Neutral Citation Number: [2023] EWHC 960 (Admin)

Case No: CO4492021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 April 2023

Before :

MR JUSTICE SWEETING

- -

Between :

POLICE AND CRIME COMMISSIONER FOR NOTTINGHAMSHIRE — **Claimant**

- and -

NOTTINGHAM CROWN COURT — **Defendant**

ANTHONY CRITCHLEY — **Interested Party**

- -
- -

John Beggs KC and Elliot Gold (instructed by **East Midlands Police Legal Services**) for the **Claimant**
Nic Lobbenberg KC and Aaron Rathmell (instructed by **Taylor Law**) for the **Defendant**

Hearing dates: 20 May 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 26 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Sweeting :

1. On 30 June 2001 the Interested Party, Anthony Critchley ("AC"), retired after 30 years' service as a police officer. It later emerged that he had committed offences of indecent assault and indecency, against children, between 1972 and 1975. These offences remained undetected throughout both his police career and his retirement until a victim came forward in 2014.

2. Following convictions in 2016 and 2018 in respect of this sexual offending in the 1970s, the Nottinghamshire Police and Crime Commissioner, the claimant in these proceedings, took the decision to forfeit 60% of AC's pension. The maximum percentage which could have been forfeited was 65% being the unsecured portion of his pension contributed by the police force, the remainder reflecting AC's own contributions.

3. AC appealed the forfeiture decision to the Crown Court which allowed his appeal in part. The claimant now challenges, by way of judicial review, the decision of 18 December 2020 (HHJ Warburton, sitting with two magistrates) to reduce the forfeiture from 60% to 25%.

4. On 13 August 2021 permission was refused on the papers. On 26 October 2021, permission was granted at a renewal hearing.

The Legal Framework

5. Section 1 of the Police Pensions Act 1976 provides:

> " (1) Regulations to be made by the Secretary of State, with the consent of the Minister for the Civil Service and after consultation with the [Police Negotiating Board for the United Kingdom] […]
>
> (3) Regulations made under this section … may provide for a pension to be forfeited wholly or in part and for the forfeiture to be permanent or temporary."

6. The relevant regulations made pursuant to the statutory power are the Police Pensions Regulations 1987. Under regulation B1 a police officer is entitled to a pension on reaching the age of 55. Regulation K5(4) provides for forfeiture of that pension as a result of a conviction:

> "Subject to paragraph (5), the pension supervising authority in respect of a pension to which this Regulation applies may determine that the pension be forfeited, in whole or in part and permanently or temporarily as they may specify, if the grantee <u>has been convicted of an offence committed in connection with his service as a member of a police force which is certified by the Secretary of State either to have been gravely injurious to the interests of the State or to be liable to lead to serious loss of confidence in the public service.</u>" (my emphasis)

7. The right of appeal is set out in Regulation H5(1) which provides:

> "Where a member of a home police force, or a person claiming an award in respect of such a member, is aggrieved by the refusal of the police pension

> authority to admit a claim to receive as of right an award or a larger award than that granted or, by a decision of the police pension authority as to whether a refusal to accept medical treatment is reasonable for the purposes of regulation A12(1A), or by the forfeiture under Regulation K5 by the pension supervising authority of any award granted to or in respect of such a member, he may, subject to Regulation H7, appeal to the Crown Court and that court, after enquiring into the case, may make such order in the matter as appears to it to be just …" (my emphasis).

8. An appeal to the Crown Court is by way of rehearing rather than a review of the earlier decision. In such an appeal the Crown Court is exercising its civil jurisdiction, applying the civil standard. There are a range of decisions of the police pension authority that may be challenged under regulation H5(1). The role of the Crown Court in determining entitlements on appeal has been described as involving a "wide discretion" (See *R. (Chief Constable of South Yorkshire) v Kelly* [2021] EWCA CIV 1699 per Phillips LJ at para. 51) without any particular methodology being prescribed under the regulations, which simply refer to the court "enquiring into the case" (See *Jennings v Humberside Police* [2002] EWHC 3064 (Admin) per HHJ Wyn Williams QC at para. 30).

9. The position in a judicial review claim is different, the Administrative Court is supervising the Crown Court for material error of law (see The Senior Courts Act 1981 section 29(3)). It should not substitute its own decision on the facts and must take care not to characterise as errors of law any evaluative judgments which it was the function of the Crown Court to make.

10. Regulation K5(4) was considered in *Whitchelo v Secretary of State for the Home Department* [1996] Pens LR 255. In that case a police officer attended a training course in surveillance techniques at which he was introduced to measures employed by the police to combat offences involving the deliberate contamination of food in supermarkets for the purpose of blackmail. He embarked on his own scheme of extortion based upon what he had learned on the course. Much of the preparation for the offending was carried out whilst he was still a serving officer, as was the first offence of the series which he committed; the latter offences taking place after he had left the police and was in receipt of a disability pension. He was convicted of 11 offences, including offences of blackmail and obtaining money by deception. He was sentenced to 17 years' imprisonment.

11. The Secretary of State, as the relevant police authority, decided that 75% of his ill-health pension should be forfeited. His appeal was dismissed by the Crown Court. He argued that his offending was not connected with his police service because regulation K5(4) was to be confined to offending by a serving police officer and/or offending in the course of duty. That approach to the regulations was rejected on appeal by way of case stated and then in the Court of Appeal. On the facts in *Whitchelo* all of the offences relied upon and required inside knowledge of police methods; knowledge which had been acquired in service.

12. At the first appeal Dyson J. (as he then was) said:

> "20. The words 'in connection with' are ordinary English words. They are not defined in the Regulations and there is nothing in the context in which they

> appear to suggest that they should be given a special or unusual meaning. What is required by Regulation K5(4) is that there should be a link or connection between the offence or offences and the offender's service as a member of a police force. I cannot accept either of the interpretations suggested by Mr Fulford. If it had been intended to limit the scope of the regulation to cases where the grantee has been convicted of an offence committed whilst a serving member of a police force, whether acting in the course of his duties or not, it would have been very simple so to provide.
>
> 21 In my judgment the language of Regulation K5(4) is plainly not restricted in this way. The essential requirement is that there should be a link between the committing of the offence and the service as a police officer."

13. Lord Bingham, giving judgment in the Court of Appeal (*Whitchelo v Secretary of State for the Home Department* 11 March 1997 (unrep)), concluded:

> "It is in my judgment clear that Regulation K5 must be construed as a whole. Its overall purpose is to avoid the scandal which would ensue if a police officer or former police officer who had committed, and been convicted of, criminal offences relating to his police service and gravely injurious to the interests of the State or liable to lead to serious loss of confidence in the public service, were to receive potentially large payments out of public funds by way of pension. It is noteworthy, as both of the lower courts pointed out, that the Regulation does not refer to offences committed by a member of a police force in the course of his duties or in his capacity as such or during his service as a member of a police force. The Regulation uses (one must assume deliberately) the much looser expression "in connection with his service". […]
>
> The test propounded by the Regulations is in my judgment a simple and straightforward one derived from the language used. It is necessary to ask: "is there a connection between the crimes of which the police officer has been convicted and his service as a member of the relevant police force?"

14. The hearing before me was focused on the question of what facts or information can be relied upon to establish the link required under regulation K5(4).

15. There is government guidance (Home Office Circular 018/2009 and Home Office Police Pension Forfeiture Guidance 11 February 2021) in relation to pension forfeiture. It relates primarily to the process of applying for a forfeiture certificate following conviction. It reflects the decision in *Whitchelo:*

> "1.10. Forfeiture will not be appropriate in every case where a pension scheme member has committed a criminal offence, but should be considered where there is, or might be, public concern about the pension scheme member's abuse of their position of trust. In order to be eligible for a forfeiture certificate, the offence(s) must have been committed in connection with their service as a member of a police force.
> 1.11. The relevant case law states that the pension scheme member need not have been a serving officer at the time of the offence in order to meet the requirement that it must be connected with their service. For example, the offence may have been committed after the individual retired, but they may, for example, have used

police knowledge, police systems or police contacts in the commission of the offence.
1.12. The baseline position in principle is that pension rights, once earned, will only be forfeited in serious circumstances. A person's rights to a police pension are part of the remuneration package to which their service has entitled them, and a conviction will not automatically result in a certificate being issued."

16. Among the factors which the Home Secretary will, according to the guidance, take into account are:

> "a) the seriousness with which the Court viewed the offence(s) (as demonstrated by the punishment imposed and the sentencing remarks);
>
> b) the circumstances surrounding the offence and investigation;
>
> c) the seniority of the officer (pension scheme member) or former officer (the more senior, the greater the loss of credibility and confidence);
>
> d) the extent of publicity and media coverage..."

17. There are three stages to the forfeiture process;

    i) First, the identification by the police authority of a case where a police officer has committed an offence in connection with his/her service as a member of a police force.

    ii) Secondly, consideration by the Home Secretary, on the basis of an application by the police authority, of whether the offence was either gravely injurious to the interests of the State or liable to lead to serious loss of confidence in the public service and, if so, the issue of a certificate.

    iii) Thirdly, where a certificate is issued, a decision by the police authority whether to exercise the power to forfeit and, if so, determination of the extent of forfeiture.

18. The parties took different positions in relation to whether the right to a pension under the Police Pensions Regulations 1987 falls outside or within the ambit of Article 1 Protocol 1" ("A1P1") scheduled to the Human Rights Act 1998. If within the A1P1 right, then forfeiture must be necessary, proportionate and in accordance with law. The claimant contended that the right to a pension in this instance does not engage A1P1 because it is conditional and forfeiture did not involve an interference with property rights. For obvious reasons perhaps, since the inevitability of some degree of forfeiture was accepted, AC did not contend that the reduction in the amount of pension to be forfeited produced a result which was non-compliant. There was no dispute but that Article 6 was engaged.

Background

19. On 26 May 2016 AC was convicted of three offences of indecent assault on, and one offence of indecency with, a child N, when N was twelve or thirteen years old. AC met N when he was on duty and called to an incident reported by N's mother. He

attended their home in police uniform. AC was then 22 years old. There was a period of grooming during which AC befriended N and, under cover of a shared interest in bird watching, took him to secluded spots at a local nature reserve and in the Peak District. The offences were committed on three separate occasions when AC masturbated N to ejaculation. On the final occasion he also asked N to masturbate him.

20. On 26 June 2016, following a trial, AC was sentenced to two years' imprisonment for each of the counts of indecent assault, with a further six months on the indecency offence, all to run concurrently. The judge sentenced on the basis that the offending involved a serious breach of trust and the use of AC's position as a police officer to take advantage of N for his own sexual gratification. It was nevertheless an isolated incident in what was otherwise a blameless life. The judge was sentencing within the confines of the sentencing regime which applied at the time of the commission of the offences.

21. Following the publicity which the case attracted three other men, A, B & C, came forward and alleged that AC had sexually abused them when they were children. At the time of the offending, which occurred during the same period as the offences involving N, AC was an assistant Scout leader in the Scout troop to which A, B and C belonged. These allegations formed the basis of a new indictment preferred in 2018 ("the 2018 indictment"). The newspaper reports of the 2016 trial and sentencing hearing referred to the fact that AC was a former police officer.

22. B was interviewed by the police on 15 December 2016. He alleged that there were two separate occasions on which he had been sexually assaulted or asked to perform sexual acts on AC.

23. The first occasion took place when AC arrived at the Scout group one evening in full police uniform in a police "panda" car. He offered to take B home but drove some way past where B lived and parked the car. He pointed out various "buttons and things" within the police car. He then used his hands to make genital contact with B over his clothing. He talked to B about nature and wildlife and asked whether he would be interested in going to a nature reserve. In interview B said:

> "I was actually quite excited about going to see, going to Attenborough Nature Reserve, I mean you know I thought, it was, it was okay, he was a policeman, he was a trusted person, he was part of the Scout group, he was a leader, he was an assistant leader so I didn't think anything of it, that was the first incident."

24. When he was asked how he had come to know AC, he explained that he had been going to Scouts for about 6 to 8 weeks and had been introduced to AC as the assistant Scout leader. This first incident became count 4 on the 2018 indictment.

25. The second occasion was about two weeks later when AC collected B from his home and drove him (not in a police car) to the nature reserve. When they were together in a bird hide AC took hold of B's hand and rubbed it on AC's genitals over his trousers and then put B's hand down AC's trousers. B then masturbated AC to the point of ejaculation. This second incident became count 5 on the 2018 indictment.

26. On 4 May 2018 AC pleaded guilty to three offences in relation to A and C, including specimen counts, and one offence in relation to B (count 5). The way in which the offences had been committed was broadly the same in relation to each boy. A said in interview that whilst he thought that what was happening was probably not right, AC was a Scout leader and a police officer and so a person in authority.

27. AC pleaded not guilty to count 4 (the first occasion of sexual assault on B) which was ordered to lie on the file. The position of the Crown Prosecution Service in relation to count 4 was that guilty pleas would have been secured in relation to offences committed against all three complainants. Count 5, involving B, was itself a serious indecent assault and a trial on count 4 would not increase the sentence. This was a conventional analysis of whether there was any public benefit in seeking a trial in circumstances where a guilty verdict would not have any impact on sentence. It was not questioned by the judge who made the order that count 4 should lie on the file. It did not mean that the prosecution was not confident of securing a conviction had there been a trial or that B was not considered to be a witness of truth in relation to the events covered by count 4. Equally B's evidence was not tested in a trial, the only fair assumption being that AC would have contested the matter had the count not been ordered to lie on the file.

28. On 5 July 2018 AC appeared for sentence before the same judge who had sentenced him in 2016, HHJ Coe. Her sentencing remarks included reference to the fact that AC was a police officer and a Scoutmaster who had access to young children. His earlier mitigation, in 2016, that his offending against N involved a single lapse, had obviously been untruthful. The judge observed that the offending which had come to light following the trial disclosed a pattern of behaviour against a number of young boys. Custodial terms of 28 months were imposed for counts 1 and 2 and 5 to 8 on the indictment, with a further 14 months on count 3, all to be served concurrently. The judge took into account that the offending had occurred 40 years ago; that there had been no offending since; that AC had received numerous commendations during his police service and that there was, what she described as, an "excellent" Offender Management report. She did not mention count 4, referring only to the 7 counts to which AC had pleaded guilty. Her reference to AC having access to young people can only, in context, have been to his access as a Scout leader. This reflected the Prosecution opening at the hearing which set out in detail the scouting activities which had been used as the pretext for AC being alone with individual scouts.

29. By letter of 14 November 2018 the claimant gave notice to AC that they were considering forfeiture of part of AC's pension pursuant to regulation K5(4). The letter attached a report from the Chief Constable. The report took into account all the convictions, that is to say the convictions in respect of N, A, B, and C.

30. The claimant sought a certificate from the Minister of State for Policing and the Fire Service, on behalf of the Secretary of State for the Home Department (SSHD), certifying that the convictions were of sufficient seriousness to warrant forfeiture. This was issued on 29 July 2019. It was not disputed in the subsequent proceedings and before me that convictions of this nature, if they related to offences committed in connection with service as a member of a police force, would be liable to lead to "serious loss of confidence in the public service". Given that it was also accepted that the offences against N were so connected, some degree of forfeiture was inevitable.

31. The notes of a pension forfeiture meeting on the 18June 2020, attended by a representative of the Police Federation on AC's behalf, indicate that his position in relation to the allegation of the use of a police car in the first incident described by B, was that he had no recollection of using police vehicles to attend Scout meetings, that police vehicles were sparse in the 1970s and that he would not have been allowed to use a vehicle off-duty to attend a meeting. These observations had also been made in AC's earlier written representations of 5 November 2019 which questioned whether there was any connection between the 2018 convictions and AC's police service, asserting that only the 2016 indictment offences met the criteria under regulation K5(4).

32. On 2 July 2020 the Claimant determined that AC should suffer a permanent forfeiture of 60% of his pension. This decision took into account all of the convictions, that is to say those involving N, A, B and C.

33. On 20 July 2020 AC appealed to the Crown Court. He accepted that forfeiture was justified in respect of the offences against N but contended that the convictions against A, B and C were not connected to his service as a police officer and were immaterial in relation to forfeiture.

34. The claimant's grounds of response to the appeal accepted that "there is no evidence demonstrating a connection with respect to the offences concerning witness C" but maintained that such a connection existed in relation to A and B.

The Appeal in the Crown Court

35. The appeal was heard by way of a remote hearing on 11 December 2020.

36. The legal and evidential burden lay on the claimant to satisfy the Crown Court, on the balance of probabilities, that AC's pension was liable to be forfeited by reference to his convictions. At paragraph 8 of its judgment the Court formulated the issues as comprising three questions:

> (i) Whether the later convictions for which the Appellant was sentenced on 5 July 2018, fell within the definition in PPR reg K5(4) [at this stage the convictions in respect of A and B];
>
> (ii) Whether, and to what extent, the court could take account of facts not relied upon in the criminal proceedings, and not forming part of the offences for which the Appellant was convicted; and
>
> (iii) Whether and to what extent there should be an adjustment of the percentage of the pension to be forfeited, taking account of the court's findings in relation to (i) and (ii) above?

37. As far as victim B was concerned the answer to the first question effectively turned on the answer to the second. The immediate facts of the offending covered by count 5 were no different to those of the offences involving A and C. The claimant contended that, although not relied upon, the evidence which had led to count 4 did in fact form part of "the offences for which the Appellant was convicted".

38. The Crown Court concluded that the criterion for forfeiture was met in respect of the offending against victim N (as was accepted) but not victims A or B and gave its reasons as follows:

> "14. The Appellant pleaded guilty to counts 1 – 3 (Victim A), count 5 (Victim B) and Counts 6 – 8 (Victim C). A further charge, Count 4 (Victim B), was not admitted by the Appellant, who denied not only the alleged offence, but denied that the circumstances in which the alleged offence had been committed had ever taken place. The Prosecution made a decision not to proceed with this particular charge. It was ordered to lie on the file in the usual terms. His convictions, therefore, relate to counts 1 - 3 and 5 – 8 only. 15.
>
> 15. It is conceded by the Respondent that in relation to victim C, though C knew that the Appellant was a police officer, there was no feature of the conviction which could be said to fall within the definition in K5(4). We agree with this analysis, and counts 6 – 8 are therefore not relevant convictions
>
> 16. As regards the counts relating to Victims A and B, both Complainants were members of the 62nd Scout Troop, which is where they came into contact with the Appellant. Both were aware that he was a police officer, though he was off duty at the time of the commission of the offences and was acting in his capacity as a Scout leader. There is no evidence in relation to any of the counts of which the Appellant was convicted in respect of Victims A and B which directly links the Appellant's offending to his service as a police officer, nor is there any evidence from which such a link could properly be inferred. His status as a police officer, though plainly evident to the two Complainants, was ancillary to his offending in each of these counts. […]
>
> 22. We have considered the submissions of each advocate, both oral and written, and find as follows:
>
> > i) There is no conviction in respect of count 4, the facts of which the Respondent seeks to rely on.
> >
> > ii) The facts referred to in relation to count 4 were never admitted by the Appellant, he having always maintained that the events relating to count 4 had simply never taken place;
> >
> > iii) The facts relating to count 4 were never litigated, whether in the course of a trial or at a Newton hearing;
> >
> > iv) Those facts did not form any part of the Prosecution's opening of the facts of the case, nor did they form any part of the Learned Judge's sentencing remarks.
>
> 23. In our judgment, the wording of the statute is clear and simple. We have to consider whether there is a connection between the crimes of which the police officer has been convicted and his service as a member of a police force. Since there was no conviction in respect of count 4, the facts relating to it are not ones which fall within the definition in the regulations, and we take the view that we cannot therefore have regard to those facts when deciding this appeal.

> 24 This leads us to the conclusion that those facts are not relevant, whether in respect of victim A or B, though in any event there was, in our judgment, simply no evidence that victim A was even present at the relevant meeting or was indeed in any different position to that of C. Knowledge that the Appellant was, in addition to being a Scout leader, also a police officer, is not sufficient in our judgment to meet the required test in regulation K5(4). We direct our attentions therefore to the convictions relating to N alone"

39. In relation to the extent to which the pension should be forfeited the Court said:

> "28. We have been referred to a series of judgments which although not binding on this court, have been proffered as assistance in terms of the types of offending, level of seriousness and length of sentence passed in other cases, in order to establish something of a scale and achieve, as far as possible, a consistency of approach so as to achieve parity with other decisions.
>
> 29. We have not been referred to any cases which are on all fours with the instant case, which involved historic sexual offending on 3 separate occasions involving a child, while the Appellant was a serving police officer in the early 1970's.
>
> 30. On behalf of the Appellant, we are asked to have regard to the following mitigating factors:
>
> > a. That these offences took place over 45 years ago at the very start of the Appellant's career as a police officer when he was in his early 20's;
> >
> > b. He thereafter had a long and impressive career in the police force when it is not suggested he committed any further offences in connection with his membership of that police force;
> >
> > c. The Appellant is now 68 years of age, and is not in good health;
> >
> > d. He has a chronic permanent heart condition for which he requires medication;
> >
> > e. He lives in accommodation which does not permit him to take any employment to supplement his income; and
> >
> > f. He would be at risk of losing that accommodation were he to lose a substantial proportion of the pension he had been receiving to date.
>
> 31. Having had regard to all these matters, and the very helpful submissions made to us by both counsel both in writing and orally, the types of reductions which have been made in other cases, and taking account of the mitigation which has been put forward on behalf of the Appellant, we take the view that a forfeiture of 60% was in the circumstances of this case too high.
>
> 32. In our judgment the appropriate level of forfeiture to meet the justice of this case is 25%, to be forfeited permanently."

Judicial Review

40. In the present proceedings the claimant no longer asserts that the conviction in respect of A is to be taken into account. It would appear to be accepted, as the Crown Court observed in its judgment on the appeal, that A was in no different position to C. The nexus between AC and victims A and C was plainly his role as a Scout leader and not his position as a police officer. The challenge is now limited to the court's approach to the conviction on count 5 in respect of B and, in any event, to the extent of the reduction from 60%.

Ground One - The Defendant misconstrued the statutory test for forfeiture

41. Both parties relied on regulation K5, and the High Court and Court of Appeal decisions in *Whitchelo* analysing the "connection" test for forfeiture. It was agreed that the Crown Court had correctly cited the relevant parts of that authority and sought to apply the regulation.

42. The claimant's primary contention under this ground was that the regulation was misapplied since in deciding whether an offence was connected to police service "the defendant wrongly held this to refer only to those offences shown at the point of conviction to have been so committed, rather than on all the evidence available to it."

43. What was meant by this was that the Crown Court was wrong to conclude that the facts of count 4 fell outside count 5, of which AC had been convicted. The court's investigation of whether there was a connection was not limited to the facts of count 5 as opened by the prosecution or rehearsed in the judge's sentencing remarks. Thus, an enquiry into the facts which had formed count 4 was not precluded by the fact that the indicted offence itself had been ordered to lie on the file. The court, it was said, was wrong to ignore factual material just because there had been no conviction.

44. In oral submissions the claimant drew attention to the similarity between the accounts given by N and B both of which, the claimant submitted, mirrored each other and showed grooming by AC in circumstances where there could have been no possibility of contamination of evidence between the victims.

45. It was said that the reference at paragraph 16 of the judgment to there being no evidence "advertised the mistake" which had been made as to whether it was open to the court to take into account the facts of count 4; the court had in effect interpreted regulation K5(4) as a reference to a conviction being the limiting factor rather than a "connection". The criminal trial, it was argued, was only part of the matrix of connection which the test permitted the court to examine.

46. It was submitted that there were two logical consequences of the Crown Court's approach on the appeal:

    i) First, that whether a police officer had been convicted of an offence in connection with his service could only be decided on the facts "apparent to the court at the point of conviction" and;

    ii) Regulation K5 would have to be read as allowing forfeiture "only if the grantee has been convicted of an offence shown and proved at the point of his conviction to have been committed in connection with his service as a member of a police force."

47. In support of the argument that this would be both unpalatable and an incorrect construction of the regulation the claimant gave a number of hypothetical examples of situations where it would be appropriate to go beyond the facts relied on in the criminal proceedings:

    i) First, a situation involving after acquired knowledge not apparent at the time of conviction which demonstrated a connection, such as the use of the police ANPR (automatic number place recognition system) to identify and then assault a victim;

    ii) Secondly, information which was ruled inadmissible in criminal proceedings but was relevant to the connection test and proved to the civil standard;

    iii) Thirdly, a basis of plea aimed at defeating forfeiture even though it might be accepted by the prosecution.

    iv) Fourthly, a case in which matters were simply ignored in the criminal proceedings or left unresolved because they had no bearing on the issues in that jurisdiction or would have no impact on sentence.

48. Had it been the intention, it was argued, to limit the exercise to facts apparent or featuring in the conviction, the Crown Court in the criminal proceedings would have been required to ascertain facts for the purpose of forfeiture as part of those proceedings or the regulation would have been expressed as requiring a conviction "shown to have been in connection with his service". As it was, *Whichelo* framed the decision-making exercise as requiring the correct interpretation of the regulation and "appropriate findings of fact properly made". Thus it was open to the Crown Court to take into account all of the material before it and it was not constrained, in the way suggested in the judgment, by the fact that there was no conviction in respect of count 4.

49. On AC's behalf it was argued that:

    i) A formulation of the test under the regulation as necessarily involving a consideration of facts "at the point of conviction" was not a phrase used in the judgment. The claimant's characterisation of the Crown Court's direction to itself as involving any such restriction was therefore simply inaccurate.

    ii) The Crown Court did consider all of the material and made a judgment as to the sufficiency of the connection applying a straightforward test.

    iii) The judicial review claim was, in reality, an attempt to have the original decision restored not a public law challenge to the decision made.

    iv) The approach taken by the claimant would potentially require a fact-finding exercise that could not sensibly be accommodated within the decision making process adopted by Police and Crime Commissioners taking regulation K5 decisions.

Ground Two: The Defendant's failure to find that the conviction of indecent assault against B in count 5 satisfied the statutory test was unreasonable and/or a misdirection

50. This ground essentially follows on from Ground 1 on the claimant's case. The claimant argued:

    i) As a matter of evidence, the interview with B was capable of being relied on for the truth of its contents. There was a clear account of AC wearing a police uniform and taking B for a ride in a panda car.

    ii) Once B's account was accepted, the only rational inference was that the appearance in police uniform and a panda car was to win B's trust and confidence. The incident involved genital contact and was not innocent on B's account. Although count 4 was not proceeded with it was to be regarded as part of the grooming process for the later offence. It comprised preparatory acts to the count 5 offending.

    iii) That on the second occasion (count 5) B's account in interview had drawn a distinction between the use of a "normal" car and the earlier trip in a police car which reinforced his credibility.

    iv) AC had not given evidence or provided a witness statement, so B's account was unchallenged.

    v) The interview material was in fact available in the criminal proceedings "at the point of conviction" and should have been taken into account.

    vi) The fact that count 4 was to lie on the file meant that it had not been dismissed or the subject of any determination that precluded the facts of the alleged offence being taken into account.

    vii) Although the offending was also linked to AC being a Scout leader; it was enough for there to be a "material contribution" between his police service and the commission of the offence.

51. Taking these features together, it was said, the only rational conclusion open to the Crown Court on the appeal was that there was a connection between AC's service as a police officer and his commission of the count 5 offence against B.

52. On AC's behalf it was submitted that:

    i) The starting point was the conviction on count 5. This offence was of the same nature as the offences against A and C where it was acknowledged that the connection was with scouting not police service.

    ii) AC was off duty and had initially met B through his role as a Scout leader. The evidence of any reliance on his status as a police officer in connection with count 5 was negligible at best. The facts of count 4 were not necessarily preparatory to count 5.

    iii) B had not been called to give evidence and his account in relation to count 4 had always been disputed and had not been tested in evidence.

    iv) The Crown Court in the appeal was entitled to come to the conclusion that AC's service as a police officer was ancillary to the offending and not

sufficient to establish the necessary connection.

v) The test was meant to be applied in a simple and straightforward way. The offences against A, B and C were committed by AC as a Scout leader against boys who were engaging in scouting activities. The "connection" was to scouting rather than police service. The test was applied in the correct way both as a matter of law and on the facts of the case.

Ground Three: The decision to reduce the percentage of forfeiture from 60% to 25% was unreasonable

53. The claimant contended that the facts of the offending against N alone were sufficiently serious to justify forfeiture at the level of 60% and all the more so if the offending against B also fell to be taken into account. The reduction to 25% was unreasonable and unexplained in the judgment even looking at the facts of the offending against N alone. It involved repetitive sexual activity, was entirely culpable and represented abuse at the top end of the scale which had been concealed for a long time. It was compounded by the fact that AC had misled a Crown Court judge and had run the argument in mitigation that his offending was a one-off. The regulations and appropriate levels of forfeiture were intended to maintain public confidence and the reputation of the police service.

54. It was argued that AC's mitigation ought to have been accorded minimal weight because he had achieved a long service record by continuing deceit, dishonesty and concealment and had obtained the benefit of a generous pension payable after 30 years of service to which he would otherwise not have been entitled. In the course of oral argument the claimant further submitted that the Crown Court had overlooked the fact that the prolonged period of service was in fact an aggravating feature given that AC had pleaded guilty to 11 offences, any one of which would have led to dismissal.

55. On AC's behalf it was pointed out that the claimant had abandoned reliance on the six offences in respect of A and C which had formed part of the original decision to forfeit at the level of 60%. If the offending against B were also to be removed then the complexion of the overall offending for the purpose of forfeiture was very different. The contraction in the number of relevant offences and victims was a rational basis for a reduction.

56. There was no real difference in terms of the impact on public confidence between permanent forfeiture of 60% and the substituted forfeiture at 25%. AC had already been subject to criminal proceedings, press statements by the police and others, a custodial sentence and Public Protection Orders. Mitigation was relevant, even if of limited weight. It was wrong in principle to argue that 30 years of "bogus" service should result in no pension. There would always be "a hierarchy of wickedness" and the Crown Court had been directed to exemplars which were capable of establishing a scale. On any view a 60% reduction would fall at the worst end.

57. Further, Ground 3, it was said, ignored the Home Office guidance which at paragraphs 5 and 11 sets out specific factors which might influence the extent of forfeiture and includes mitigating and aggravating circumstances. These included the seriousness with which the court viewed the offence as demonstrated by the punishment imposed and the sentencing remarks.

58. The judgment in the case of *Harrington v MPA* (Snaresbrook Crown Court – A2006/7706) is annexed to the 2009 Home Office Circular. It includes, at paragraph 50, the following which was also relied on as part of AC's submissions:

> "50. We accept that the maintenance of public confidence in the integrity of the police is a legitimate and important matter of public interest which for the general public good may justify overriding the rights of the individual under Article 1 of the First Protocol. However, we also consider that there are other ways in which that confidence can be both maintained and restored when it comes into question. In our judgment we have long passed the days when any suggestion that any police officer might be guilty of any offence would be greeted with expressions of public shock and outrage.
>
> 51.Today's society rightly demands very high standards of its police but the expectation is simply more realistic. Police officers will sometimes fall from those very high standards of behaviour which are expected of them. When these events occur, public confidence will substantially be restored by open admission of any organisational failure, the thorough, timely and competent investigation of any alleged offence and the conviction and proper punishment of the offender."

Discussion and Conclusions

59. A pension is an earned entitlement which forms part of a police officer's remuneration. As the guidelines acknowledge, pension rights should only be forfeited in serious circumstances.

60. Once a certificate has been issued there are two constraints on the exercise of the power of forfeiture within regulation K5(4); the requirement that there should have been a conviction and that the conviction should be "of an offence committed in connection with" service as a member of a police force. Both conditions must be satisfied.

Conviction

61. Regulation K5(4) is not engaged where there is reprehensible conduct by a police officer, however serious. It requires the commission of a criminal offence. The regulation does not give the claimant a role in determining whether a police officer's conduct amounts to a criminal offence. It was evidently not the intention behind the regulation to usurp the function of the criminal courts in deciding whether an offence has been committed. The regulation is predicated on the existence of prior criminal proceedings which have resulted in a conviction.

62. That means that only an offence which has been admitted or proved in those proceedings can be examined for the purpose of forfeiture to establish whether that offence was connected to police service.

63. In the present case if there had been a series of alleged offences committed after the count 5 offence (hence not capable of being preparatory to that offence) which were left to lie on the file or which resulted in not guilty verdicts, it would not have been open to the claimant, however cogent the evidence, to determine that AC had committed further offences and to go on to consider whether they were connected

with police service. Equally it would not have been open to the claimant to conclude that count 5 was part of a series of offences. The threshold question was whether or not there was a conviction of an offence.

64. The appeal to the Crown Court in its civil jurisdiction was a rehearing of the decision taken by the claimant within these parameters and not the relitigation of the criminal trial. Had there been a conviction in relation to count 4 then it would have been necessary to consider whether that offence was connected to police service. The facts of the offence would have been relevant for that purpose. The conviction would have resolved the question of whether there was an offence. AC could not contend otherwise just as, in the absence of a conviction, the claimant could not conclude that an offence had been committed.

65. It does not seem to me that there was any error of law on the part of the Crown Court when it stated; "Since there was no conviction in respect of count 4, the facts relating to it are not ones which fall within the definition in the regulations". This was the result of the absence of a conviction. The observation was confined to the effect of the regulation. The Crown Court was making the uncontroversial point that there was no conviction which allowed it to inquire into the basis of an offence. Whatever evidence the claimant could point to, new or existing, the threshold question could only be answered in the negative.

66. There was however a conviction in respect of count 5. The Crown Court did therefore have to enquire whether this offence was connected with police service.

Connection

67. The regulations could have provided that forfeiture was possible simply where a serving or former officer was convicted of an offence, but they do not. It is inherent in the statutory scheme that a police officer or former police officer may commit serious offences while serving or when in receipt of a police pension without forfeiture arising under regulation K5(4). Domestic sexual offending for example would not be likely to fall within the connection test. Neither would offending, however serious, during the period of receipt of a pension after the officer had left the police force where the offending had nothing to do with his former service (in contrast to the position in *Whichelo* where it did).

68. Although it is unnecessary to put any gloss on the width of the term "connection" within regulation K5(4) it must include situations in which police service is used to facilitate offending; indeed, that may be the usual circumstance in which a connection will be made out. *Whichelow* is such a case, as were all of the examples discussed before me.

69. Where an offence requires, as here, obtaining the trust of a victim or their compliance the status of the offender as a police officer may be a powerful factor in the commission of the offence; but that will depend on the factual circumstances in each case. The fact that the offender is a police officer may not of itself be a feature which enables the offending or wins the trust of a victim.

70. The present case offers an example since the claimant no longer contends that the offences against are A and C are connected with AC's police service. The victims

were pliant and trusting because they knew AC and he was their Scout leader although they were also aware he was a police officer. It was open to the Crown Court to observe that the fact that AC was a police officer was merely ancillary in those circumstances. Indeed, that appears to be implicit in the claimant's stance in relying only on the conviction relating to B in this claim for judicial review and abandoning the contention advanced in the Crown Court appeal that the offending against A was also connected.

71. It does not seem to me to be helpful or to add anything to an enquiry into whether there was a connection to introduce the concept of "material contribution"; that phrase does not appear in the regulation; the word "connection" is not qualified, as it could have been, by a term such as "some", "significant", or "more than minimal". It is not necessary to add a concept from the language of causation to answer the question of whether there was a connection. The test is, as the Court of Appeal observed, in *Whichelo* "a simple and straightforward one, derived from the language used."

72. As criminal proceedings are a necessary precursor to the operation of the regulation, a paradigm case will be one where a police officer has been convicted of an offence and the judge's sentencing remarks and/or the facts as opened by the prosecution, demonstrate a connection to service as a member of a police force. That may usually be because the offence has been facilitated in a way which it could not have been had the offender not been a police officer.

73. Sentencing remarks represent a judicial assessment of the offending for the purpose of sentence. They will have been preceded either by a trial or the opening of facts which are subject to the entitlement of a defendant to advance a basis of plea and for disputes to be resolved by a *Newton* hearing.

74. Although it is possible to envisage circumstances in which the criminal process is either inadequate or incomplete as a source of material in relation to the circumstances of conviction for the purpose of forfeiture, it is nevertheless the starting point because it is the conviction in the criminal court which is being considered. Hence the reliance in the guidelines on the sentencing remarks and the sentence imposed, as well as the fact that media reports of the criminal proceedings are a central consideration in deciding whether public confidence would be affected by the conviction.

75. The decision-making process which the claimant undertakes does not lend itself to adjudicating on disputed issues of fact about the offending. The process requires the claimant to have made a preliminary determination, albeit having invited the police officer to comment, about whether a connection exists prior to submitting the case to Home Secretary whose role does not include adjudicating on that issue. In most cases that will not be a practical difficulty because the facts will have been established in the criminal proceedings.

76. The scenarios suggested by the claimant in the course of argument involved facts coming to light subsequently. These would have to be, as the examples chosen suggest, facts which are material to an offence of which the police officer has been convicted if they are to be taken into account in establishing a connection for the purpose of forfeiture. After-acquired knowledge about the circumstances and factual basis of an alleged offence of which the police officer had been acquitted or which

had not been proceeded with would not relate to a conviction. Whilst I would therefore accept the general premise (subject to issues of proof) that the material available in the criminal proceedings can be added to, that is subject to the limitation that only the facts surrounding offences of which the police officer has been convicted can be augmented.

77. The present case involves a rather different issue. There was no additional evidence, emerging after conviction, which was relevant to the issue of connection with police service. The arguments related to material which was, to use the claimant's phrase "available at the point of conviction". The issue was the boundary of the factual circumstances that fell to be taken into account in deciding whether the count 5 offence was committed in connection with police service.

78. At paragraph 18 of its judgment the Crown Court summarised the claimant's submission on the point as follows:

> "18. In addressing the court, Mr Gold has submitted that we can go beyond the facts which formed the subject matter of the convictions, inquire into and make findings of fact in relation to count 4, the offence which was not the subject of a conviction. This, he submits, opens the gateway for a finding that the offences in relation to both victims A and B that there is a connection with his service as a police officer."

79. The way in which the Crown Court framed the questions it had to address reflects this submission by the claimant. Reference to the "facts of count four" is a convenient shorthand for the circumstances in which B alleged he was first subject to a sexual assault. Each offence will have both its immediate facts and a hinterland of facts which lead up to it. The immediate facts of count 5 do not give rise to an obvious "connection" with service as a police officer. They do not differ significantly from the facts of the offending against A and C. That is the reason why, no doubt, the claimant sought to recruit facts which related to count 4 to make the required link.

80. The question which arose on the claimant's forfeiture decision and on appeal was whether the facts of count 5 included, as part of the offending, "preparatory" steps which involved AC arriving in uniform and taking B for a drive in a police car some weeks before (irrespective of whether this evidence was relied on as part of the separate alleged offending within count 4). This had been raised in the claimant's written submissions before the Crown Court, which included at paragraph 76:

> "Further, this account of Mr B will always have formed part of the preparatory facts of the offence. If a trial or hearing pursuant to *R v Newton* on count five had proceeded, then regardless of whether the prosecuting authority sought to prove count four, the fact of Mr Critchley's attending the boy scouts and driving B home in the police car would have been admissible evidence going to the reason for why B attended the nature reserve with him – whether or not it formed an integral part of the actual offence as charged."

81. The observation that might be made in relation to this submission is that it was somewhat circular. Had there been a trial or *Newton* hearing it would have been open to AC to contend that the alleged "preparatory" acts had never taken place for the

same reason that he contested count 4 in its entirety. The issue would then have been resolved.

82. In fact, the claimant's submissions to the Crown Court went much further than asserting that there were preparatory acts. They amount, at paragraph 83, to an invitation to find that the count 4 offence had been committed. They included a reference to AC using his position as a police officer to obtain the trust of B's mother for which there was, it appears, no evidence.

83. It was a feature of the offending against all three boys, A, B and C, that AC had met them when he was off duty and as a result of his position as an assistant Scout troop leader. Whilst it follows from *Whitchelo* that AC did not need to be on duty for a connection to arise or subsist, the concession in relation to C (and later A) demonstrates that a relationship of trust and authority sufficient to enable the offences and render the boys compliant was to be found in their membership of the Scout group.

84. This factual distinction had been emphasised in submissions. At paragraph 20 of its judgment the Crown Court said:

> "20. Mr Lobbenberg, on behalf of the Appellant, points to the fact that the Appellant did not have contact with any of the three victims in the later case as a result of or in connection with his role as a police officer, and therefore the distinction which has been drawn between A and B, and on the other hand, C, is artificial. In fact, in each case, the Appellant's contact with each victim came directly via his duties as a scout master, rather than in any way which could be said to be in connection with his membership of a police force. Abhorrent though it may be that he was able to abuse his position as a scout master to have access to each of these victims, that is a situation which, Mr Lobbenberg submits, is entirely distinguishable from the scenario which prevailed in the case relating to N and is not one which would bring the offending within the definition in K5(4).".

85. For the reasons I have set out the Crown Court, in my view, correctly identified the test that was to be applied under regulation K5(4). In concluding that it could not enquire into the facts of count 4 under the regulation it was applying that test, which required a conviction. It is axiomatic that if count 4 had been the only offence but had resulted in an acquittal there could have been no enquiry and no forfeiture. The Crown Court was also responding to the wider submission that it could, in effect, find that the offence had been committed by accepting B's account in interview.

86. The high point of the claimant's case is that at paragraph 23 of its judgment the Crown Court might be thought to have closed the door on any consideration of whether the facts of count 5 included preparatory acts falling within the allegations made as part of count 4 simply because there was no conviction on count 4.

87. However, if that had been the approach as far as any consideration of preparatory acts in relation to count 5 was concerned then it would not have been necessary for the Crown Court to make the findings it did at paragraph 22. The reference to the "facts referred to in relation to count 4" (at paragraph 22 of the judgment) can only be to the attendance of AC in uniform and in a police car.

88. The context was that B had not been called to give evidence and the material before the court included AC's early denial and his explanation for casting doubt on B's account. There was no judicial determination of whether there were any preparatory acts to count 5, or any prosecution case to that effect. It was a pertinent observation that the reliance which it would otherwise be able to place on a conviction was not open to the court on the appeal. It was not a necessary part of the offending in count 5 that it had been preceded by a ride in a police car some weeks earlier. The court was well placed to make an evidential assessment of whether in those circumstances it was prepared to conclude that such a trip had taken place as part of its enquiry into the facts of the case. It was not irrational to determine that it could not. That was a factual conclusion and did not involve a misdirection of law.

Forfeiture

89. The claimant's argument that forfeiture close to the maximum amount was justified because AC had only been in a position to obtain his pension by concealment of his offending or that this negatived any mitigation based upon long and commendable police service does not appear to me to stand up to analysis:

i) The regulations could have provided for forfeiture of any accrued pension after the date on which an offence was committed or the notional date of dismissal, but they do not. That is not the focus of the exercise in determining whether there should be forfeiture.

ii) Any such approach would produce anomalous results. Where offending comes to light after retirement there would appear to be no reason why a police officer who had committed a serious offence a day before retirement should be in a different position, on the basis of concealment, to a police officer who had committed the same offence the day after they joined the police force. Each would be able, in mitigation, to point to the same period of service without offending. The Home Office guidance suggests that the seniority of a police officer would in fact be an aggravating feature and so more likely to apply to a police officer offending at the end of their career (against whom the concealment argument would have little or no traction).

iii) The causative argument, that the offence would have led to dismissal had it been detected or admitted so that a pension could not have been earned, does not provide a solution to a factual situation in which forfeiture only arises because a police officer <u>is</u> entitled to a pension. The legislation does not disentitle a police officer to a pension, it provides for forfeiture in defined circumstances of a pension to which the officer is entitled.

iv) The identification of mitigating and aggravating factors involves a balancing exercise which is predicated upon the commission of an offence or, as here, circumstances which involve the imposition of a variable penalty in the form of forfeiture. Positive features are not eclipsed or expunged by an aggravating factor such as concealment of offending. They are simply part of the mix of fact that must be weighed up in reaching an overall view as to seriousness and culpability.

v) Mitigating circumstances are expressly referred to in the Home Office guidance as a factor which may influence the extent of forfeiture (as also, are the seriousness of the offence and the extent of the publicity and media coverage). The fact that offending occurred a long time ago, when AC was a young man, and had then been followed by a long period of unblemished public service was clearly mitigation that could be advanced in the criminal proceedings, as indeed it was. I can see no reason why it was not also relevant to the decision in relation to forfeiture regardless of a counterfactual scenario in which earlier detection or admission of the offences would have led to dismissal.

90. The claimant's case was that the offending against N alone justified forfeiture at the level of 60%. The original decision was, nevertheless, based upon the inclusion, in addition, of all of the offending within the 2018 indictment. By the time of the appeal to the Crown Court, C had been excluded from consideration as, ultimately, were A and B given the court's determination of the issue relating to connection to police service. As the court observed, at paragraph 25 of its judgment, that "may properly be regarded as altering the seriousness of his overall offending, insofar as it is relevant to the forfeiture of the Appellant's pension, and the extent of that forfeiture."

91. Since the touchstone for determining the extent of forfeiture was the seriousness of an offence which was connected with police service and its impact on public confidence it was logical to conclude that more extensive offending would have been both more serious and more likely to lead to a loss of confidence. The Crown Court properly identified both the aggravating and mitigating features of the relevant offending. A tribunal comprising a Crown Court judge sitting with magistrates was well placed to make an assessment of the seriousness of offending as well as its effect upon the public. It took into account the submissions which had been made by the parties including the identification of comparators: "as assistance in terms of the types of offending, level of seriousness and length of sentence passed in other cases, in order to establish something of a scale and achieve, as far as possible, a consistency of approach so as to achieve parity with other decisions." These included cases where no forfeiture had resulted such as that appended to the Home Office circular.

92. Permanent forfeiture of 25% of a pension was a not inconsiderable reduction. It will have a significant effect on AC. The extent of forfeiture was an evaluative judgement on seriousness and impact which the Crown Court was required to make. In doing so it properly set out all the factors which were to be taken into account. It did not take into account extraneous matters. It was open to the court to conclude that the offences against N alone did not merit forfeiture at close to the maximum amount given all of the circumstances That conclusion was not irrational and the forfeiture ordered, at 25%, cannot, in my view, be said to be outside the reasonable range for the offending involved. Although, as the court observed, the comparators produced in submissions were not binding, they illustrate that forfeiture in this case was within the boundaries of comparable cases of forfeiture.

Conclusions

93. For the reasons set out in this judgment I conclude that the decision of the Crown Court to order a permanent reduction of AC's pension by 25% was not based on a

misdirection of law and/or fact and was not unreasonable. The claim for judicial review is therefore dismissed.