

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Lloyd's (Mark) Application [2010] NIQB 125

**IN THE MATTER OF AN APPLICATION BY MARK LLOYD
FOR JUDICIAL REVIEW**

McCLOSKEY J

I INTRODUCTION

[1] Constable Mark Lloyd, the Applicant herein, has been a police officer since 1987. He is in dispute with the Police Service of Northern Ireland, the Respondent herein, about his entitlement to so-called "*on call*" payments spanning a period of some fifteen years, from 1991 to 2006, and giving rise to a claim that he is owed some £32,000 in total. This dispute is the subject matter of his application for judicial review, which is contested by the Respondent.

[2] Two preliminary observations may be made. First, notwithstanding the strong disagreement between the parties about the Applicant's legal entitlement to the payments in question, many of the material facts upon which the court's adjudication will be based are largely uncontroversial. Secondly, it appeared to the court from the outset that the Applicant's main focus should be a claim for declaratory relief. This seemed appropriate from the twin perspectives of (a) what I conceive to be the central task of the court, which is to construe certain provisions of a finance code and other related documents and (b) the broader canvas detectable in both parties' evidence. In this latter respect, it is evident that there are several other police officers in similar dispute with the Respondent.

[3] Furthermore, it appears to me that, properly analysed, the Applicant's dispute with the Respondent does not relate to a single, or composite, claim for the

allowance in question. Rather, it concerns a proliferation of individual claims relating to a multiplicity of periods of time spanning an overall period of fifteen years, which began some nineteen years ago. This analysis seems to me confirmed by the Applicant's formal written claim for the allowance, dated 12th May 2008, and the response thereto. While the Respondent has made a decision in omnibus terms, its constituent elements are a series of individual refusals. This analysis flows not only from the formulation of the Applicant's claim for the disputed allowance but also the provisions of the Finance Code (*infra*). Any attempt by this court to adjudicate on the legality of the series of individual refusals would be both impractical and of questionable doctrinal validity, as this is a court of supervisory jurisdiction and not an appellate tribunal. The question of the correct approach to be adopted by the court was raised by me at the inception of the *inter-partes* hearing and, following due consideration, neither party dissented from the course which I have charted above.

[4] This approach stimulated the formulation of detailed draft declarations on behalf of the Applicant, coupled with the presentation of an amended Order 53 Statement. [For the record, I grant permission to make the amendments sought]. This in turn had the merit of focussing attention on the central issues of construction in dispute between the parties, while simultaneously highlighting the nature and significance of the Respondent's secondary, or fallback, submission. Both counsel, Mr Scofield (on behalf of the Applicant) and Mr. Dunlop (on behalf of the Respondent), are to be commended for co-operating fully with the court in this exercise and are to be complimented for the quality of their written and oral argument, in circumstances where I have not found the issues susceptible to ready resolution.

II THE LEGAL MATRIX

The "Post Criteria"

[5] This is, effectively, a job description for the post of "*Constable, Underwater Search Unit*". The main purpose of the post is stated to be:

"To fulfil duties as Police Diver both operationally and in training".

One of the specified duties is:

"To carry a radio pager and be available for operational call-out at all times, barring only sickness and annual leave".

Under the rubric "hours of work", it is stated:

“Members are on twenty-four hours call-out and are expected to respond accordingly. This can put a strain on station/branch duties ...

[Allowances Payable] No special allowances other than normal Finance Code Regulations apply”.

The evidence also contains “Vacancy Bulletin No. 5/99”, which advertised, *inter alia*, vacancies for constables in the Unit and, amongst the “Criteria for Acceptance”, listed the following:

“The duties of the Unit are part-time, however a high level of commitment is expected”.

The text also highlights the special skills and qualifications required of members of this unit.

Relevant Finance Code Provisions

[6] Regulation 33 of the Police Service of Northern Ireland Regulations 2005 provides:

“(1) Subject to Regulation 37, the Secretary of State shall determine the entitlement of members to any allowance and in making such a determination the Secretary of State may confer on –

(a) the Board;

(b) the Chief Constable

such functions –

(i) in relation to the calculation of an allowance,

(ii) where the payment of an allowance is subject to such conditions as may be specified in the determination, in relation to those conditions,

as he thinks fit.

(2) No allowances shall be paid to a member except as provided by or under these Regulations or approved by the Secretary of State and the amounts and conditions of payment of such allowances shall be as so provided or approved”.

The “Police Pay and Allowances Code (popularly known as “*the Finance Code*”) exists under the auspices of this Regulation. It regulates the broad subject of pay and allowances for police officers in matters as diverse as detached duty, meal costs, sports credit, the cleaning of uniforms and searching a badly decomposed body. Paragraph 2.1 provides:

“All officers of the PSNI may apply provided they meet the Conditions for Entitlement”.

Paragraph 3 bears the title “*Conditions of Entitlement*”. These appear to be generic qualifying conditions, to be distinguished from the various “*Conditions for Entitlement*” regulating individual payments/allowances.

[7] Within Section 3 of the Finance Code, there is a time limit provision. Paragraph 3.9, entitled “*Time Limit for Submission of Claims for Expenses/Allowances*”, states:

*“With the exception of housing emolument all claims for allowances should be submitted to the DCU/HQ Finance Office within **three months** from the end of the month to which the claim initially related. If it is not possible to submit the claim within the three month period a full report should be attached to the claim form outlining the reasons for the lateness of the claim. All retrospective claims received will be considered according to individual merit and will only be paid in exceptional circumstances with the approval of the District Commander/Head of Branch”.*

In short, paragraph 3.9 establishes a time limit of three months, measured from the end of the pertinent month, for the presentation of claims, coupled with a discretionary dispensing hour for late claims, exercisable only in exceptional cases. Section 5 of the Finance Code emphasizes the paramount importance of honesty and integrity on the part of all concerned – the individual officer and any countersigning or supervising officer involved. Any suspected violation of the Code must be reported and there are various cross references to the PSNI Code of Ethics. Section 5 continues:

“Police officers shall ensure that accurate records are kept of their duties as required by relevant Codes of Practice and Police Service policy and procedure ...

A breach of the Code may result, in appropriate circumstances, in a criminal or disciplinary investigation, either by the Police Ombudsman or the Police Service”.

[8] The Finance Code also contains a freestanding chapter entitled “*On Call Allowance*”. This begins with the following:

"1. Description

This is an allowance paid to officers who have been authorised to remain immediately available for duty, if required ...".

This is followed by a statement that the rates and conditions governing payment of this allowance have been approved by the Secretary of State under Regulation 33(1) of the 2005 Regulations. The text continues:

"3. Conditions for Entitlement

An officer will be entitled to payment of on-call allowance if all of the following criteria are met:

(a) There is a specific rostered commitment to be immediately available for duty outside scheduled duty hours.

(b) The officer is authorised at short notice of a requirement to be on-call for limited periods due to the exigencies of duty.

(c) The officer remains at home or otherwise immediately available to report for duty if required.

(d) The officer can be contacted by means of a telephone or pager if required to report for duty."

This is followed by a notable distinction between overtime payments and on-call payments:

*"An officer may not claim **overtime** in respect of **periods of on-call** unless called upon to perform duty. If called upon to perform duty, overtime may be claimed in respect of the period of actual duty performed.*

When an officer responds to a work related telephone call whilst on-call it is the responsibility of his/her authorities to determine whether or not 'duty' has been performed as a result of having received the call. An officer will not necessarily have to report to his/her station to perform the duty."

The next section of the regulatory provisions is predominantly concerned with the concept of “*recall to duty*”. The opening words are of interest:

“4. Officer Receives a Telephone Call Whilst Off Duty

*If an officer receives a call from a supervisory officer but he/she is **not ‘on call’** i.e. his/her name does not appear on **an on call roster to be immediately available for duty outside scheduled duty hours ...**”.*

The highlighted words draw attention to the “*on call roster*” and its function. These words are repeated in subsequent passages within these discrete provisions.

[9] The next discrete section of the “On-Call Allowance” provisions regulates the process for making a claim. It states, *inter alia*:

“5. Claims Process

On-Call Allowance is paid in respect of periods of on-call performed. Only one claim for payment of On-Call Allowance should be made in respect of each period of on-call performed ...

*Claims for payment of the allowance should be made on Form F63(A) ... and submitted to the appropriate authorising officer at the end of the month to which the qualifying periods refer. If during **a rostered period of on call** an officer is called upon to perform actual duty the allowance will be paid in addition to the payment of any overtime that duty attracts.*

The period of notice given for the requirement to perform duty will be taken from the time at which the officer was called to perform the duty, not the date and time at which his or her name was included on the on-call roster”.

[My emphasis].

In Section 6, the responsibilities of claiming officers, countersigning officers and approving officers are detailed, with due emphasis on the need for integrity, accuracy and honesty. The impact of the Code of Ethics is highlighted. The requirement to submit every claim on the appropriate form is reiterated:

“A claim for On-Call Allowance in respect of any period must be submitted on the relevant claim form, fully completed or finalised, to the supervisor responsible for that qualifying period for certification”.

This is followed by a series of references to the claim form. Finally, Section 7 specifies the rates of payment, employing the terminology “rostered period” in both the table of rates and the ensuing “Examples”.

III FACTUAL MATRIX

General

[10] The Applicant was formerly one of several members of the Police Service of Northern Ireland (“PSNI”) Underwater Search Unit (“the Unit”). This was in existence when his employment as a police constable began in 1987. The duties of the Unit included search and rescue operations, the recovery of bodies and the gathering of physical evidence. The Applicant became a member of this Unit in 1990, joining eleven extant members of the team. The Unit is no longer in existence, as a result of the outsourcing of the relevant services to a private sector provider, with effect from 1st March 2008.

[11] The activities of the Unit were at all times regulated by the Association of Chief Police Officers Diving Manual (“the ACPO Manual”). This contains the following material provisions. Firstly, by virtue of paragraph 32, the responsibilities of the “diving contractor” are to ensure that, *inter alia*:

“... The size and abilities of the dive team are sufficient to enable the diving project to be carried out safely ... [and] ... sufficient and suitably qualified police diving supervisors are appointed in writing for police diving operations ...”.

The topic of *team size* is regulated more extensively in paragraph 43:

“For most police diving projects using SCUBA, the minimum team size should be five qualified police divers who will perform the following duties: diving supervisor; police diver; attendant for diver; standby police diver; [and] attendant for standby.”

[44] *A team of four police divers can be used but only where the risk assessment identifies that it is safe to do so. Where the police diving project involves the use of surface supply equipment, the minimum number of personnel required should be increased to six police divers. The additional*

members should be used to control the supply of breathing gas from the surface control panel to the diver.

[45] All of the people who form part of the dive team must be competent to discharge their duties ...”.

Accordingly, as a general rule, the team must be composed of at least five members, all qualified police divers and this figure rises to six in certain circumstances. Under the rubric “Fitness”, paragraph 82 states:

“All persons diving have a responsibility not to dive if by doing so they might present a risk to themselves or others. They must inform the police diving supervisor immediately if there is any medical condition which prevents them from diving safely or rendering assistance to another member of the diving team. Before every dive they must ensure that they know of nothing which makes them unfit to dive including: any known medical condition; effects of drugs or alcohol; effect of medication whether prescribed or proprietary; any feelings of tiredness, being unwell or emotionally upset”.

It is clear from a perusal of the ACPO manual that its contents constitute the detailed outworkings of the Diving at Work Regulations 1997, made pursuant to the Health and Safety at Work Act 1974.

[12] With the passage of time, membership of the team gradually diminished. Ultimately, by April 2005, the Unit had seven members only. According to the Applicant, all seven team members had the onerous commitment of being “*on constant call out*”. In addition to these specialist duties, all team members habitually performed the duties of a regular police constable, each being assigned to a District Command Unit. The Applicant avers:

“We were, however, always on call. We were originally issued with pagers (before mobile phones) for this purpose. We were called out regularly at weekends and each member of the team has had leave cancelled on several occasions by reason of being called on for diving duties ...

We were employed as part of the diving team, subject to the usual employment obligations of a police officer employed in a specialist post and paid for conducting diving duties. Where these were conducted outside scheduled hours, we were paid overtime ...

We were also obliged to be on-call and were subject to disciplinary action on the occasion of failing to respond to a call ...

*It is correct to say that it was not practice to tell an officer that he should be on-call at a particular time and to stay ready – but this is because we were on call **all** of the time ...*

We had to be in a state of readiness at all times ... I frequently had to attend calls when I had family commitments or events ...

We were contacted by pager and/or by mobile telephone or (in certain cases) by police officers coming to fetch us. Belfast Regional Control had each of our mobile telephone numbers, home numbers and addresses so as to ensure that we could be contacted at short notice, expressly for call-out purposes ...

We were sometimes contacted and told to report for duty the next morning, but were usually called and asked to make our way immediately to Lisnasharragh for diving duties”.

From this combination of averments, which are in substance unchallenged, the factual matrix of the Applicant’s case emerges with some clarity. The main affidavit sworn on behalf of the Respondent, by Superintendent Boyd, highlights the absence of any substantial controversy between the parties concerning the assertions contained in the averments set out above.

The Disciplinary Proceedings

[13] One of the discrete topics addressed, in some detail, in both parties’ affidavit evidence is the Respondent’s initiation of disciplinary proceedings against the Applicant and certain other team members arising out of events which occurred in January 2006. The evidence establishes, in short, the following. In the wake of the sinking of a trawler in the Irish Sea, a police diving operation was scheduled to proceed on 21st January 2006. In essence, the Applicant and two other team members refused to perform diving duties, in circumstances where all three were due to depart on a ski-ing holiday. A stand off developed, with the Respondent cancelling the Applicant’s leave and the three members then reporting unfit for duty. These events were the impetus for the service of a formal Regulation 9 Notice, which recited in material part:

“You are hereby notified that it is alleged that on 21st January 2006 you were required to undertake police duties in your role as a police diver, notwithstanding that you had applied for or intended to avail of a period of absence. It is

recorded that this requirement for duty and the cancellation of your leave ... was conveyed to you ... on 20th January 2006. It is alleged that you disregarded this order placing yourself on the sick and availing of unauthorised leave. This disobedience to orders is now subject to investigation ...".

This signalled the initiation of formal disciplinary proceedings against the Applicant (and the other officers concerned).

[14] The next step in the process entailed an interview of the Applicant by the Respondent's "Internal Investigations Branch". The thrust of what was put to the Applicant during this interview was that, being a member of the Unit, when summoned to diving duties he was obliged to attend. The transcript of the Applicant's interview includes the following replies made by him:

"People have to be competent, well trained, and even with that even with experience not everybody is suitable for doing all diving jobs, some diving jobs are more complicated than others, and some people are more able to do the jobs than others ...

In our work ... we get no extra pay for it. We work twenty-four hours a day, seven days a week unpaid. We get the normal overtime that anybody else would get but we, so the nature of the job just requires us to be happy to volunteer to do it and be, have to be asked to do it".

It was then put to the Applicant that, on the basis of a then current recruitment bulletin, candidates must "... be willing to work as an integral part of a small unit and such [sic] respond to operational needs on a 24/7 days per week basis ...volunteers are expected to be on a twenty-four hour call out and expected to respond according [sic]." In response to further questions, the Applicant asserted that he had voluntarily relinquished leave on certain previous occasions. Continuing, he suggested that he and other Unit members had sometimes had to "... change arrangements and change leave arrangements", adding:

"... This is the first, I've never been ordered, I've never been ordered to cancel leave before ...I've always volunteered to cancel you know ...".

Later in the interview, the Applicant suggested that the "establishment" number of Unit members should be nine (including Sergeant Leech), but had dropped to seven and, effectively, six some time previously. He continued:

"I've been on twenty, call out twenty-four hours a day, seven days a week unpaid since joining the USU in 1990. Out [sic] of our call outs at weekends work are very

common. When I joined there were twelve divers thus facilitating two to three divers at any one time that may due to personal circumstances simply could not respond or it was extremely inconvenient due to family commitments, commitments or personal commitments. Since the team strength was reduced to nine in 1993, fluctuations in team members and availability have left little room for discretion. Really by implication meaning that most people have to go out on just about every job ...

Conditions further deteriorated in 2003 when the team members fell to six due to retirements and an injury. This only slightly improved with the addition of one diver in April 05."

This interview was conducted on 30th March 2006.

[15] The final stage in the process was a hearing before a disciplinary tribunal, chaired by Assistant Chief Constable Finlay. The evidence considered by the tribunal included a statement of Chief Superintendent Cameron containing the following passages:

"At approximately 8.05pm I rang Assistant Chief Constable Toner and we agreed that as this was an operational matter potentially investigating suspicious deaths, this was what the Underwater Search Unit existed for and what the team had been trained and equipped for. This had the potential to become a critical incident. The three members should be contacted and their leave cancelled. Assistant Chief Constable [Toner] directed that the leave for the three officers should immediately be cancelled and that there would be a disciplinary investigation if they did not report for duty ...

This is what they were trained for and a lot had been invested in them by the organisation."

The documentary evidence further shows that ACC Toner's cancellation of leave direction was duly communicated to the Applicant and the other two officers. Their response was to report unfit for duty. The outcome of the disciplinary proceedings is (perhaps surprisingly) not documented. However, the parties are agreed that it entailed two main findings by the tribunal. The first was that the Applicant and the other team members concerned had been given a lawful order. The second finding entailed an acceptance of their defence that they had not been obliged to obey the order on account of unfitness, based on health considerations. As a result, they were acquitted of the disciplinary charge. At this stage, the PSNI had begun the process of outsourcing the services of the Unit and, according to the Applicant's averments,

“... the disciplinary proceedings really sounded the death knell for the dedicated PSNI diving team.”

Other Background Events and Communications

[16] In May 1996, Sergeant Leech communicated in writing with another Unit member about his failure to respond to a pager message which, notably, required him to report for duty *“immediately”*. The communication continues:

“At the time of the call-out you were on duty and therefore should have been available and if not a telephone message as to why should have been forthcoming ...

I point out that when accepted as a USU member you gave me and the panel on your selection board an assurance that you would be available as and when required. This does not mean just when it suits you. Every other member of the team responded to this call-out.”

I would point out that although the Applicant relied on this document, the statement that the Unit member was *“on duty”* at the material time strongly suggests that it cannot assist the court’s resolution of the issues to be addressed. Later, in December 2004, the Applicant and other Unit members were in dispute with the Respondent about their entitlement to *“Special Priority Payments”*. Sergeant Leech, who was the senior officer in the Unit (and is one of the contributors to the ACPO Manual) compiled a written submission on their behalf containing the following material passage:

“Members of the USU are expected to be available for call out 24/7 without, at present, additional payment of allowances. When called out to crime scenes as specialists they are the only persons trained within the entire Police Service who can safely recover evidence from hazardous locations such as under water or confined spaces. Therefore by definition the role carries a higher responsibility level than the norm”.

[My emphasis].

[17] Subsequently, in August 2008, when the Applicant’s claim for the allowance was being considered, Sergeant Leech prepared a detailed report, in the form of a statement. This records that he had been the sergeant in charge of the Unit from December 1990 to September 2006. His statement explains:

“... the Unit was staffed on a part time basis with only the sergeant in charge and one constable as full time USU and that, as such, part time members were required to be stationed in or around the greater Belfast area to enable a speedy response to diving call outs and that we were expected to respond to diving operations if called upon to do so ...

The ethos within Underwater Search Unit was that we were all part of a small specialist Unit and wanted to remain as such, so much so that when a diving operation did arise a member felt aggrieved and disappointed if they were not called for any reason.

However if a member was not available for USU duties then it was fully understood that attendance for diving duties was not mandatory, but a high level of commitment was expected ...

There was no call out rota in place ...

Call out was as the operational need arose and members were contacted accordingly taking into account prior knowledge of pre-planned commitments and event, however given the nature of the infrequency and unpredictability of such calls it was sometimes necessary to request that members with pre-planned events report for duty ...

Over the years there were many occasions when individual members have been unavailable for USU duties for a number of reasons.”

[My emphasis].

I interpret the thrust of Sergeant Leech’s description to convey that a high majority of diving operations was conducted during normal duty hours. In particular, for reasons which are perhaps obvious, such operations were very rarely carried out during hours of darkness.

[18] Referring to a substantial quantity of illustrative office diary extracts (attached to his report) Sergeant Leech’s report continues:

“These examples from each year clearly show that members, including myself, were unavailable due to annual leave, uniform station duties, babysitting, attendance at training

courses, court etc. My personal journal and police notebook entries along with copies of e-mail correspondence also clearly show that members fully understood that they were volunteers and diving duty was not mandatory."

[My emphasis].

Omnibus descriptions of this kind recur in Sergeant Leech's report and it is noteworthy that he does not differentiate amongst Unit members. The themes identifiable in the passages quoted above reappear in the final section of his detailed report where, referring to the terminology of "Vacancy Bulletins" he contrasts *expectation* with *compulsion* and continues:

*"At no time during my tenure as sergeant in charge of Underwater Search Unit did any member submit a claim, current or retrospective, for the payment of standby or on call allowance. It must be also clearly stated that over the years members of the Underwater Search Unit did display a very high level of commitment, which at times did encroach and impinge upon our home and social lives **but I, with each Unit member realise that we were all volunteers** and if the impact on my career, family or social environment had been too great, then all I needed to do to remedy this was to resign my duties as a police diver. However, I feel that I was well compensated professionally, philanthropically and financially during my tenure as a police diver."*

[Emphasis added].

The background and surrounding documentary materials also include a notable statement by the Head of Human Resources in a minute dated 18th February 2008:

"I would also point out that the availability of leave is subject to the exigencies of duty and because the availability of staff on twenty-four hour call out is a critical element of this role was detailed as part of the post criteria at the time of the advert".

The Applicant's Claim

[19] Around one year after completion of the disciplinary process, on 7th January 2008, the Applicant submitted, for the first time, a claim for "on-call" allowance in the following terms:

“Claim for on-call allowance to cover my off duty/rest days/public holidays for period February 1991 to January 1996”.

He formulated this claim by means of an e-mail which rehearsed, in particular, the aforementioned disciplinary proceedings and stated the following:

“Although working as a single ‘volunteer’ member of the USU since 1990, there has been an expectation for all USU members to attend a diving operation when detailed and indeed this was the case in practice since I joined ...

*As a result of an allegation of disobedience to orders on 31st January 2007 and the resulting disciplinary proceedings ... it is evident that there was an operational/corporate requirement placed upon USU members to attend all off duty call outs. **In practice, members of the RUC/PSNI Underwater Search Unit were required by HQ to respond to operational call outs on a twenty-four hour/seven day basis.**”*

[My emphasis].

A subsequent memorandum from the Applicant, dated 12th May 2008, began as follows:

“... I have detailed below, as discussed, a broad outline of the total periods of on call for each calendar year from 1991 to 2006 ...

Due to the complexities and duty time involved in research, I have taken each year and deducted all days absent due to sickness and annual leave. Although more than 60% of my annual leave was spent at home and therefore on call, I have not counted this to compensate for USU training courses ...”

In the particularised claim which followed, the Applicant subdivided his application for the disputed allowance into fifteen individual periods, each of fifty-two weeks’ duration, beginning on 1st January 1991 and ending with a three-week period, from 1st January to 20th January 2006.

The Impugned Decision

[20] The refusal of the Applicant’s claim for on-call allowance payments was initially communicated to him in a minute from Superintendent Eccles which was couched in terse and unenlightening terms. A substantial elaboration of the reasons

for the refusal was subsequently conveyed to the Applicant in a more detailed minute from the superintendent, dated 20th March 2009, which contains the following passages:

“Criteria A. Consideration was given to the profile which applies to the position of constable, Underwater Search Unit...

It is significant that the word ‘expected’ is used as opposed to ‘must’ or ‘will’. It is also known that there have been a number of occasions when members of the USU did not attend for operational duties as a result of annual leave or other commitments, despite a request.

Criteria B. It was not practice to contact an officer and tell that officer that he or she would be on duty at a particular time or that they should place themselves in a state of readiness to report for duty if required. It is accepted that there is an expectation that members of the USU may involve themselves in activities which could preclude their reporting for USU duties. This therefore falls short of the criteria required to meet Criteria B.

Criteria C. Again under Criteria C there is no requirement imposed upon members of the USU that at any particular period of time they should take steps to ensure that they are always in a state of readiness to dive.

Criteria D. This criteria is met by the members of the USU.

*As the requirement is that **all** four criteria must be met, and that has failed to happen, it is judged that there is no entitlement for retrospective payment on on-call allowances.”*

Accordingly, with specific reference to Section 3 of the relevant Finance Code provisions, the Respondent took its stand on the basis of a contention that the Applicant’s claim failed to satisfy the first three of the four stipulated conditions for entitlement and, in consequence, failed.

[21] Later, the Respondent also relied on non-compliance with the time limit provision in the Finance Code (paragraph [7], *supra*). This occurred some four months after the initiation of these proceedings and was communicated to the Applicant in a letter dated 11th September 2009 which recites, in material part:

“I am further aware that this matter has been the subject of a judicial review ...

I have now had the opportunity to reconsider your application ...

[After recording the author's agreement with the decision of Chief Superintendent Eccles]

I have also considered Section 3.9 of the [Finance Code] ...

That paragraph makes it clear that all claims for allowances should be submitted ... within three months from the date to which the claim initially related. I note that you made your claim for on call allowances on 7th January 2008 and your claim related to the period 1991 to January 2006. Accordingly on foot of paragraph 3.9 as quoted above your application was received out of time ..."

This letter invited the Applicant to put forward any case which he wished to make based on the exceptional circumstances dispensation. His solicitors duly responded, in a carefully composed letter dated 9th October 2009. This elicited a reply from Superintendent Boyd, by letter dated 8th December 2009, communicating the following:

"Having carefully examined the issues raised in your letter, my conclusion is that your client has not persuaded me that exceptional circumstances exist causing him to delay lodging his application within the three month time limit provided".

[22] In my view, the impugned decision, correctly analysed, has two basic components. The first is a rejection of the Applicant's claim for the disputed allowance on its merits, based on an assessment that, in its totality, it failed to comply with the qualifying conditions enshrined in the Finance Code. The second component is the Respondent's assessment that the claim must be dismissed on the further ground that it is in breach of the time limit specified in paragraph 3.9 of the Code and does not fall within the exceptional circumstances dispensation. I acknowledge that, in his challenge, the Applicant segregates each of these elements and challenges them on differing grounds.

IV THE PARTIES' MAIN ARGUMENTS

[23] With reference to the central issue of the proper construction of the Finance Code Provisions and whether, thus construed, the Applicant qualifies for any payment thereunder, I distil the principal contentions of Mr. Scofield to be the following:

- (a) The Applicant was required to be, and was, immediately available for diving duties outside scheduled hours at all times.
- (b) This requirement applied to all members of the Unit.
- (c) Given (a) and (b), there was no requirement for a specific roster, as this would have been otiose.
- (d) There is no challenge to the Applicant's averment that the Respondent would have been unwilling to compile duty rosters in any event, as they would have been in contravention of EU law.
- (e) Any suggestion that the Applicant and other Unit members were mere "volunteers" is misconceived and irrational.
- (f) The Applicant's construction of the relevant Finance Code provisions is supported by the disciplinary proceedings against him.

These contentions resolve to a central submission that the Applicant's claim for on duty allowance payments satisfies the conditions enshrined in the Finance Code, with the result that the impugned decision is vitiated by illegality.

[24] Moving from the provisions of the Finance Code to the impugned decision, the Applicant advances the freestanding submission that, in categorising the Applicant as a "volunteer" the language of Superintendent Eccles' letter of 20th March 2009, the vitiating misdemeanour of a misdirection and/or the intrusion of an immaterial consideration occurred. The Applicant further attacks the Respondent's elated reliance on the time limit provision as an impermissible *ex postfacto* rationalisation and/or the frustration of the substantive legitimate expectation that this discrete provision would not be invoked to his detriment. The final limb of this aspect of the Applicant's challenge is his contention that the Respondent's conclusion that the time limit for claiming could not be waived on the basis of exceptional circumstances is irrational. The subsidiary argument advanced on behalf of the Applicant is that if the relevant Finance Code provisions exclude him from qualifying for payment of the disputed allowance, they are unlawful as they have operated to constitute a disproportionate infringement of his right to family life under Article 8 of the Convention. The converse of this discrete submission is acknowledged on the Applicant's behalf: if he *did* qualify for payment under the Finance Code, the Article 8/1 intrusion of which he complains would not be disproportionate, by virtue of the availability of financial recompense.

[25] The principal submissions on behalf of the Respondent join issue with the Applicant's contentions relating to the correct construction of the Finance Code provisions. It is suggested that it is not sufficient to be "on-call". Rather, all of the qualifying criteria must be satisfied. The Respondent further relies on the absence of a specific, concrete rostered commitment and argues that the Applicant's suggestion

of constant and immediate availability is belied by certain aspects of the available evidence. With reference to paragraph 3(b) of the Finance Code, it is submitted that the Applicant was not available at short notice. This rests on an *assertion* that there was no compulsion to attend diving duties when contacted. In relation to paragraph 3(c), it is submitted that the Applicant was not “*immediately*” available to report for diving duties. In this respect, the absence of any significant restrictions on the Applicant’s private life is highlighted. The Respondent equates being on call with being expected to receive a pager/mobile phone communication: I understand this discrete submission to point up the contrast between a concrete expectation – probably better characterised an obligation (on the one hand) – and a merely speculative possibility (on the other). Finally, it is submitted that the Respondent’s reliance on the time limit enshrined in the Finance Code is unimpeachable, since the Code is a legal instrument to which the Respondent was obliged to give full effect, subject only to any express discretion contained therein..

V CONCLUSIONS

[26] As appears from my remarks at the outset of this judgment, I consider that the minutiae of the Applicant’s dispute with the Respondent about his entitlement to on-call allowance (dates, periods, figures, amounts, calculations and so forth) do not belong to the central territory of this judicial review application. Furthermore, this being a court of supervisory, and not appellate, jurisdiction, adjudication on this series of claims would be wholly impractical, having regard to their sheer bulk and vintage. It seems to me that the court is predominantly concerned with the Applicant’s entitlement *in principle* to the disputed payments. This turns on the proper construction of the relevant provisions of the Finance Code, an exercise which I consider to lie at the heart of these proceedings.

Three Governing Principles

[27] In conducting this exercise, I begin with three governing principles. The first is that the construction of every document is a question of law to be determined by the court. The second is that while this is not, strictly, an exercise in statutory interpretation or the construction of a legal instrument such as a contract or a will, the Finance Code has a distinct statutory aura or flavour, given that it is made by a government Minister pursuant to subordinate legislation, in turn made under a measure of primary legislation. Measures such as the Finance Code under consideration in these proceedings are a reflection of the truism that in the world of contemporary government it is necessary for Parliament to delegate extensive law making power in matters of detail, with primary legislation establishing the general framework only. In this sphere, the operation of the doctrines of *ultra vires* and procedural propriety are especially important. I consider the third governing principle to be that the Finance Code provisions are to be construed in their full context.

Context

[28] It follows from this formulation of the governing principles that any evidence about the parties' subjective views and opinions might at most inform the court's evaluation of the relevant context but is otherwise immaterial, since the exercise in construction is an objective one. Secondly, the relevant documents fall to be construed by the court in a context of policing and operational policing requirements. Thirdly, linked to this latter observation, it is safe to assume that those who composed the relevant documents were possessed of relevant policing experience and expertise and had their minds focussed on operational exigencies and duties. Fourthly, the audience to whom the relevant documents are addressed is composed predominantly of members of the workforce in question. Fifthly, having regard to this combination of factors, I consider that the court should avoid an unduly technical or legalistic or sophisticated approach in construing the documents in question. Pedantry is equally to be avoided.

[29] Thus I consider that the proper approach for the court is **not** to enquire into and determine whether any public law misdemeanours – such as irrationality, the intrusion of immaterial factors or the disregard of material considerations – have infected the Respondent's conclusion that the Applicant is not entitled to on-call allowance payments. Of course, the court's review of the impugned decision is confined to the public law misdemeanours which are actually in play in any event. In my view, the barometer with which the court is fundamentally concerned in these proceedings is that of *legality*, with its gaze focussing firmly on the Finance Code itself. I consider the court's primary task to be one of construing the material provisions of the Code, in accordance with the governing principles rehearsed above. If, having conducted this exercise, the effect of the court's conclusions is that the Applicant *could, in principle*, qualify for any of the payments claimed by him, in respect of any individual period, this will raise the further question of whether there is any legally sustainable reason for refusing his series of claims, in whole or in part. If, on the other hand, the court's conclusions on construction support the impugned decision, the whole of the Applicant's challenge must fail, subject to his fallback argument that the relevant Code provisions are unlawful, on the ground that they infringe his Convention rights (*infra*).

Statutory Aims and Objectives

[30] In construing the disputed provisions of the Finance Code it seems to me appropriate to reflect on certain provisions of the parent statute. By Section 32(1) of the Police (Northern Ireland) Act 2000:

“(1) It shall be the general duty of police officers –

(a) to protect life and property;

(b) to preserve order;

(c) to prevent the commission of offences;

(d) where an offence has been committed, to take measures to bring the offender to justice”.

Section 32(4) provides:

“In carrying out their functions, police officers shall be guided by the code of ethics under Section 52”.

The Code of Ethics made under Section 52(1) is linked to the formal attestation which every police officer must, per Section 38(1), make before a Justice of the Peace. This entails an affirmation that the officer will, *inter alia*, faithfully discharge his duties with fairness, integrity and diligence. Per Section 52(5), while the statutory Code of Ethics is made by the Northern Ireland Policing Board, it is the product of consultation with a series of interested agencies – the Police Association, the Secretary of State and the Ombudsman, amongst others. The power to make Regulations for the government, administration, conditions of service and pay and allowances of police officers is conferred on the Secretary of State by Section 25(1) of the Police (Northern Ireland) Act 1998.

[31] In tandem, the 1998 and 2000 statutes significantly reformed policing in Northern Ireland. They established a series of new agencies (the Policing Board, the Ombudsman, District Policing Partnerships) and governance arrangements. Under these statutes, the Secretary of State was designated the Responsible Government Minister. This is reflected in the extensive roles, functions and responsibilities conferred on him. In the present context, one of those responsibilities was to make Regulations governing the hours of duty, leave, pay and allowances of police officers. The exercise of this discrete power is manifested in the 2005 Regulations (paragraph [6], *supra*) and, in turn, those Regulations made provision for the formulation by the Secretary of State of the Finance Code under scrutiny in these proceedings. Thus the Finance Code forms part of a distinctive statutory structure. The further feature of the new statutory arrangements (and certain instruments made thereunder) which I would highlight is the recurring themes of economy, efficiency, effectiveness, diligence, integrity and high ethical standards in the performance of their duties by every police officer. The predominance and obvious importance of these themes and principles in the parent statutes and relevant subordinate instruments provide some objective insight into the intentions of the Secretary of State and his advisers in formulating the contentious provisions of the Finance Code. Furthermore, I consider that the Finance Code must be construed in a manner which is harmonious with and in furtherance of the discernible statutory aims, objectives, themes and principles.

On Call Allowance: the Qualifying Conditions

[32] Applying the approach outlined above, I construe the contentious provisions of the Finance Code in the following way:

- (a) **Qualifying condition (a):** *“A specific rostered commitment”*. In my view, the Secretary of State must have contemplated that this would *normally* entail a formal, written schedule, prepared by the relevant senior officer and made known to all officers within the unit in question. It is indisputable that the statutory aims, objectives and principles already highlighted would be duly served and furthered by this mechanism. In short, this must be the mechanism which the Secretary of State contemplated for the great majority of Police Service units. However, the Secretary of State must also have been presumptively aware of the particular characteristics and responsibilities of the police constable members of the Underwater Search Unit. He would also have been aware of the long established practices and *modus operandi* of this Unit (rehearsed in Chapter III above). When the Finance Code was made, the Unit had been in existence for some two decades. It had at no time operated under the auspices of a formal duty roster and the thrust of the evidence is that it had functioned efficaciously and successfully without this device. Other important factors in this context include the unambiguous statement in the job description that Unit members *“are on twenty-four hours call out and are expected to respond accordingly”*, the geographical restrictions on the regular posting of Unit members and the very small membership. In my view, all of these considerations combine to yield the conclusion that, objectively construed, *in the case of this particular Unit*, qualifying condition (a) does not require a formal written duties roster.
- (b) *“Immediately available for duty outside scheduled duty hours”*. In my view, in accordance with this discrete requirement members must be available to respond without undue delay, by reporting either to the Lisnasharragh base or to the relevant location, at a speed compatible with the exigencies of the particular operation. This is the second limb of qualifying condition (a). I would add that the longer the distance to be travelled, the less likely it is that the officer concerned will satisfy this criterion. Furthermore, the consumption of even small amounts of alcohol seems to me inimical to the statutory objects, which overshadow and inform this entire subject : such an officer would not, in my view, satisfy this criterion.
- (c) **Qualifying condition (b):** *“The officer is authorised at short notice of a requirement to be on call for limited periods due to the exigencies of duty”*. The word *“authorised”* seems erroneous. The condition makes better sense if one substitutes *“informed”* or *“advised”*. Irrespective, I consider that, properly construed, this adds nothing of substance to qualifying condition (a).

- (d) **Qualifying condition (c):** *“The officer remains at home or otherwise immediately available to report for duty if required”*. This is qualifying condition (c). In my view, with the exception of the reference to *“at home”*, this adds nothing of substance to qualifying condition (a). In short, the precise whereabouts of the individual member do not matter, provided that he is able to respond without undue delay by reporting to the relevant place at a speed compatible with the exigencies of the particular operation.
- (e) I consider that the meaning of **qualifying condition (d)** – *“The officer can be contacted by means of a telephone or pager if required to report for duty”* – is self-evident.
- (f) *“On call performed”*. These words appear in paragraph 5 of the relevant section of the Finance Code. In my view, they clearly connote a state of affairs during a measurable period of time.

Finally, there is a clearly identifiable interface between on call duty and overtime duty. The various provisions of the Finance Code seem to me to establish that at the point when the former terminates (when summoned to duty) the latter begins. There is a clear separation between these two species of payment and the relevant Code provisions are demonstrably designed to avoid double counting. Thus both allowances can, conceivably, be paid successively, but not simultaneously.

Paragraph 3.9: the Time Limit for Claiming

[33] The text of paragraph 3.9 is reproduced in paragraph [7], *supra*. It has two distinct elements. The first of these requires the submission of a police officer’s claim for *any allowance* within three months from the end of the month to which the claim initially related. The meaning of this is self-evident. The second element of paragraph 3.9 contemplates the possibility that, in certain circumstances, late claims may be accepted. Objectively and contextually construed, I consider the breakdown of this discrete element to be the following:

- (a) The officer must demonstrate that it *was not possible* to comply with the three month time limit.
- (b) This must be demonstrated via *“a full report”*, outlining the reasons for the delay, duly attached to the completed claim form.
- (c) Late claims will be evaluated *“according to individual merit and will only be paid in exceptional circumstances with the approval of the District Commander of the Head of Branch.”*

The first aspect of (c) reflects the well established principle of public law that a decision maker must not fetter his discretion and should assess every case on its particular merits. This requires a fair, uncluttered and open minded approach. The further aspect of this discrete provision is that there is no definition of “*exceptional circumstances*”. Thus there is invested in the relevant decision maker a broad measure of discretion which must be exercised fairly, rationally and in accordance with the *Padfield* principle viz. in a manner harmonious with and in furtherance of the main aims, objects, themes and principles of the parent statutes.

[34] Having regard to my analysis of the statutory structure above, I am of the opinion that the relevant decision makers (the finance officers and senior police officers concerned) are obliged to give effect to paragraph 3.9 in every case. In my estimation, there are three reasons for this. Firstly, it flows from the status of the Finance Code, as I have analysed this. Secondly, it is compatible with those statutory objectives and principles which are concerned with efficiency, economy, good husbandry and ethics. I consider that all of these principles and standards would be undermined if the relevant decision maker were at liberty to unilaterally and capriciously disregard Section 3.9 in individual cases. Thirdly and finally, this construction of paragraph 3.9 is harmonious with the principle of legal certainty and the doctrine of the rule of law itself.

[35] From the above analysis it seems to me that two omnibus conclusions emerge:

- (a) The Applicant could, in principle, qualify for the payment of on call allowance under the Finance Code in respect of given individual periods, each of which would have to be analysed in accordance with the court’s construction of the Code.
- (b) However, all of his claims for on-call allowance are time barred under Section 3.9 of the Finance Code.

[36] Given the above analysis and conclusions, the Applicant’s invocation of a substantive legitimate expectation that the Finance Code time limit would not be applied to his detriment must fail: see, by analogy, *R -v- Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 , per Laws LJ at p.1129 . In the compact formulation of Peter Gibson LJ [at p.1125], “...*any expectation must yield to the terms of the statute under which the Secretary of State is required to act.*” In short, an asserted substantive legitimate expectation which is confounded by a provision in a relevant statutory measure – as in the present case – must fail. It is defeated by the terms of the statutory measure itself and is, in consequence, shorn of any vestige of legitimacy.

[37] Thus the only route whereby the Applicant could secure payment of on call allowance in respect of *any* of the periods in question is by the application of the “*exceptional circumstances*” dispensation in his favour. I shall consider this discrete

aspect of the Applicant's challenge in the following paragraph. Before doing so, I conclude that the Applicant's submission that the Respondent's belated reliance on paragraph 3.9 constitutes impermissible *ex post facto* rationalisation must be rejected. I consider that the Respondent was simply giving effect to a provision in a statutory measure which, in my view, it had no power to disregard.

[38] Finally, it is incumbent on the court to determine the Applicant's contention that the Respondent's reliance on paragraph 3.9 was irrational and/or vitiated by a failure to properly construe the provisions of the Finance Code. It follows from the conclusions already made that the latter contention must fail, since in my view the Respondent properly construed paragraph 3.9. Based on all the evidence, I have no basis for concluding that, in so doing, the Respondent lapsed into the prohibited territory of *Wednesbury* irrationality. This self-evidently elevated threshold for intervention has not been surpassed. I further reject the Applicant's contention that the Respondent's rejection of his claim under paragraph 3.9 of the Finance Code constituted a supplementary, freestanding decision. In my view, this is, properly analysed, part and parcel of the original impugned determination. It simply represents a further reason for refusing the claim.

[39] I would add that, in light of my conclusion that the Applicant could, in principle, qualify for payment of on-call allowance, his subsidiary argument based on Article 8 of the Convention does not arise. I should say that I would have rejected it in any event. The suggestion that the provisions of *the Finance Code* operated so as to infringe the Applicant's right to family life is, in my view, misconceived. The Finance Code is simply a mechanism for the remuneration of police officers. Its provisions did not cause the intrusion of which the Applicant complains. Rather, any intrusion of this *genre* occurred as a direct result of the Applicant's job description and the duties which he was required to perform in consequence, taking into account also the statutory duties imposed upon him as a police constable. In addition, the evidence establishes that members of the Unit were at liberty to terminate their membership and many clearly did so. Accordingly, I consider his Convention challenge to the Finance Code misconceived.

Disposal

[40] It follows from the above conclusions that I disagree with the Respondent's first reason for rejecting the Applicant's claims for on-call allowance. However, I find no error of law or other vitiating factor in the second reason, based on paragraph 3.9 of the Finance Code. This is fatal to the Applicant's claim for the allowance. Furthermore, I have assessed these two reasons as forming part of a single, indivisible decision. Thus it appears to me that the Applicant does not qualify for any of the relief claimed in the amended Order 53 Statement. In particular, as paragraphs [32] -[34] of this judgment clearly construe the relevant Finance Code provisions, a declaration seems inapposite. It follows that, subject to further argument, the appropriate order will be a dismiss of the application for judicial review.

[41] I would add the observation that in light of the court's conclusion that the first of the Respondent's two basic reasons for refusing the Applicant's claim for on-call allowance is legally incorrect, it is conceivable that the Applicant's legal advisers may formally request the Respondent to reconsider its rejection of the Applicant's "*exceptional circumstances*" claim. If this should eventuate, it will, of course, lie squarely outwith the ambit of these proceedings.

[42] The parties will have an opportunity to address the court on the question of costs.