

<b>Neutral Citation No: [2023] NIKB 71</b>	<b>Ref: SIM12213</b>
<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	<b>ICOS No: 21/26057/01</b>
	<b>Delivered: 29/06/2023</b>

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**KING'S BENCH DIVISION  
(JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY GARY BEST  
FOR JUDICIAL REVIEW**

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**Mark Mulholland KC with Richard Smyth (instructed by Edwards & Co)  
for the Applicant**

**Philip McAteer (instructed by the Departmental Solicitor's Office) for the Respondent  
Neasa Murnaghan KC with Joseph Kennedy (instructed by the Crown Solicitor's Office)  
for the Notice Party**

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**SIMPSON J**

***Introduction***

[1] The applicant is a serving police officer in the Police Service of Northern Ireland ("PSNI"). He initially joined the RUC in 1997, after a period in the RUC Reserve. The respondent is the Chief Constable of the PSNI.

[2] On 17 September 2019 the applicant initiated an application for retirement on the grounds of permanent disablement – commonly known as ill health retirement ("IHR"). Prior to the coming into existence of the Northern Ireland Policing Board ("NIPB"), decisions in relation to pensions were for the Police Authority. Although some of the legislative provisions discussed below refer to the Police Authority, readers should note this now to be a reference to the NIPB. NIPB is a Notice Party to these proceedings.

[3] On 24 September 2019 the applicant became aware that serious allegations had been made against him. On the same date he was informed by PSNI's Professional Standards Department that he was under criminal investigation arising from those allegations. He was suspended from duty with effect from 23 October 2019. [Criminal proceedings were subsequently commenced against the applicant. Those criminal proceedings have now ended, with the prosecution offering no

evidence and the judge directing the jury to enter a verdict of not guilty. This occurred in February 2023. The applicant remains subject to potential disciplinary proceedings.]

[4] Following a medical assessment by a Selected Medical Practitioner, who reported to NIPB in November 2020, by letter of 18 February 2021 (wrongly dated 18 February 2020) NIPB notified PSNI that the applicant's application for IHR was granted, and that he would be retired with effect from 2 April 2021. The letter included the following:

"As you will be aware, Board Officials were notified by Deputy Chief Constable Hamilton at the inception of this case that [the applicant] *"is being prosecuted for"* [the identified offences were set out].

Accordingly, it has been indicated that the Chief Constable may consider this matter further to Regulation 14 of the Police Service of Northern Ireland Regulations 2005 ("the 2005 Regulations") which states that the consent of the Chief Constable may be required before an officer can retire.

...

If the Chief Constable chooses not to pursue this matter by way of Regulation 14 ... then [the applicant's] last day of service will be 1 April 2021. Accordingly, his Ill Health Retirement Pension and Injury on Duty Award will be effective from 2 April 2021."

[5] By letter dated 25 March 2021 the Chief Constable ("the respondent") notified the applicant that he had "exercised his discretion under Regulation 14 of the Police Service of Northern Ireland Regulations 2005 to refuse permission for you to retire on 1 April 2021." It is the decision conveyed to the applicant in that letter which is challenged in these judicial review proceedings.

[6] Three broad grounds of challenge were initially relied upon. First, the applicant asserted that the decision is vitiated by illegality. He says that the Royal Ulster Constabulary (Pensions) Regulations 1988, as amended ("the 1988 Regulations") provide a comprehensive and exhaustive statutory framework for retirement on the grounds of ill health and that, since the 1988 Regulations dictate that the decision-making entity is the NIPB, the respondent has no role. The applicant says that Regulation 14 of the 2005 Regulations does not apply to compulsory retirement on the grounds of ill health.

[7] Secondly, the applicant relied upon Article 1 of the First Protocol ("A1P1"). This was said to arise because the applicant was awarded an injury on duty award

pursuant to the PSNI and PSNI Reserve (Injury Benefit) Regulations 2006, which award is paid by way of a gratuity and a pension element. The pension element is paid as an enhancement to his ill health retirement pension. However, as was made clear in Mr. Mulholland KC's opening of this case the applicant no longer relies on A1P1 as a freestanding ground of challenge.

[8] Thirdly, the applicant says that the decision is vitiated by procedural unfairness because the respondent did not offer the applicant any opportunity to make any representations before arriving at the impugned decision.

[9] Leave was granted by Scofield J on 15 September 2021. The Notice of Motion, dated 27 September 2021, seeks a "declaration that the respondent's decision ... made on or about 25/3/21 that the applicant shall not be permitted to retire on the grounds of ill health, and any policy which reflects that decision, is unlawful." The applicant seeks an order of certiorari quashing the decision.

[10] Scofield J directed that the Notice of Motion was to be served on the NIPB, and the Notice Party was granted leave to participate in the proceedings.

[11] I am grateful to all counsel for their comprehensive, yet succinct, submissions on this issue, which I confess to having found difficult, and I have taken all of those submissions into account.

### *The statutory regime*

[12] Before I discuss the events which occurred following the application for IHR I need to set out the relevant statutory provisions, otherwise it would be difficult to make sense of the narrative. Those provisions identified by the parties as being relevant to the consideration of this challenge are as follows.

[13] First, the 1988 Regulations. These were made pursuant to section 25 of the Police Act (Northern Ireland) 1970. Where material this section provides:

"(1) Subject to the provisions of this section, the Ministry may make regulations as to the government, administration and conditions of service of members of the Royal Ulster Constabulary.

(2) Without prejudice to the generality of subsection (1), regulations under this section make provision with respect to the following matters, that is to say -

...

(d) voluntary retirement of members of the [police];

...

(k) pensions and gratuities in respect of service as a constable..."

[14] The Regulations are divided into 13 parts, A - M. Part A is entitled "General Provisions and Retirement."

[15] Disablement is dealt with in Regulation A11, in the following terms:

"(1) A reference in these regulations to a person being permanently disabled is to be taken as a reference to that person being disabled at the time when the question arises for decision and to that disablement being at that time likely to be permanent.

(2) Subject to paragraph (3), disablement means inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a male or female member, as the case may be..."

[16] Regulations A15 to A19 are the regulations in Part A which deal with retirement. Each appears under a separate heading.

*"Retirement*

**A15**

(1) A reference in these regulations to retirement includes a reference to the services of a member being dispensed with under regulations for the time being in force under section 25 of the Police Act (Northern Ireland) 1970(a) (other than regulations relating to the maintenance of discipline or to dismissal) but does not include a reference to leaving the force on transferring to a police force in Great Britain, and a reference to a continuous period of service is a reference to a period of service uninterrupted by any such retirement.

(2) If a member is dismissed but is entitled to an ordinary pension by virtue of regulation B1(5), these regulations shall apply in his case as if he had retired as mentioned in regulation B1(5)(b).

*Compulsory retirement on account of age*

**A16**

(1) Subject to paragraph (2) every member shall be required to retire –

- (a) if he is the chief constable or a deputy chief constable or assistant chief constable, on attaining the age of 65 years,
- (b) if he is a superintendent or inspector, on attaining the age of 60 years,
- (c) if he is a sergeant or constable, on attaining the age of 55 years:

Provided that, in the case of a member holding a rank not higher than that of inspector who was serving on 5th July 1972, the time at which he shall be required to retire shall, unless at any time he elects or has elected by notice in writing to the Police Authority that this proviso shall not apply to him, be on attaining the age of 57 years.

(2) The time at which, under paragraph (1), a person shall be required to retire may be postponed, if the person concerned holds a rank above that of superintendent, by the Police Authority, and, if he holds the rank of superintendent or any lower rank, by the chief constable with the approval of the Police Authority:

Provided that no such postponement or postponements shall extend beyond 5 years from the time at which, under paragraph (1), he would have been required to retire.

*Compulsory retirement on grounds of efficiency of the force*

**A17**

(1) This regulation shall apply to a member, other than a chief constable, deputy chief constable or assistant chief constable, who if required to retire would be entitled to receive a pension of an amount not less than 2 third of his average pensionable pay or would not be entitled to receive a pension of such an amount if it did not fall to be reduced in accordance with Part VIII of Schedule B (reduction of pension related to up-rating of widow' s pension).

(2) If the Police Authority determine that the retention in the force of a member to whom this regulation applies would not be in the general interests of efficiency, he may

be required to retire on such date as the Police Authority determine.

*Compulsory retirement on grounds of disablement*

**A18**

Every member may be required to retire on the date on which the police authority determine that he ought to retire on the ground that he is permanently disabled for the performance of his duty;

Provided that a retirement under this regulation shall be void if, after the said date, on an appeal against the medical opinion, on which the Police Authority acted in determining that he ought to retire, the medical referee decides that the appellant is not permanently disabled.

*Effective date of retirement*

**A19**

- (1) For the purpose of these regulations-
  - (a) a member shall be taken to retire or cease to serve immediately following his last day of service;
  - (b) a member required to retire under regulation A16, A17 or A18 shall be deemed to retire on the date on which he is so required to retire and his last day of service shall be the immediately preceding day.
- (2) The references in paragraph (1) to a person's last day of service are references to his last such day during the relevant period of service."

[17] In Schedule A to the Regulations retirement is defined, thus: "'retirement' and cognate expressions shall be construed in accordance with regulations AI5 to A19."

[18] Regulation 14 of the 2005 Regulations, which appears in Part II ("Government") of the Regulations provides as follows:

**"Retirement**

14. Members may retire in such circumstances as shall be determined by the Secretary of State, and in making such a determination the Secretary of State may –

(a) require such notice of intention to retire as may be specified in the determination, or such shorter notice as may have been accepted by the Chief Constable, to be given to the Chief Constable, and

(b) require the consent of the Chief Constable to be obtained before giving such notice.

[19] The Secretary of State's determination pursuant to Regulation 14 was:

"...

v. the circumstances in which a member may retire shall be those specified in Annex C;

3.(a) Expressions used in these determinations which also appear in the Regulations have the same meanings as in the Regulations.

...

[20] Annex C provides as follows:

**"RETIREMENT**

**Regulation 14**

(1) Without prejudice to the following provisions:

a) The Pensions Regulations relating to compulsory retirement

a) The Conduct Regulations relating to resignation as an alternative to dismissal

c) Section 21 of the Act relating to retirement in the interests of efficiency or effectiveness;

and subject to paragraph 2, a member may retire only if he has given to the Chief Constable one month's written notice of his intention to retire or such shorter notice as may have been accepted by that authority:

Provided that, while suspended under the Conduct Regulations, a member may not, without the consent of the Chief Constable, give notice for the purposes of this determination or retire in pursuance of a notice previously given.

(2) In the case of the Chief Constable, the Deputy Chief Constable or Assistant Chief Constable, paragraph 1 shall have effect as if - a) for “one month’s” there were substituted “three months”...

[21] Regulation 3 of the 2005 Regulations provides the following definition: “the Pensions Regulations” means the regulations relating to Police Service of Northern Ireland pensions for the time being in force.

[22] As part of its submissions NIPB refers to Regulation H1 of the 1988 Regulations. Part H relates to “Appeals and Medical Questions.” Where material, Regulation H1 provides:

*“Reference of medical questions*

(1) Subject as hereinafter provided, the question whether a person is entitled to any and, if so, what awards under these regulations shall be determined in the first instance by the Police Authority.

(2) Where the Police Authority are considering whether a person is permanently disabled, they shall refer for decision to a duly qualified medical practitioner selected by them the following questions –

- (a) whether the person concerned is disabled;
- (b) whether the disablement is likely to be permanent;
- ...
- ...

(4) The decision of the selected medical practitioner on the questions referred to him under this regulation shall be expressed in the form of a certificate and shall ... be final.

(for ‘Police Authority’ read ‘NIPB’)

[23] Regulations H2 to H6 deal, in turn, with appeals to a medical referee, further reference to the medical authority, a refusal of a member to be medically examined, appeals and litigation on appeals.

[24] It is also helpful to note, in passing, that Regulation 80(3) of the Police Pensions Regulations (Northern Ireland) 2015 (“the 2015 Regulations”) (which features in correspondence) provides (where material) that:

“ ... the [NIPB] after considering all the relevant circumstances and all the advice and information available to the [NIPB] (including input from the member) (a) may require the member to retire ... on the grounds that the member is permanently medically unfit for performing the ordinary duties of a member of the police service; or (b) may require the member to continue to serve as a member of the police service.”

[25] In the present case the applicant was in the 1988 Scheme, and it is common case that the provisions of Regulation 80(3) of the 2015 Regulations do not apply to an officer in the 1988 Scheme. The recognition of this fact led, as discussed below, to the change in the wording of the result letter to include a reference to Regulation 14 of the 2005 Regulations (see above in paragraph [4])

[26] Finally, reference was also made to a document entitled “DEPARTMENTAL GUIDANCE POLICE MISCONDUCT, PERFORMANCE AND ATTENDANCE, AND COMPLAINTS PROCEDURES” (“the Guidance”) dated September 2016 in which, at paragraph 1.50, the following is included:

“Nothing in this paragraph should be taken to suggest that, where a member’s medical condition is found to be such that he or she would normally be retired on medical grounds, the misconduct proceedings should prevent or delay retirement.

However, there may be some cases, especially those where the conduct in question is very serious, where it may not be in the public or the police service’s interest to proceed with medical retirement in advance of misconduct proceedings, held in the absence of the member concerned if necessary. In the event of medical retirement the misconduct proceedings would automatically lapse.”

### *Events following the application for IHR*

[27] While there is some earlier correspondence, largely dealing with requests by the applicant for an update on the progress of his application, the material correspondence begins in the summer of 2020. On 17 August 2020 NIPB wrote to the Professional Standards Department (“PSD”) of PSNI. The letter referred to some communication from PSD in March 2020 relating to outstanding disciplinary issues and asking whether “you intend to make any representations at this stage, to include confirmation (if any) that you do not wish the officer’s ill health retirement to be considered by the Board?”

[28] On 15 October 2020 Mark Hamilton, Deputy Chief Constable, wrote to NIPB. The letter informed NIPB, inter alia, that the “DCC, on behalf of the Chief Constable, is likely to seek to make representations to you under Regulation 80(3) of the Police Pensions Regulations.” [as to this, see paragraph [25] above] However, the letter went on to say:

“In any event, the Chief Constable is unlikely to permit [the applicant] (who is currently suspended) to retire whilst the misconduct proceedings are outstanding, relying on his power under Annex C of the Determinations associated with Regulation 14 of the Police Service of Northern Ireland Regulations 2005 which states that ... ‘while suspended under the Conduct Regulations, a member may not without the consent of the Chief Constable, give notice ... to retire...’”

[29] The letter also refers to paragraph 1.50 of the Guidance and describes the allegations against the applicant as “very serious.” The letter concludes:

“The declaratory purpose of the police misconduct process is to protect public confidence in, and the reputation of, the police service. [the applicant] is potentially facing serious criminal allegations ... Therefore, we would ask you to confirm that you will invite the Chief Constable to make further representations to the Pension Authority in the event that the SMP certifies [the applicant] as permanently medically unfit.”

[30] On 3 November 2020 the applicant attended for examination by a Selected Medical Practitioner (“SMP”) who was asked to assess the applicant for both IHR and an Injury on Duty (“IOD”) award. Following that examination and assessment the SMP certified that the applicant was permanently disabled due to PTSD and depression. The report and certificate were made available to NIPB, although there is nothing in the papers to show precisely when.

[31] However, on 27 November 2020 the temporary Director of Police Administration at NIPB emailed PSD in the following (where material) terms:

“Please be advised that the Board’s [SMP] has recommended that this officer be ill health retirement (sic) on the basis of various medical conditions. We would be most grateful if you would confirm if you would like to make any further submissions in opposition to this application which may be considered by the Resources Committee who will make the final decision in this case.

Any further submissions will be shared with [the applicant] who will be asked to make his own submission and/or rebuttal to your position.

As such I would be most grateful to receive any additional submissions from you before 3pm on Friday 4 December 2020 in order that these may be shared with [the applicant] and brought thereafter to the next Resources Committee on 16 December 2020."

[32] In an email of 2 December 2020 addressed both to personnel internal to NIPB and to personnel in PSNI, NIPB states, following a reference to the communication from the Deputy Chief Constable referred to at paragraph [28] above:

"In this respect the Board has requested a response from [the Deputy Chief Constable] on/before 3pm on Friday 4 December 2020. On receiving this updated submission, I will pass same for the attention of [the applicant] with further directions as to next steps.

Separately, I will ensure that a copy of the SMP Report and Certificate is provided to you by way of courier in order that same can be forwarded to [the applicant]. However, it should be clearly outlined that any decision in the respect of IHR/IOD awards is not for the SMP. Rather, it is the Board as Scheme Manager and ultimate decision-maker under the Regulations who will make a final decision in any/all cases."

[33] A reply to this email was sent by PSNI on 3 December 2020. This noted that the NIPB email and letter from the Deputy Chief Constable had been passed to the applicant through his line manager. Referring to the paragraph of the 2 December 2020 email recorded immediately above, the PSNI email said:

"My understanding of this comment is that:

- [the applicant] is to be provided with a copy of the SMP decision and certificate but also needs to be made aware that until the decision has been brought before the Resources Committee he will not be permitted to retire from the PSNI. [The answer back was – "Correct"]
- It is also my understanding that the SMP decision will not be provided to the Resources Committee until DCC Hamilton provides further substantive

submissions ... Is this correct? [The answer back was – “Correct, and in addition, in the interests of parity and fairness to [the applicant] he will of course be given the opportunity to comment on submissions made and make submissions in rebuttal if he so wishes.”]

[34] The Deputy Chief Constable wrote a lengthy letter to NIPB dated 14 December 2020. This letter made a number of points: that the applicant was still subject to criminal proceedings and had been served with a misconduct notice; that NIPB “has discretion” to allow or refuse an IHR application; requesting NIPB to “exercise its discretion to allow [the applicant] to remain in service until the criminal and misconduct proceedings are concluded”; indicating that the Chief Constable “is unlikely to permit [the applicant] to retire whilst the misconduct proceedings are outstanding”, citing Regulation 14, Annex C and paragraph 1.50 of the Guidance. The letter ends:

“Whilst this is a decision for the Board, these matters are clearly very serious and ones where it would not be in the interest of the public, or the Police Service, for [the applicant] to be allowed to medically retire prior to the conclusion of the misconduct proceedings.”

[35] In the event this letter was received too late for the Resources Committee meeting on 16 December 2020, so the matter was put back for decision at a Committee meeting scheduled for 20 January 2021. [However, a further NIPB to PSNI email of 11 February 2021 indicates that the decision would be taken at the Committee meeting on 17 February 2020, and that is the date on which the decision was actually taken by NIPB.]

[36] On 29 January 2021 (the letter wrongly states ‘2020’) NIPB wrote to the head of PSD referring to a meeting (undated) which took place involving personnel from NIPB and PSD. The letter identifies what NIPB call a “lacuna” – ie that the provisions of Regulation 80(3) of the 2015 Regulations do not apply to an officer in the 1988 Scheme. This leads to NIPB’s assertion that: “[t]herefore whilst the Board may lawfully consider submissions from the PSNI in relation to members of the 2015 Scheme who are involved in disciplinary and/or criminal proceedings it is not statutorily permitted to do the same for members of the 1988 Scheme.”

[37] The letter also proposed that the result letter sent in relation to members would include a relevant paragraph, and this can be seen in the letter sent in relation to the applicant set out at paragraph [4] above.

[38] The result letter relating to the applicant was sent to PSD on 18 February 2021 (again wrongly dated ‘2020’). The letter was, apparently, not sent directly to the

applicant and the papers contain no indication of how the contents were relayed to the applicant.

[39] On 23 March 2021 the Deputy Chief Constable sent a submission to the Chief Constable. The covering correspondence to the Chief Constable states:

“This relates to an application to retire under ill health as per the 1988 Pension Scheme. A date of 1 April 2021 has been notified to the officer but a recommendation has been made by Professional Standards to refuse permission to retire until misconduct proceedings have been completed.

As this falls under the 1988 Scheme any refusal must be made by the Chief Constable.

I forward this report to you for your consideration.”

[40] A number of documents accompanied this letter, one of which was the recommendation of PSD. The recommendation set out a short history of “Ill health retirement and misconduct” and stated the following:

“There has been a long history in relation to misconduct proceedings and ... IHR applications. In the past an officer who was subject to misconduct had to apply to the ... DCC for a waiver before being allowed to enter into the IHR application process...

Unfortunately, the process was challenged by way of judicial review in December 2018. Due to potential human right issues PSNI contended that officers should be allowed to apply for IHR even if they faced gross misconduct proceedings, therefore the matter did not proceed to a full judicial review. This led to the waiver system being revamped to allow officers to apply for IHR without a waiver.

The current system allows an officer who is subject to misconduct proceedings to apply for IHR and be examined by the ...SMP and once the report of the SMP is received ... NIPB will ask for PSNI’s representation to the NIPB Resources committee in relation to whether the officer should be allowed to retire on IHR.”

[41] On 24 March 2021 the Chief Constable notified his decision to the Deputy. He referred to the submission sent to him and indicated that he was satisfied, first, that

the case met the test outlined in paragraph 1.50 of the Guidance, and, secondly, that it “is legitimate for me to refuse the officer permission to retire on 1 April 2021.”

[42] The outcome of all of this was the letter of 25 March 2021 (see above, paragraph [5]) containing the impugned decision.

#### *Regulation 14 – the competing contentions*

[43] As noted above, the applicant’s principal contention is that Regulation 14 of the 2005 Regulations does not apply in the circumstances of this case, where the applicant is subject to compulsory retirement. The applicant contends that Regulation A18 and Regulations H1-5 constitute “an exhaustive, self-contained and comprehensive code for” ill health retirement; that NIPB is the final decision-maker; and that there is no role for the Chief Constable.

[44] The respondent contends that Regulation 14 applies and that the applicant “cannot give notice or retire without the consent of the Chief Constable.” Annex C, he argues, “creates a separate requirement, applying after the outcome of the NIPB processes, for specified consent in certain circumstances.” It is further argued that “not all cases of IHR under Regulation A18 are ... properly considered to be compulsory.”

[45] The respondent rightly notes that there appears to be nothing in any regulations relating specifically to IHR. So far as I can see, there is no bespoke route for IHR and absent this, an applicant for IHR is simply shoehorned into the Regulation A18 box.

[46] The respondent cautions about the use of the headings to each relevant regulation. The respondent also makes submissions as to the import of “without prejudice to”, “provided that” and “subject to.”

[47] NIPB also submits that Regulation 14 applies in the circumstances of this case. It describes its role as the final decision-maker as “restricted”, submitting that “... NIPB is bound by the answers to the questions posed to the medical referee. In essence, the NIPB does not hold any discretion in this area as a result of the finality of the answers to the four medical questions under H1 of [the 1988 Regulations].”

#### *Consideration*

[48] It is a fact (as stated in paragraph 1.50 of the Guidance) that: “In the event of medical retirement the misconduct proceedings would automatically lapse.”

[49] One could easily envisage a situation where a police officer who has been suspended pending disciplinary proceedings applies for ill health retirement with the intention, if it was to be granted, of avoiding the disciplinary proceedings to be

brought against him. Clearly there should be a procedure to prevent such a situation.

[50] In my view there is in existence in the 1988 Regulations precisely such a procedure. It was identified and specifically referred to by both PSNI and NIPB in their exchanges in late 2020 and early 2021: namely, that the PSNI would make representations to NIPB as to why NIPB should not exercise its discretion to permit retirement, and the applicant would have the opportunity to make his own representations as to why the disciplinary issues should not prevent NIPB requiring his retirement. However, when one looks at the NIPB letter of 18 February 2021 it is clear that no discretion was brought to bear at all; the SMP having certified permanent disablement, the application for IHR (and IOD) was approved. This is acknowledged in NIPB's skeleton argument at paragraph 13 (and see paragraph [47] above). It seems to be somewhat at odds with the sentiments expressed in its email of 2 December 2020 that "any decision ... is not for the SMP. Rather, it is the Board as the Scheme Manager and ultimate decision-maker ... who will make the final decision..."

[51] That NIPB have such a discretion is clear from the wording of Regulation A18 and the use of the word "may." I am fortified in this view by the fact that this was also the opinion of Collins J in the case of *R v Cleveland Police Authority, ex parte Rodger* [1998] Lexis Citation 3043. There the applicant was a serving police officer who had been absent from work due to ill health. He was required by the Chief Constable to retire on medical grounds and was accordingly served with a notice of medical retirement pursuant to the Police Pension Regulations 1987, Regulation A20. (This was not a case in which the applicant applied for ill health retirement; rather he was being required to retire.) It came to light at around the same time that allegations were being made against the applicant which would, in the ordinary course of events, have made him the subject of disciplinary proceedings. The Assistant Chief Constable therefore wrote to him deferring his retirement. Disciplinary notices were subsequently served, however disciplinary proceedings were not pursued pending a decision on the applicant's application for judicial review of the Chief Constable's decision.

[52] The wording of the English Regulation A20 is identical to that of Regulation A18 of the 1988 Regulations, save for one minor difference in nomenclature, which is not material.

[53] Dealing with the issue of discretion Collins J said:

"The first question to determine is: what is the duty of the police authority under A20? It is to be noted that the word used is 'may':

'Every regular policeman may be required to retire...'

The use of that word indicates that it is a power which is to be exercised and that there must be a degree of discretion involved in its exercise.

...

It is perfectly proper for [the police authority] to have regard to other matters such as, for example, whether a police officer who may be permanently disabled from carrying out his normal duties, can be found light duties. If the officer has been injured on duty, or incapacitated on duty, I have no doubt forces do from time to time decide that it is perfectly proper for them to decide that they will not retire him, albeit he is permanently disabled from doing the whole of his duties.

Another possibility is the existence of disciplinary proceedings. Obviously the nature of those proceedings will have to be considered and if they are relatively trivial matters it would seem quite wrong that the discretion should be exercised against retirement on grounds of disablement. If, on the other hand, they are serious, and they might well lead, if established, to a penalty of dismissal, the authority will have to decide whether on balance it is better to permit the officer to remain suspended on full pay or to discharge him on grounds of disablement. In this respect, as we know, questions of public interest may come into the picture. I am quite satisfied that the discretion under A20 is, as the regulation quite clearly, in my judgment, indicates, a discretion whether to exercise and if so, when."

(The judgment contains no paragraph numbering)

[54] In my view it is precisely this discretion which is available to NIPB.

[55] Thus, it seems to me that a methodology for dealing with the present factual circumstances is built into the process to be adopted under Regulation A18 and the discretion given to NIPB by the wording of the Regulation. In reaching its decision NIPB would have been able to take into consideration, for example, the seriousness of the allegations of misconduct, the fact that the applicant was suspended, the fact that the criminal proceedings had ended and the circumstances which led to their coming to a conclusion. This process would also have allowed, as adumbrated by Collins J, for considerations of the public interest to be taken into account in reaching the decision as to whether or not to require retirement.

[56] Turning to consider the provisions in Regulations A15 to A19 inclusive, it seems to me that they cover a range of situations where a member is required to retire, irrespective of his wishes. As it seems to me their purpose is to allow for the Chief Constable effectively to dispense with the services of a member with a view to maintaining the overall operational efficiency of the police force. So, under A16, a member can be required to retire, irrespective of his wishes, at a certain age, with the Chief Constable having the ability to retain, for a limited period of time, a senior officer, thus providing a means whereby the Chief Constable can postpone the loss of operational experience. A17(2) specifically refers to the “general interests of efficiency” in requiring a member to retire. A18 provides for a member to be required to retire if he is unable, through disablement, to perform the duty of a police constable. It is to be remembered that A11(2) provides that: “disablement means inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a male or female member, as the case may be...”

[57] Under the above regulations I see no basis for importing any requirement that a member should serve any notice of his intention to retire; on the contrary he may have no intention of retiring and may be most reluctant to retire. These particular regulations provide that he be required to retire, irrespective of his own intentions. The applicant has never given any notice of intention to retire; rather he has applied for ill health retirement, his eligibility for which at all times depends on the findings of an independent medical practitioner, who might or might not certify that he is permanently disabled. His case was dealt with under Regulation A18 which provides for a member being required to retire.

[58] On the other hand, Regulation 14 of the 2005 Regulations nowhere contains any element of requirement. It provides that an officer “may retire” in certain circumstances. I consider that Regulation 14 deals with the situation where a member wishes to retire from the force for the officer’s own personal reasons, but for (again) reasons of efficiency, the officer is required to give notice eg to allow a time for operational planning to deal with the loss of the officer’s services. I consider that the provision in Annex C is to allow for the situation where an officer, wishing to retire for his or her own personal reasons, is not permitted to do so while under suspension.

[59] The respondent submits that the expression “without prejudice to” in Annex C means that the three legislative provisions referred to are not affected by anything in Annex C, and that it is not an expression which connotes priority of one provision over another. However, in my view if one seeks to import a notice requirement into the 1988 Regulations – where none exists on the face of the Regulations, and where it is difficult to envisage where in the ‘requirement’ process such a notice would be expected to be given – the Regulations will undoubtedly be affected by such an importation. That this is so seems to be clear from the submission of the Chief Constable that the applicant is required to give notice (such as is contemplated in Regulation 14) after the decision of NIPB. It seems to me that this is an entirely artificial submission, and I cannot see how the legislation would permit this. At that

stage the acknowledged final decision-maker has decided that the applicant be required to retire, and the retirement has its foundation in that decision, and has no other basis. The applicant would not be retiring pursuant to any notice but pursuant to the NIPB decision.

[60] The respondent submits that the expression “provided that” in Annex C does connote priority and that the purpose of the use of the expression is to manage the overlap between retirement and misconduct proceedings. However, in my view (for the reasons set out above in paragraph [55]) the overlap is easily managed by the discretion invested in NIPB.

[61] The respondent seeks to rely on the submission that under the ill health retirement procedure, an officer may withdraw from the procedure at any time. Accordingly, he says, the procedure is different from the compulsory retirement procedure in Regulation A18. However, in my view the officer could not withdraw ‘at any time.’ First, it is difficult to see how this would be possible after the finding of the SMP that the officer was permanently disabled and thus unable “to perform the ordinary duties of a” police officer (Regulation A11(2)). Secondly, once the decision was made by the NIPB on 17 February 2021, it is impossible to see how the officer could then withdraw from the process. I do not consider this to be a sound submission.

#### *Conclusion on Regulation 14*

[62] It is entirely right, and is to be expected, that regulations should provide that the obvious mischief identified in this case – namely, the ability of a suspended officer to avoid disciplinary proceedings by retiring – is preventable, no matter what the route to retirement. If Regulation 14 is not available, implies the respondent, then the mischief is not prevented. Therefore, for wholly laudable and entirely understandable reasons, the respondent seeks to rely on Regulation 14. However, it seems to me that the existing regulations do provide for the prevention of retirement where an officer is suspended from duty pending the outcome of disciplinary proceedings, whatever the route towards retirement.

[63] The discretion granted to NIPB by the provisions of Regulation A18 allows for representations to be obtained from both sides, the applicant and the respondent; a consideration of those representations by NIPB; and a decision, which may also be informed by the public interest, as to whether the suspended member be required to retire or whether the suspended member should remain in service until the conclusion of the disciplinary proceedings. Accordingly, in such a process NIPB has the ability properly to consider issues relating to the public interest and how those issues interact with the interests of PSNI and those of the applicant. It is in those circumstances that NIPB can properly be called the final decision-maker. In the event that either the Chief Constable or an applicant is disgruntled by the NIPB decision, judicial review would lie.

[64] Regulation 14 provides for any situation in which an officer indicates an intention to retire, by ensuring that he cannot give a notice of intention, or retire pursuant to a notice already given, if he is suspended from duty.

[65] Thus, either way, whether an officer is being required to retire or is seeking for his own reasons to retire, an officer can be prevented from doing so while suspended from duty pending the outcome of misconduct proceedings.

[66] Therefore, in the particular circumstances of this case I am of the view that Regulation 14 does not apply, and the respondent cannot rely upon it.

### *The fairness challenge*

[67] In light of my decision in relation to Regulation 14, the fairness challenge is academic. However, I will briefly consider it.

[68] The applicant says that the decision is vitiated by procedural unfairness as the respondent “did not offer the applicant any opportunity to make representations before he arrived at his decision.” He relies on the dicta of Lord Denning in *R v Kent Police Authority, ex parte Godden* [1971] 2 QB 662, 669 – “I am clearly of opinion that the decisions leading to compulsory retirement are of a judicial character and must conform to the rules of natural justice.”

[69] The respondent contends that there was no requirement on him to do so, as the decision conveyed in the 25 March 2021 letter determines neither the application for IHR or the misconduct proceedings. It does not prevent IHR if the applicant is not dismissed on foot of the misconduct proceedings. The respondent says the decision was simply one “which facilitated the completion of ongoing disciplinary proceedings before IHR (if those proceedings do not result in dismissal).”

[70] In my view if the decision by the respondent to rely on Regulation 14 rendered the applicant vulnerable to the loss of or reduction of pension if dismissed after a finding of misconduct, such would the seriousness of the potential consequences that it may well have been appropriate to permit the applicant to make representations, although I doubt whether any representation would have made the slightest difference. However, I heard no evidence as to what might be the consequences, so in the circumstances I make no finding on the issue of fairness of the process.

### *Disposition*

[71] I grant the applicant a declaration that the decision of the respondent to rely on Regulation 14 of the 2005 Regulations in order to refuse permission to the applicant to retire was unlawful. I will grant an order of certiorari, bring up the decision into this court and quash it.

[72] I will hear the parties on the issue of costs and any other relief.