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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY 'JR168' AND 'JR168A'
FOR JUDICIAL REVIEW

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

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Re JR168 and Another's Application (Suspension of police constable)

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Ronan Lavery KC and Richard Smyth (instructed by Edwards & Co, Solicitors) for the applicants
Brett Lockhart KC and Philip Henry (instructed by the Crown Solicitor's Office) for the respondent

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SCOFFIELD J

Introduction

[1] The applicants are two probationary constables in the Police Service of Northern Ireland (PSNI). In these proceedings, they seek to challenge a variety of actions on the part of the PSNI following an arrest made by the first applicant on 5 February 2021, namely (i) the decision to suspend the first applicant, (ii) the decision to re-position the second applicant, and (iii) a determination that the applicants had misconducted themselves, which was then publicly announced. The first two decisions were made by Deputy Chief Constable Mark Hamilton, acting as the "appropriate authority" within the meaning of that term in the relevant regulations. The third target of the application relates to a statement made by the Chief Constable of the PSNI.

[2] The applicants were represented by Mr Lavery KC and Mr Smyth; and the respondent was represented by Mr Lockhart KC and Mr Henry. I am grateful to all counsel for their assistance by way of their written and oral submissions.

[3] The system of policing in this jurisdiction underwent significant reform as part of the package of measures outlined in the Belfast (Good Friday) Agreement which was designed to resolve the conflict known as 'the Troubles.' The policing reforms were modelled on a wide-ranging review undertaken, and report produced, by the Independent Commission on Policing in Northern Ireland chaired by Chris (later, Lord) Patten, which was expressly designed to bring "a new beginning" to policing here. The circumstances of this case might be thought to reflect a clash between two conceptions of policing, respectively those before and after the 'new beginning' contemplated by the Patten reforms. The incident giving rise to the issues of contention in these proceedings involved, on the one hand, bereaved families mourning the loss of loved ones in an atrocity many years ago in which police collusion has long been suspected; and, on the other hand, two young police constables who had no personal knowledge whatever of that atrocity, not having been born when it occurred. One of those constables – a Roman Catholic originally from the Republic of Ireland – is the very type of candidate whom the Patten reforms were (at least in part) designed to attract to a career in policing, so as to increase confidence in the police and acceptance of policing across the community in Northern Ireland. For reasons which are understandable, the first set of protagonists were focused on the policing of the past. The applicants represent policing in the present, in which, again understandably, many officers may not be familiar with the details of contentious incidents which occurred many years ago.

Factual background

The incident on the Ormeau Road on 5 February

[4] The issues at the heart of these proceedings arise from an incident which occurred on 5 February 2021. That date was the 29th anniversary of a notorious shooting attack which occurred at Sean Graham's Bookmakers on the Ormeau Road in Belfast in which five people were tragically killed and nine others seriously injured. On the anniversary in 2021 a commemoration event was held at the scene. This was, however, also a time at which legal restrictions were in place (referred to generally as a 'lock-down') regulating the gathering of individuals in order to combat the Covid-19 pandemic which was then in course. Police officers came upon the commemorative gathering and concern arose as to whether those in attendance were, or may have been, acting in breach of coronavirus restrictions. The respondent's response to pre-action correspondence has accepted that this gathering was in breach of the Coronavirus Regulations which were in force at that time. It has also been recognised, however, that those present were (for the most part) wearing masks and socially distanced; and that the commemorative event itself was conducted peacefully and in a dignified manner.

[5] The police officers concerned are the first applicant (who first entered the ranks of the PSNI in late July 2020, around six months before the incident in question, and who was 26 years old at the time); and the second applicant (who has averred that he is a Catholic from the Republic of Ireland who joined the PSNI in March 2020). They commenced duty at 7:00am that morning and were in a police vehicle on patrol in Belfast. There had been no mention at their morning briefing, or in advance of the incident, about the commemorative event which was due to be held on the Ormeau Road that day. The first applicant has averred that he was completely unaware that 5 February was an anniversary of a notorious attack on the Ormeau Road.

[6] It is not the function of this court on an application for judicial review to make detailed factual findings about precisely what happened when the applicants engaged with those in attendance at the commemorative event. I have, however, been provided with a range of affidavit evidence about this, as well as police radio call logs and footage recorded on the first applicant's body-worn camera. Both sides have made submissions on the detail of the factual picture to some degree.

[7] In his affidavit evidence, the first applicant has described that, having come upon the event when travelling in their police vehicle around 2:30pm, he telephoned his sergeant (because the radio "was busy"). They had observed a gathering which appeared to be in excess of the permitted numbers under the Coronavirus Regulations then in force. Neither he nor the second applicant "had any idea that the gathering was a commemorative anniversary." They stopped their vehicle in the vicinity but did not immediately approach the gathering. The first applicant's averment is then as follows:

> "He [the sergeant] told me he was unaware of the nature of the gathering and told us to take no further action until some enquiries were made. He responded a few minutes later advising that he was unaware what the gathering was about and to engage our body worn cameras and monitor from a distance. We got out of our vehicles and followed this instruction. Another callsign enquired whether [we] needed [them] to attend at that point [and] I stated there was no need. My sergeant then asked for a situation report and he was told the gathering was dispersing and I asked whether we should approach to attempt to locate the organiser. I was instructed to do so. We were not informed prior to engaging with the participants what the nature of the gathering was or may have been."

[8] Mr Lockhart for the respondent asserted that the available radio logs demonstrate that what happened is "quite different" from that described by the applicants in their initial affidavits. On the respondent's case, the officers were in

fact told what the commemoration related to; they were given *permission* to approach, on request, rather than being "instructed" to approach; and they were instructed to approach only if it would not cause trouble. As is often the case in situations such as this, the position is not entirely straightforward. The applicants have explained that, when their initial affidavits were provided, they were not in possession of the detail contained in the radio logs. They described the situation as best they could remember it. They were not able to recall every comment or radio transmission in fine detail; and nor were they able to recall if they had even heard or understood everything that was said on the radio by other officers, given that several conversations could be being transmitted at the one time and other events or sounds may detract from what an officer picks up in his or her ear-piece.

[9] The radio logs suggest that the officers indicated they were going to "have a bit of engagement" with those in attendance if the sergeant was "happy enough." The sergeant said he thought that was best but that, if they met with "any resistance" to "just back off", although it would be good to get some body-worn footage. The event was initially considered to be some kind of "protest" and it is clear that, in the early stages, neither the officers nor the sergeant knew about the nature of the event.

[10] Another officer in a different location mentioned Sean Grahams on the radio but does not appear to have indicated the nature of the event. Indeed, the Inspector, who contributed shortly afterwards, continued to refer to the gathering as a protest and indicated that the officers should "make sure that you get [as] good a footage as possible on as many body worn videos as possible." A few minutes later, the officers, who had just arrived, said they thought the event was "a Remembrance Service." At this point, another uniform unit commented over the radio that it was "a 30 year anniversary of the bookie shooting there." The Inspector then advised the officers to "still get the footage but treat it with sensitivity." The first applicant replied that they were just stood at the side and would let those participating in the event continue. They then waited until the event had finished. At this point, they then asked their supervising officers if they "would like possible details of the organiser or the guy speaking", to which the response was, "Yes if you're not going to rock the apple cart too much." The first applicant confirmed this and said he would try his best; at which point he was told by the Inspector that that was "good work there" and that the footage could be passed to the Public Order Evidence Team in due course.

[11] It seems entirely clear to me from the body-worn video (BWV) with which the court was provided that the applicants waited until after the commemorative event was concluded, and the vast majority of those who had been in attendance had left, before attempting to have any engagement with those present (although some of those present had looked over and had seen the officers in attendance, at a distance, before the event concluded). In the Deputy Chief Constable's affidavit, which deals with events on that day, there is reference to an officer having "arrested a person who was taking part in a memorial event for those who were shot dead at Sean Graham Bookmakers in 1992." I accept the applicants' submission that this

averment is inaccurate. The individual was not arrested while the memorial was taking place. The applicants only engaged with those in attendance after the memorial event had finished. On the evidence before me, I am satisfied (for present purposes) that they were aware from their own observations that it was some kind of commemorative event taking place but that they knew nothing of the details of the Sean Graham shooting or who was involved, much less the contention around the atrocity in terms of possible police collusion. They were tasked by their superiors both to get footage of those involved, which would later be assessed, and also to get some details of the organiser of the event and/or the speaker; although they had also been advised (in terms) to act cautiously and with discretion and restraint. The first applicant's intention, as conveyed on the radio, was just to have a chat with the few persons who remained and 'wrap things up.'

[12] Around three minutes later, assistance was requested and, shortly after that, the officers were asked to explain how it had gone "horribly wrong." In response, the officers reported that they had been turned upon as they approached, with one male screaming and shouting at them. The first applicant said he had given this individual a warning but that the man continued to become more aggressive. Multiple persons then came around and were 'jumping at' the officers, with several people recording the incident. One male was to be arrested for disorderly behaviour but, every time the officer got near him, he was pushed away. The officers were told not to worry about that, to follow up "in slow time" and to try to get the situation resolved without too much community impact. Shortly after, the Inspector asked the sergeant to make sure the crews knew they "didn't do anything wrong" – an observation upon which the applicants understandably rely.

[13] What happened in the minutes after the first applicant indicated that he would seek to have a chat to the organiser/speaker lies at the heart of the action later taken against the applicants. This culminated in the arrest of an individual, a Mr Sykes, who was both a bereaved relative of the Sean Graham attack and himself a survivor of the attack (having been shot during it). The applicants' version of events at the time, as summarised in their radio transmissions, is summarised above.

[14] It seems that Mr Sykes challenged the first applicant as to why he and his colleague were in attendance, before the first applicant had an opportunity to engage those present in conversation on his own terms. The officers were challenged as to police actions at an event in East Belfast earlier in the week (discussed further below). When the first applicant replied by indicating that he was an officer from *South* Belfast, Mr Sykes – who was no doubt emotional in the circumstances – was dismissive of this response and swore. The situation escalated very quickly after that. The officers say they did not know who the man who was speaking to them was; and that they were not provided with his name or details, despite requesting these. For his part, it seems that Mr Sykes firmly believed the officers had attended the event with the purpose of antagonising those present and, importantly, that they were aware of the nature of the Sean Graham attack and of his identity (such that it was unnecessary for him to explain to them who he was, even when requested).

[15] The first applicant says that Mr Sykes was warned about his behaviour but did not desist and he (the first applicant) had a reasonable and honestly held suspicion that he was committing an offence. He also believed that arrest was necessary since he did not know the man's name or address. He therefore informed him that he was under arrest – but Mr Sykes moved away. Other police had arrived by this point and a third officer stopped Mr Sykes. He was then detained for disorderly behaviour and resisting arrest and placed in the back of a police car, in handcuffs. In the course of these few minutes, however, there was considerable aggravation, shouting (including swearing and abuse from some of those present) and jostling. Several of those present were urging the first applicant not to proceed with an arrest and contending that this was unnecessary. The second applicant has averred that he was assaulted and was the subject of verbal abuse, including reference to his national origin. Mr Sykes was not willing to provide his details and appears to have been seeking to evade arrest whilst others remonstrated with the police officers present about the necessity or propriety of the proposed arrest.

[16] A key issue of contention in any misconduct investigation would be whether the arrest of Mr Sykes was necessary and effected with no more than reasonable force; and, in addition to that, whether the conduct of the officers who were in attendance complied with the PSNI Code of Ethics in a variety of ways. In particular, a key issue later transpired to be whether the first applicant's conduct had been such as to improperly escalate the situation or improperly fail to 'de-escalate' the situation. It is not for me to reach any conclusion on that.

[17] Once Mr Sykes had been detained and placed in a police vehicle, the applicants then proceeded to Musgrave Street PSNI Station to take him into custody. During the journey, he continued to refuse to provide his name or address. He has made a complaint that, at this point, the officers concerned ceased using their radio but instead communicated with another or others via mobile telephone. At the police station, the first applicant was "instructed to de-arrest the male" by his supervisor; and Mr Sykes left the police station with his solicitor without having been processed at the custody suite in the usual way.

The reaction to the incident

[18] Almost immediately, there was a lot of attention on social media relating to this incident. This was because footage recorded by some attendees on their mobile phones was posted online shortly afterwards. At least one dominant narrative on social media was that police had, in a heavy-handed way, interrupted a commemorative event and/or harassed or antagonised victims or survivors of the Sean Graham shooting. This in turn generated a lot of media attention and political comment. An important piece of the context is the contrast drawn between police attendance at this event and the PSNI handling of the prior incident in East Belfast shortly before. A level of general dissatisfaction with the ongoing Covid-related restrictions and how rigorously and consistently they were being policed no doubt

also fed into the context. Viewed objectively at the present remove, however, I think it is fair to say that the incident generated a political storm which was disproportionate to the events on the ground. I also appreciate that this would not, or may not, have been readily ascertainable at the time by those caught up in the events.

[19] As alluded to above, one of the significant features of this case is that the incident occurred not long after another contentious incident in which a group of masked men had been seen together in the Pitt Park area of East Belfast but had *not* been approached by police, notwithstanding that this may also be thought to have prima facie indicated a breach of the Coronavirus Regulations and indeed potentially much more serious criminality. (In his affidavit, DCC Hamilton has explained that this was a "a UVF "show of strength" the week before, during which a large number of masked men marched in East Belfast toward a building with apparent intent to threaten the occupants." He says that police presence prevented an attack, but police did not confront the crowd. It appears that that was an operational policing judgment made at the time as to how best to manage the threat of violence or disorder.) This aspect of the matter, giving rise to contentions of double-standards in policing, was undoubtedly to the fore in some of the discourse on social media in relation to the Ormeau Road incident. For instance, on 7 February, the deputy First Minister tweeted that, "There appears to be a culture of double standards in the PSNI. A culture of turning a blind eye to UDA and UVF thugs, while targeting those laying flowers on the anniversary of loved ones. The PSNI must be held to account." The minutes of the PSNI Platinum Group meeting which followed the Ormeau Road incident on the morning of 6 February also makes reference to "the consistency question."

[20] A statement was put out on social media on the evening of 5 February on behalf of the Chief Constable in the following terms:

> "Officers from the South Belfast Local Policing Team came across a group of between 30 and 40 people gathered at what was a memorial event at the Sean Graham Bookmakers on the Ormeau Road at 2:30pm this afternoon Friday 5 February.
>
> As the event concluded, two officers approached a person to talk to him about a breach of the Health Protection Regulations.
>
> The situation quickly escalated and a man was arrested for disorderly behaviour and resisting arrest. He was taken to Musgrave Street Police Station and was released at 4.04 pm. In the course of the incident a police officer sustained a minor injury to his face.

> We are now reviewing all footage of the incident including our officers Body Worn Video and have notified the Office of the Police Ombudsman, and we are carrying out an assessment of the conduct of the officers concerned.
>
> I have personally spoken to the First Minister, the Deputy First Minister, the local Member for Parliament and a range of other stakeholders to brief them on what has happened.
>
> I fully recognise the sensitivities of this incident and just how difficult a day this would have already been for the families who lost loved ones in the atrocity. That should not be forgotten.
>
> We are acutely aware that this is the latest incident to raise concerns about the enforcement of Coronavirus Regulations and illustrates there are no easy answers.
>
> I would appreciate calm at this time."

The impugned decisions

[21] The next day, 6 February, the first applicant was served with a notice of suspension signed by the Deputy Chief Constable (DCC), which stated as follows:

> "In consequence of a report received it appears that the conduct of Constable [JR168], A District LPT, did not meet the appropriate standard. It is hereby ordered that the Constable be suspended from duty with immediate effect (6th February 2021) in accordance with Regulation 10 of the Police (Conduct) Regulations (Northern Ireland) 2016 until further notice.
>
> The following is a summary of the reasons for the suspension:
>
> The officer is being investigated by Police Ombudsman for the offences of unlawful arrest and assault. The consequences of the complaint and the investigation are in the public interest [*sic*] and impact on the reputation of the Police Service and have potential to have a significant impact on public confidence."

[22] The first applicant had attended for duty on 6 February and was asked by the Chief Inspector to go to his office. The Chief Inspector handed him the notice of

suspension. On the first applicant's case, he said that it was the first time in 30 years that he did not agree with the suspension decision which he was giving, but that he was following lawful orders. Indeed, the first applicant's evidence is also that, in the aftermath of the incident, a number of other senior officers spoke to him to reassure him and indicate their view that he had handled the matter appropriately. The first applicant was therefore surprised when he was suspended. No one had spoken to him about his conduct as part of the process to determine whether he should be suspended. Also on 6 February, the second applicant was informed by his Chief Inspector that he was to be re-positioned as a result of the incident the day before. He was moved from his local policing role to a 'station-based role.' He has also averred that he was told he could not be 'public-facing' but says there is no official guidance as to what this means.

[23] Later that day, both applicants were served with a notice by the Police Ombudsman (PONI) known as a Form OMB3. This is a form given to an officer, in order to comply with regulation 17 of the Police (Conduct) Regulations (Northern Ireland) 2016 (SR 2016/41) ("the Conduct Regulations"), to inform him or her that they are under investigation and explain what the complaint is. The detained person, Mr Sykes, had complained to the effect that the presence of police at the time of the commemorative event was insensitive; that he had been unlawfully arrested and assaulted (in that the use of handcuffs was unnecessary and they were applied too tightly); that it was not appropriate for officers to use mobile telephones instead of police radios once at Musgrave PSNI Station; and that police kept asking who he was, despite their having known who he was.

[24] Shortly after the first applicant had been served with the notice of suspension, the Chief Constable made a further statement at PSNI Headquarters in relation to the matter which was televised and was also posted on social media by the PSNI. It contained the following:

> "Whilst the Police Ombudsman has just commenced her initial investigation into yesterday's events on the Ormeau Road, I felt it necessary to address the widespread public concern across our community. It is I think important that people understand that Police did not attempt to prevent the commemoration.
>
> After the commemoration had finished, the officers present became involved in an incident with a man who had been there. What followed was not reflective of the values of the Police Service of Northern Ireland.
>
> Having reviewed the Body Worn Video from yesterday's incident on the Ormeau Road a decision has been taken to suspend one officer and re-position a second officer.

> I want to apologise to all those who were present yesterday and to those who have been affected by what they have seen on social media.
>
> I will be writing to the legal representatives of families who lost loved ones in the 1992 atrocity and offering to meet them in person to listen to their concerns and to apologise.
>
> The Police Service has, in particular during the past week, been under significant scrutiny from all communities for its policing of the Coronavirus Regulations.
>
> Policing during a global pandemic and the enforcement of the Health Protection Regulations is at times drawing us into conflict with the communities we serve. We do not want this and are keen, if we can, to find a way to draw a line under the events of last week and move together with the community.
>
> We are and continue to fully co-operate with the Police Ombudsman's investigation."

[25] The applicants challenge the respective decisions in relation to their duty status and also the Chief Constable's making of the public statement set out above.

The decision-making process

[26] Between the incident on 5 February occurring and the impugned decisions summarised above, there was something of a frenzy of activity. The evidence provided to the court in these proceedings has offered a helpful insight into what was occurring during this period. The DCC was engaged in other duties when information about the incident started to emerge. He returned to PSNI Headquarters in order to deal with the fall-out. Before doing so, the DCC received a call from Mr Gerry Kelly MLA. The applicants place some reliance on this in their submissions. Mr Kelly was an elected MLA, a former Junior Minister, and, perhaps more importantly in the present context, a member of the Northern Ireland Policing Board (NIPB) and the Sinn Féin spokesperson on policing.

[27] On return to PSNI Headquarters, the DCC attended a series of meetings which are described in his affidavit, which was the only affidavit filed on behalf of the respondent in these proceedings. At 4:30pm he chaired a senior management meeting at which a 'critical incident' was declared, and a number of initial actions were agreed. Another meeting was held at 7:00pm. During these meetings it was plain that concerns were escalating. The statement referred to at para [20] above was agreed and put out. The matter was referred to PONI by way of a complaint from

Mr Sykes, which meant that the PSNI did not itself have to refer the matter to PONI for review. Additional police resources were arranged because of fear that there may be public disorder arising out of anger over the incident, although this did not transpire.

[28] The concerns did not ease the following day. A Platinum Group (a step above Gold Command) was set up and met at 10:00am on Saturday 6 February. It was noted that there had been no trouble overnight. Resourcing was in place for the weekend as a contingency but there was no intelligence of planning for disorder. During the morning, the DCC viewed the BWV footage available. The Chief Constable also viewed the footage and was noted by the DCC as having "expressed his deep concern." The DCC's impression from the footage is summarised in his written note as follows:

> "It was clear from the BWV how the situation had evolved. A small group of people approximately 30 were listening to a speech. They appeared to be socially distanced and wearing masks. It also became clear that the police officers concerned had no knowledge of the situation they had intervened in. The situation escalated quickly when a man spoke to police and challenged them as to why they were there.
>
> The arresting officer, [JR168], took an approach that appears to be over zealous. He did engage and gave a warning but then moved quickly to take more action. It is clear he was swore at but he made no attempt to deescalate the situation or use the conflict resolution model. He appeared determined to caution then arrest the person and took no heed to numerous attempts from others to calm the situation down as it became more and more fraught. There seemed to be no attempt by [JR168] to consider the Conflict management model or seek any more peaceful resolution to what was becoming a highly charged incident. There is in my view a question as the situation developed as [to] the necessity and proportionality of what the officer was trying to achieve. There is also [a] question as to what was the legitimate aim of trying to arrest a man attending a memorial who was clearly upset with police for what he saw as an unnecessary intervention. The second officer became involved as the incident developed and assisted his colleague with the arrest. The second officer did continually warn of the use of BWV.

> Overall I formed the view that once the altercation started there appears to be little reason to have continued and the situation could have been calmed had the officers exercised more restraint and chosen a different course. There was no obvious sense of the sensitivity of the occasion and rather a determination to deal with the [detained person]. The outcome in the political and community arena has been unprecedented.
>
> In the event the arrest of a victim of the massacre who appear[ed] to be putting flowers at the memorial has created a very significant critical incident. There is criticism of policing from across the community [and] calls for the [Chief Constable] to resign, there is political involvement at every level and there appears to be a quickly deteriorating relationship with policing. The situation appears to be very grave."

[29] Later that day the Chief Constable met with the Chair and the Chief Executive of the Policing Board. They too watched the relevant footage. The DCC later joined them. They too were deeply concerned and expressed the view that the PSNI needed to quickly examine the duty status of the officers and move quickly to make the police position clear in the public domain. The public interest and need to act soon were emphasised to the DCC as the appropriate authority. The DCC expressed the view at that point that there was a case to re-position the officers. A conversation about suspension then followed.

[30] The DCC and Chief Constable then met with other senior police officers and discussed how to proceed in relation to the applicants. This meeting appears to have been the crucial one in terms of the decision-making relevant to this judicial review. The DCC's note records that, "The [Chief Constable] was clear that he believed suspension was needed." He referred to a case in London where there had been a fatal shooting and the Metropolitan Police delayed taking action whilst waiting for the misconduct investigation to take its course and the situation had escalated in the intervening period. The Chief Constable was noted to be particularly concerned about the possibility of disorder, although there was no intelligence in relation to that.

[31] The key decision-making in this case is described in the DCC's note as follows:

> "The [Chief Constable] was still concerned that without decisive action there was the possibility of things escalating in the community. The [Chief Constable] made it clear that a decision had to be made now. The [Chief Constable] was of the view that given the significant

> public interest generated by the consequence of the officers' actions that suspension was appropriate. On reviewing the regulations I stated that I felt that the public interest test for suspension was met for the arresting officer and not for the second officer. The primary actions that led to the incident were carried out by the arresting officer, [JR168]. [JR168A]'s role was [a] lesser one but is part of the overarching critical incident and is subject of complaint. [Chief Constable] agreed that the arresting officer be suspended and the second officer repositioned. He directed that we move quickly and tell the officers the decision verbally now and follow up with the paperwork afterward. At 16:45 on 6 February 2021 I told C/Supt Knox to progress the suspension of [JR168] and the repositioning of [JR168A] and said that I would sign the orders.
>
> The [Chief Constable] was strongly of the view that we needed to act quickly and announce the matter in the public. An apology would also be made …
>
> … Given his role in the decision making around suspension and repositioning the [Chief Constable] has since told me that he will recuse himself from any future role going forward in the case."

[32] In the course of a discovery process in these proceedings, the respondent disclosed the Chief Constable's 'Day Book' for 6 February 2021. The contents of this record make for interesting reading in a number of respects. It was entirely proper for it to be disclosed but, in light of its contents, in my view it ought to have been disclosed earlier in the proceedings (when the respondent's affidavit evidence was filed) in the discharge of the respondent's duty of candour, rather than only being disclosed when the applicants mounted and pursued a formal discovery application. The Chief Constable described the DCC, in the course of the meeting with the Chair and Chief Executive of the NIPB, as being "clearly confused and conflicted." In relation to the later meeting at which the impugned decisions were made, the Chief Constable's note suggests that there was agreement as to re-positioning the second applicant but more of a debate in relation to the appropriate course to take as regards the first applicant. As to this, it suggests that one feature tending against a restriction falling short of suspension was the Chief Constable's concern that the officer would remain in the workplace "with access to a firearm." The first applicant has taken particular exception to this reference given the lack of any evidence or suggestion that there was misuse of a firearm in any way.

[33] The following note is made in the Chief Constable's Day Book entry for 4:35pm:

> "Collective decision – needed DCC to suspend. Notes file CS Singleton.
>
> Situation – DCC struggling to process information and make decisions. Plays scenario over and over again distance [*sic*] and noted by Chair/Chief Exec – explained behaviours. Recognition that this was a defining moment – action to steady public emotions and [indecipherable] considered feedback that [Sinn Féin] may leave Policing Board. Think MJ [Minister for Justice?] feared that may collapse Executive and that would play into febrile/dangerous context. Options other than suspension unlikely to assuage criticism and we may be pushed there anyway further eroding confidence and allegations of impartiality. Conscious of internal reaction and welfare of officers – decision tasked to be followed up re 9 point plan. One of the most difficult decisions I have made."

[34] The DCC's affidavit in these proceedings sets out his decision-making process, including the considerations taken into account. He explains how he distinguished between the two officers. There was more concern about the conduct of the first applicant, who was engaged in the initial interaction and responsible for the arrest of Mr Sykes. The second applicant was distinguished from the first because he lent support, albeit he was not perceived to be the cause of the situation. A third officer, to whom repeated reference is made in the applicants' submissions, attended at a subsequent point to provide support and assisted the two officers after the situation had already escalated. He was considered to be less culpable again. He had not seen what went on before or how the situation had come to be so fraught.

[35] After the decisions to suspend and redeploy were made, short written statements of reasons were served on the officers (see para [21] above). The Chief Constable then made the public statement set out above in which he apologised. The DCC's affidavit evidence explains that this was considered to be warranted based on the circumstances and on the information available to the Chief Constable at this point. He wished to maintain public confidence in the PSNI. Owing to the nature of social media, a significant number of people had watched footage of the incident and had seen part of what happened. That footage was not as complete as the BWV footage available to the police, but it did give the public an insight into what happened. It was in that context, the respondent submits, that the apology was made. People had seen what happened. The situation had escalated and there was a pressing need to attempt to defuse the tension that had arisen.

[36] The applicants complain, amongst other things, that they were unable to make representations about the impugned decisions. They were able to do so after

the relevant decisions had been made but, it is common case, not before the decisions were taken. I address the applicants' legal complaint about that below.

[37] As to contemporaneous documentation relating to the impugned decisions, reference has already been made to the Chief Constable's Day Book above. The suspension and re-positioning notices served on the applicants respectively on 6 February 2021 also represent another source of contemporaneous reasoning. For his part, the DCC typed up a note summarising the various meetings which had taken place and the decision-making process. This note is dated 8 February 2021 (the Monday following Saturday 6 February when the relevant decisions had been made, in circumstances where the Chief Constable's Day Book records that, on 7 February, the DCC was struggling to cope and was sent home looking unwell in the afternoon). Most of the summary above is taken from the contents of the DCC's detailed note in this regard.

Subsequent decision-making

[38] The PSNI is required to keep under review any decision to suspend or re-position pending disciplinary investigation or proceedings. In due course, the first applicant made representations in relation to his suspension, within 10 days, as he was entitled to do under the Conduct Regulations. The DCC issued a response on 25 February 2021, concluding that the suspension should remain in place. The DCC considered that the suspension had been properly imposed and that the relevant criteria continued to be met. The first reason given for this decision was as follows:

> "Consideration was given to alternative courses of action to suspension however, based on your actions leading up to and including the arrest I consider suspension reasonable in the circumstances."

[39] The DCC went on:

> "It is not for me to determine whether there is strong enough evidence for a misconduct charge or criminal offence to be made out when determining if suspension is appropriate, those determinations are a matter for the Office of the Police Ombudsman."

[40] Similarly, representations on behalf of the second applicant did not result in his re-positioning being altered or removed.

[41] The applicants were later interviewed by PONI. In December 2021, the first applicant (and the third officer involved in the arrest) were informed that they were not to be prosecuted in relation to their actions on the day in question. Although their cases had been referred to the Public Prosecution Service (PPS) for

consideration, the PPS did not consider there to be sufficient evidence to prove that the first applicant's or the third officer's actions were unlawful. The matter then reverted to PONI to consider the question of misconduct. The disciplinary process has not yet finally concluded in relation to the first applicant. However, I was told that there was no ongoing PONI action in relation to either the second applicant or the third officer.

[42] However, after the 'no prosecution' decision on 8 December, the Police Federation made further representations asking that the impugned suspension and re-positioning decisions be lifted. On 16 December, the applicants were informed that their respective suspension and re-positioning would be lifted. They have each therefore returned to normal duty but remain highly aggrieved at the actions they challenge in these proceedings. The second applicant had been re-positioned for over 10 months. He has averred that he was grateful to have this decision lifted but was unsure how the 'no prosecution' decision could have affected this (in light of the fact that he had not been the subject of any referral to the PPS). He believes that his probationary period of 2 years will be affected by the re-positioning.

Summary of the parties' cases

[43] The applicants mounted a wide-ranging challenge. They contend that the respondent failed to give adequate reasons with respect to the decisions to suspend and re-position them respectively; and that it acted in a procedurally unfair manner in determining that they had misconducted themselves (evidenced chiefly by the Chief Constable's statement of 6 February). They contend that they were given no opportunity to make representations before a determination which was adverse to them had been made and publicly announced. Additionally, it is contended that the suspension of the first applicant was irrational and/or disproportionate; that the respondent erred as to the appropriate test in law and, in particular, in relation to consideration of the public interest; and that it was wrongly undertaken outside the scheme of the Conduct Regulations. It is further contended that a variety of relevant considerations were left out of account or irrelevant considerations taken into account. Similar points are made in respect of the challenge to the re-positioning of the second applicant, although recognising that the statutory test in that regard is not the same as that for suspension. The applicants also contended that there as unlawful inconsistency between how the first applicant, the second applicant and the third officer were dealt with pending investigation of the complaints against them.

[44] The respondent contended that the proceedings were academic, since the suspension and re-positioning decisions were 'lifted' on subsequent review. In addition, it contended that the broadly-pleaded challenge is essentially a merits challenge amounting to an impermissible appeal. On the substance of the challenge, it was submitted that, particularly in the context of policing in Northern Ireland, the margin of appreciation to be afforded to an experienced senior police officer exercising his professional judgment in matters of this nature is "especially high",

such that no challenge to the substance of the decision is sustainable. The policing context, in the respondent's submission, means that all police officers, regardless of rank, must be "aware of the sensitivities associated with serving in Northern Ireland and conduct themselves accordingly." The respondent also emphasised that, at the key point of decision-making, "Without exception, every person who viewed the [BWV] footage was concerned by the officers' conduct" and that of first applicant in particular. There were concerns (the respondent submits) that the first applicant was abrupt and antagonistic, that he escalated the situation, and that he ignored several opportunities to de-escalate.

Discussion of relevant statutory provisions and authorities

[45] A detailed statutory scheme for the investigation of alleged misconduct by police officers is set out in the Conduct Regulations referred to above, along with the Police (Northern Ireland) Act 1998. It is the Conduct Regulations which are most relevant for present purposes.

[46] The Conduct Regulations apply where an allegation comes to the attention of the appropriate authority which indicates that the conduct of a member of the PSNI may amount to misconduct or gross misconduct (see regulation 5). "Misconduct" and "gross misconduct" are terms which are defined in the Regulations. The former consists of a breach of the PSNI Code of Ethics which is not more properly dealt with as a performance matter. The latter is a breach of the Code of Ethics where the misconduct is so serious that dismissal would be justified (see regulation 3(2)). Where the member in respect of whom the allegation is made is a senior officer (that is, above the rank of chief superintendent), the appropriate authority is the NIPB. In any other case, the appropriate authority is the Chief Constable, although he may (as he did in this case and frequently does) delegate that role to another senior officer (see regulation 3(6) and (7)).

[47] Regulation 10 of the Conduct Regulations contains the power to suspend officers when the Regulations apply. Regulation 10(1)-(4) provides as follows:

> "(1) The appropriate authority may, subject to the provisions of this regulation, suspend the member concerned from his office as constable.
>
> (2) Where a complaint or matter is being formally investigated by the Ombudsman the appropriate authority may consult the Ombudsman before deciding whether to suspend the member concerned.
>
> (3) A member concerned who is suspended under this regulation remains a member for the purposes of these Regulations.

(4) The appropriate authority shall not suspend a member under this regulation unless the following conditions ("the suspension conditions") are satisfied—

(a) having considered temporary redeployment to alternative duties or an alternative location as an alternative to suspension, the appropriate authority has determined that such redeployment is not appropriate in all the circumstances of the case; and

(b) it appears to the appropriate authority that either —

(i) the effective investigation of the case may be prejudiced unless the member concerned is so suspended; or

(ii) having regard to the nature of the allegations and any other relevant considerations, the public interest requires that he should be so suspended."

[48] It can be seen, therefore, that the power to suspend a police officer is qualified. The conditions in sub-paragraphs (a) and (b) of regulation 10(4) must be met. At the same time, the conditions emphasise that there is an element of judgment to be exercised by the appropriate authority, both as to whether redeployment is appropriate or not and as to the impact of non-suspension on the effective investigation of the alleged misconduct and/or as to what is required in the public interest.

[49] The appropriate authority may exercise the power to suspend the member concerned at any time from the date when the Regulations first apply to him in accordance with regulation 5 until it is decided that the conduct of the member concerned shall not be referred to misconduct proceedings (or a special case hearing) or until such proceedings have concluded (see regulation 10(5)). Where an officer is suspended, he is to remain suspended until the suspension conditions are no longer satisfied, until it is decided that he should not face misconduct proceedings, or until such proceedings have concluded (unless he is dismissed with notice, in which case he will remain suspended until the end of the notice period) (see regulation 10(10)).

[50] Where a suspension is imposed, the member concerned must be given written notification either at the time of the suspension or shortly afterwards, with a

summary of the reasons for the suspension (see regulation 10(6)). The member concerned, or his police friend (a police officer who is not otherwise involved and who is chosen by the member concerned to assist and represent them), may make representations against the suspension to the appropriate authority within 10 days of his having been suspended (see regulation 10(7)). As noted above, the appropriate authority must keep the suspension under review. In particular, he must review whether the conditions for suspension remain met in a number of circumstances: where representations are made by the member concerned under regulation 10(7)(a); if there has been no previous review, before the end of 20 working days after the suspension has been imposed; and, in any other case, on being notified that circumstances relevant to the suspension conditions may have changed. This is set out in regulation 10(8).

[51] I was referred to a wide range of authorities in the course of submissions, some of which I discuss briefly below. As was made clear in *R (Monger) v Chief Constable of Cumbria Police* [2013] EWHC 455 (Admin) at para [7], where there is a comprehensive statutory framework, it must be followed. There was no dispute about that proposition.

[52] The applicants relied upon authorities such as *Mezey v South West London and St George's Mental Health NHS Trust* [2007] EWCA Civ 106; 94 BMLR 25 and *R (Sosanya) v General Medical Council* [2009] EWHC 2814 – albeit that these arose in different professional contexts – in order to support their submission that the courts have recognised that suspension is "not a neutral act" but, rather, one that casts a shadow over the suspended individual, with an immediate and dramatic impact upon their reputation and career prospects. They further submitted that suspension decisions should only be made as a matter of last resort, relying on *Sheikh v General Dental Council* [2007] EWHC 2972 (Admin). Their submission was that the statutory provisions at play in that case were directly analogous to those with which I am concerned in the Conduct Regulations discussed above.

[53] I did not find reference to authorities relating to different statutory schemes or different professional contexts particularly helpful, even though (as the applicants submitted) a number of those authorities also arose in the context of professionals with a public-facing role which was statutorily regulated to some degree. The thrust of the applicants' submission was that the bar should be set high for a police officer to be suspended. I accept that to be so: not because of any general principle in this regard which can be drawn from diverse authorities but simply because of the text of the relevant provisions of the Conduct Regulations. As is clear from the discussion above, suspension will only be available where the appropriate authority has considered temporary redeployment and determined that that is not appropriate in all of the circumstances of the case. Such redeployment can be to alternative duties or to an alternative location, or both. It is only where this is not appropriate in the circumstances that the suspension option is available. Where that is so, there is an additional requirement *either* that the effective investigation of the case may be prejudiced if the member concerned is not suspended *or* that the public interest

"requires" that the member should be so suspended. Unless both conditions in regulation 10(4)(a) and (b) are met the appropriate authority "shall not suspend" the member. The provision is constructed in such a way that there is a presumption against suspension unless each condition is met; and that redeployment, as an alternative, should first be excluded. Even then, suspension will only be permissible if the investigative process will otherwise be prejudiced, or the public interest "requires" such suspension.

[54] A contrast is also properly to be drawn between the present provisions of regulation 10(4) and its statutory predecessor, regulation 5(1) of the Royal Ulster Constabulary (Conduct) Regulations 2000, which simply stated as follows:

> "Where there has been a report, allegation or complaint which indicates that the conduct of a member did not meet the appropriate standard, the Chief Constable may suspend the member concerned from duty and from his office of constable whether or not the matter has been investigated."

[55] This provided a broad discretion to suspend. Regulation 10(4) of the 2016 Regulations was obviously designed to circumscribe the suspension power in a way which had not previously been the case.

[56] One authority from England and Wales which arose in a closely analogous statutory context is that of *R (Rhodes) v Police and Crime Commissioner for Lincolnshire* [2013] EWHC 1009 (Admin). That case involved a challenge by way of judicial review to a decision of the Police and Crime Commissioner for Lincolnshire to suspend the Temporary Chief Constable of Lincolnshire. The challenge was dealt with extremely quickly and proceeded as a rolled-up hearing focused on the rationality of the suspension decision. In the course of his judgment, however, Stuart-Smith J addressed the provision dealing with suspension of police officers contained in the Police (Conduct) Regulations 2012 (to which the Commissioner's statutory power to suspend was subject). Regulation 10(4) of those Regulations was in materially identical terms to regulation 10(4) of the Conduct Regulations in this jurisdiction which is at issue in these proceedings. There was a dearth of prior authority on the issue of when suspension of a police officer was or was not appropriate; but the judge felt that some assistance by analogy may be gained from authorities in the context of similar regimes (see para [19]), which he then examined. The nub of these earlier decisions was that, where a public interest test was to be applied, it was implicit that suspension should be "necessary" in the public interest. Of course, in the present case, that is made explicit by the reference in regulation 10(4)(b)(ii) to the public interest 'requiring' suspension.

[57] Stuart-Smith J continued (at para [22]) as follows:

> "Though not bound by them, I am in respectful agreement with the passages in these cases that I have cited. I also

> accept that the reasoning that is contained in the passages is transferable by parity of reasoning to the suspension conditions laid down by reg 10(4) of the 2012 Conduct Regulations. In fact, reg 10(4) is clearer than the test under the Dentists and Medical Acts, because it provides expressly that there shall be no suspension unless the public interest "requires" that the officer be suspended. This carries the implication that the public interest leaves no other course open. It follows, in my judgment, that a police officer is not to be suspended under reg 10(4) unless:
>
> (1) Temporary redeployment to alternative duties or an alternative location has been considered as an alternative to suspension and determined not to be appropriate in all the circumstances of the case; and
>
> (2) It appears to the authority that *either* the effective investigation of the case may be prejudiced unless the officer concerned is suspended *or* the public interest *requires* that he should be suspended, which carries the implication that suspension is necessary because the public interest leaves no other course open."
>
> [underlined emphasis added]

[58] Where suspension is to be justified on the public interest basis, it can be seen that there is a high threshold. At the same time, appropriate regard must be had to the unique status of constable and, in particular, the broad range of coercive powers which police officers may deploy against the citizenry. There will be cases where, by reason of the seriousness of the misconduct alleged, a precautionary approach to the issue of suspension will be appropriate. It is also to be recognised that the judgment to be made is for the appropriate authority and, on judicial review, it is not for this court to interfere simply because it thinks it would have made a different decision had it been the primary decision-maker (as recognised in para [28] of the judgment in *Rhodes*). In the result, the Commissioner's decision in the *Rhodes* case was quashed on the basis that it was irrational for a variety of reasons, including that certain matters had not been properly taken into account (see paras [100]-[101]).

Is the case academic?

[59] The respondent's written submissions contended that this application for judicial review should be dismissed on the basis that, since the first two impugned decisions had been revisited upon review in December 2021, the proceedings were academic. Mr Lockhart did not press this point strongly in oral submissions, but I do not understand it to have been abandoned.

[60] I do not consider the case to be academic between the parties, particularly in the case of the first applicant. In his affidavit evidence, he has explained the impact on him – both professionally and personally – of the suspension decision. Leaving aside the personal impact on him, he has explained that his probationary period was paused whilst he was suspended and that his income was affected in that he could not present himself for overtime whilst subject to suspension. His salary increases in line with years served but, since his period of suspension extended his probationary period, those increments were delayed (and, I assume, would continue to be delayed in the event that the suspension remains on his personnel record). DCC Hamilton's affidavit recognises, candidly, "the reality that there are disadvantages to being suspended (and to a lesser extent from being repositioned) …" Even leaving aside any ongoing impact on salary, it seems to me that this is the type of decision which, if unlawfully imposed, ought not to stand on the applicant's disciplinary or personnel record. In any event, given the limited guidance in authority in relation to the application of the public interest test for suspension in the Conduct Regulations, this is a case where, had I been persuaded that the issue was truly academic between the parties, I would have been inclined to exercise the court's discretion to proceed to determine the arguments in relation to those Regulations in any event.

[61] The objection based on the academic nature of the proceedings is stronger, in my view, in relation to the second applicant's challenge to his re-positioning. Nonetheless, on balance, given the reputational and professional impact of having been consigned to a 'non-public-facing' role for an extended period, I again consider that the second applicant is entitled to a determination of whether or not that decision was lawfully made.

The decision to suspend the first applicant

[62] The first applicant squarely challenges the rationality and proportionality of the suspension decision in his case (as does the second applicant in relation to his re-positioning). In doing so, their submissions invited me to consider in some detail the factual circumstances surrounding the incident on 5 February 2021.

[63] The applicants rely strongly upon the contention that they had been tasked by their superiors to approach the gathering on the day in question. They say there was a public health crisis, and they had a duty investigate any alleged offences under the Coronavirus Regulations. They also assert that they had not been given sufficient information by their superiors as to the background of the gathering on the Ormeau Road. This is important, in the applicants' submission, since, when the respondent later came to review the BWV footage of the incident, it approached the matter with the benefit of knowledge which the applicants did not have at the relevant time. That is to say, the senior officers viewed the footage through the prism of police attendance at a memorial event of the nature of which they were fully aware and in full knowledge of the identity and circumstances of the arrestee; whereas when the attending officers were unaware of the nature of the event (and,

indeed, the nature of the event which was being commemorated). The first applicant's evidence is that he had "no idea what the gathering on the Ormeau Road was about." As noted above, he was 26 years of age and the Sean Graham attack occurred before he was born.

[64] It is not possible, or appropriate, for me to seek to resolve many of the issues which the submissions of this nature raised. It is clear that the two applicants had no advance knowledge of the memorial event, nor any in-depth knowledge of the atrocity it was commemorating. Much of the dispute – which may have to be resolved if a misconduct hearing proceeds in due course – is what they could or should have picked up from what they observed or heard at the scene (including the physical memorial and flowers which were present) and how quickly they ought to have done so. Likewise, the suggestion that they had been tasked to investigate the event and obtain details is not entirely clear-cut. There is certainly an element of truth to this; but, on the other hand, the applicants had been advised to proceed with caution and sensitivity. The extent to which they did or did not do so, and how realistic this approach was once the situation quickly began to escalate, is not for me to judge. For my own part, I think it is inaccurate to say that the first applicant made no attempt to de-escalate the situation at any stage, since there were occasions when he invited Mr Sykes to step away from the melee and 'have a chat' to try to resolve matters. Whether those efforts were appropriate or adequate is, again, not a matter for me to judge.

[65] The applicants' submissions in the above regards were made in the context of an over-arching submission that the respondent failed to properly consider the relative (lack of) gravity of what was alleged against them. I reject that submission. The applicants' real complaint is that the respondent viewed the allegations against them as more serious than they would characterise them. The first applicant also contended that there were a number of relevant considerations which were left out of account in the respondent's decision to suspend him. These included: the impact of the decision upon him, his junior status, and the fact that he had been instructed to approach the individuals in question, in circumstances where the respondent had not adequately informed him of the nature of the gathering. I do not consider any of these points to represent a proper basis on which the impugned decision is liable to challenge. The onus is on the applicants to establish that relevant considerations have been left out of account. Many of these issues were obvious and can plainly be seen to have been taken into account in the evidence which has been provided on behalf of the respondent. In this case, the DCC considered the video evidence in relation to the incident. He did not, at that time, have the benefit of the transcript of radio transmissions; but suspension decisions will often be taken in circumstances where the full evidential picture is not yet available. That is one of the reasons why such decisions must be kept under review as a more full picture emerges. In his affidavit evidence in these proceedings, the DCC describes the first applicant as being "overzealous" and as having not 'de-escalated' the situation. He was aware of the bones of the complaint against the applicants and took steps to inform himself, based on the first-hand BWV footage, of what had occurred.

[66] Several aspects of the applicants' case were really invitations to the court to engage with the merits of the misconduct allegations themselves. For instance, the DCC refers to the first applicant having made no attempt to deploy his 'Conflict Resolution Training.' Retired Superintendent Burrows avers in his affidavit which was filed on behalf of the applicants that, to his knowledge, there is no such training; rather there is a "personal safety programme." The applicants also drew attention to the fact that no training manual has been exhibited by the DCC to identify which aspect of training he felt the first applicant may have failed to have deployed. However, these are not matters for me. The real issue in the case is that, having considered the officers' actions and their consequences (as to which, see further below), the respondent reached decisions with which the applicants strongly disagreed.

[67] In submissions which more directly engaged the true nature of the court's supervisory jurisdiction, the applicants contended that the respondent erred as to the meaning or application of the legal tests set out in regulation 10(4) of the Conduct Regulations. They provided affidavit evidence in support of their case from, amongst others, a retired officer, Jon Burrows, who was a former head of the PSNI's Professional Standards Department. He described that, in his experience, suspension decisions are only taken in cases where officers face allegations of gross misconduct; and he indicated that he was not aware of a suspension of an officer in similar circumstances or for similar misconduct as was alleged against the first applicant in this case. Mr Burrows' evidence was to the effect that the behaviour complained of in this case could or should properly have been considered as a performance issue, rather than a misconduct issue, as would often be the case where a constable had an honest but mistaken belief that he should make an arrest. In any event, he contended that the conduct complained of could not properly have been considered to represent gross misconduct, with suspension being in practice reserved for cases that have been assessed as gross misconduct. His affidavit evidence was also critical of the lack of planning in advance for the commemoration event, or the provision of information to officers about this. In a further affidavit from Mr Trevor Purcell, the Vice Chairman of the Police Federation of Northern Ireland, similar points are made. Mr Purcell has given evidence of his experience, over a period of some 20 years, of police disciplinary matters. In his evidence, he says that allegations of unlawful arrest and assault (by means of the use of force used in effecting an arrest) are relatively frequent but that he cannot recall any situation where an officer was suspended (or later dismissed) as a result of such an allegation. He also averred to officers having been accused of much more serious offences, and misconduct which was alleged to have resulted in deaths, who were not suspended but were merely re-positioned.

[68] Building on this evidence, in the first applicant's submission the misconduct alleged against him (which he denies) would, even if proven, not amount to gross misconduct meriting dismissal. Indeed, in his submission, the conduct complained of did not even amount to misconduct since it was instead merely a 'performance

issue' to be dealt with more properly under the Police (Performance and Attendance) Regulations (Northern Ireland) 2016 ("the Performance Regulations"). In Regulation 4 of those Regulations, "unsatisfactory performance" is defined as including a "failure of a member to perform the duties of the role or rank he is currently undertaking to a satisfactory standard or level." Where an issue is dealt with as a performance matter, there are a range of steps which can be taken to improve the officer's performance or, ultimately, sanction him. However, it is a different track from the disciplinary process and would not involve suspension of the officer in the meantime. In very broad terms, the process is designed to be educative rather than punitive.

[69] I accept the respondent's submission that some elements of the first applicant's case appeared designed to introduce additional conditions, or an additional test, before a suspension could be legally justified. For instance, a thrust of the applicant's submissions was that the misconduct alleged had to be one which would, if proven, amount to gross misconduct justifying dismissal at the end of the disciplinary process. Although in practice that may frequently be how the matter is approached, there is no such requirement within the Conduct Regulations. An officer is subject to those Regulations, and so liable to suspension under regulation 10, where an allegation has come to the attention of the appropriate authority which indicates that his conduct may amount to misconduct *or* gross misconduct (see Regulation 5(1)). Provided the suspension conditions in regulation 10 are satisfied, an officer may be suspended even where the allegation relates to mere misconduct rather than gross misconduct. It is right to say that, in such cases, it may be unlikely that the public interest will *require* suspension. Indeed, where there is little or no prospect of the officer being dismissed even if the alleged misconduct is proven, it would seem *prima facie* contrary to the public interest that they be sent home on full pay (possibly for a lengthy period) whilst the misconduct investigation and process takes its course. However, there may be exceptional circumstances where the public interest does require a suspension in such a case whilst the misconduct is investigated. That is what the respondent argues to be case in this instance. In addition, an officer facing a misconduct allegation which is less than gross misconduct may still be lawfully suspended having regard to regulation 10(4)(b)(i) if their continued service may prejudice the effective investigation of their conduct.

[70] It is also true that, for the Conduct Regulations to apply at all, the member concerned must face an allegation of at least "misconduct", which is to be contrasted with a mere "performance matter." The former is defined as a breach of the PSNI Code of Ethics which PONI or the appropriate authority (as the case may be) has "decided is not more properly dealt with as a performance matter." Although the applicants argued strongly that a contention that an officer has acted in an "over-zealous" manner is more properly dealt with as a performance matter – particularly where (as here) the officer is a probationary constable and faced with an unexpected, highly charged and fluid situation – it could not be said that the respondent's decision *not* to treat this case from the outset as a mere performance matter was irrational. Indeed, the allegations which had been raised included

matters of alleged unlawful arrest and assault. There is a variety of provisions within the PSNI Code of Ethics set out in the Schedule to the Conduct Regulations which the applicants might be considered to have been alleged to have breached. Without expressing any view on the ultimate resolution of this issue, I can discern no illegality in the respondent's (necessarily provisional) approach of considering that allegations had been made which indicated that the conduct of the first applicant *may* amount to misconduct. The dividing line between performance matters and misconduct is one of fact and degree in some cases; but one which expressly involves a judgment by the relevant disciplinary authority and one where an alleged breach of the Code of Ethics is properly viewed as misconduct unless and until determined to be a performance matter only.

[71] The first applicant also submits that the consideration of temporary redeployment (as an alternative to suspension) was inadequate, insofar as the issue was considered at all. In short, he contends that demands were made by Sinn Féin which were treated as synonymous with, or determinative of, the public interest in the circumstances of the case. In my judgment, these submissions really represent the nub of the case. The first question was whether redeployment was not appropriate in all the circumstances. In the present case, there was no suggestion that the effective investigation of the case may be prejudiced unless the first applicant was suspended. The second question, therefore, was whether it appeared to the appropriate authority that, having regard to the nature of the allegations and any other relevant considerations, the public interest required that he should be so suspended.

[72] I am satisfied that the DCC directed himself to the correct legal tests within regulation 10(4) of the Conduct Regulations when reaching the decision to suspend the first applicant. The issue for me is whether, in purporting to apply those tests, he fell into some error of law. Although the DCC's typed note does not contain any discussion of the issue of temporary redeployment, I am satisfied that this was considered and discarded (because of the collective view of what the public interest required in the circumstances). This issue is addressed – albeit briefly – in CSI Knox's report which was provided to DCC Hamilton, although I understand this may have been prepared after the decision had been taken in principle to impose a suspension. In any event, it shows that the respondent was aware that a condition of suspension was that temporary redeployment had been considered as an alternative but had been determined not to be appropriate in all the circumstances of the case. Redeployment of the first applicant was plainly considered and discussed; and it was the option selected for the second applicant.

[73] The respondent's own guidance – 'Service Procedure: Misconduct for Police Officers' (SP 9/2012, Version 2, issued in March 2015), at para 4(3)(a) – states that "the decision to suspend an officer is only taken in exceptional circumstances after all other options, including 'alternative duties', have been considered." Whether redeployment is appropriate or inappropriate is not, in my judgment, wholly divorced from public interest considerations which may be considered under

regulation 10(4)(b)(ii). That is because the statutory question is whether redeployment is appropriate "in all of the circumstances of the case", which will include public interest considerations which may also be considered under regulation 10(4)(b)(ii). Insofar as the applicants suggested that the two statutory conditions must be addressed entirely separately, or that redeployment must be addressed without reference to wider public interest considerations, I reject those submissions. Indeed, where the public interest does in fact require that an officer be suspended, it is unlikely that redeployment is appropriate. Each condition must nonetheless be considered and be determined to be met.

[74] In summary, at the core of this case lies the conclusion that the public interest required that the first applicant should be suspended under regulation 10(4)(b)(ii). In approaching this issue, a number of considerations may be relevant. However, it is not without significance that the only relevant consideration specifically mentioned by the relevant provision itself is "the nature of the allegations." This will encompass both the strength of the case against the officer accused of misconduct (how plausible and cogent the allegations are) but also, crucially, the gravity of the misconduct alleged. It gives a strong steer towards the public interest test being addressed primarily, albeit not exclusively, to the risk posed to the public by the officer if he continues in service in light of the nature of what has been alleged against him. A plainly material consideration in each case will also be the likely outcome if, in due course, the officer is found guilty of the misconduct alleged. The respondent's policy set out in the Service Instruction referred to above is entirely consistent with this.

[75] However, the public interest is not confined to consideration of the nature of the allegations against the officer. That is evident from the provision's mention of "any other relevant considerations." Mr Lavery placed particular reliance on the reference, in the notices served upon the applicants on 6 February outlining the impugned decisions, to the "consequences" of their action as forming part of the basis for their suspension and repositioning respectively. In his submission, this made clear that they were being suspended not because of their actions but because of the reaction to the incident. Is that a valid consideration? I see no reason why, in principle, public concern about an incident of alleged police misconduct should not be a relevant consideration in determining what the public interest requires for this purpose. Even if the culpability of the officer concerned is low, if the harm caused by his or her actions is high, that need not simply be ignored. As Mr Lockhart emphasised in his submissions, a core aim of the police misconduct procedures – in addition to upholding high standards in policing and protecting the public – is to maintain public confidence in the police and to maintain its reputation. If public confidence in the police would be materially undermined by the non-suspension of an officer against whom misconduct has been alleged, that is a relevant factor which may be taken into account in determining what the public interest requires.

[76] But the public interest in such circumstances is wider than the question of public confidence. It incorporates (a) the public interest in the protection of the

public from rogue police officers, which must be judged in the context of the seriousness of the misconduct alleged; (b) the public interest in the fair treatment of police officers, including by not acting in a way which is disproportionate; and (c) the public interest in maintaining an efficient and effective police service, which includes minimising wasted public expenditure in paying officers to then perform no policing functions and preserving the morale of other serving officers. (This last-mentioned aspect, that of the effect on officer morale of colleagues being – or with reasonable basis being perceived to be – treated unfairly or 'scapegoated' is a matter on which Mr Purcell focused in some of his evidence. He averred that "the decisions which have been taken have widely been seen from other officers as being unfair." It is also clear from the minutes provided by the respondent that "maintaining officer confidence" was also viewed as "critical.") In short, what the public interest requires is a multi-faceted assessment.

[77] It follows that although the consequences of an act of alleged police misconduct (in terms of public outcry) might be a relevant consideration, that will rarely if ever be determinative on its own of what is required in the public interest. That is likely to be particularly so when the consequences of the alleged misconduct go well beyond what the officer did or could have foreseen or understood at the time. The respondent's document 'PSNI Guidance on Outcomes in Police Misconduct Proceedings' makes this distinction (at para 4.8). It observes that many police officers are required to take decisions rapidly and/or in highly charged or dangerous situations, for example in a public order or other critical incident. The guidance goes on:

> "Such decisions carry significant consequences. Take care not to confuse these consequences with what the officer knew or could reasonably have known at the time of decision."

[78] In addition, the weight to be given to public outcry about alleged police misconduct must be carefully considered. The applicants rely on the dictum of Lord Goff in *R* v *Secretary of State for the Home Department, ex parte Venables* [1997] 3 WLR 23, at 41G-H, to the effect that, in decisions affecting the rights and interests of individuals (there, a power analogous to a sentencing decision) decision-makers may be taking into account a legally irrelevant consideration if they take into account "public clamour", which is often not fully informed, directed to the decision in the particular case (and see also Lord Steyn, at 74E-F, in the same case). On the other hand, the respondent has pointed to the observation of Stephens LJ, in the particular context of policing in Northern Ireland, in his concurring judgment in *Re McGowan's Application* [2019] NICA 12 at para [105], that "it should also be recognised that when there is a public outcry it is likely that public confidence of at least a part of our community has been damaged or lost." The PSNI Guidance on Outcomes in Police Misconduct Proceedings, at para 4.61, rightly directs appropriate authorities to distinguish between "objective evidence of harm to the reputation of the police service from subjective media commentary." A fortiori, this applies to subjective

political commentary or social media commentary. In short, public reaction can be a valid consideration in terms of what the public interest requires but it must be tempered by some requirement of objectivity and having arisen on a properly informed basis.

[79] Ultimately, I have been persuaded on the balance of probabilities that the nature of the decision-making in this case was such that the assessment of the public interest by the respondent in relation to the suspension of the first applicant was infected or overborne in a legally impermissible way. I have reached that conclusion for the reasons summarised below.

[80] First, I have been persuaded – particularly by the uncontroverted affidavit evidence provided by Messrs Burrows and Purcell – that the suspension which was imposed in this case was highly unusual in light of the nature of the misconduct alleged against the first applicant. It appears quite out of kilter with the PSNI's general approach to suspension of officers. That does not, of itself, render the suspension unlawful; but it does call for careful analysis of the decision-making process which gave rise to this outcome. In short, it calls for an explanation of why suspension was imposed in this case when, in light of the nature of the misconduct alleged, it would not usually follow.

[81] Second, it is notable that the primary decision-maker, the DCC, even after having viewed the BWV footage, took the view that the case for re-positioning was made out. At least initially, he was not of the view that the public interest required suspension of either officer.

[82] Third, that position clearly changed in the meeting which was then held late in the afternoon of 6 February between the DCC, the Chief Constable and other senior officers. The DCC's note makes clear that the Chief Constable was of the view that "given the significant public interest generated by the consequence of the officers' actions that suspension was appropriate." I am satisfied that the Chief Constable was pressing for suspension and that the ultimate decision (although legally the responsibility of the DCC) was, in the Chief Constable's words, a "collective decision." That is entirely consistent with the Chief Constable's note that it was one of the most difficult decisions he had made; and with his own decision, recorded by the DCC before this had been requested by either applicant, that the Chief Constable would recuse himself from any future role in the case "given his role in the decision making around suspension and repositioning." The respondent's submissions in these proceedings accepted that the Chief Constable, although not "the ultimate decision-maker", had "provided input into the decision, as one would expect he ought to, in the circumstances." Indeed, the Chief Constable's note of the DCC's approach at this time (see para [33] above) suggests that the view of the Chief Constable was likely to be a decisive factor in his ultimate decision.

[83] Fourth, and importantly, both the DCC and the Chief Constable were acutely aware of the threat of Sinn Féin withdrawing support for policing and/or

withdrawing from the Policing Board if immediate action was not taken in respect of the officers' duty status. The applicants placed considerable reliance upon the communication between the police authorities and Sinn Féin politicians which was disclosed in the evidence. For instance:

(a) On 5 February 2021, the deputy First Minister (Michell O'Neill MLA) posted a message on Twitter indicating that she had requested an urgent call with the Chief Constable. In a further message on Twitter that day, the Chief Constable stated that he had spoken to the deputy First Minister about the events on the Ormeau Road. He was to provide a further update in due course.

(b) DCC Hamilton's affidavit indicates that, shortly after becoming aware of the incident, and before he went to Police Headquarters to deal with it, he received a telephone call from Gerry Kelly MLA, as noted above. Mr Kelly explained to DCC Hamilton that the situation was extremely serious, and the public was responding negatively to police actions.

(c) The applicants point to the unusual circumstances of the detained person being 'de-arrested' and released without having been processed in the normal way as an example of how effective such representations were and the extent to which senior officers felt they had to act quickly, and perhaps outside normal procedures, in order to assuage growing criticism.

(d) There was an important meeting at 7:00pm on 5 February. DCC Hamilton has averred that, at this point, he was "aware the Chief Constable was informed by Sinn Féin that there was a risk support for policing would be withdrawn unless action was taken in respect of the officers." Indeed, the formal minutes of that meeting record the following:

> "[DCC Hamilton] also advised that there was pressure emerging from the Deputy First Minister in regard to the status of the officers involved and that there were suggestions of grave consequences for republican support for policing."

(e) DCC Hamilton's note of 8 February refers to the same issue but in more forthright terms, as follows:

> "The [Chief Constable] received information from Sinn Fein that unless officers were suspended, they would remove support for policing. I discussed this with ACC Alan Todd and we agreed that that was not warranted at this stage [late afternoon on 5 February]. Other early information pointed to

commentary that some in the republican community were saying that this would be 'their Drumcree.'"

[84] I accept the respondent's submission that there is nothing of itself wrong with discussion between senior police officers and politicians in a situation of this nature. Indeed, consultation with political representatives on the NIPB is perhaps to be expected. Taking soundings, or considering representations, from other elected representatives is perfectly appropriate. In this case, I understand from the respondent's submissions that the Chief Constable spoke to all the main political parties within a 24-hour period.

[85] However, in my view it is highly significant that the DCC's formal note which was designed to set out the process leading to, and the reasoning for, the decisions records an understanding that unless suspension was imposed, Sinn Féin *would* remove support for policing. This was recorded to be information provided to the Chief Constable. In the Chief Constable's own note explaining the decision, reference is made to this being a "defining moment" and to the "feedback that SF [Sinn Féin] may leave [the] Policing Board." Consideration is then given to the potential knock-on effect of such an action, namely that it might collapse the Executive Committee of the Assembly.

[86] Fifth, and perhaps crucially, the Chief Constable's note goes on to record as follows: "Options other than suspension unlikely to assuage criticism and we may be pushed there anyway…" This is a clear indication that the respondent was concerned that, if a suspension was not imposed, they would find themselves in a position where they had to bow to continued external pressure from those who were already being critical and, belatedly, impose a suspension having been "pushed there."

[87] Sixth, it is difficult to see why the Chief Constable would record that the decision was one of the "most difficult decisions" he had made if he was persuaded that, but for that pressure, suspension was warranted. The DCC noted that the Chief Constable considered suspension appropriate in light of the "public interest generated by the *consequence* of the officers' actions" (see para [31] above) which will have at least included, and indeed is likely to have been dominated by, his understanding of the threat to support from policing if the pressure to suspend the officers was not acceded to.

[88] Seventh, it is impossible to avoid the conclusion that the pressure so exerted was, in large measure, a result of a wholly separate and unrelated incident (the Pitt Park incident) which was wrongly conflated with the actions of the applicants in the incident in which they were involved (see, for instance, the Tweet referred to at para [19] above). Objectively speaking, there was no relationship between that prior incident and the misconduct allegations made against the applicants in this case. In addition, external demands for immediate action in respect of their duty status must necessarily have been made in the absence of a fully informed understanding of the

applicants' circumstances and actions. It appears those demands were made almost immediately after the incident occurred. The suggestion that there was 'targeting' of this Sean Grahams commemoration event, for instance, is not borne out by the evidence and is not the basis upon which the respondent proceeded. There may have been justifiable concerns about what had happened but the requirement for an immediate change in the officers' duty status, failing which support for policing as a whole would or might be withdrawn, appears to have been a knee-jerk reaction. It was also, in my view, one which was objectively unwarranted since, as later events demonstrated, the suspension of one or both officers is in no way determinative of whether criminal proceedings or misconduct proceedings would follow and/or result in any sanction.

[89] Taking these considerations together, I have been persuaded that the respondent imposed suspension in the first applicant's case because of the threat (whether real or perceived) that, if it did not do so, republican support for policing would be withdrawn. When that threat arose in the circumstances described in the preceding paragraph, to reach a decision on that basis was in my view unlawful. Whether characterised as the indirect taking into account of an irrelevant consideration (the circumstances and concern around the Pitt Park incident); as an unlawful abdication of the decision-making function by acting under dictation (see Fordham, *Judicial Review Handbook* (7th edition, Hart) at section 50.2); as an irrational conflation of the views of those demanding suspension with the public interest in all of the circumstances of the case; or as an instance of the type of "public clamour" which should properly be left out of account in the vein of the *Venables* case, the result is the same. I propose to quash the first applicant's suspension as a result. I will do so on grounds (2)(iii) and (3)(iii) within section 5 of the applicant's Order 53 statement which seem to me to encapsulate the error of law described above.

[90] Before leaving the topic of the public interest test, there are some further observations which ought to be made. First, I do not underestimate the difficult situation in which the respondent was placed. Mr Lockhart rightly observed that maintenance of public confidence in the police is a crucial concern in this jurisdiction in a way which is not directly comparable with many others. In his submission, the maintenance of "the consent of both communities" is "an existential question" for the police service here. In his submission, the actions of the Chief Constable defused an unprecedented situation which posed an existential threat to policing. I acknowledge that senior officials from the Policing Board were also involved in the discussions around the suspension decision and appear to have shared a number of the concerns which were troubling the Chief Constable. No doubt they too were concerned about a potential collapse of the Policing Board structure. However, the fact that the Chief Constable considered the interim duty status of two junior officers in the present case to present an issue of that magnitude is itself illustrative of the legal flaw in the public interest assessment discussed above.

[91] It is also important to say something in this case about the issue of police operational independence. In *R v Police Commissioner of The Metropolis, ex parte Blackburn* [1968] 1 All ER 763, Lord Denning stated as follows:

> "The office of Commissioner of Police within the metropolis dates back to 1829 when Sir Robert Peel introduced his disciplined Force. The commissioner was a justice of the peace specially appointed to administer the police force in the metropolis. His constitutional status has never been defined either by statute or by the courts. It was considered by the Royal Commission on the Police in their report in 1962 (Cmnd 1728). I have no hesitation, however, in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."

[92] This important principle was recently affirmed in *Commissioner of Police and another v Benjamin* [2014] UKPC 8 (see para [29]). The present case is not, classically, one involving operational decision-making in relation to on-the-ground policing. As discussed above, the statutory scheme calls for an assessment of the public interest. But it remains important that the Chief Constable (or the appropriate authority delegated by him) should be free to make such decisions free from undue external pressures from the executive branch. In Northern Ireland that is perhaps particularly so, given the often contentious nature of policing in this jurisdiction and the risk of paralysis in the event that political representatives of each traditional community in Northern Ireland sought to exercise a veto over a particular police action by mutual threat of withdrawal of support for policing. In our system the Chief Constable is held to account for the exercise of his functions and those of the police by the Policing Board, in accordance with the provisions of the Police (Northern Ireland) Act 2000. That is the appropriate forum for requiring justification of decisions made

independently by or on behalf of the police, after appropriate challenge and explanation, rather than seeking to dictate the outcome of such decisions in advance.

The decision to re-position the second applicant

[93] The second applicant was re-positioned. He also challenges the rationality and proportionality of that decision. In particular, he points to (what he contends is) a marked inconsistency between his treatment and that of the third officer in respect of whom no interim action was taken. I deal with that issue separately below. Even if there were criticisms to be made of his actions (which he denies), the second applicant also contends that these were in the nature of performance issues only. For similar reasons as discussed above (see para [70]), I do not accept that there is a proper basis for the court to interfere with the respondent's decision on that basis. There may be a stronger case that any alleged misconduct on the part of the second applicant amounted to a performance issue only; but it was not unlawful for the respondent, at that early stage of the process, to take the view that the misconduct alleged may not fall into that category.

[94] However I have determined, on balance, that the re-positioning decision in relation to the second applicant should also be quashed on a similar basis to that for quashing the suspension of the first applicant, discussed above. This was a difficult decision because I accept, firstly, that the DCC initially considered re-positioning to be an appropriate response in relation to *both* applicants; and also, more importantly, the statutory scheme does not impose the same constraints upon deployment to alternative duties as it does in respect of suspension. The redeployment of an officer to an alternative location or to alternative duties, although sometimes viewed as something of a demotion, is plainly not as serious as suspension. It is also much closer to the normal operational decisions properly within the discretion of senior officers as to the deployment of police resources (although, where imposed as part of a disciplinary investigation process, it obviously has a different character from everyday deployment decision-making). The appropriate intensity of review in respect of such a decision is accordingly reduced. However, I have been satisfied that the same basic approach was adopted in respect of the re-positioning of the second applicant as was adopted in respect of the suspension of the first, namely that the respondent was materially influenced by the threat (real or perceived) that one party would leave the Policing Board unless the duty status of both officers who first attended at the commemoration event was changed (with at least one instance of suspension required). I have not been satisfied by the respondent to the high standard required that, but for this, the decision in respect of the second applicant would inevitably have been the same. I am fortified in that view by the fact that the third officer referred to above was not re-positioned, notwithstanding having been involved in the contentious use of force and having been the subject of a complaint to the Ombudsman.

Inconsistency and unequal treatment

[95] The first applicant has next drawn attention to (what he contends is) the marked inconsistency between how the respondent dealt with him and with the second applicant respectively. In turn, the second applicant has also complained about the marked discrepancy between his treatment and that of the third officer, who was involved in assisting with the arrest of Mr Sykes and, for instance, the use of handcuffs. That officer had no action taken against him pending the investigation of the complaint, notwithstanding that a referral to the PPS was made in respect of him (along with the first applicant), but no such referral was made in respect of the second applicant. The second applicant did not physically restrain Mr Sykes, nor did he arrest him. In his submission, out of the three officers who were involved in the incident he (the second applicant) was the officer who was "least involved." The third officer did restrain Mr Sykes but was not subject to either suspension or re-positioning. The second applicant contends that this difference in treatment is illogical. All three officers received OMB3 Forms in materially identical terms. The first applicant contends that the third officer was in a "directly comparable" position to his. Mr Purcell's evidence also disclosed that the applicants' sergeant was later (some three weeks after the incident) served with a Form OMB3, albeit in different terms. No interim action, such as suspension or repositioning, was taken in that case.

[96] Inconsistency or unequal treatment is not, of itself, a ground of judicial review unless it amounts to a discrepancy of such magnitude or significance, on materially similar facts, as to rob the decision of logic or amount to irrationality. A classic description of this is the observation of Ouseley J in *R (McMorn) v Natural England* [2015] EWHC 3297 (Admin) in the following terms: "A decision made by a public authority is unlawful on the grounds of inconsistency if like cases are treated differently *without a rational basis* for the different treatment" [italicised emphasis added].

[97] I accept the respondent's case that the distinctions drawn between the three officers were within the range of rational responses available. In short, it was not irrational to view the first applicant as the most 'at fault.' He was the arresting officer and the officer who, arguably, did most to escalate the situation (or who had the greatest opportunity to de-escalate the situation). The second applicant came to his assistance. The third officer came upon the scene later and assisted with the arrest but after the first applicant was set upon a particular course. All of their actions were different. Although certain comparisons can be made, it was in my view within the range of rational responses available to the respondent to view the seriousness of each officer's contribution in the graduated way in which it did.

Procedural fairness; improper purpose of punishment; and the Chief Constable's statement

[98] It is convenient to deal with a range of the remaining grounds of challenge advanced by the applicants together. In each case, the applicants also allege that the decisions taken in relation to them were procedurally unfair. The misconduct alleged against both applicants was subject to investigation by PONI. The applicants contend that, notwithstanding that, the respondent itself 'determined' that the applicants were guilty of misconduct and, in terms, made a public announcement to that effect. The applicants submit that, in advance of this, they were given no opportunity to make representations to the respondent before the Chief Constable came to his conclusion and/or made the public announcement of which they complain. They also contend that the suspension and re-positioning decisions were imposed for an extra-statutory purpose, namely that of punishment, rather than simply as a public interest measure pending investigation.

[99] Insofar as the procedural fairness challenge relates simply to the suspension and re-positioning decisions, I cannot accept it. It is true that the applicants were not spoken to by the decision-makers before those decisions were made. However, the Conduct Regulations provide for representations to be made by a suspended officer within 10 days *after* the suspension decision has been made (see para [50] above). The statutory scheme is designed to allow for urgent decisions to be made at short notice, with detailed participation on the part of the affected officer following within a short period of time thereafter. As already described, a suspension decision is also required to be kept under review as circumstances change, including where this is disclosed by further representations on the part of the officer. In short, the statutory scheme does not require detailed participation rights in advance of the initial decision. It may represent best practice to hear from an officer before suspending him or her; but to imply that into the scheme as a requirement would, in my view, cut against the statutory intention.

[100] The respondent permitted the first applicant the procedural facility anticipated and required by the Regulations to protect his interests. Although the Regulations do not expressly make clear when an officer subject to redeployment should be permitted to make representations, I see no reason why they would be entitled to greater procedural protection than those subject to suspension (particularly when redeployment is envisaged as an alternative to suspension). The second applicant also had an opportunity to make his case shortly after the impugned decision in respect of him had been made. I do not consider this was procedurally unfair.

[101] The position in respect of the Chief Constable's statement, the third impugned decision in this case, is more complex. Mr Purcell's evidence, from his own experience and on behalf of the Police Federation, is that he has never seen the Chief Constable apologise for the conduct of officers in respect of matters which are subject to investigation as he did in this case. He describes this as "highly unusual." In

addition, in an interview on the Stephen Nolan radio show on 8 February the Chief Constable indicated that police had looked at the evidence and made "a *determination* about apparent and alleged officer behaviour." The nature of the Chief Constable's public statements is such that the applicants contend (a) that they should have been given an opportunity to make their case before these statements were made and (b) that the first two impugned decisions can properly be considered to have been "infected by improper purpose", namely to impose a punishment on them for misconduct which had been determined (without due process) to have been established.

[102] Ultimately, I accept the respondent's submission that the making of the public statement by the Chief Constable on 6 February is not justiciable by way of an application for judicial review. It did not have any legal effects. As a matter of law, it was not dispositive of the misconduct proceedings, or any aspect of them. The statement acknowledged that PONI had just commenced her investigation into the incident; and made clear that it was being made to address public concern. The Chief Constable was plainly trying to ease tensions which had arisen as a result of the incident. He was not determining or resolving the misconduct case, which was the subject of Mr Sykes' complaint, nor was he purporting to.

[103] That said, I can quite understand why the applicants were aggrieved at the terms of the statement. It certainly gives the impression that the Chief Constable was convinced that misconduct was (or was highly likely to be) established in some respect. The making or offering of an apology does not necessarily, of itself, amount to such an indication. However, the Chief Constable's comment that "what followed was not reflective of the values of the Police Service of Northern Ireland" may go some way to suggesting a view on his part that misconduct – that is, a breach of the Code of Ethics which sets out the values of the PSNI – had occurred. Indeed, the statement read as a whole suggests that the Chief Constable had reached a fairly clear view (i) that the conduct complained of was not a mere performance matter; (ii) that there was strong evidence that misconduct had occurred; and (iii) that there were members of the public who had been distressed by the behaviour of which complaint had been made. But these are matters which can properly be considered at the stage of determining whether a suspension should be imposed. In addition, no mention was made of any particular officer having committed any particular misconduct.

[104] More importantly, as I have indicated above, it was clear that a formal disciplinary procedure would follow and that no legally effective decision as to misconduct had been made. The Chief Constable's statement was not, as the applicants contend, a "determination." Legally, it could be no more than the Chief Constable's view of the matter at that stage. It is not for me to judge the wisdom of the Chief Constable having made a statement in those terms (although it is notable that he indicated that he would recuse himself from any further decision-making in the case and that PONI wrote to him on 10 February 2021 asking him not to make

any further public comment on the matter). I do not consider, therefore, that it would be appropriate to grant any relief in relation to it.

[105] I have also not been satisfied that the impugned suspension and re-positioning decisions were infected with a punitive purpose, as the applicants allege, notwithstanding the terms of the Chief Constable's statement. I note that, in his Day Book, the Chief Constable expressly noted that the suspension was "an act without prejudice." He was aware, and acknowledged, that the normal investigative and disciplinary procedures had to be followed. Although I have held that there was a legal error in the way in which the public interest test was applied, from the respondent's perspective the decision cannot be said to have been imposed as a punishment. It was considered to be required in the public interest – albeit through a flawed reasoning process in law, as I have found – as an interim measure to resolve matters pending the outcome of the disciplinary process.

Failure to give adequate reasons

[106] I also reject the applicants' challenge on the ground of the respondent having failed to give adequate reasons for the impugned decisions. It is a requirement of the Conduct Regulations that a summary of reasons is given for a suspension decision (see regulation 10(6)). Although there is no equivalent obligation expressly set out in the Regulations in relation to a redeployment decision made as an alternative to suspension, I see no reason why fairness would not require a similar summary of reasons to be provided for such a decision (and the respondent did so). The applicants complain that the summaries with which they were provided did not adequately explain why the decisions had been made. I do not consider this case to have been made out. Part of the applicants' case is that the *true* reasons for the decisions were not candidly expressed in the notices with which they were served. However, the applicants were clearly aware of the incident and complaints which gave rise to the decisions and the basic reasoning of the respondent as to why the decisions had been taken (including the reference to the "consequences" of their actions, upon which the applicants have relied). A detailed discussion of all of the various aspects of the public interest in play was not required.

Proportionality

[107] Finally, I also reject the applicants' case based on alleged lack of proportionality and breach of Convention rights. As I have held above, I do not consider the impugned decisions were made for a punitive purpose. It is in such a context that disproportionality will classically arise at common law, as an aspect of irrationality. In the first applicant's case, had the assessment of the public interest been undertaken lawfully and a rational conclusion been reached that the public interest required suspension, it would in my view be difficult to contend that this was outside the area of discretionary judgment properly open to the respondent, particularly given its interim nature and requirement to be reviewed.

[108] I do not consider that the second applicant's Convention rights were engaged by the decision merely to reposition him within his job. I also have grave doubts that the first applicant's Convention rights were interfered with merely by means of his suspension. As to his property rights under article 1 of the First Protocol, he was not deprived of any property (unless the office of constable itself, from which he was suspended, is to be viewed as property for this purpose, which I doubt). He continued to be remunerated. The first applicant's article 8 claim was mounted on the basis of "the professional, personal and reputational impact of the suspension decision" upon him. The applicants relied upon *Hawthorne v Police Ombudsman* [2020] NICA 33, in which the Court of Appeal noted at para [53] that "it must also be borne in mind that matters bearing on personal honour and reputation fall within the scope of art 8 and where they attain a certain level of gravity and are made in a manner causing prejudice to personal enjoyment of the right to respect for private life they are entitled to protection (see *Pfeifer v Austria* 48 EHRR 175)." However, this was not a case where final findings of misconduct were made against either officer. This aspect of the applicants' claim was directed particularly towards the Chief Constable's statement which, for the reasons set out above, I do not consider an appropriate target for judicial review.

[109] In truth, this challenge brought by serving police officers to interim disciplinary measures imposed upon them is not a human rights challenge. I do not consider that these grounds added anything material to the other aspects of their claim.

Conclusion

[110] For the reasons given above, I will allow the applicants' judicial review on the limited grounds explained at paras [89] and [94] above and will quash the decision made to suspend the first applicant and the decision to re-position the second applicant. Although the practical effect of those decisions has dissipated, given that they have previously been 'lifted' by the respondent upon review, I consider the applicants are entitled to a form of relief which removes those decisions from their records as a matter of law. This decision, of course, has no bearing on any further disciplinary processes which may be in train, or which may follow arising out of the incident on 5 February 2021.

[111] I will hear the parties on the issue of costs.