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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

Between:

GARETH WATSON

Appellant

-and-

THE POLICE SERVICE OF NORTHERN IRELAND

Respondent

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Ian Skelt KC and Michael Egan (instructed by Edwards & Co, Solicitors) for the appellant
Mark Robinson KC and Mark McEvoy (instructed by the Crown Solicitor's Office) for the respondent
John Beggs KC and Aaron Rathmell (instructed by PSNI Legal Services Branch) for the first intervener, the PSNI Professional Standards Department
Paul McLaughlin KC (instructed by WP Tweed & Co, Solicitors) for the second intervener, the Scottish Police Federation
Hugh Davies KC and Kevin Baumber (instructed by O'Hare Solicitors) for the third to sixth interveners, a number of England & Wales Police Staff Associations

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Before: Keegan LCJ, Treacy LJ and Scoffield J

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SCOFFIELD J (*delivering the judgment of the court*)

Introduction

[1] This is an appeal against a decision of Colton J ([2022] NIQB 59) by which he dismissed the appellant's application for judicial review. The appellant was a constable in the Police Service of Northern Ireland (PSNI). He challenged a decision of a disciplinary panel ("the Panel") which concluded that it had jurisdiction to hear and determine misconduct charges which had been brought against him. The PSNI, of which the disciplinary panel was an emanation, was the respondent to the application for judicial review and is the respondent to this appeal. However, the

PSNI's Professional Standards Department (PSD), the prosecuting body before the Panel, was an intervener in the court below and has made most of the running in opposition to the appeal in this court in its capacity as first intervener in the appeal.

[2] The central issue in the proceedings is the extent to which, if at all, a police constable can be disciplined for misconduct where the relevant misbehaviour took place before his or her attestation as a constable. This is an issue of some importance both to those responsible for, and those subject to, police misconduct proceedings. For this reason, the appellant's appeal has been supported by the Police Federation of Northern Ireland ("the NI Federation"), even though the outcome of the appeal will now have no practical significance for the appellant. In addition, a number of staff organisations which represent police constables in England and Wales applied to intervene in the proceedings (namely, the Police Federation of England and Wales, the Civil Nuclear Police Federation, the Ministry of Defence Police Federation and the British Transport Police Federation, collectively "the English Federations"). In like manner, the Scottish Police Federation ("the Scottish Federation") also applied for, and was granted, intervener status.

[3] Mr Skelt KC and Mr Egan appeared for the appellant; Mr Robinson KC and Mr McEvoy appeared for the respondent; Mr Beggs KC and Mr Rathmell appeared for the PSD; Mr Davies KC and Mr Baumber appeared for the English Federations; and Mr McLaughlin KC appeared for the Scottish Federation. We are grateful to all counsel for their comprehensive written submissions and well-marshalled and focused oral submissions.

Factual background

[4] The factual background to these proceedings is helpfully and succinctly described by Colton J in paras [1]-[10] of his judgment. We gratefully adopt the summary which he has there set out. For present purposes, only the key elements of that background bear repetition.

[5] In April 2016 the appellant was applying to join the PSNI. In the course of that process he completed a questionnaire which was part of the security vetting procedure. He began his police training in January 2017 and was formally attested as a constable in June 2017. However, it later became clear that he had answered a particular section of the questionnaire in a manner which was not full and accurate. Having been asked to disclose details of any full-time or part-time employment which he had held within the last five years, he failed to disclose two periods of part-time employment. The first of these was a period of employment as a sales assistant with Matalan from October 2011 to July 2014; and the second was a period of employment with a menswear retailer (Statement) between January 2015 and October 2016. The reason why this was considered especially significant is because the appellant was given a warning for gross misconduct when employed by Matalan; and was alleged to have made unauthorised payments to himself (on some ten occasions, to a total tune of £1,675) in the course of his employment with

Statement. The applicant says his employment with Matalan was a 'Saturday job' when he was aged between 16-18 years old; and his employment with Statement was a 'zero hours' casual job. Nonetheless, whatever rationale or mitigation may be offered for having failed to disclose these jobs, it is clear that they ought to have been disclosed.

[6] When the police authorities became aware of this, a misconduct charge was brought against the appellant in March 2021. The nub of the charge was that the appellant had made a "false declaration" in April 2016 in the course of completing the vetting questionnaire and that he "failed at any time thereafter to correct the falsity". Particulars of the charge were set out, including details of the disciplinary issues which (it was then known) had arisen during the course of each undisclosed period of employment; and details of the appellant's completion of the questionnaire. He had mentioned one period of employment with a different company but had omitted mention of either of the jobs mentioned above. The questionnaire included a declaration, which the appellant had signed, that the information he had provided was true and complete to the best of his knowledge and belief. We return to the terms of that declaration later. The misconduct notice also referred to the fact that the appellant had not sought to correct the false declaration. This conduct was said to be in breach of a number of provisions of the PSNI Code of Ethics ("the Code") and to amount to gross misconduct. The relevant provisions of the Code which were cited were Article 1.10 (discreditable conduct), Article 7.1 (integrity) and Article 7.5 (dishonesty).

[7] The misconduct notice issued to the appellant asserted that, although he had not been a constable when he signed the vetting questionnaire, the misconduct panel appointed to hear and determine the matter nonetheless had jurisdiction to consider the allegations. The appellant and his advisers immediately took issue with this suggestion. He applied to stay the misconduct proceedings on the ground that the Panel lacked jurisdiction, since the kernel of the complaint related to conduct which pre-dated his attestation as a constable.

[8] The Panel gave a written decision which was delivered on 5 May 2021 by which it refused the application to stay the proceedings. The Panel's rationale for this conclusion was that, from the moment of attestation (although not before) a police officer in the appellant's position was "under an immediate and ongoing duty to ensure that his superiors are in receipt of full disclosure of any and all information previously sought", including that sought in the vetting questionnaire. Even assuming that there had been good reasons for the initial non-disclosure, the Panel concluded that "an attested officer is not absolved from correcting or completing that disclosure immediately and certainly as soon as practicably possible upon attestation". The obligation to correct the record was "an ongoing, career-long obligation". The basis for the Panel's jurisdiction in the case, so expressed, has come to be termed the 'ongoing duty point'.

The proceedings below

[9] The appellant challenged by way of judicial review the Panel's decision not to stay the misconduct proceedings against him. Inter alia, he sought an order quashing the Panel's decision; a declaration that it lacked jurisdiction to hear and determine the charge; and an order requiring the Panel to stay the misconduct proceedings against him. Colton J granted leave to apply for judicial review. He also later permitted the PSD to intervene in the proceedings.

[10] As the judgment below explains (see paras [29]-[43]), at the substantive hearing of the application an issue arose as to the grounds upon which the misconduct panel had held that it had jurisdiction to proceed. It accepted the ongoing duty point described above (see para [8]). However, before the Panel it had also been argued on behalf of the PSD that it had jurisdiction to proceed on two further bases: first, that the Police (Conduct) Regulations (Northern Ireland) 2016 ("the 2016 Regulations") conferred power to adjudicate on pre-attestation conduct (referred to as the 'interpretation point'); and, second, that the appellant had in any event consented to such jurisdiction when he signed his application to join the PSNI (the 'consent point'). The respondent and the PSD considered that the Panel had not determined these two issues in light of its conclusion on the ongoing duty point. The judge considered – and we agree – that a fair reading of the Panel's decision indicated that it had rejected the interpretation point. The consent issue appears not to have been determined by the Panel either way.

[11] This debate was significant because the PSD wished to support the Panel's conclusion, and oppose the grant of relief in these proceedings, on the basis that either or both of the alternative grounds for the Panel's disciplinary jurisdiction were correct as a matter of law. In turn, this generated a procedural debate since the appellant objected to what he contended was a collateral attack on the Panel's decision without the respondent or the PSD having itself sought to judicially review the decision. Colton J acceded to the intervener's invitation to rule on these issues in order to provide guidance for future cases, accepting that the case raised an important point of wider public interest which had not been addressed in earlier authority (see para [42] of the judgment). In determining that he should do so, he was influenced by the fact that the respondent and the PSD, who supported these matters being resolved by the High Court, had for that reason not pressed an objection that the appellant had an alternative remedy by way of appeal to the Police Appeals Tribunal. He went on to address all three arguments in the course of his judgment. In this appeal, the appellant challenges the judge's conclusion on both the interpretation point and the ongoing duty point; and separately complains that the judge ought not to have determined the interpretation point at all.

The academic nature of the appeal

[12] After the present appeal had been initiated, the appellant resigned from the PSNI with effect from 1 March 2023. Accordingly, the outcome of the appeal became

academic as between the respondent and the appellant in the sense described in *Re Bryson's Application* [2022] NICA 38 at paras [13]-[15]. We did not accept the appellant's argument that the potential effect of the judge's interpretation of the regulations meant that the case was not academic. Whether or not the appeal was successful, the misconduct proceedings against the appellant would no longer continue. As between the parties, therefore, the appeal would serve no practical purpose.

[13] In light of this, we heard argument in advance of the substantive hearing in relation to the question of whether the appeal should be permitted to proceed. The respondent and the PSD took the view that it should not. The Lady Chief Justice indicated the decision of the court that, in the exercise of our discretion, we would proceed to hear and determine the appeal. She further indicated that the reasons for this would be provided in the substantive judgment of the court. In short, we accepted the appellant's submission that, having regard to the guidance set out in *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 and similar authorities, this was a case where the court should exercise its discretion to determine the issue. It appeared to us that the case was a classic instance of where an appeal should be permitted to proceed in the public interest, notwithstanding that it was academic between the parties. The interpretation point raised a discrete point of statutory construction, which does not require detailed consideration of the facts. The point is likely to arise in a number of cases in future. (We were told that there was at least one pending police misconduct case in Northern Ireland where essentially the same issue had arisen; and at least one such case pending in England at the time of hearing.) In addition, we considered that it would be unfair if the PSD were to have been permitted to introduce this additional point in the court below on the basis of its asserted public importance but, at the same time, to be able to insulate it from further testing on appeal, especially in circumstances where the respondent could have declined to have accepted the appellant's resignation until after the outcome of the pending misconduct proceedings.

[14] In its submissions on this issue the PSD, relying upon para [9] of *Secretary of the Home Department v R (MS (A Child))* [2019] EWCA Civ 1340, invited the court, if it permitted the appeal to proceed, to do so only upon condition that the respondent's side was completely indemnified in costs. In short, it was argued that if the appellant's side wished to pursue an academic appeal on an issue of principle, it should pay all of the costs for that privilege. It has not been the practice in this jurisdiction to adopt such an approach and, whilst there may be cases where this is appropriate, we were not persuaded that this appeal was one such case. Generally, we consider it better to take the normal course of apportioning costs at the conclusion of the proceedings when the resolution of all of the issues in the case is clear. In any event, we did not consider it appropriate to require such an indemnity from the appellant (or, more realistically, the NI Federation) in this case in the circumstances described above, where the key issue in the appeal had been introduced at first instance by the first intervener in the face of opposition from the appellant.

Third party intervention in judicial review – a short excursus

[15] It is also appropriate to say something briefly about third party intervention in judicial applications in this jurisdiction, since this too was a hotly contested procedural issue before this court. We permitted the English Federations and the Scottish Federation to intervene in the appeal by way of written and oral submissions, although having first urged the appellant to take all practicable steps to coordinate his case with those proposed interveners in order to streamline the presentation of arguments in support of the appeal as much as possible. The appellant's counsel and those interveners' counsel are to be commended for the collaborative and constructive approach which was taken in this regard. This permitted the Federations' submissions, both written and oral, to be presented with more economy than was otherwise likely to have been the case. Limited oral representations were permitted from the second to sixth interveners and these were strictly case-managed in terms of both time allocation and the requirement to avoid duplication of others' submissions. Those interveners were permitted participation rights in the teeth of opposition from PSNI and the PSD. We were cautious in permitting their intervention and, whilst we found some assistance in the submissions they provided, largely by way of context and background, they have not been determinative of the outcome.

[16] The dispute about the participation of the English and Scottish Federations (together, "the GB Federations") arose primarily because they did not slot neatly into any of the established gateways for third party intervention in judicial reviews in this jurisdiction. Leave having been granted, an applicant for judicial review must serve their notice of motion "on all persons directly affected" by the application pursuant to RCJ Order 53, rule 5(3). That did not apply. No question of notice to the Crown arose under Order 120 or 121 in this case; and, self-evidently, police representative bodies would not benefit from participation rights under those gateways in any event. None of the Federations could be said to be a "person who desires to be heard in opposition to the motion" for judicial review – within Order 53, rule 9(1) – since each *supported* the case of the applicant for judicial review in the proceedings. Such a person shall be heard "notwithstanding that he has not been served with the notice of motion" where he appears to the court to be a proper person to be heard. That leaves the residual power on the part of the court under Order 53, rule 5(7) to direct service of the notice of motion on any other person who in its opinion ought, whether under rule 5 "or otherwise", to have been served; or, alternatively, the broad power in any cause or matter to order a person to be added as a party where they fall within Order 15, rule 6(1)(b)(i) or (ii).

[17] Neither of these last provisions is drafted in terms particularly well-suited to the modern practice of judicial review where, frequently, third party interveners (such as representative bodies, interest groups or non-governmental organisations) seek to intervene in support of public interest challenges. It may often be artificial to say that they are groups which ought to have been served with the originating

motion by which the proceedings have been commenced; or that their presence before the court is necessary for the determination of the issues or for the determination of an issue between them and one of the parties. In truth, the impetus for their proposed participation will usually come from the organisation or group itself, either in the public interest or out of representative self-interest, rather than because of any direct or indirect personal impact of the decision under challenge or the relief sought in the proceedings. Put shortly, they, like the GB Federations in this case, are more properly to be termed 'interveners' than 'notice parties.' Nonetheless, we are satisfied that Order 53, rule 9 (or, alternatively, Order 15, rule 6(2)(b)) provides a sufficiently flexible mechanism by which the court can permit participation by way of a third party in the position of the GB Federations in this case insofar as it is necessary to identify a particular rule of court authorising this course.

[18] In our opinion, however, the better view is that third party interveners – as opposed to those who ought to be put on notice of the proceedings because of some effect upon them which the relief claimed may have – can be permitted participation rights in public law proceedings in the exercise of the High Court's inherent jurisdiction to regulate its own process. That is certainly how the matter is generally approached in Practice Direction 1/2013 on Third Party Interveners issued by the then Lord Chief Justice, Sir Declan Morgan, in March 2013. There is also support for this approach in a number of English authorities decided before the introduction to the Civil Procedure Rules (see Fordham, *Judicial Review Handbook* (7th edition, Hart) at section 22.2.14). In Practice Direction 1/2013 a third-party intervener is described as a stranger to a particular case – to be contrasted with a party or a notice party – who has an interest in the outcome. The granting of leave to intervene is said to be a matter of discretion for the court, whether in public or private law proceedings. An applicant for intervener status is expected to set out in correspondence to the court the nature of its interest in the proceedings; an indication of the content of the proposed intervention; and an explanation of how the interests of justice would be promoted by the proposed intervention, amongst other things.

[19] Certainly, it appears to us that, where a properly formulated basis for intervention in the interests of justice is put forward, those opposing an application for judicial review should not, if they ever were, automatically be in a more privileged position than those lending support to the challenge. We note that the Civil Procedure Rules in England do not draw any distinction between third parties served with the claim form who wish to contest the claim or to support it on additional grounds (see CPR Rules 54.14 and 54.32); nor between non-parties who seek to intervene in the proceedings by way of filing evidence or making representations (see CPR Rule 54.17) on this basis.

[20] In future, it appears to us that it would be helpful if the following approach and terminology was to be used. First, the *principal parties* to the case are the applicant for judicial review and the respondent whose decision or actions are under challenge. Second, *notice parties* are persons whom the rules require to be put on

notice of the proceedings, either as directly affected persons under Order 53, rule 5(3) or under the provisions requiring notice to be given to the Crown in certain circumstances. Such persons are entitled to full party status and, although the court retains power to regulate their participation, will usually be permitted to participate by way of filing evidence and making written and oral submissions. Third, other persons or bodies can be formally joined as notice parties where, although they are not directly affected by the proceedings, their interest is sufficient that formal party status ought to be afforded to them. This can be achieved by directing service of the notice of motion (and the papers in the case) under Order 53, rule 5(7). Fourth, the court has power to permit intervention by a non-party, an *intervener*, who is in a separate category from someone who ought to have been served with the proceedings. Although, in one sense, their participation may render them a 'party' to the proceedings (within the meaning of that term as defined in section 120 of the Judicature (Northern Ireland) Act 1978), their status is further removed from that of the principal parties or notice parties. Fifth, the phrase *interested party* is not a defined term in this jurisdiction, unlike in England and Wales where it is used to describe a person directly affected by a judicial review claim. In this jurisdiction, that term is generally used at the pre-action or pre-leave stage to denote a person who, if leave is granted, would qualify as a notice party.

[21] The GB Federations in the present case are interveners. The proper role and function of third-party interveners, and the approach to be adopted to their participation, has been addressed in authorities such as *Re Northern Ireland Human Rights Commission's Application* [2002] NI 236 (at para [32]) and *E v Chief Constable of the Royal Ulster Constabulary* [2009] AC 536 (at paras [2]-[3]). The High Court has inherent power to permit interveners to participate in proceedings. On appeal, the Court of Appeal has the like powers (see section 38(1) of the Judicature (Northern Ireland) Act 1978 and RCJ Order 59, rule 10).

[22] After the judge's substantive judgment had been given in the court below, a dispute arose as to the appropriate costs orders to be made, necessitating a further written ruling ([2022] NIKB 39). At this point, PSD contended that it ought from the outset to have been a respondent to the application or, at the very least, a notice party. In seeking to recover its costs, PSD argued that it was in effect the "true respondent". We see some force in this position. The PSD was the presenting side in the misconduct proceedings the propriety and continuation of which was at issue in the Panel's decision. As such, it was a party directly affected by the judicial review application, pointing to it being a notice party rather than merely an intervener. Indeed, in some well-recognised circumstances – usually involving a challenge to the decision of an inferior court or tribunal, where the respondent to a judicial review chooses to adopt a neutral stance in order to preserve its independence – the opposing party before the decision-maker will step into its shoes in order to defend its decision.

[23] The basis upon which a third party is permitted to participate in judicial review proceedings should, as far as possible, be spelt out at the time when the court

permits their participation. This may be particularly relevant to the issue of costs. As Practice Direction 1/2013 indicates, there is a strong presumption that interveners participate on a costs-neutral basis (bearing their own costs, with any additional costs to the other parties being costs in the proceedings). A similar, though weaker, presumption applies in relation to notice parties, subject always to the court's discretion. In a case such as that described in the paragraph above, where a notice party has in substance acted as the sole or main respondent, a different approach to costs will usually be warranted.

Summary of the parties' positions

[24] The appellant first contends that the judge erred by permitting the PSD, as intervener, supported by the respondent, to argue the interpretation and consent points; and that he further erred by going on to determine them. Without prejudice to that submission, he next contends that the judge erred in concluding that the 2016 Regulations permitted misconduct proceedings to be brought in respect of pre-attestation conduct (so long as the appellant was a serving officer); and that he erred in concluding that the applicant had an ongoing duty to correct or declare any alleged falsity in his vetting form. Finally, he contends that the judge erred in concluding that his rights under article 8 ECHR were not violated by the holding of misconduct proceedings relating to pre-attestation conduct.

[25] In light of the approach commended in *Re Darley's Application* [1997] NI 384 (at 387c-e) and reiterated in *Re Jordan's Application* [2014] NICA 36 (at para [21]), the Panel left it to the PSD to respond to the appellant's case. However, the PSNI as respondent corporately also considered itself to have a wider role over and above simply acting on behalf of the Panel. As the body responsible for setting standards and the misconduct system, it emphasised the importance of it being capable of dealing effectively with a situation where a police officer has been untruthful in a vetting form the significance of which could not have been a matter of doubt.

[26] The PSD seeks to uphold Colton J's judgment on both the interpretation point and the ongoing duty point. It submits that the 2016 Regulations may apply to pre-attestation conduct given that the empowering provisions under which they are made are in broad terms; given that the regulations themselves do not contain any temporal limitation; and given the purpose behind the misconduct regime. It also submits that misconduct may arise where a member of the police service has made and failed to correct a false declaration or omission in their vetting application.

[27] The English Federations have limited their submissions to the issue of whether the 2016 Regulations apply to pre-attestation conduct by a member of the PSNI. This is said to be a point of law "of wide and significant application", given that the equivalent regulations in England and Wales (the Police (Conduct) Regulations 2020) use nearly identical language. The English Federations are concerned as police forces in that jurisdiction were, we were told, already advancing the interpretation adopted by Colton J in misconduct proceedings. They contended

that Colton J had erred on the interpretation point, which they considered was (or may be) largely attributable to PSD's failure to accurately analyse the legal remedies available to remove police officers whose pre-attestation conduct rendered them unsuitable for service. In this regard they relied heavily upon police forces' ongoing duty to vet a member for suitability, with reference to the Vetting Code of Practice issued by the College of Policing, and the ability to deal with proven pre-attestation conduct giving rise to unsuitability through the mechanisms contained within the Police (Performance) Regulations 2020, at least for the vast majority of officers. For much more senior officers, they too could be removed if ongoing vetting raised issues, either by the police and crime commissioner for the relevant area or by the relevant chief constable, as the case may be, under the Police Reform and Social Responsibility Act 2011; or by the Commissioner for the Metropolis or the Mayor's Office for Policing and Crime in the case of the Metropolitan Police, again under the 2011 Act.

[28] The Scottish Federation has also confined its submissions to the interpretation point and, again, supports the appellant in this regard. It submits that the statutory regime for the regulation of police officers' conduct applies only to the conduct of sworn officers which occurs after they have been attested. It is submitted that this is apparent from the natural and ordinary meaning of the 2016 Regulations, applying well-established canons of construction and reading those regulations as a whole and in context. The relevant statutory provisions in Scotland are not identical to those in Northern Ireland; but are said to be sufficiently similar to provide some interpretative assistance to the court and to identify further potential effects of the interpretation adopted in the court below (each of which, the Scottish Federation submits, point towards the appeal being allowed on this point). The thrust of the Scottish Federation's submissions was that concerns raised about a police officer should be dealt with either through the conduct or performance regimes, which provide a complementary package of measures designed to cater for all issues, but in respect of which it is important to draw a clear and principled dividing line.

Relevant statutory provisions

[29] Colton J has also helpfully set out the statutory provisions relevant to the issues in this appeal in some detail in his first instance judgment. We do not need to replicate all of them here. The main provisions relating to police complaints and discipline are set out in Part VII of the Police (Northern Ireland) Act 1998 ("the 1998 Act") and the 2016 Regulations. The 2016 Regulations were made in the exercise of powers conferred by sections 25, 26 and 59(8) of the 1998 Act.

[30] Considerable focus has been directed towards the terms of regulation 5(1) of the 2016 Regulations, which is in the following terms:

> "These Regulations apply where an allegation comes to the attention of an appropriate authority which indicates

that the conduct of a member may amount to misconduct or gross misconduct."

[31] A number of the terms used in regulation 5 are defined elsewhere, especially in regulation 3(2). In particular, "misconduct" means "a breach of the Code of Ethics" which, in the case of an investigation under section 56 of the 1998 Act, the Police Ombudsman has decided is not more properly dealt with as a performance matter; or, in any other case, the appropriate authority has decided is not more properly dealt with as a performance matter. The Code of Ethics refers to the Code contained in the Schedule to the 2016 Regulations. A "member" is defined as a member of the police service.

[32] The Code of Ethics is an important document, which is discussed in further detail below. The Northern Ireland Policing Board (NIPB) ("the Board") was established pursuant to the Police (Northern Ireland) Act 2000 ("the 2000 Act"). The Board was required by section 52(1) of that Act to issue a code of ethics for the purpose of laying down standards of conduct and practice for police officers, which it may from time to time revise. The Board did so, initially in 2003, and then published a revised Code in 2008. As noted above, the Code of Ethics as so developed is now also set out in the Schedule to the 2016 Regulations.

The scope of the first instance judgment

[33] The appellant has complained that the judge erred in permitting the PSD to challenge two aspects of the Panel's decision which had been determined in his favour, or at least not against him, in circumstances where no application for judicial review had been brought by it and there was no "properly pleaded challenge" on this issue. In short, it is contended the judge had no business considering the interpretation point or the consent point. We reject these grounds of appeal. In our view, it was open to the judge to permit these points to be argued and determined. The questions for him were ultimately whether the issues had some relevance to the case before him and, if so, whether they could be dealt with in a manner which was fair to all parties. Assuming the answer to each of these questions was 'yes', it was a matter for his case management discretion as to whether he permitted the relevant arguments to be made.

[34] As to relevance, it is impossible to say that the PSD's desire to have these issues resolved was irrelevant to the matters before the judge. Although an analogy with RCJ Order 59, rule 6 is imperfect, we consider that PSD (as the presenting authority before the Panel) was entitled to seek to uphold the Panel's preliminary decision – that it had jurisdiction to consider the misconduct charge and should go on to hear and determine it at a substantive hearing – on grounds other than the one basis on which it had concluded that to be so. RCJ Order 59, rule 6 allows a party, when a decision in its favour has been appealed, to contend that the decision should be affirmed on grounds other than those relied upon by the decision-maker and/or to contend that the decision was wrong in whole or in part. In the present case, if

there was some other or additional basis upon which the Panel could and should properly have gone on to consider the misconduct charge against the applicant, that would be a basis for refusing the relief which the applicant sought in the proceedings, or at least some of that relief.

[35] As we have indicated above, the question for the judge then became whether or not PSD's additional arguments could be dealt with fairly. It has not been seriously suggested by the appellant that they could not be; nor that he was unable to deal with the new legal arguments made or unfairly deprived of an opportunity to meet them by necessary evidence. With one caveat (see para [38] below), his objection is simply one of principle.

[36] Without requiring to delve deeply into the circumstances where judicial review arguments may be raised in defence of proceedings, allowing a party to mount a collateral attack on a decision taken by a public authority without himself having to bring an application for judicial review, we are satisfied that it was clearly within the judge's permissible discretion to allow the PSD to make the case it wished. Proceedings were already afoot to challenge the Panel's decision, in which the PSD had been permitted to intervene. The outcome of the arguments it wished to make may well have been determinative of the relief to be granted in the case. Moreover, the judge was told that the interpretation point in particular was one of public importance, guidance upon which would be of assistance to many who are interested in or responsible for police misconduct procedures. That assertion has been borne out by the applications to intervene in this court. In all of these circumstances, it was a perfectly acceptable course for the judge to consider that he ought to hear argument on the additional issues and seek to resolve them in this case. Indeed, in the circumstances of this case that appears to us to have been consistent with the overriding objective in RCJ Order 1, rule 1A; and the well-known principle that public law proceedings should focus on substance rather than form.

[37] That said, it is unfortunate that the case developed in the way in which it did. PSD applied to intervene in the proceedings with an express indication that it did not wish to take over conduct of the proceedings. This raised the appellant's expectations that its role would be secondary to that of the Panel in defending the proceedings. As it turned out, that expectation was thwarted. It is also unfortunate that the intervener's case on the additional points was only made clear in its skeleton argument, served in advance of the hearing, rather than at some earlier stage. The appellant's reliance upon Order 53, rules 5(1) and 6 is misplaced since, strictly speaking, they confine an applicant for judicial review to his pleaded grounds and pleaded relief and do *not* confine the respondent (or notice party) in the grounds upon which they rely in opposing the grant of the pleaded relief. Indeed, under the present procedural regime, there is no requirement for a respondent or notice party in judicial review to plead their case in this jurisdiction. However, the appellant is right to say that a degree of procedural rigour is required to ensure that an applicant is not taken by surprise by a respondent's or notice party's case, particularly where they seek to uphold the respondent's substantive decision on a basis which was not

part of its contemporaneous reasoning. That is the reason why, in an appeal, Order 59 to which we have referred above requires the service of a respondent's notice. There was no such requirement under the court rules in this case but it would have been better if the PSD's intentions were spelt out more clearly and/or at an earlier stage. That is particularly so where, as here, the respondent itself had shown some diffidence in its defence of the proceedings because of the principle described by this court in *Re Darley's Application*.

[38] For the reasons given above, we would not criticise the judge for his handling of this issue. He legitimately considered that it was right, and in the public interest, to deal with the variety of arguments relevant to the Panel's jurisdiction; and he also correctly determined that these legal arguments could be dealt with without unfairness to the appellant and that the case should proceed without further delay given that the misconduct proceedings hung in the balance pending the court's determination. The intervener's intended course should have been spelt out more clearly at a much earlier stage; but that was not the fault of the first instance judge. We do not understand there to have been any application for an adjournment on the part of the appellant to enable him to lodge further evidence or submissions in relation to the 'new' points, which were essentially issues for argument. The caveat mentioned in para [35] above is that it has become clear, since the first instance judgment and particularly in response to Colton J's reasoning, that the appellant might with more time have considered and drawn the judge's attention to much more detail about the PSNI vetting procedures and the Performance Regulations (discussed below). However, the judge was not precluded in law from considering that he ought to deal with the further issues the PSD had raised as supporting the Panel's ultimate conclusion.

The interpretation point

[39] The focus of the argument in this appeal has been on the interpretation point, which is dealt with at paras [61] to [88] of Colton J's judgment. He concluded that the correct interpretation of the Code of Ethics and 2016 Regulations was such that a police officer could be guilty of misconduct, and disciplined accordingly, in respect of behaviour which occurred before his attestation as a constable. The primary basis upon which this conclusion was reached was that disciplinary jurisdiction was conferred by reason of the individual being a serving member of the police *at the time of those proceedings* rather than when the misconduct occurred (see para [78] of the judgment). What was required was current membership of the police service and an allegation as to that member's conduct (whenever that conduct may have occurred). This court has reached a different conclusion and, whilst recognising the reasons in public policy why an interpretation such as that adopted below may be thought to be desirable, we consider that the judge went beyond the proper interpretation of both the Code and the Regulations. We have come to this conclusion for the reasons now summarised.

Construing the relevant provisions

[40] First, we accept the appellant's submission that the Code applies only to police officers. That is the ordinary and natural meaning of its terms. By virtue of section 52 of the 2000 Act, it is a code of ethics "for the purpose of … laying down standards of conduct and practice for police officers" and "making police officers aware" of the rights and obligations arising out of the European Convention on Human Rights (ECHR). It is headed, "Ethical Standards required of Police Officers". The published version of the Code contains a Foreword from the Chair of the NIPB and an Introduction from the Chief Constable, both of which make clear that it is to set the standards required of police officers. The fact that the Code governs the conduct of officers whilst they are not on duty is beside the point. An off-duty police officer is still a police officer and is therefore properly subject to the standards of conduct expected of those who have been entrusted with this important office. That the Code is designed to establish professional standards for the conduct and practice of police officers (at the time when they occupy that office), and only police officers, is in our view clear from its terms. For example, sub-para (f) of the Preamble to the Code, which is included in the statutory portion of the Code set out in the Schedule to the 2016 Regulations, recites the statutory purpose mentioned above which is contained in section 52 of the 2000 Act. By way of further example, Article 1.3 provides that: "Police officers shall carry out their duties in accordance with the Police Service attestation …". This would make no sense if the Code was designed also to apply to those who were not, or not yet, police officers.

[41] Second, a similar point can be made in relation to the 1998 Act and the 2016 Regulations. They govern disciplinary procedures relating to "members", that is to say members of the police service. Regulation 5(1) provides that the provisions of the Regulations apply "where an allegation comes to the attention of an appropriate authority which indicates that the conduct of a member may amount to misconduct or gross misconduct". In our judgement, the reference here to the "conduct of a member" refers to a police officer's conduct *as a member*, that is to say, at a time when they were a member of the police service and could therefore be in breach of the Code of Ethics. That appears to us to be the ordinary and natural meaning of the phrase. It is also the better meaning of the phrase when read in the context of the provision as a whole. The whole misconduct scheme is designed to determine whether conduct amounted to misconduct (whether plain or gross). But misconduct is defined as being breach of the Code, which is a Code applicable only to sworn police officers. We accept the appellant's submission that a person cannot breach the Code at a time when they are not subject to it because they are not then a police officer. Various features of the statutory scheme are in our view consistent with this basic position.

[42] That is also consistent, in our view, with how the relevant terms are to be read within the parent Act. A relevant "complaint" for disciplinary purposes is to be construed in accordance with section 52(8) (see section 50(1)), which in turn refers to a complaint determined by the Police Ombudsman to be one to which section 58(4)

applies. That provision applies "to a complaint about the conduct of a member of the police force which is made by, or on behalf of, a member of the public". In our view, that can only sensibly refer to a complaint made by a member of the public about the conduct of a police officer occurring after they had become a police officer. The 2016 Regulations (at regulation 3(2)) define a "complaint" in related terms, that is to say as meaning "a complaint about the conduct of a member of the police service" which the Ombudsman has determined is a complaint to which section 52(4) applies.

[43] Both the PSD in its submissions and the judge below emphasised the word "allegation" in regulation 5(1); but in our view that simply reflects that not all matters giving rise to disciplinary procedures will be complaints made to the Police Ombudsman by or on behalf of a member of the public. For instance, where a conduct concern is raised about a police officer by one of their colleagues, it would be inconsistent with the statutory scheme to include this within the defined term of a "complaint". Misconduct procedures can be triggered in a variety of ways where a concern about conduct which might constitute misconduct comes to the attention of an appropriate authority. The more important point is that the purpose of such procedures is to establish whether there has been misconduct or gross misconduct in circumstances where "misconduct" means a breach of the Code of Ethics.

[44] We have felt able to resolve the argument in relation to the interpretation point by means of a simple process of construing the words used in the Code and in the relevant statutory provisions discussed immediately above. However, we are fortified in this conclusion by the following ancillary matters:

(i) The relevant empowering provision in the 1998 Act for present purposes is section 25(2)(e), which provides that the relevant regulations may make provision with respect to "the conduct, efficiency and effectiveness of members of the Police Service of Northern Ireland and the maintenance of discipline". Although the provision goes on to provide that the regulations may also deal with the "suspension or dismissal of members", we consider that the provision permitting regulations to deal with their conduct relates to their conduct (and their efficiency and effectiveness) *as police officers*, that is to say, having been sworn to perform that function and whilst capable of exercising the powers of that office.

(ii) The statutory declaration to be made by a police officer at attestation is set out in section 38(1) of the 2000 Act. It makes clear that the officer affirms prospectively that he or she "will" discharge the duties of the office consistently with the standards required in the Code. It does not purport to require a declaration of prior, historical compliance. (The statutory declaration is also expressly linked to the Code in that, in preparing the Code, the Chief Constable and Board are to have regard to its terms: see section 52(2) of the 2000 Act.) The act of attestation is itself a solemn and significant step, at which point (but not before) the officer agrees to be subject to the

heightened standards expected of those occupying the office of constable. As the Panel recognised (at para 37 of its decision), it is only after a course of training and instruction that a candidate for the constabulary is likely to properly understand the nature and demands of those ethical standards.

(iii) The Explanatory Notes to the 2016 Regulations also indicate that the Schedule to those Regulations, i.e. the Code, "sets out the standard of professional behaviour expected *of members*" [emphasis added], breach of which may constitute a matter of performance, misconduct or gross misconduct. Departmental Guidance issued by the Department of Justice displays a similar understanding; as does information about the Code which is published on the Board's website.

(iv) Although Colton J considered the temporal aspect of the Code's application to be defined by the officer's status at the time of the misconduct proceedings, rather than the time of the underlying conduct, there can be little doubt that his construction was such as to imbue the Code with some measure of retroactive effect. (Indeed, PSD's submissions accepted that its case involved the regulations having "a kind of retrospective effect".) We consider that such an effect would require to have been expressed in clear words which are simply absent from the Code and the statutory scheme more generally. In addition, since some of the requirements of the Code could not possibly apply to an individual at a time when they were not a police officer (and, therefore, could not exercise police powers or perform many police functions), some explanation would be required or would be expected as to which obligations were capable of applying to pre-attestation conduct. Although the resolution of the legal question of whether a statutory provision is properly to be given retrospective or retroactive effect ultimately comes down to an issue of legislative intent and fairness (see, for instance, Lord Rodger's observation at para [201] of his opinion in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816), we consider in this instance that the legislature would not have intended the provisions of the Code to apply to unattested individuals and, indeed, that it is unfair to hold them to the provisions of that Code as if they were police officers at the time of the relevant conduct. Section 36(1)(b) of the Medical Act 1983 was helpfully drawn to our attention as an instance of a provision where Parliament had expressly and unambiguously conferred jurisdiction upon a professional misconduct panel whether or not the individual had been registered at the time of the relevant conduct. Another such example, which was considered by the Supreme Court in *R (Coke-Wallis) v Institute of Chartered Accountants* [2011] 2 AC 146, is Byelaw 4 of that Institute's byelaws. In the present case, there was nothing indicative of a legislative intention to give retroactive effect to the Code in the manner contended for by the PSD.

(v) There is one instance where all parties accept that the Code plainly has an element of retroactive effect, namely where an officer (whilst a police officer) is convicted of a criminal offence which was committed at a time before he or

she became a police officer. In those circumstances it is the conviction, to which the individual is subject whilst a sworn officer, which brings discredit on the police service. However, this instance of pre-attestation conduct giving rise to potential misconduct sanctions is an exception rather than the rule.

(vi) The interpretation adopted at first instance also gives rise to a potential practical difficulty which we do not consider could have been intended. That arises because a member is required by the Code to report breaches of the Code on the part of others (see Article 7.3, within the Article requiring officers to act with integrity). The result is that a person who was or was to become a police officer would be under an obligation to report potential misconduct on the part of another person who was or later became a police officer, even at a time when both relevant persons were not constables. Although such a duty of candour might be thought desirable in respect of the most serious instances of pre-attestation 'misconduct', the reporting obligation would apply to any breach of standard caught by the Code. In our view, the PSD's submissions did not adequately answer this point, other than asserting that misconduct proceedings would be concerned only with non-trivial matters and that there was adequate protection for an officer in the course of the misconduct process itself. In summary, the PSD's argument resolved to an assertion that one could trust the good judgment of police standards departments in exercising prosecutorial discretion and appropriate authorities as to the proportionality of sanctions which would be imposed. For the reasons already summarised, we do not consider that the Code and 2016 Regulations were intended to operate in this way.

[45] We have set out above why we consider the relevant statutory provisions to bear the meaning and effect contended for by the appellant in these proceedings. Before addressing the remaining points in the appeal, we deal below with a number of authorities relied upon by the PSD and with a further aspect of Colton J's reasoning relevant to the interpretation point. As will be seen, in neither case do we consider that they impel a contrary view to that which we have reached as a matter of construing the relevant statutory provisions.

Consideration of relevant authorities

[46] The respondent and first intervener relied upon *R (R) v National Police Chiefs' Council* [2021] 1 WLR 262. In that case the English Court of Appeal upheld the legality of a statutory requirement in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 requiring applicants for the constabulary to disclose any formal caution, including those that were spent. The court emphasised the need that police officers should be, and should be seen to be, persons of the utmost integrity in view of the responsibilities which they have and in order that the police may command public confidence. That was a case about the level of disclosure which can properly be required of candidates for the profession of policing. We entirely agree

with it but do not consider that it assists with the specific issue which arises in this appeal.

[47] The PSD also relied upon a number of other authorities which, it submitted, were examples of senior courts in England and Wales applying conduct regulations to professional persons where the impugned conduct occurred *prior to* the commencement of the relevant regulations or the individual's registration, namely *In the matter of the Solicitors Act 1974 (Re Ofosuhene)* (unreported, 21 February 1997); *Antonelli v Secretary of State for Trade and Industry* [1998] QB 948; and *R (Lewis) v The Prosthetists and Orthotists Board* [2001] EWCA Civ 837.

[48] We consider that caution is required before reading across an approach which may be applicable to a different statutory scheme, or a different profession, to the present case. The *Ofosuhene* case, relating to the conduct of a solicitor whilst he had been an "unadmitted clerk", certainly appears to offer some support for the PSD's preferred interpretation. However, in that case, an application could be made to the Solicitors' Disciplinary Tribunal "to require a solicitor to answer allegations in an affidavit". In light of that wording, the Divisional Court was not prepared to imply into the statutory scheme a limitation that the relevant allegation must relate to conduct whilst the individual had been a solicitor. Rose LJ made clear that he gained "no assistance" from the other schemes, statutory and otherwise, to which reference had been made in the course of argument, emphasising that the case was to be determined by reference to the particular statutory wording in section 47 of the Solicitors Act 1974. In our judgment, for the reasons set out at paras [40]-[44] above, the limitation on the Panel's powers in the present case is to be found within the express words of the relevant statutory provisions. It is not a case of asking whether any such limitation is to be implied into the statutory scheme. The *Ofosuhene* case is authority merely for the proposition that, where differently expressed, the legislature *could* establish a scheme having the effect for which the PSD contends.

[49] We did not find the *Antonelli* case of particular assistance, involving, as it did, an issue about whether conduct which pre-dated the relevant statutory provisions could nonetheless found a disqualification order against an estate agent. The issue in that case is not closely analogous to that in the present case for a number of reasons, including that the impugned conduct in *Antonelli* had resulted in a criminal conviction (albeit in another jurisdiction) when acting in the course of the profession in question and in circumstances where criminal convictions of certain types were grounds for the making of a disqualification order. For present purposes, the case turned upon whether the phrase "convicted of an offence" could include conviction of an offence before the commencement of the Act containing the Director General of Fair Trading's disqualification powers. Everyone is, of course, subject to the criminal law. As we have observed above, individuals only become subject to the PSNI Code of Ethics when they become a police officer. Beldam LJ noted in *Antonelli* that the relevant words were unqualified, save as to the type of convictions which would be relevant (see 959E-F). Again, for the reasons given above, we do not consider that the same can be said of the statutory scheme in the present case.

[50] The *Lewis* case is closer to the present facts. However, it involved an orthotist engaging in professional misconduct in connection with his practice as such, albeit before he was registered, in circumstances where registration had been and remained unnecessary to practise the profession. He was alleged to have been "guilty of infamous conduct in any professional respect". Waller LJ observed (at para [30]) that it "cannot depend on registration whether a person is practising a profession". Orthotists had been practising their profession long before the regulatory board had been formed and were still not compelled to be registered in order to practise. In contrast, it is clear that a citizen cannot be acting as a police officer until attested and legally imbued with the powers and duties of a constable.

[51] It is true that the Court of Appeal in *Lewis* disavowed the view that it was giving retrospective effect to the legislation by holding that a disciplinary committee in the future, albeit considering past conduct, could lead to registration being cancelled for the future (see para [33]). However, in the present case, we consider that there is material difference between holding a civilian to the standards set out in the PSNI Code of Ethics and holding a (non-registered but practising) professional to the standards of the profession.

[52] We also note that the *Lewis* case was distinguished by a Police Appeals Tribunal (PAT) in the 2019 case of *Doughty*, in which the tribunal reached a decision consistent with the appellant's case in this appeal. In the *Doughty* case, the officer had been accused of groping a colleague's breasts while he was associated with the police as a community support officer but prior to becoming a member of the relevant police force. The PAT considered that the relevant regulations did not apply in respect of such conduct: "… absent a post-attestation conviction for pre-attestation conduct the [English analogue provisions to the 2016 Regulations] did not cover pre-attestation conduct …"

[53] Mr Skelt relied upon the discussion in the *Doughty* ruling which disclosed that the tribunal had received evidence from a detective superintendent (Mr Marshall OBE) who had been seconded to the Home Office to work on the introduction of a new police complaints system to be introduced under the Police Reform Act 2002. This had given rise to the Police (Conduct) Regulations 2008. Mr Marshall had been involved in the drafting of these with the assistance of Home Office lawyers. His evidence was to the effect that the regulations were intended to apply only to the conduct of serving officers whilst serving in that capacity. As we observed in the course of argument, the subjective intention of a drafter of the regulations is neither here nor there if that intention is not objectively expressed in the words used. Nonetheless, we agree with the reasoning of the PAT in that case in relation to regulations which are in materially similar terms to the 2016 Regulations with which we are concerned. The tribunal held that words of regulation 5 of the Police (Conduct) Regulations 2012 – which are in materially identical terms to those of regulation 5 of the 2016 Regulations (set out at para [30] above) – should be given their ordinary meaning which was that the regulations applied only to the conduct

of a serving police officer, whether on or off duty. The tribunal was also referred to the *Lewis* case, which was relied upon heavily by the appropriate authority. In common with our view, the tribunal did not consider this determinative and overturned the decision of the misconduct panel (that it was bound by *Lewis*) which was appealed against. The tribunal in *Doughty* also appears to have sought evidence from both sides as to whether a police officer had ever previously been subjected to police misconduct proceedings for pre-attestation conduct which had not resulted in a post-attestation criminal conviction. Only one such case was identified through researches. In that case, referred to as the Wiltshire case, the misconduct panel had declined jurisdiction to determine the charge.

[54] The PSD submitted that the PAT in *Doughty* was wrong to distinguish *Lewis* because "it was tolerably clear that the key jurisdictional fact in *Lewis* was the orthotist's current and continuing status as a registered professional, not when the conduct was alleged to have occurred" [underlined emphasis in original]. For the reasons given in the preceding section of this judgment, we do not consider that present status as a member of the PSNI is the sole or key jurisdictional fact in this case; and for the reasons given at paras [50]-[51] above we consider that the *Lewis* case can be distinguished, insofar as it is relevant.

Protection of the public and the concerns of the judge below

[55] The judge below considered the appellant's argument on the interpretation point to be "at first blush … attractive" (see para [77] of the judgment). We obviously consider that he was right to do so. In this court's view, in going on to then reject that argument the judge erred firstly in considering that the terms of the questionnaire which the applicant completed may have been relevant to the issue of statutory interpretation (see paras [80] and [89] of his judgment); and more importantly, secondly, in adopting a purposive interpretation (see paras [81] and [87] of the judgment) which stretched the meaning of the relevant statutory text beyond what it could properly bear.

[56] In reaching this conclusion, we wish to emphasise that we agree with all that Colton J had to say about the importance of maintaining public confidence in the police service, which is an important aspect of the rule of law. It is undoubtedly of the highest importance that improper behaviour on the part of police officers, whilst they are police officers, is brought to light and dealt with, whether they are on or off duty at the time of the relevant misconduct. However, improper behaviour which occurs *before* the individual becomes a member of the police service is in a different category. It might well render that person unfit to be entrusted with the office of constable and its attendant powers; and it is just as important that such matters come to light and have appropriate consequences; but this will not amount to *police* misconduct.

[57] Colton J appears to have been heavily influenced by submissions on behalf of the PSD that there may be circumstances where highly concerning pre-attestation

conduct came to light after an individual had joined the police, which showed them to be unsuitable to serve as a police officer, and where this was "incapable of legal remedy" or could not be investigated by the PSD. The judge felt that this illustrated the weakness of the appellant's arguments (see paras [82]-[84] of the judgment below).

[58] The appropriate means of addressing pre-attestation conduct which renders a candidate unsuitable for service as a police constable is in a robust vetting regime. Where, as here, the vetting regime fails because of a lack of candour in a candidate's responses which only later comes to light, it is right that some mechanism exists (where appropriate) for this to have consequences for that individual *qua* police officer. In many cases, this may be able to be dealt with through the Police (Performance and Attendance) Regulations (Northern Ireland) 2016 ("the Performance Regulations") where vetting or security clearance is withdrawn upon discovery of the non-disclosure or false declaration. The 2016 Regulations and the Performance Regulations were made and came into force at the same time and are complementary instruments representing an overall package of measures to deal with matters which may render a constable liable for dismissal or other sanction. A range of potential outcomes are set out in regulation 39 of the Performance Regulations, including dismissal, reduction in rank or redeployment to alternative duties. A performance panel may make a finding of gross incompetence, which is defined as including "a serious inability … to perform the duties of his rank or the role he is currently undertaking to a satisfactory standard or level, to the extent that dismissal would be justified". That may encompass a range of circumstances where vetting is removed and the individual is therefore subject to an inability to perform police functions to a satisfactory standard.

[59] The College of Policing publication, 'APP [Authorised Professional Practice] on Vetting' (2021), on which the PSNI vetting procedures are based, discusses the withdrawal of vetting clearance for civilian police staff and police officers at section 8.47. It includes the following guidance:

> "The [Employment Rights Act 1996] does not apply to police officers or special constables. Therefore, when clearance is withdrawn and suitable alternative employment cannot be identified, and/or the risk cannot be reasonably managed, the force should consider proceedings under the Police (Performance) Regulations 2020.
>
> When a police officer's or special constable's RV [recruitment vetting] clearance is withdrawn, they will be unable to access police information and systems. Unsupervised access to police premises will also not be permitted. As a result, the police officer will be unable to perform their role to a satisfactory level. This could,

therefore, amount to gross incompetence and a third-stage meeting should be considered."

[60] A recent example of a case dealing with the discharge of an officer, albeit a probationary officer, as a result of vetting clearance being removed is *R (Victor) v Chief Constable of West Mercia Police* [2023] EWHC 2119. In the course of that judgment, at paras [40]-[44] and [88], Eyre J recognised the role of the Performance Regulations in this regard (albeit that those regulations did not apply in that case given the officer's probationary status). The facts of that case illustrate that the vetting process may lawfully, in some circumstances, lead to an officer's discharge even where related misconduct proceedings did not result in that outcome. The PSD accepted that this procedure may cater for some circumstances where vetting was originally secured but ought not to have been. However, it was concerned that the use of this procedure may be highly fact sensitive. We agree. However, as Mr Skelt submitted, this concern can readily be met, for instance by the simple mechanism of requiring a sworn officer to confirm the accuracy and completeness of information previously submitted by him or her in their application to join the police service. If an untruthful answer was provided at that stage, it seems clear that that could found a misconduct charge, arising from conduct when the individual was plainly subject to the Code of Ethics. If such a procedure is not presently required, we would urge that serious consideration is given to its introduction. We consider that such a process may be preferable, at least in some cases, to relying merely on the withdrawal of a security clearance in the event that an irregularity in the vetting process is discovered. Whilst in most cases withdrawal of such clearance may result in an officer being unable to perform the duties of their role – since such clearance is necessary for individuals to be permitted unsupervised access to the police estate, its assets and infrastructure – in others there may be an argument that the officer can continue with their duties, or with alternative duties, notwithstanding the removal of a certain level of clearance. In yet other cases, it may be that an irregularity which is later discovered is not such as to warrant revocation of a clearance granted at the time of vetting. However, it may still be necessary to mark, and condignly punish, dishonesty.

[61] By requiring post-attestation confirmation of information provided at the vetting stage, the PSNI (and other police forces) would be able to ensure that the provision of incomplete or misleading information could properly be dealt with as an instance of misconduct committed whilst the individual was a police officer, where this was necessary. Consideration should perhaps also be given to including a catch-all requirement to disclose matters which would undermine public confidence in the police service if an individual was to secure admission. All judges are familiar with a similar mechanism, whereby questions in relation to good character are put to them at the time of appointment, including whether there is anything that might affect the acceptability of their appointment. As the authority referred to at para [46] demonstrates, it is proportionate to a legitimate aim to seek more information from candidates for the police service, given the nature of their role, than it would be in other contexts.

[62] Viewed in this way, we consider the first instance judge placed excessive weight on the submission made to him that, on the appellant's interpretation, candidates guilty of seriously discreditable conduct before they became police officers would have to be retained as officers without any option for them to be investigated by the PSD. One result of the way in which the PSD introduced the interpretation point seems to have been that the judge below was deprived of full argument or information in relation to the vetting regimes which have been placed before this court by the appellant (and the GB Federations).

[63] We agree with the respondent's submission that incorrectly or incompletely filling out the vetting questionnaire should not be, and was explained to candidates not to be, a "consequence-free action"; but it does not follow that the consequences should flow from a misconduct charge alleging breach of the Code at a time before the officer was subject to that Code. Other mechanisms already exist or may be introduced in order to deal with this issue. These include withdrawal of vetting which may give rise to gross incompetence capable of being dealt with under the Performance Regulations; and/or requiring confirmation of vetting information at a time when the individual has become an officer, rendering them liable to misconduct charges if, in confirming the information previously given, they act in a way which contravenes any provision of the Code of Ethics. In addition, we consider that such charges are already possible on the basis of the ongoing duty point, to which we now turn.

The ongoing duty point

[64] We do not accept the appellant's argument in relation to the ongoing duty point. Rather than representing a 'contrivance', as the appellant suggested, we consider that this analysis draws a proper distinction between pre- and post-attestation conduct. Whether or not a failure to correct or supplement information provided at the vetting stage amounts to an ongoing breach of the Code of Ethics will have to be examined on a case-by-case basis. In principle, however, it appears to us that such a failure may well constitute misconduct committed at a time when the relevant individual is subject to the Code.

[65] This issue turns more upon the proper meaning and interpretation of the Code than the 1998 Act or 2016 Regulations. The appellant accepted that the Code could be amended to provide an ongoing duty of disclosure in relation to pre-attestation conduct. We do not consider this necessary. Article 7 deals with the requirement of integrity, including a requirement (at Article 7.5) that police officers "shall not commit any act of corruption or dishonesty" and shall "oppose all such acts coming to their attention…" The Explanatory Notes to this requirement explain that this includes "knowingly omitting to make oral or written statements or entries in any record or document required for police purposes." This is plainly capable, in appropriate circumstances, of covering a situation where an individual knowingly

keeps quiet about misleading or incomplete information which they are aware they previously provided for vetting purposes.

[66] The appellant also complained that this ongoing duty related to "unspecified conduct." In this respect, we do agree with the judge below as to the importance of the terms of the questionnaire and related declaration (see para [91] of the judgment). These emphasised to the appellant, in clear terms, both the importance of providing full and honest disclosure and the continuing reliance which would be placed by the police on that obligation having been discharged.

[67] We further reject the appellant's submission that the basis of the asserted duty can only be that the past conduct which should be disclosed was itself a breach of the Code, as otherwise there can be no duty to report it. In our view, the obligations that, once attested, a police officer shall act with integrity and/or shall not commit any act of dishonesty and must oppose any such act are capable of capturing a situation where that officer made a false declaration and, after attestation, keeps that matter to himself or herself. Whether or not that amounts to the commission of misconduct whilst a police officer will depend upon all of the circumstances. However, the mere fact that it might – and, in our view, on the evidence in the present case reasonably could – be found to represent misconduct is enough to see off any argument posing a knock-out blow to the Panel's jurisdiction.

[68] The respondent's submission on this issue – and, no doubt the Panel's decision on it – takes the case against the appellant at its height, namely that he knowingly secured the position of constable by deceit and knowingly maintained that deceit in an active and continuing way. Especially in circumstances where the appellant had signed the voluntary declarations contained at the end of the vetting form – including an acknowledgement that the information provided may be subject to ongoing checks and that any false statement or deliberate omission may result in disqualification, discipline or dismissal – it was plainly open to the Panel to take the view that it could enquire into whether the appellant had been guilty of misconduct in failing to volunteer the matters which had previously not been disclosed. We agree with both the Panel's and the judge's conclusions on this issue.

The consent point

[69] The consent point was not the subject of detailed argument before us and we propose to deal with it only briefly. In summary, the PSD also contended that the Panel was entitled to treat the appellant's non-disclosure as misconduct under the 2016 Regulations because the applicant himself had consented to this particular aspect of pre-attestation conduct being subject to police misconduct procedures. This argument is premised upon the terms of the declaration that the appellant signed within the questionnaire, which included the following:

> "… I declare that the information I have given is true and complete to the best of my knowledge and belief and I

> understand that any false statement or deliberate omission in the information I have given in this questionnaire may disqualify me from employment … *or make me liable to disciplinary action*, which may include dismissal."
>
> [italicised emphasis added]

[70] We agree with Colton J's conclusion, at para [89] of his judgment, that prospective assent on the part of an applicant to the police cannot, as a matter of law, confer a statutory jurisdiction upon the Panel which it does not enjoy. The position may well be different in a situation in which a misconduct tribunal derives its jurisdiction from contractual arrangements. In the present context, however, we do not consider that this assists the respondent.

Article 8 ECHR

[71] For the reasons we have given, we consider the ongoing duty point to have been such as to justify the Panel's decision, and the decision of the judge below, that the Panel had jurisdiction to hear and determine the misconduct proceedings against the appellant. The appellant also contended that his dismissal would represent an infringement of his Convention rights on the basis that it was not in accordance with law by reason of the vagueness of the duties imposed. We reject this contention. In light of our conclusion on the interpretation point, an officer should only face misconduct charges in respect of conduct committed after their attestation, before which the Code will have been provided and explained to them. Some of the obligations in the Code are wide; but properly so. In the area of professional regulation, absolute precision in advance as to the application of professional and ethical standards in any given situation is unrealistic: see, generally, the discussion of this issue by Singh J in *R (Pitt and Tyas) v General Pharmaceutical Council* [2017] EWHC 809, at paras [45]-[51].

[72] Whether any particular disciplinary sanction which is taken in response to pre-attestation conduct (on the basis of the ongoing duty point) is such as to violate an officer's article 8 rights must be determined on a case-by-case basis. There is no proper basis, in our view, to conclude that the Panel's determination – that the misconduct proceedings should be permitted to proceed – represented or would inevitably give rise to a breach of the applicant's article 8 rights. The legitimate aims being pursued by the misconduct proceedings are both obvious and weighty. The expectation of privacy which the applicant enjoys in respect of the subject matter of the proceedings, if any, is highly attenuated given the nature and purpose of the vetting procedure to which the applicant voluntarily submitted.

[73] Since the appellant has now resigned from the police, strictly we need not determine this aspect of his appeal; and it does not appear to us to raise the type of issue which, in the exercise of our discretion, we should go on resolve for the benefit

of future cases. However, it appears to us to clearly lack merit for the reasons given in the preceding paragraphs.

Conclusion

[74] In recent times, as a result of a number of high-profile cases of the most disturbing nature, there has been a wholly warranted and appropriate focus on the need to exclude or remove from the police individuals who are unfit to hold the office of constable. In the respondent's words, "… local and national discourse regarding trust in the police has scarcely been more heightened".

[75] As Lord Carswell explained in *R (Green) v Police Complaints Authority* [2004] 1 WLR 725, at para [78], public confidence in the police is a factor of great importance in the maintenance of law and order in our polity. Improper behaviour on the part of police officers must not be left unchecked. We would add that behaviour demonstrating that an individual is unfit to be a police officer should also be uncovered and acted upon. However, as Lord Carswell also emphasised, the relevant accountability mechanisms must operate in a suitable manner and in a way which is fair both to complainants (or the public) on the one hand and to police officers on the other.

[76] For the detailed reasons given above:

(1) We allow the appellant's appeal to the limited extent of setting aside the judge's conclusion, at paras [78], [87] and [97](ii) of his judgment (based on the reasoning at paras [76]-[88]), that jurisdiction was conferred upon the Panel to hear a misconduct charge in respect of conduct when the appellant was not a police officer merely by reason of the appellant being a serving member of the PSNI at the time of the misconduct proceedings.

(2) We dismiss the remainder of the appeal and affirm the judge's order dismissing the appellant's application for judicial review since, as the judge found, the Panel had jurisdiction to proceed to consider alleged misconduct on the part of the appellant on the basis of the ongoing duty point.

[77] We consider that there are already mechanisms in place to deal with pre-attestation behaviour of significant concern on the part of an individual who subsequently becomes a police officer, namely a rigorous vetting process, the provisions of the Performance Regulations and/or the possibility of misconduct proceedings for breach of an ongoing duty. Nevertheless, insofar as concerns remain on the part of the PSNI as to the robustness of these mechanisms, we recommend consideration of amended processes (such as are raised at paras [60]-[63] above) in order to address these in future. Such an approach would promote legal certainty and would avoid the difficulties to which the PSD's preferred interpretation gives rise. If that is still considered inadequate by the PSD or their

counterparts in GB forces, in our view that is a matter to be addressed by amendment of the relevant provisions.

[78] We will hear the parties on the issue of costs but, provisionally, are attracted to the position that (i) the appellant should recover his costs of this appeal from the PSD, as a notice party which effectively stood in the shoes of the respondent and which has been unsuccessful on the principal issue; (ii) all other parties to the appeal should bear their own costs; and (iii) we should not interfere with the judge's costs order below (that the respondent recover its costs from the applicant but that there should be no order for costs in respect of the PSD).