanders to fix maximum periods in terms of days and months when the practical need may be for the period of an event which cannot be measured in such close terms other than the fact it will not last more than 12 months and will be reviewed every 3 months.

[32] Thus in this case, the investigation is being carried by external bodies and the precise length of the investigation will be unknown to the Commander. To use the service procedure in the way advocated by Mr Scoffield would be a recipe for operational paralysis precluding its meaningful use for such matters as investigations or civil unrest...

### **Procedural Fairness**

[33] It was the applicants' case that the Respondent had concealed from them at least part of the reasoning behind the transfers namely the allegation of racist policing. Moreover they had been denied the opportunity to make representations about this matter. This amounted to an instance of procedural unfairness in Mr Scoffield's submission.

[34] Dealing with non-voluntary transfers, paragraph 17(5) of the Service Procedure declares:

"Where a non-voluntary transfer has taken place the local Head of HR will provide the officer with written notification. This notification will state the date, the location and the reason(s) for the transfer along with the specific grounds for selection.

These details will be retained on the officer's personal file".

[35] I consider that the respondent is obliged to consider the issue of the transfer in a procedurally fair way consistent with the service procedure. In Tucker's Case at paragraph 45 Scott-Baker LJ said:

"In my judgment the Deputy Director General was entitled to have in mind the risks attached to disclosing to the appellant the full circumstances of why his secondment was being brought summarily to an end. This does not of course mean that fairness goes out of the window altogether and nor, so far as I can see, did it in this case. The bottom line is that the Deputy Director General acted in good faith and gave such information as he felt he could. Furthermore, the decision was reviewed and some further information provided as events unfolded. What the courts cannot do in a case such as this is scrutinise the decision and form its own view whether the Deputy Director General was objectively justified in withholding information".

[36] The extract from O'Leary's case that I have drawn on in paragraph 17 of this judgment adds weight to that proposition.

[37] I am satisfied that the rules of procedural fairness do apply in the instant case. Any material which influenced the decision-makers and which constituted a reason for the transfer ought to have been communicated to the applicants so that they could make representations on their behalf and appeal against any such reasoning.

[38] However I am not persuaded on the facts put before me to the requisite standard that the allegations of racist policing which surfaced during discussions about these officers prior to the decision to transfer them played any or any material part in the decision-making process. Accordingly I do not consider that the allegations of racism were something which they ought to have been permitted to make representations on or that they should have been informed that this matter constituted one of the reasons for the transfer.

[39] I have formed this factual conclusion for a number of reasons. First, had it played a part in the reasoning, I can conceive of no good reason why the investigation of allegations of racist policing would not have been



communicated to these officers. They were clearly told that the reasons included the concern about the transfer of Constables Wright and Martin, and reference was further made to other incidents such as the NICHE training incident and the alleged bullying/harassment made by Constable McVeigh. Why would a further reason have been withheld?

[40] Mr Scoffield made much of the content of the minutes of the meetings of 10 September 2007, 29 October 2007, 5th November 2007 and 6 November 2007 to found his suggestion that the racist allegation did form part of the decision-making process which was not disclosed to the applicants. I find no weight in those assertions. I shall address first the meeting of 10 September 2007 to review the incident that occurred on 20 June 2007. Present were CS Skuce, Superintendent Nolan, Gillian McDowell and Chief Inspector Sinclair. Whilst the racism allegation surfaced at that meeting, the references recorded indicated that it could not form a basis of the decision to transfer. Relevant extracts from that minute are as follows:

“Ch/Supt Skuce went to speak about the transfer of Constables Wright and Martin - then asked - ‘what about Constables Wills and Farrell?’ He said that we have no further evidence of racism to endorse these moves.”

“Supt Nolan added that Constables Wills and Farrell have confirmed that PONI have only spoken to them about the alleged assault on the prisoner (whom would be deemed an unreliable witness) and the alleged assault on Constable Wright. She added that we have since received the report from the NICHE trainers re the officers’ behaviour and use of foul language during training. there is also an issue with a missing police radio, although this was during a fracas and the issue is deemed to be minor”.

“Ch/Supt Skuce then suggested ringing Ch/Supt Lindsay-White (PSD) for a conference call to discuss the issues of NICHE training, Constable McVeigh’s bullying and harassment (B and H) allegation and the alleged racism by Constable Wills and Farrell.”

“Ch/Supt Skuce confirmed that we needed to action something here today. He strongly felt that we needed to liaise with PSD and confirm exactly

what they are dealing with. Mr Skuce went on to re-cap some of the issues.”

“Constable Farrell and Wills – Mr Skuce confirmed that management had looked at some statistics etc ... and these two officers weren’t sitting much above anyone else with regards to stopping Foreign Nationals.”

“Ch/Supt Skuce ... went on to speak about the alleged racism and gave a brief outline. He stated there some uncertainty surrounding this and PONI’s involvement”.

*“Ms McShane (to whom a telephone call had been made in PONI at 3.05pm on that date to arrange an urgent meeting) confirmed that two male officers had been interviewed about the alleged assaults on Constable Wright and on the prisoner, and that neither of these officers has made counter allegations. She went on to say that these two officers have not yet been spoken to re the alleged racism and felt that more information was needed for that to happen. ... She added that PONI were to investigate the alleged racism, they would need more information to research this”.*

[41] Therefore so far as the meeting of 29 October 2007 is concerned, I find nothing to substantiate the suggestion that his allegation of racism was to form part of the decision for transfer. Whilst it was being earnestly scrutinised, it seems clear to me that each time it was visited, it was met with an assertion that there was insufficient information. Hence it seems to me that it was clear that it could not form the basis for any decision to transfer these men.

[42] The subject was again revisited in the minutes of a meeting on 5 November 2007 at Clogher PSNI Station where Ms McShane spoke to CS Skuce and Superintendent Nolan. There was a general discussion about the behaviour of the applicants and in particular that Constable Wright has alleged that the assault at Dungannon was simply the straw that broke the camel’s back and that she had approached her line manager – Sergeant Alison – several times before about the behaviour of the applicants eg “calling young males homos, the disproportionate amount of stopping and searching foreign nationals”. CS Skuce did ask if the PONI “will speak to Wills and Farrell about the alleged racism before the PPS file goes through?”. Ms McShane “confirmed that PONI can speak to these officers in the interim, but added

that if PPS decide to prosecute for the assault, it would leave other allegations "cleaner" and "easier to deal with".

[43] Other references at this meeting of 5 November 2007 to racism included the following:

"Ch/Supt Skuce asked about the information PONI needed for their analyst. Ms McShane said they would need ICIS checks, 55/8's and stop and searches. She said the analyst would need to look at these alongside the demographics of the area and see if any patterns stood out. She said this could take up to 4 months. Ch/Supt Skuce confirmed we would get that information through to PONI as quickly as possible. ... Ch/Supt Skuce said he hoped PSD would take the other issues on."

[44] Once again I can discern no positive evidence here that the racism allegation was to be a reason for the transfer. Understandably in my view a senior police officer was querying the issue of racism but nothing occurred in the course of that meeting which could have substantiated that being a reason at that stage for the transfers.

[45] On 6 November 2007 at a meeting at which CS Skuce, Chief Inspector Tom Sinclair, and Ms McDowell were present relevant extracts from that meeting concerning racist policing reveals the following :

"Ch/Supt Skuce opened the meeting by confirming that all present were aware of the ongoing PONI investigation into the alleged assaults in Dungannon on 20 June 2007. He talked about the transfer of the two female officers being found to be wrong and as a result of this, and looking at the bigger picture in Dungannon, a decision has been to reposition some officers.

Mr Skuce continued by saying that Constable Wills and Constable Farrell would be temporarily transferred. He added it concerned him when he received paperwork from NICHE trainers about alleged bad behaviour in the class and Constable Wills and Constable Farrell had been named in that report".

[46] I pause here to observe that the decision is therefore described as having been completed and there is no reference to the racism as being part of that decision. Rather the discussion of the NICHE training incident when the alleged bad behaviour and use of foul language had taken place the main topic at that meeting.

[47] Further notes of that meeting on 6 November 2007 refer to the allegations of racism in the following manner:

“Ch/Inspt Sinclair asked about the allegations of racism – has this been looked at?

Ch/Supt Skuce confirmed that PONI would take this on.

Ch/Insp Sinclair asked what do we do if these allegations come back unfounded?

Ms McDowell said that if that happens we would have to meet again and decide the next step.

Ch/Supt Skuce said if this comes back as unfounded, it would still be very difficult for the officers to work together. Mr Skuce rounded up the meeting again stressing the confidentiality of these issues”.

[48] I find no basis in these minutes for concluding that the racism was a factor in the decision to transfer these men. The lack of evidence about the issue is self-evident from a consideration of these minutes despite the concerns raised. The applicants have translated their suspicions into bald unsubstantiated assertions of fact. I can well understand why it did not form part of the decision-making process. That being so it would have been inappropriate in my view to have raised it with the applicants or to have invited them to make representations concerning same. It is right to say that the Police Ombudsman was conducting an inquiry into this matter, but it was not being dealt with by the PSNI and what information they had was very limited. After the transfer, at the end of November, a notice from the Police Ombudsman was served on Constable Wills to the effect that he was to be investigated on this matter. That does not persuade me that prior to this and prior to the decision to transfer, it was a factor in that decision. I reject Mr Scoffield’s assertion that it was a highly influential matter.

I therefore conclude that there is nothing procedurally unfair in this treatment of the racist allegations and I am not satisfied that they formed any part of the decision-making process.

[49] On the other hand I am fully satisfied that they were aware of the allegations about the NICHE training incident and the bullying/harassment suggestions. They were clearly raised with them prior to the decision being taken and were contained in the reasons put forward.

### **Wednesbury Irrationality**

[50] I find no warrant for a claim of Wednesbury irrationality in this case. The fact there was delay before arriving at this decision was clearly unfortunate and it was a matter that self evidently troubled the decision-makers. Nonetheless it did not change the unfairness of the original decision to move only Constable Wright and Constable Martin and the need to introduce, albeit belatedly, a measure of fairness into the process.

[51] Mr Scoffield argued that only the racist allegations could have provided the basis for the transfer. No other reason provided any rational basis. I am unpersuaded by this argument. The fact of the matter is that senior management did have a duty to protect all officers in the workplace to ensure a harmonious working environment. The mere fact that those involved in the alleged training incident at NICHE and the alleged victim of the bullying and harassment were no longer present in Dungannon does not deflect from the general need to take steps to temporarily separate and transfer these men from the area until the relevant investigations had been concluded. This was not a punitive step in my view and could not constitute the high threshold of irrationality needed to aspire to the Wednesbury level on an operational basis. I remind myself that the role of the court in Judicial Review is not to sit as a court of appeal on the merits of such an operational decision but rather to confine myself to deciding if it was so irrational as to lift it outside the bracket of reasonable discretion vested in the decision makers. I am not so satisfied in this case

### **Breach of Article 8 of the Convention**

[52] I am not satisfied that the Article 8 rights under the Convention of these men were engaged in this transfer process. I regard these transfers, albeit within a disciplinary context, as being matters of organisational management which were non punitive in nature and had nothing to do with their private lives. (See Tucker's Case at paragraph 25). It is a fact of public service that transfers may be required from time to time and individuals may have to suffer the inconvenience of travelling greater distances than perhaps they would have wished. As was indicated in Tucker's Case at paragraph 27, on being a police officer, the applicants forfeited certain advantages one of which is that they do not have the right to determine where they serve. There are great advantages in service in the PSNI including for example the right to remain in service and to ill-health and injury pensions. Movement of police

officers is therefore one of the burdens which is well matched by the advantages.

[53] If I am wrong in this determination, and the Article 8 rights of these men were engaged, I am satisfied that the transfers in this instance were in accordance with the law, were for a legitimate aim namely organisational requirements with a disciplinary element and were proportionate to the legitimate aim. The proportionality aspect is well illustrated in my view by the consideration that was given to the officer with the family who was transferred to Omagh whilst the officer without family was transferred the greater distance to Enniskillen. I consider that the minutes to which I have earlier referred illustrate that due consideration was given to the family circumstances of both officers prior to the decision being made.

[54] It will be clear from my earlier comments that I have determined that both these officers were given reasons for the decision at the meeting of 6 November 2007 and in subsequent correspondence.

### **The three stage appeal**

[55] The applicants lodged appeals against their transfers on 7 November 2007. These appeals are governed by paragraph 23 of the Service Procedure. It was the applicants' submission that their appeals were simply determined in one stage by CS Skuce and Ms McDowell and not thereafter considered by someone not previously connected to the transfer decision as required by 23(3). Ms McDowell on behalf of the Respondent at paragraph 12 of her affidavit states as follows:

“Constables Wills and Farrell were informed of their right to appeal and both submitted an appeal on 7 November 2007. Following consultation with Chief Superintendent Skuce a response to both appeals was sent on 8 November 2007. It stated that Chief Superintendent Skuce had reviewed the original decision and on the 15 days notice would now be given prior to the transfer. Both letters sent to the officers stated “Please be advised that your welfare considerations will be kept under review and I would reiterate that this transfer is a temporary measure”.

[56] It was considered that the change to the notice period constituted a change to the original decision. Thus the respondent argued that the appeal submitted by Constable Wills and Farrell had accordingly been upheld in that the decision had changed. Following this change to the original decision Constable Wills and Constable Farrell did not indicate they wished to progress to stage two of the service procedure according to Ms McDowell.

[57] In R v North and East Devon Health Authority ex parte Coghlan (2001) QB 213 Lord Woolf addressed the issue whether a public authority could disappoint its promise to the appellant (in that case a promise of a home for life in a residential care home providing specialist care). He posed three ways in which the matter could be decided:

- “(a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on *Wednesbury* grounds . . .
- (b) . . . The court may decide that the promise or practice induces a legitimate expectation of . . . being consulted before a particular decision is taken . . .
- (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that hereto the court will be in proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for change in policy”.

[58] In my view this Service Procedure does provide a legitimate expectation of a substantive benefit namely a proper independent appeal at stage two if initially the appeal is refused. I do not consider that any reasonable or purposive interpretation of the terms of paragraph 23 of the Service Procedure could construe that substantive benefit as having been conferred if a change only to the notice given before the transfer would commence terminated the three stage appeal process in circumstances where the substantive appeal was against the transfer itself. The applicants were entitled to expect that the appeal against the transfer - and not merely the notice before the transfer was to begin- would be subjected to the full appeal procedure. The concept of the transfer itself, the decision to transfer and the written notification of the

transfer are all clearly discussed at paragraphs 17-19 under the headings “Non Voluntary Transfer”, “Availability to Transfer” and “Transfer Application Process” before the question of notice of internal transfer is given as set out in paragraph 20. This is described therein as “Notice of a Transfer”. In my view the decision to transfer per se is different conceptually from the decision to give notice of the transfer. Paragraphs 20(1) and (2) make it clear that there is a distinction to be drawn between notice to be given and the transfer itself. These men were clearly appealing against the transfer decision albeit they were appealing against the notice as well. Their substantive appeal cannot be sidestepped merely by altering the notice preceding the transfer. Otherwise the decision to transfer could be considered to have been changed if some trivial change had been made to the notice period.

[59] To allow this would be to dilute the entire benefit of the appeal system. There can be an appeal against the transfer decision itself, the notice of the transfer or both. For my own part a purposive constitution of this document cannot embrace a situation where an appeal against both decisions is deemed to have been successfully determined by a consideration of only one. Thus, if the respondent is correct, a decision to increase the notice from immediate transfer to notice of one day would constitute a change in the decision and resolve the whole appeal without he need to consider the transfer itself. That cannot have been the intention of the draftsman. Ms McDowell seems to misunderstand the terms of 23(3) ie stage two in that she suggests that the applicants did not wish to progress to stage two of the Service Procedure. On the contrary stage two arises when the appeal papers must be forwarded to a Chief Inspector, the papers having been prepared by the officers at stage one. This step must be taken by the officers at stage one because only they can decide to whom the papers will be forwarded for stage two to commence.

[60] I have therefore come to the conclusion that the applicants did have a legitimate expectation that they would be able to invoke the three stage appeal procedure outlined in paragraph 23 of the Service Procedure against the transfer itself and that their appeal would not be halted at stage one merely because they had successfully appealed against the notice period. The transfer remained operative after the appeal and their legitimate expectation of a three stage appeal process was frustrated in these circumstances. Accordingly whilst I have rejected the other grounds of relief sought I have determined that in this case the Respondent is in breach of the appeal process as alleged at paragraph 2(b) of the Order 53 Statement. It should now take steps to invoke stage two, and if necessary stage three thereafter, of the process by forwarding the appeal papers to a Chief Inspector within the District/Department not previously connected to the transfer decision to enable the appeal process to continue.

[61] I shall invite counsel to address me as to the precise terms of the order and on costs.