Neutral Citation Number: [2025] EWHC 275 (Admin)

Case No: AC-2024-LON-001436

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 February 2025

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE KING	**Claimant**
on the application of	
LINO DI MARIA	
- and -	
COMMISSIONER OF POLICE OF THE METROPOLIS	**Defendant**
(1) COLLEGE OF POLICING	**Interested Parties**
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT	

- -

Kevin Baumber and Rosa Bennathan (instructed by **Reynolds Dawson**) for the **Claimant**
John Beggs KC, James Berry and Katherine Hampshire (instructed by the **Directorate of Legal Services**) for the **Defendant**
Gerard Boyle KC and Aaron Rathmell (instructed by the **Government Legal Department**) for the **First Interested Party**
The **Second Interested Party** did not appear and was not represented

Hearing dates: 15 & 16 January 2025

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Approved Judgment

This judgment was handed down remotely at 11 am on 11 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LANG DBE

Mrs Justice Lang :

1. The Claimant seeks judicial review of the Defendant's decision to withdraw his vetting clearances, and then to refer him for gross incompetence under regulation 32 of the Police (Performance) Regulations 2020 ("the Performance Regulations"), on the grounds that he can no longer perform his duties without vetting clearance.

2. The Claimant is a serving police officer in the Metropolitan Police Service ("MPS"). The Defendant has direction and control over officers and staff in the MPS, pursuant to section 4(3) of the Police Reform and Social Responsibility Act 2011 ("PRSRA 2011").

3. The First Interested Party ("the College of Policing") is an operationally independent, arm's length body of the Home Office, which provides professional guidance to police forces, including the Vetting Code of Practice 2023 ("the Code of Practice") and the Authorised Professional Practice on Vetting 2021[1] ("the APP"). The Second Interested Party ("the Secretary of State") decided not to participate in these proceedings.

4. The decision to withdraw the Claimant's vetting clearance was made on 15 September 2023, and then upheld on appeal on 15 February 2024, whereupon the Claimant was placed on paid Vetting Special Leave. The reasons for the removal included allegations of sexual misconduct which had been formally withdrawn under the Police (Conduct) Regulations 2020 ("the Conduct Regulations"), on the basis that there was no case to answer, and other allegations and complaints which had not been proved. On 1 March 2024, he was referred to a third stage meeting under the Performance Regulations, which has been postponed pending the determination of this claim.

5. At a third stage meeting under the Performance Regulations, the panel must make a finding on the allegation of gross incompetence, but it does not have the power to re-open or review the vetting decision, and so the reason for the allegation of gross incompetence cannot be investigated. Regulation 46 makes provision for a range of outcomes. However, unless some level of vetting clearance is reinstated, dismissal is inevitable. The Claimant may appeal to the Police Appeals Tribunal, but the Tribunal also has no power to re-open or review the vetting decision. Dismissal will result in inclusion on the Police Barred List which effectively prevents the barred person from obtaining service or employment with any police force for a specified period.[2]

6. In May 2024, the then Secretary of State for the Home Department conducted a consultation on draft regulations which were intended *inter alia* to place vetting on a statutory footing. There was a hiatus when the general election was called and a new Secretary of State appointed. The current Secretary of State informed the Court by letter that no decision had yet been made as to whether such regulations should be made, and if so, in what form, and the outcome of the litigation was likely to inform such consideration. Revised draft regulations were issued for consultation by the Secretary of State on 15 January 2025, the first day of the hearing in this case. None of the parties invited me to adjourn, as it was not clear when or if any regulations might be made, and if so, whether they would apply retrospectively to the Claimant.

[1] APP 2021 was in force at the time of the decision in this case but it has since been replaced by APP 2024.
[2] Section 88A Police Act 1996 and the Police Barred List and Police Advisory List Regulations 2017.

7. Permission was unopposed by the Defendant, and granted on the papers by Foster J. on 29 July 2024.

Summary of Claimant's Grounds of Challenge

8. The Claimant's Grounds of Challenge may be summarised as follows:

   i) **Ground 1**. Withdrawal of vetting is not a lawful basis for dismissal by the Defendant.

   ii) **Ground 2**. The vetting regime is a statutorily unregulated process that does not comply with Article 6 ECHR, with the implication that the Code of Practice and the APP are unlawful.

   iii) **Ground 3**. Vetting dismissal for misconduct, to the exclusion and frustration of the statutory scheme under the Conduct Regulations, is unlawful.

   iv) **Ground 4**.

      a) Withdrawal of vetting is outside the scope of the Performance Regulations.

      b) Referral of vetting withdrawals to a third stage meeting under the Performance Regulations frustrates the operation of the Performance Regulations by stripping them of their content and efficacy, including procedural safeguards, and depriving the officer of any meaningful opportunity to challenge the allegation of gross incompetence.

   v) **Ground 5**. The decision to withdraw the Claimant's vetting was irrational.

History

9. The Claimant joined the Metropolitan Police Service in February 2004. He was promoted to Sergeant on 25 July 2022. Until the removal of his vetting clearance, he managed a team in Forensic Services.

10. The Claimant was vetted when he was initially recruited. His vetting clearance was successfully renewed on a date in 2014/2015, at the level of Recruitment Vetting and Counter-Terrorist Check. In 2017, he applied for a new role which required a higher vetting level. On 17 August 2017, following an interview by vetting officers, he was granted Management Vetting and Security Check vetting clearance. That was due to expire in August 2024. In March 2023, his line manager confirmed that he no longer required vetting at this enhanced level and that Recruitment Vetting and Counter-Terrorist Check clearance would be sufficient for his role.

Allegations made against the Claimant

A: 25 January 2011

11. On 25 January 2011, the Claimant's ex-partner alleged that the Claimant used police systems to look her car up. His searches were checked for a 12 month period and no relevant searches were found.

B: 12 August 2019

12. On 12 August 2019, the complainant, a serving police officer, made two allegations of rape. First, on 3 December 2018, after she and the Claimant had been to the gym together and were sitting in the back of the complainant's car in the Tesco car park and kissing, the Claimant forced her to have oral sex. Second, on 9 December 2018, they left the gym together and went to her car in the Tesco car park, where the Claimant initiated sexual contact, and his penis entered her anus.

13. On 6 January 2020, the Claimant was interviewed under caution and gave a prepared statement. He stated that there had been two instances of consensual sex in the complainant's car (the second incident was on 15 not 9 December). On the first occasion, she consented to oral sex, and he warned her that he was going to ejaculate. On the second occasion, the complainant was on all fours in the back of the car, and he accidentally entered her anus, not her vagina as he had intended, and apologised. In interview, the Claimant stated that he had no idea why she waited 10 months to report the incidents; they had not been in contact with each other since texting shortly after the second occasion, and two chance encounters.

14. On 2 January 2020, the Claimant was placed on restricted duty, with conditions. The restricted duty direction was reviewed and removed on 28 March 2020 but he remained subject to conditions not to have contact with the complainant and not to be involved in cases concerning sexual offences/violence.

15. On 12 June 2021, the Crown Prosecution Service ("CPS") decided to take "no further action" because of inconsistencies in the evidence which undermined the complainant's case. These included emails and texts from the complainant to the Claimant after the first incident. She referred favourably to their "encounter", told him when she could next meet him at the gym, and gave him her phone number. She had initially told her Inspector they had not sent texts to each other and not exchanged phone numbers. Witness statements were obtained from other officers which were "highlighted as undermining the case" because of the inconsistencies in the various accounts given by the complainant.

16. On 6 July 2021, a detailed Conduct Matter Investigation Report was made pursuant to the Conduct Regulations. The emails and texts exchanged between the complainant and the Claimant were discussed at paragraphs 6.1.6 and 6.1.7. The evidence and inconsistencies identified by the CPS were referred to in paragraph 5.122 of the Conduct Matter Investigation Report, and at paragraph 6.1.9 which concluded that the complainant's case was undermined by the inconsistencies between the account of events she gave in interview, and the accounts which she gave to fellow officers.

17. The investigator concluded that there was no case to answer, as there was insufficient evidence upon which a reasonable tribunal could find, on the balance of probabilities, either misconduct or gross misconduct. All restrictions were removed.

C: 25 November 2019

18. The husband of a member of MPS staff reported that the Claimant had sent inappropriate emails to his wife. This was investigated and the emails were found to be friendly, but not sexual. The case was finalised as a Local Resolution. Following a check of the Claimant's emails, messages to and from three female officers were found which were not of any significance.

D: 6 June 2021

19. On 6 June 2021, the complainant, who was a British Transport Police officer, made an allegation to the police that the Claimant had raped her on 20 February 2015. She was studying at University with the Claimant and they were friends. They were working on a combined essay together at her home when he initiated sexual contact and vaginally raped her. She froze and said nothing. They then continued with the essay. She said that she had three further sexual encounters with the Claimant which were consensual. Following an ABE interview, in which she said that she found the sexual intercourse enjoyable, and exchanged messages with the Claimant afterwards, the complainant said she did not wish to proceed with the criminal allegation. The police were not satisfied that the sexual activity was non-consensual.

20. This allegation was considered on 21 December 2021 in a detailed Conduct Matter Investigation Report, made pursuant to the Conduct Regulations. It stated that the Claimant was not served with a form 163 because there was no indication of misconduct. Nonetheless he was invited to respond, which he did on 21 December 2021. He denied any wrongdoing and said he totally refuted the allegations. He explained that when studying at university between 2014 and 2016, they would flirt and text and "hook up" for sexual encounters. She was aware that he was married. Their sexual relationship came to an end because she had a relationship with another officer at the university.

21. The report recorded that the complainant decided not to proceed with the allegation. The report concluded that, because of the issues about consent, there was no case to answer, as there was insufficient evidence upon which a reasonable tribunal could find on the balance of probabilities, either misconduct or gross misconduct.

E: 26 October 2021

22. On 26 October 2021, the Local Professional Standards Unit submitted a Right Line report raising concerns from a number of the Claimant's colleagues that the Claimant had been included in a list of HeforShe[3] allies because he regularly conducted himself in a highly inappropriate manner with female members of staff. They said that they had been made to feel uncomfortable by actions such as staring in the office and being

[3] HeforShe is a gender solidarity campaign.

cornered or intimidated in the office and the gym; and that he lingered outside the office waiting for them to leave, making them feel uncomfortable and unsafe.

F: 2 November 2021

23. On 2 November 2021, a Right Line report was made anonymously by someone who worked with the Claimant complaining that he commented on her clothes, looked her up and down when he spoke to her, asked her to meet him in quieter areas of the building, and talked about sexual matters.

G: 10 August 2022

24. The Claimant's ex-partner reported the Claimant for making derogatory and threatening remarks to her, during handovers of the children, and her supervisor reported it. An Assessment and Advice Form was completed. When interviewed during the vetting review, the Claimant said that the allegations had been made by his ex-partner's line manager with whom she was in a relationship, in an attempt to "do my fucking legs".

25. A local misconduct investigation was carried out. The Claimant denied making the alleged comments. The investigation determined that there was no clear evidence to support a finding that the Claimant was in breach of Professional Standards and therefore there was no case to answer.

Complaints by the public

26. The summary provided in the Operation Assure Referral form stated that between 2007 and 2011, the Claimant had attracted circa 14 complaints from members of the public in relation to incivility, impoliteness and intolerance, assaults and discriminatory behaviour. The Claimant commented that when he was working in the Territorial Support Group for a few years he received a lot of complaints as part of a group, rather than directed to him personally.

27. None of the public complaints have been substantiated.

Review on 10 June 2022

28. On 10 June 2022, the Claimant attended a detailed review with the Directorate of Professional Standards ("DPS") Integrity Assurance Unit, chaired by Detective Superintendent Jim McKee – Intelligence Bureau, Anti-Corruption and Abuse Command. No action was taken against him, but at the meeting, Det Supt McKee advised the Claimant that he could not afford to get another allegation of a similar nature and that he must conduct himself at a higher standard. The conclusions set out in a letter of 17 June 2022 were as follows:

    i) The matters under consideration were categorised as 'Adverse Information'.

    ii) Disclosure to the CPS on Form MG6B was not required.

iii) No Risk Management Measures were required to undertake any specific role or serve in a particular role.

iv) No referral to the Disclosure and Barring Service was required.

Vetting review in 2023

29. The Claimant was referred to Operation Assure by Operation Onyx on 12 March 2023[4]. On 21 March 2023 the Claimant was notified that his Management Vetting clearance was being reviewed in the light of "Your having been subject to a number of allegations of inappropriate/sexual behaviour".

30. The referral took place despite Det Supt McKee's email to colleagues, dated 15 March 2023, in which he said "I do not think that this case warrants referral to Op Assure at this time. There are no findings against the officer and whilst the fact there are two previous allegations of sexual assault we concluded in our meeting that these most likely emanated by the lifestyle of the officer rather than a risk that he presents. We determined no RMM although told him to withdraw from He4She. The more recent incident is not related to the workplace and appears to be a case of former partners not getting on. The right action in this case is for us to monitor and review for RMM if there is further information of concern."

31. On 13 April 2023, the Claimant attended a vetting interview with Vetting Review Manager Mr Frank Richardson and Vetting Officer Sue Lea. His Police Federation representative was present.

32. Ms Lea's report dated 20 April 2023 listed the allegations made against him, and his response to them, and concluded that they showed a clear pattern of unprofessional behaviour and conduct which fell below expected standards, and which on the balance of probability would be repeated further. This conduct had continued over a period of time. He had not ensured that his behaviour and language could not reasonably be perceived to be abusive, oppressive, harassing, bullying, victimising or offensive to the public or his colleagues. The significant adverse complaints and conduct history indicated an abuse of position and indicated that he was coercive and intimidating. She recommended that vetting clearance be withdrawn.

33. Enquiries were made about the accuracy of Ms Lea's report in the course of these proceedings, at my request. I was informed that she was mistaken in stating[5] that the allegation dated 10 August 2022 (behaviour towards ex-partner) resulted in a referral to the reflective practice review process[6], as there was no such referral. Also, Ms Lea stated that the Claimant was subject to "Current Restrictions"[7] but apart from the advice to step down from HeforShe, the restrictions referred to by Ms Lea were not adopted, at the review on 10 June 2022. Therefore her observation[8] that the "behaviour described

[4] Operation Assure and Operation Onyx are described at Judgment/[62] – [64].
[5] Supplementary Bundle/422
[6] Part 6 of the Conduct Regulations 2020
[7] Supplementary Bundle/423
[8] Supplementary bundle/430

in these incidents raises questions concerning his suitability to serve in the role even under restrictions shown" appears to be ill-founded.

Decision to withdraw vetting clearance dated 15 September 2023

34. On 15 September 2023, Mr Richardson wrote to the Claimant informing him that his Management Vetting clearance had been withdrawn because:

    i) He had displayed inappropriate behaviour which impinged on his suitability to serve in the role;

    ii) He had displayed behaviour contrary to the Code of Ethics in relation to Conduct and Authority, respect and courtesy.

35. Mr Richardson attached a "Vetting Review Decision", in which he set out the vetting tests in the Code of Practice and summarised the history, referring in particular to the allegations of rape on 12 August 2019 and 6 June 2021 (Allegations 1 and 2, which I have referred to as Allegations B and D), and the allegations by his ex-partner on 10 August 2022 (Allegation 3, which I have referred to as Allegation G). The decision concluded as follows:

> "5.4 Decision
>
> 5.4.1 In conclusion, there is a significant amount of information that raises concerns around LDM. The most prevalent cause for concern is LDM's conduct towards women. During the vetting interview as part of this review LDM was clearly upset by the allegations that had been made against him and despite a lack of guilty outcomes it appeared that these allegations had not led LDM to review his behaviour in a way that now could be used to mitigate any risk.
>
> 5.4.2 Section 1.3 of the Vetting APP outlines the purpose of the APP which includes supporting the delivery of the highest standards in serving the public through the nine policing principles. These principles include authority, respect and courtesy as well as conduct.
>
> 5.4.3 LDM's conduct specifically engaging in sexual activities in public places on more than one occasion could bring the police service into disrepute and damage the trust and confidence between the police and public.
>
> 5.4.4 LDM has displayed a lack of respect and courtesy which was evident during his vetting interview which showed insufficient composure, respect and self-restraint. The allegations in relation to his behaviour around his former partner also could fall into a category of not meeting the expected level of behaviour for a police officer.

> 5.4.5 In making a risk based decision, having specifically considered sections 8.7, 8.8 and 8.38 of the Vetting APP along with the National decision model and conclude that despite not being found guilty of the serious allegations made against him, LDM has conducted himself in a way that significantly raises concerns about his behaviour towards women which represents a risk to his female colleagues, the public and the wider MPS.
>
> 5.4.6 When considering the two stage test as per section 8.37.4 of the Vetting APP, the case shows evidence of being subjected to adverse information and given the number of allegations as well as concerning intelligence it could reasonably be concluded that the circumstance around LDM are suitable for withdrawal of vetting.
>
> 5.4.7 As a result I agree with the Review Officer's recommendation and I have decided that Lino Di Maria should not hold Management Vetting (MV) and it should be withdrawn.
>
> 5.4.8 I have also decided that Lino Di Maria should not hold Recruitment Vetting (RV) which is the minimum requirement for a Police Officer."

Appeal against the removal of vetting dated 13 February 2024

36. The Claimant appealed, relying upon the following grounds:

> "**(a) Additional information that was not available to the decision-maker**
>
> In response to Allegation 3: I categorically deny the accusation. The incident in question stems from personal disagreements with [X], the mother of my children. At no juncture did I display aggressive or threatening behaviour. It is my perspective that the allegations may have been influenced by external parties, specifically her colleague and superior, …. (Line Manager PS ….). The underlying issue was rooted in my suspicions regarding [X's] intimate relationship with [her Line Manager], which I had raised on three prior occasions, two of which occurred while we cohabitated. It was later revealed to me by [X] on numerous occasion when visiting/ collecting my children that it was not she who initiated these allegations, but rather they were prompted by [her Line Manager] and still to this day [X] states it was not her who "put pen to paper"(Her exact words). Additionally, [X] confirmed to me during a visit to collect my children that she had confided in [her Line Manager] regarding Allegation (1). I am led to believe that Allegation (3) was an attempt by [her Line Manager] to leverage a deeply personal matter against me.
>
> …… [History of vetting procedures since 2004]

(b) Disproportionate decision

Before October 2019 Allegation (1), I maintained an impeccable vetting status and consistently exhibited professional behaviour, with no issues brought to my attention. Upon being informed of Allegation (1) in October 2019, I was permitted by the MPS to continue with my standard work responsibilities within Forensic Services, subject to minimal restrictions, until the investigation's conclusion.

In May 2022, the Integrity Unit provided guidance on my conduct. I have rigorously adhered to these guidelines and have since achieved significant milestones in my career path as documented in the below section.

(c) Perverse or unreasonable decision

I write to address concerns raised about my past interactions with female colleagues within the police and believe the decision to revoke my vetting is perverse and unreasonable. To begin, I vehemently deny all allegations levelled against me. These were rigorously investigated by both the Crown Prosecution Service (CPS) and DPS/Appropriate Authorities, concluding with a verdict of "No Case To Answer," finding no evidence of misconduct or gross misconduct on my part.

During my service as a constable, I engaged in relationships with female colleagues, some of whom I maintain strong friendships with today. In my early years, I admit I may have been promiscuous with consensual encounters, but it's crucial to highlight that I have consistently respected personal boundaries and never jeopardised anyone's safety or committed grave offences.

I kindly request your understanding and consideration regarding my demeanour during the recent vetting interview in April 2023. Upon reflection, I acknowledge that my responses and attitude may not have reflected the level of professionalism expected. The re-emergence of allegations from the past four years, particularly labels such as 'Rapist', 'Predator', and 'danger to women', which are without foundation, has been deeply distressing for me. These unfounded accusations have taken a significant toll on my mental well-being. Explaining and defending my innocence repeatedly against such serious accusations naturally evokes profound stress and anxiety. I hope you can understand the intense emotions underpinning my reactions during the interview.

I wish to highlight a productive meeting with the DPS Integrity Unit in May 2022, where I received guidance on upholding the

highest standards of professionalism from the Detective Chief Superintendent.

Since then:

- I achieved a promotion to substantive Sergeant and completed a Level 4 Diploma in First Line Management & Leadership.

- I was in the process of attempting to advancing to the Inspector's position by sitting the Inspectors exam in November 2023, with the endorsement of my senior leaders.

- I led vital Met wide initiatives/operations such as OP Genix, promoting collaborative efforts in crime detection through digital mediums (FIMS database), and collaborated efficiently with the Directorate of Media & Communications (DMC) in focusing on priority crimes to help rebuild trust with the public.

- I was honoured to attend the 2022 Police Officer of the Year awards, celebrating a member of my team's nomination for Criminal Justice & Victim Care runner-up.

- I have successfully managed diverse teams including women, receiving positive feedback from my colleagues, superiors and senior leadership.

- I have consistently received commendable feedback during Professional Development Reviews (PDR's) including my most recent for 22/23.

- I presented Forensic Imagery's contribution to High Standards, Less Crime, More Trust to top leadership figures within the Met Police including The Commissioner Sir Mark Rowley on the 8th November 2022 and Mr Matt Twist Assistant Commissioner around January 2023 at Lambeth HQ.

I firmly believe my track record showcases my dedication to upholding the highest standards of the police service, aligning with the Code of Ethics since my meeting with the DPS integrity unit and more importantly throughout my policing career.

In all, I remain steadfast in my role, aiming to be a positive influence, especially for my children. My dedication to the police spans almost two decades, and I am committed to upholding its high standards to the code of ethics, conduct & authority, respect & courtesy.

I urge you to evaluate this report with an objective lens, free from external influences such as trial by media or guilt by accusation. The presumption of innocence is a cornerstone of our justice system and must be upheld. I appreciate your consideration of

> my perspective and am unwavering in my dedication to serve with utmost integrity and professionalism."

37. The Claimant's appeal was dismissed by Commander Ben Russell by a letter of 13 February 2024, with a decision attached, which concluded that the decision to withdraw his vetting clearance was reasonable, and in line with the Code of Practice and APP.

38. On Ground (a), Commander Russell rejected the points made by the Claimant on Allegation 3 on the grounds that the information was available to the original decision-maker. He acknowledged that the Claimant was clarifying his vetting history, which was not fully set out in the decision, but did not consider that his previous vetting decisions materially affected the current vetting decision.

39. On Ground (b), Commander Russell concluded that the fact that no issues were brought to his attention before 2019 did not invalidate the allegations made, some of which were alleged to have occurred before 2019. The threshold for imposing restrictions when allegations were made was materially different to the threshold for vetting decisions. The Claimant's promotion had no impact on the vetting decision.

40. On Ground (c), Commander Russell stated that the Claimant's achievements in his career in the police were not a factor in the vetting decision, according to the APP. He recognised that the Claimant was distressed, stressed and anxious during the interview at having to go over previous allegations, but believed it was reasonable for Mr Richardson to draw adverse inferences from the Claimant's demeanour, and factor this into the vetting decision.

41. Commander Russell concluded that although there were no misconduct or criminal findings against the Claimant, it was not uncommon for allegations of this nature to be difficult to prove. The allegations and complaints arose over a significant period of time from a number of complainants and there was a "consistency and cumulative force" in them. They were unlikely to be "entirely devoid of truth". The threshold test was met.

42. On 20 February 2024, Mr Richardson completed a referral to the appropriate authority to make a determination as to gross incompetence under regulation 32 of the Performance Regulations.

Referral under regulation 32 of the Performance Regulations

43. On 1 March 2024, Commander Harman, acting in his capacity as delegated appropriate authority, determined that, as the Claimant no longer had any vetting clearance, he was unable to perform the duties of his role as an officer and was suitable for referral to a third stage meeting under the Performance Regulations, on the basis of gross incompetence.

Vetting

The legal status of the Code of Practice and the APP

44. Section 39A(1) of the Police Act 1996 empowers the College of Policing, with the approval of the Secretary of State, to issue codes of practice "relating to the discharge of their functions by chief officers of police". Such officers are required by section 39A(7) to have regard to such codes when discharging any function to which a code relates. The Secretary of State is required by section 39A(5) to lay before Parliament any code of practice issued by the College of Policing under section 39A(1).

45. Paragraph 3.4 of the Code of Practice sets out the ways in which it is supported by the APP, and paragraph 5.5 of the Code of Practice provides:

> "Forces are expected to have regard to APP in discharging their responsibilities and the standards adopted. This is the standard for police vetting and provides the operational guidance and detail on how to deliver vetting."

46. In *R (J) v Chief Constable of West Mercia* [2022] EWHC 26 (Admin) Steyn J. explained at [86] that "…the APP Guidance is guidance, not legislation, but there would need to be a good reason not to follow it".

The purpose and scope of police vetting

47. The purpose and scope of police vetting is explained in the Code of Practice as follows:

> "**1. Introduction**
>
> 1.1 Everyone in policing must maintain the highest ethical and professional standards, and must act with the utmost integrity. This is crucial in ensuring that public trust and confidence in the service is maintained.
>
> 1.2 It is essential that the public is confident that police vetting processes are effective in identifying those who pose a potential risk to others, or who are otherwise unsuitable for working within the police service.
>
> 1.3 It is imperative that those working in policing are also able to maintain the trust and confidence of their chief constable to perform their role in delivering policing services.
>
> 1.4 Vetting is an integral part of a police force's framework of ethics and professional standards. Vetting must form part of a wider security regime, rather than being used in isolation. It assists with identifying individuals who are unsuitable to work within the police service, or to have access to police assets. This includes people who:

• are unsuitable through criminal activity or association

• pose a risk to the public and to those who are particularly vulnerable

• have a demonstrable lack of honesty

• have previously behaved in a manner that is inconsistent with the standards of professional behaviour

• are financially vulnerable

1.5 A thorough and effective vetting regime is an important component in considering an individual's suitability to work in policing. An assessment of an individual's integrity, professionalism and demonstration of the expected character indicates whether they will achieve and maintain the required level of vetting clearance. This helps to ensure public trust and confidence in those working in policing to deliver a public service.

2. Purpose

2.1 The Vetting Code of Practice sets out the expectations of chief officers in relation to vetting, which are to be applied by police forces in England and Wales.

2.2 This code has been developed to help achieve, implement and maintain the national standards, as set out in the supporting authorised professional practice (APP), and to ensure that those standards are consistently applied across the police service.

3. Scope

….

3.2 The code applies to all those engaged on a permanent, temporary, full-time, part-time, casual, consultancy, contracted or voluntary basis with the police, as well as any individuals who apply to join the service. It also applies to those in partner agencies who have unsupervised access to any police premises or police information that is not publicly available.

3.3 The purpose of the Vetting Code of Practice is to:

• set out the actions that a chief officer must ensure are taken for effective vetting in the police service

• ensure confidence that all those in policing are effectively vetted, so that only those who are suitable to work in policing, and can maintain the expected standards, are able to do so

> • promote an ethical and professional environment in policing
>
> • uphold the standards of professional behaviour
>
> • ensure the consistent application of vetting standards across the police service
>
> 3.4 The code will be supported by APP on Vetting, which will describe the vetting procedures, technical processes and detail needed to implement vetting."

48. Commander Harman described the threats that vetting is designed to tackle in paragraph 6 of his witness statement, dated 13 September 2024:

> "The threats faced by the police service, including the MPS, that vetting is designed to tackle are set in the [APP] at paragraph 8.2.2 …. These threats are real, not theoretical. They include people joining the police service who pose an unacceptable risk to women or vulnerable persons who they will encounter while in a position of trust. They also include people seeking to infiltrate the police for their own criminal ends or the criminal ends of their associates (e.g. by obtaining and disclosing information from police systems about rivals or police operations, tipping off criminals about police interest in them and so forth). Importantly, they also include people who are vulnerable to coercion or blackmail, whether because of their close association with criminals, because of something in their private life that they do not wish to be revealed, or because they are financially vulnerable due to being in debt. The opportunities for criminals to seek to corrupt a police officer e.g. through family / friends, social groups (whether online or offline), shared spaces such as the gym etc. are manifold and the ease with which this might be done where the officer has a vulnerability to coercion or blackmail cannot be overstated."

Vetting regimes

49. There are two vetting regimes applied across the police service. Force Vetting is designed to protect police assets. National Security Vetting is designed to protect government assets. Force Vetting (for police officers) has two levels: Recruitment Vetting and Management Vetting. National Security Vetting has three levels: Counter-Terrorist Check, Security Check and Developed Vetting.

50. According to the MPS Vetting Policy dated 19 March 2024, the minimum level of Force Vetting is set at Recruitment Vetting. The minimum level of National Security Vetting is set at Counter-Terrorist Check.

51. The Claimant held Force Vetting at the basic level of Recruitment Vetting and also at the enhanced Management Vetting. He held National Security Vetting at Security Check level.

52. Recruitment Vetting is described in the APP at paragraphs 7.11.1 – 7.11.2 as the minimum level of check acceptable for police personnel to be allowed access to unsupervised assets, estates and information.

53. Management Vetting is described in the APP as follows:

> "7.20.1 All police personnel with long-term, frequent and uncontrolled access to SECRET assets and occasional access to TOP SECRET assets should hold MV clearance (see designated posts and minimum level of clearance). In order to grant MV clearance, the force should ensure that they have no reason to doubt the integrity of the individual or their susceptibility to improper external influences.
>
> 7.20.2 The purpose of MV is to provide a means of additional assurance in relation to the integrity, reliability and potential for financial vulnerability of individuals serving in posts with access to sensitive police premises, information, intelligence, financial or operational assets, where:
>
> • the risk of potential compromise of those assets is high
>
> • the risk of serious damage to the force is substantial."

54. There are two phases to the vetting regime – pre-appointment and post-appointment vetting. According to paragraph 14 of Commander Harman's witness statement, pre-appointment vetting has been a longstanding requirement for MPS officers and staff. The process of pre-appointment Force Vetting is described extensively in chapters 7 and 8 of the APP.

55. Post-appointment vetting is necessary because, as the APP states at paragraph 8.48.1, vetting is based on a snapshot in time and an individual's circumstances may change. Pre-appointment vetting may not reveal all risks posed by an applicant and some risks may only materialise once the officer has taken up their appointment. The APP sets out a number of triggers for a re-vetting or a vetting review. These include the expiry of vetting clearances (paragraph 8.49 of the APP sets out the expiry period for each level of vetting, after which a full re-vetting is required); or if adverse information comes to light relating to the officer; or there is a material change in their personal circumstances (paragraph 8.48.4 of the APP).

56. The conclusion of misconduct proceedings may be a trigger for a vetting review in certain circumstances. Paragraph 8.50.1 of the APP states:

> "8.50 Reviewing vetting clearance following misconduct
>
> 8.50.1 Following the conclusion of a misconduct hearing or meeting where the officer, special constable or member of staff is not dismissed but has been issued with a written warning or a final written warning, a review of vetting clearance should be carried out. The review includes a consideration of the

> applicant's suitability to maintain the level of clearance held and to continue in the post they occupy." (*emphasis added*)

57. This would not therefore include cases which:

    i) were dismissed or withdrawn without a hearing, for example, following a finding of "no case to answer"; or

    ii) following a hearing, where neither misconduct nor gross misconduct were found proved.

58. The Code of Practice expresses this point in slightly different terms, at paragraph 5.10:

> "Following the conclusion of misconduct proceedings that result in a sanction other than dismissal, an individual's vetting clearance will be reviewed. This does not preclude a decision to review a vetting clearance, even where no sanction is given …"

As this part of the guidance only refers to cases where sanctions are imposed or could have been imposed, I consider that it is not intended to apply to cases where there has been a finding of "no case to answer" or that misconduct or gross misconduct has not been proved, as there would be no legitimate basis for imposing a sanction in such circumstances.

59. The Code of Practice sets out the tests to be applied in vetting decision-making, at paragraph 5.6:

> "….. Having gathered the necessary information and intelligence, each case must be decided on its own merits, taking all relevant information into account. Assess the risks posed by the individual to the public and the police service, giving consideration to threats, vulnerability and impact. In making a decision, this does not establish a precedent, as each case is considered on its own merits.
>
> In making vetting decisions where adverse information has been considered, the decision maker must apply the vetting test.
>
> 1. Are there reasonable grounds for suspecting that the applicant, a family member or other relevant associate:
>
> • is, or has been, involved in criminal activity
>
> • has financial vulnerabilities (applicant only)
>
> • is, or has been, subjected to any adverse information
>
> 2. If so, is it appropriate, in all the circumstances, to refuse vetting clearance?"

60. The Code of Practice provides, at paragraphs 5.7 and 5.10, that if a person is unable to hold the required vetting clearance to perform their role, the force will consider an

alternative suitable role with a lower level of vetting clearance. If such a role is not available or clearance cannot be granted at the lowest level, the individual will be subject to dismissal proceedings, as vetting clearance is a requirement of their role.

61. The APP gives the following guidance on the consequences of withdrawal of vetting clearance:

> "**Employment Rights Act 1996 and Police (Performance) Regulations 2020**
>
> 8.47.1 Where vetting clearance is withdrawn or refused on renewal for existing personnel, a different process will need to be followed for police officers and police staff. If vetting clearance is refused at RV, unsupervised access to police assets, including premises, information and systems, cannot be granted. IF MV clearance is withdrawn, consideration must be given to whether RV clearance can be granted.
>
> 8.47.2 For police staff, withdrawing RV clearance may lead to dismissal under section 98 of the Employment Rights Act 1996 (ERA). This would ultimately occur when the force decides that alternative employment is not possible and/or the risk cannot be managed.
>
> 8.47.3 The ERA does not apply to police officers or special constables. Therefore, when clearance is withdrawn and suitable alternative employment cannot be identified, and/or the risk cannot be reasonably managed, the force should consider proceedings under the Police (Performance) Regulations 2020.
>
> 8.47.4 When a police officer's or special constable's RV clearance is withdrawn, they will be unable to access police information and systems. Unsupervised access to police premises will also not be permitted. As a result, the police officer will be unable to perform their role to a satisfactory level. This could, therefore, amount to gross incompetence and a third-stage meeting should be considered."

Operation Assure and Operation Onyx

62. In 2023, Operation Assure and Operation Onyx were launched. Commander Harman set out in detail in his witness statement the concerns about the lack of effective vetting

reviews in the MPS, combined with allegations of misogyny and discrimination,[9] which led to the introduction of Operation Assure and Operation Onyx.

63. Operation Assure is the MPS's process for reviewing vetting clearances, focussing on cases where there is some indication of wrongdoing, with the possibility of referral to proceedings under the Performance Regulations. As at September 2024, some 221 officers have been, or are currently being, considered by Operation Assure for a review of their vetting clearance. 37 officers have been referred to the third stage of the Performance Regulations on grounds of gross incompetence, and 8 officers have been dismissed, whilst others have resigned.

64. Operation Onyx is the MPS's review of all allegations of sexual offending or domestic violence made against serving MPS officers between April 2012 and January 2023.

The Conduct Regulations

65. The Conduct Regulations were made by the Secretary of State pursuant to section 50 of the Police Act 1996.

66. Police officers are subject to 'Standards of Professional Behaviour' which are contained within Schedule 2 to the Conduct Regulations 2020. The requirements of those standards are informed by the Code of Ethics published by the College of Policing and the National Police Chiefs' Council.

67. Statutory guidance on the Conduct Regulations is provided in the "Home Office Guidance: Statutory Guidance on Professional Standards, Performance and Integrity in Policing" ("Home Office Guidance"), issued under sections 87 and 87A of the Police Act 1996.

68. While some allegations of misconduct are investigated under Part 3 of the Conduct Regulations, public complaints and "recordable conduct matters" are investigated pursuant to Schedule 3 to the Police Reform Act 2002 and the Police (Complaints and Misconduct) Regulations 2020. Following the outcome of an investigation under either set of Regulations, Parts 4 and 5 of the Conduct Regulations apply.

69. The investigator must submit a written report indicating their opinion on whether there is a case to answer. In police discipline this has the meaning explained in the Home Office Guidance:

> "8.61 The test for case to answer or central question to be answered is as follows:

[9] Reports of Her Majesty's Inspectorate of Constabulary and Fire & Rescue ("HMICFRS") into corruption in the MPS, 22 March 2022 and 2 November 2022. Baroness Casey's review, including the initial letter of 17 October 2022 to the Defendant identifying issues and making recommendations, following the conviction and sentencing of Wayne Couzens for the kidnap, rape and murder of Sarah Everard, and her final report in March 2023. The scope of Operation Onyx was expanded following publication of the Angiolini Part 1 report in February 2024.

> Is there sufficient evidence, upon which a reasonable misconduct meeting or a reasonable disciplinary hearing panel could make a finding on the balance of probabilities of either
>
> (i) misconduct or
>
> (ii) gross misconduct?
>
> 8.62 The test for case to answer (as it is reflected in common law and other regimes), is a modified version of the so called "Galbraith test" (based on the well-known criminal law authority). That test is modified for case to answer because it is applied before the disciplinary proceedings themselves are brought and because, in the circumstances of police disciplinary proceedings, a lower standard of proof is applied.…".

70. The threshold for identifying a case to answer is a low one as if there is a case to answer on one legitimate construction of the facts, the investigator has to recommend that there is a case to answer. See *R (Commissioner of City of London Police) v Independent Office for Police Conduct and PC Alston, Alfie Meadows* [2018] EWHC 2997 (Admin) at [16] and *R (IPCC Chief Executive) v IPCC* [2016] EWHC 2993 (Admin) at [21].

71. The College of Policing has issued "Guidance on Outcomes" in relation to the disciplinary action to be imposed following misconduct proceedings. The Guidance on Outcomes explains the purpose of misconduct proceedings as follows:

> "2.1 Police officers exercise significant powers. The misconduct regime is a key part of the accountability framework for the use of these powers. If public confidence in the police service is to be maintained, outcomes should be sufficient to demonstrate individual accountability for any abuse or misuse of police powers. These outcomes must be used to achieve organisational justice.
>
> …..
>
> 2.3 The purpose of the police misconduct regime is threefold:
>
> 1. to maintain public confidence in and the reputation of the police service
>
> 2. to uphold high standards in policing and deter misconduct
>
> 3. to protect the public."

72. In Chapter 3, the Guidance on Outcomes describes the "available outcomes" as follows:

"3.1 Misconduct is generally defined as unacceptable or improper behaviour[10]. The Conduct Regulations further define misconduct as 'a breach of the Standards of Professional Behaviour that is so serious as to justify disciplinary action'[11].

3.2 Regulation 41(15) of the Conduct Regulations provides that the person(s) conducting the misconduct proceedings must:

'[…] review the facts of the case and decide whether the conduct of the officer concerned amounts—

- in the case of a misconduct meeting, to misconduct or not; or
- in the case of a misconduct hearing, to misconduct, gross misconduct or neither.[12]'

3.3 ….

3.4 Under Regulation 2(1):

- misconduct means a breach of the Standards of Professional Behaviour that is so serious as to justify disciplinary action
- gross misconduct means a breach of the Standards of Professional Behaviour that is so serious as to justify dismissal

3.5 The power to determine outcome therefore arises after the person(s) conducting the proceedings have:

- reviewed and determined the facts
- established which, if any, Standards of Professional Behaviour have been breached
- determined whether the conduct found proven against the officer amounts to misconduct, gross misconduct or neither.

3.6 The HOG allows persons considering more than one allegation against the same officer at a misconduct hearing to take the allegations together. They can treat them as a single

[10] *Roylance v General Medical Council (No 2)* [2000] 1 AC 311: 'Misconduct is a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances.'

[11] Regulation 2(1), 23(2)(a) and 23(2)(b) of the Conduct Regulations.

[12] Regulation 41(16) of the Conduct Regulations adds that they 'must not find that the conduct of the officer concerned amounts to gross misconduct unless– (a) they are satisfied on the balance of probabilities that this is the case; or (b) the officer admits it is the case'. Regulation 61(16) contains the same provision for accelerated misconduct hearings (in respect of gross misconduct).

allegation for the purposes of making an assessment, a finding, a determination or a decision in connection with conduct that is the subject matter of an allegation.

3.7 When assessing if a matter will proceed to misconduct proceedings, Regulation 23(5) of the Conduct Regulations provides that, where it is determined that there is no case to answer or no misconduct proceedings will be brought, the appropriate authority must assess which of the following is suitable:

- the matter amounts to practice requiring improvement and should be referred to be handled by the RPRP
- the matter should be dealt with through the Performance Regulations
- no further action is required.

Part 4 proceedings: Misconduct proceedings

3.8 Where the person(s) conducting the misconduct proceedings find that the conduct amounts to neither misconduct or gross misconduct following a misconduct meeting or hearing, they may direct that the matter is referred to be dealt with under the RPRP as prescribed in Regulation 42(1)(b), or a decision may be made that no further action is required.

3.9 The power to impose disciplinary action at the end of misconduct proceedings is contained in Regulations 42(1), (2) and (3) of the Conduct Regulations.

3.10 If the case against an officer is proven as misconduct, then disciplinary action will follow and the appropriate outcome from the available outcomes below must be decided upon…..

3.11 The available outcomes at a misconduct meeting are:[13]

- written warning
- final written warning

3.12 The available outcomes at a misconduct hearing are:[14]

- written warning
- final written warning

[13] Regulation 42(2) of the Conduct Regulations.
[14] Regulation 42(3) of the Conduct Regulations.

- reduction in rank
- dismissal without notice."

73. Dismissal for gross misconduct will result in inclusion on the Police Barred List maintained by the College of Policing for at least 5 years: see sections 88A and B of the Police Act 1996 and the Police Barred List and Police Advisory List Regulations 2017.

74. The regime established by the Conduct Regulations is intended to be compliant with Article 6 ECHR and includes appropriate procedural safeguards.

75. These include the assistance of a Police Friend (regulation 7); legal representation where dismissal is a possibility (regulation 8); an investigation by a suitably qualified investigator (regulations 14-16); written notices (regulations 17 and 30); an opportunity to make representations (regulation 18); interview (regulation 20); an investigation, report and decision on whether there is a case to answer (regulation 21); a severity assessment (regulation 23); the opportunity to plead a defence (regulation 31); full disclosure (regulation 32); and a fair hearing at which the allegations must be proved and witnesses can be called and cross-examined.

76. Where the matter is sent to an accelerated misconduct hearing under Part 5, the core protections of notices, legal representation, proof, and the outcomes process are maintained (regulations 51, 54 and 56).

77. Allegations must be framed in accordance with the Standards of Professional Behaviour in Schedule 2.

78. The Part 4 hearing is by a panel chaired by an officer appointed by the Chief Officer and sitting with two Independent Panel Members appointed by the local policing body. A legally qualified person advises the panel.

79. The panel delivers its decision on finding (whether proven) and outcome (disciplinary action imposed) under regulation 43.

The Performance Regulations

80. The Performance Regulations were made by the Secretary of State under section 50 of the Police Act 1996. They do not apply to a probationer nor to officers above the rank of chief superintendent. They are concerned with the performance, or attendance, or gross incompetence of police officers. They are treated as disciplinary proceedings (regulation 4(7)).

81. Generally, matters are handled in three stages. Where the line manager of a police officer considers that the performance or attendance of a police officer is unsatisfactory he may be required to attend a first stage meeting (regulation 15). If, following a prescribed procedure, the allegation is made out, the officer may be given a written improvement notice specifying a period of up to 12 months within which specified matters must improve sufficiently (regulation 18).

82. If, at the end of that period, the line manager considers that a matter specified in the written notice has not improved sufficiently, the officer must attend a second stage meeting (regulation 22). If, following a prescribed procedure, a second line manager considers that the performance or attendance has been unsatisfactory during that period, they must give the officer a final written improvement notice which lasts for 12 months.

83. If the line manager considers that by the end of that period there has not been a sufficient improvement in the matters of concern, the officer must attend a third stage meeting (regulation 30). Where a panel convened under regulation 34 finds the allegation to be made out, they may order one of the outcomes in regulation 46, which includes dismissal or a reduction in rank.

84. A third stage meeting may be required without a prior first or second stage meeting by regulation 32(1)(a) where the appropriate authority decides that the performance of a police officer constitutes "gross incompetence".

85. Regulation 4(1) defines "gross incompetence" as follows:

> "'gross incompetence' means a serious inability or serious failure of a police officer to perform the duties of the officer's rank or the role the officer is currently undertaking to a satisfactory standard or level, without taking into account the officer's attendance, to the extent that dismissal would be justified and "grossly incompetent" is to be construed accordingly".

86. Dismissal for gross incompetence will result in inclusion on the Police Barred List maintained by the College of Policing for at least 3 years.

87. Where dismissal is a possibility, the Performance Regulations are intended to comply with the requirements of Article 6 ECHR. Advice and representation by a police friend is provided for by regulation 5. Legal representation is permitted but only at a stage three meeting where dismissal is possible (regulation 6).

Police Appeals Tribunal

88. The officer has a right of appeal to a Police Appeals Tribunal, under the Police Appeals Tribunal Rules 2020, against findings and outcomes made in proceedings under the Conduct Regulations and the Performance Regulations. The permissible grounds of appeal are set out in regulations 4 and 5.

89. Where the appellant is not a senior officer, the tribunal is comprised of a legally qualified chair[15]; a serving senior officer and a lay person. An appeal may be dismissed by the chair upon a review, if there is no real prospect of success (regulation 15). There is a hearing, in public, at which the appellant is entitled to be legally represented and accompanied by a police friend (regulation 19). Witnesses are called and may be subject to cross-examination (regulation 20).

[15] The Chair must satisfy the judicial appointment eligibility condition on a 5 year basis and be nominated by the Lord Chancellor: paragraph 1(1) of Schedule 6 to the Police Act 1996.

90. The Police Appeals Tribunal is subject to the supervisory jurisdiction of the Administrative Court.

Ground 1

Parties' submissions

91. The Claimant initially submitted that, in the absence of any statutory basis, a vetting requirement could not be imposed by the Defendant. The Claimant subsequently accepted that the Defendant did have power to impose a vetting requirement, pursuant to his powers of direction and control in section 4(3) PRSRA 2011 and paragraph 4(1) of Schedule 4 to the PRSRA 2011. However, he maintained that the Defendant had no power to dismiss a police officer for lack of vetting clearance. The withdrawal of vetting was not a lawful basis for the dismissal of a police officer, in the absence of statutory authority.

92. The Defendant, supported by the College of Policing, submitted that, despite the absence of any statutory provision requiring a police officer to hold vetting clearance, the Defendant was entitled to impose a requirement for officers to hold vetting clearance, pursuant to his broad powers of direction and control over his officers. Furthermore, the Defendant is under a duty in section 39A(7) of the Police Act 1996 to have regard to the College of Policing publications, including the Code of Practice and APP, which contain requirements for police officers to hold vetting clearance.

Conclusions

93. Police officers (warranted constables) are holders of public office; they are not employees: *Farah v Commissioner of Police of the Metropolis* [1997] 1 All ER 289 at 305H. They are bound by their oath of office and by primary and secondary legislation including the Police Act 1996 and the regulations made thereunder. That secondary legislation includes the Police Regulations 2003, made pursuant to section 50 of the Police Act 1996 which, together with the Secretary of State's determinations made under those regulations, contain police officers' main terms of office. See *Allard & Anor v Chief Constable of Devon and Cornwall Constabulary* [2015] EWCA Civ 42, per Patten LJ at [2]. Because of their status, they do not enjoy the protection of the unfair dismissal legislation which is available to police civilian employees.

94. Section 50 of the Police Act 1996 enables the Secretary of State to make regulations for, *inter alia*, processes that may result in dismissal from office:

> "50.— Regulations for police forces.
>
> (1) Subject to the provisions of this section, the Secretary of State may make regulations as to the government, administration and conditions of service of police forces.
>
> (2) Without prejudice to the generality of subsection (1), regulations under this section may make provision with respect to—

> …
>
> (e) the conduct, efficiency and effectiveness of members of police forces and the maintenance of discipline;
>
> (f) the suspension of members of a police force from membership of that force and from their office as constable;
>
> …
>
> (3) Without prejudice to the powers conferred by this section, regulations under this section shall—
>
> (a) establish, or
>
> (b) make provision for the establishment of,
>
> procedures for the taking of disciplinary proceedings in respect of the conduct, efficiency and effectiveness of members of police forces, including procedures for cases in which such persons may be dealt with by dismissal."

95. Pursuant to section 50 of the Police Act 1996, the Secretary of State has made regulations for:

    i) Dismissal for misconduct in proceedings under the Conduct Regulations; and

    ii) Dismissal for unsatisfactory performance proceedings in proceedings under the Performance Regulations.

96. Separate provision is made for newly-appointed police officers who are subject to a probationary period. By regulation 13 of the Police Regulations 2003, titled "Discharge of probationer", the services of a probationer may be dispensed with if the chief officer considers that they are not fit, physically or mentally, to perform the duties of their office or that they are not likely to become an efficient or well conducted constable.

97. Senior officers (those above the rank of Chief Superintendent) are not subject to the Performance Regulations. They may be "called upon" to "retire or resign" pursuant to sections 38-40 and 48-49 of the PRSRA 2011 in the case of senior officers (those above the rank of Chief Superintendent) only.

98. The Secretary of State has not yet made regulations for dismissal by reason of withdrawal of vetting clearance. Nor is there any statutory provision to the effect that vetting clearance is a legal pre-requisite to hold the office of police constable. The 'Home Office Review-The process of police officer dismissals' (September 2023) identified the need to "establish a robust and fair process for removing those who cannot maintain their vetting clearance" and recommended that the Home Office clearly define a route by which forces are able to remove officers who are unable to hold vetting clearance (p.79). The draft regulations issued in 2024 and 2025 address these issues in part, but not fully.

99. I accept the Defendant's submission that he may require police officers in the MPS to undergo vetting pursuant to his broad powers of direction and control over his officers in section 4(3) PRSRA 2011, and his power to do anything which is calculated to facilitate, or is conducive or incidental to, the exercise of his functions, in paragraph 4(1) of Schedule 4 to the PRSRA 2011.

100. The Defendant's duty in section 39A(7) of the Police Act 1996 to have regard to the College of Policing publications, which contain requirements for police officers to hold vetting clearance, supports this interpretation of the Defendant's powers.

101. However, in my judgment, the Defendant's powers do not extend to the dismissal of a police officer by reason of withdrawal of vetting clearance. Dismissal is a matter which should be provided for in regulations made by the Secretary of State under section 50(3) of the Police Act 1996. This results in an anomalous situation where officers who do not have basic vetting clearance cannot be dismissed by the Defendant. In my view, that anomaly could and should be resolved by regulations. Mr Beggs KC did not dispute this analysis. However, he submitted that the third stage meeting procedure under the Performance Regulations was the mechanism by which a police officer may be dismissed if his vetting clearance has been withdrawn, as he is no longer able to perform his duties. I shall consider this issue under Ground 4 below. Subject to the issue in Ground 4, Ground 1 succeeds.

Ground 2

Parties' submissions

102. Article 6 ECHR provides:

> "(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> (3) Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

103. It was common ground between the parties that the civil limb of Article 6(1) is engaged by vetting reviews with respect to serving MPS officers where the outcome might be the removal of minimum vetting clearance. That is because a decision to withdraw an officer's minimum vetting clearance makes it very likely that the officer will be dismissed from the force and included in the Police Barred List. Thus, the withdrawal of vetting will have a "more than tenuous or remote" link with the loss of the officer's office, profession and income. See *Regner v Czech Republic* (application no. 5289/11) (2018) 66 EHRR 9 at [109]; [112]; [119] – [120]; *Petrova v Bulgaria* [2016] ECHR (application no. 57148/08), at [31] – [35]; [38] – [40]; [44] - [45].

104. In *R (G) v Governors of X School* [2012] 1 AC 167, the Supreme Court held that where an individual was subject to two sets of proceedings, only the second of which would directly determine a civil right within the meaning of Article 6, the question of whether the requirements of Article 6 apply to the initial proceedings is to be answered by "a pragmatic context-sensitive approach to the problem" (at [67]). It was sufficient for the engagement of Article 6 that the initial proceedings would be truly dispositive of the civil right determined in the subsequent proceedings, or would at least cause irreversible prejudice in those later proceedings. Although the Court held, on the facts in that case, that Article 6 did not apply, the principle is relevant here.

105. It was also common ground that Article 8 ECHR is engaged in these circumstances because the loss of the officer's office, profession and income will amount to an interference with his private life. Such an interference must be in accordance with the law, in pursuit of a legitimate aim, and necessary in a democratic society, which means that it must meet pressing social need, and be proportionate to the aim pursued. Proportionality falls to be considered at stage 2 of the vetting test when the vetting officer has to consider whether it is appropriate, in all the circumstances, to refuse vetting clearance: see the judgment of Coulson J. in *R (A) v Chief Constable of 'C' Constabulary* [2014] EWHC 216 (Admin), [2014] 1 WLR 2276, at [32] – [34], quoted at Judgment/[167].

106. The parties agreed the following legal principles:

i) the requirements of Article 6 largely mirror the requirements of fairness at common law; and

ii) what fairness requires in any particular situation is a matter of law for the court to determine.

107. The issues that were in dispute were the content of the rights under Article 6, and whether the vetting regime, as set out in the Code of Practice and the APP, complied with Article 6.

108. The Claimant submitted that the requirements of Article 6 which applied in vetting reviews were as follows:

i) a fair and public hearing within a reasonable time;

ii) an independent and impartial tribunal established by law;

iii) to be informed promptly and in detail of the nature and cause of the accusation against him;

iv) to have adequate time and facilities for the preparation of his defence;

v) an oral hearing;

vi) to defend himself in person or through legal assistance of his own choosing, including the right to make oral representations on factual issues, to explain his version of the situation, to allow decision makers to form their impression of him, and to be heard on outcomes; and

vii) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

109. The Defendant and the College of Policing took issue with the scope of the Claimant's submissions in regard to subparagraphs (i), (ii), (v), (vi) and (vii) above.

Legal principles and authorities

"Fair and public hearing"

110. The right to a fair and public hearing is conferred by Article 6(1).

111. There is a general right to an oral hearing, which derives from the right to a public hearing and public pronouncement of judgment under Article 6(1). However, in civil cases, as opposed to criminal cases, there is no guarantee or absolute right to a hearing. The Grand Chamber reviewed the authorities in *Nunes v Portugal* [2018] ECHR (Applications nos 5539/13, 57728/13 and 74041/13), which concerned disciplinary proceedings against a judge, as follows:

> "190. The Court has identified the following situations in which the above-mentioned exceptional circumstances may justify dispensing with a hearing:

(a) where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the case file (see Döry v. Sweden, no. 28394/95, § 37, 12 November 2002, and Saccoccia v. Austria, no. 69917/01, § 73, 18 December 2008);

(b) in cases raising purely legal issues of limited scope (see Allan Jacobsson v. Sweden (no. 2), 19 February 1998, § 49, Reports 1998-I, and Mehmet Emin Şimşek v. Turkey, no. 5488/05, §§ 29-31, 28 February 2012), or points of law of no particular complexity (see Varela Assalino v. Portugal (dec.), no. 64336/01, 25 April 2002, and Speil v. Austria (dec.), no. 42057/98, 5 September 2002);

(c) where the case concerns highly technical issues. For instance, the Court has taken into consideration the technical nature of disputes concerning social-security benefits, which may be better dealt with in writing than in oral argument. It has held on several occasions that in this sphere the national authorities are entitled, having regard to the demands of efficiency and economy, to dispense with a hearing, as systematically holding hearings may be an obstacle to the particular diligence required in social-security cases (see Schuler-Zgraggen, § 58, and Döry, § 41, both cited above).

191. By contrast, the Court has found the holding of a hearing to be necessary, for example:

(a) where there is a need to assess whether the facts were correctly established by the authorities (see Malhous v. the Czech Republic [GC], no. 33071/96, [60], 12 July 2001);

(b) where the circumstances require the court to form its own impression of litigants by affording them a right to explain their personal situation, on their own behalf or through a representative (see Göç, cited above [Göç v. Turkey [GC], no. 36590/97, ECHR 2002-V)., [51]; Miller, cited above [Miller v. Sweden, no. 55853/00, 8 February 2005], [34] in fine; and Andersson v. Sweden, no. 17202/04, [57], 7December 2010);

(c) where the court needs to obtain clarification on certain points, inter alia by means of a hearing (see Fredin v. Sweden (no. 2), 23 February 1994, [22], Series A no. 283- A, and Lundevall v. Sweden, no. 38629/97, [39], 12 November 2002).

192. The Court has previously examined the question whether the lack of a public hearing at the level below may be remedied by a public hearing at the appeal stage. In a number of cases it has found that the fact that proceedings before an appellate court are held in public cannot remedy the lack of a public hearing at the lower levels of jurisdiction where the scope of the appeal

> proceedings is limited, in particular where the appellate court cannot review the merits of the case, including a review of the facts and an assessment as to whether the penalty was proportionate to the misconduct (see, for example, in a disciplinary context, Le Compte, Van Leuven and De Meyere, cited above [Albert and Le Compte v. Belgium, 10 February 1983, Series A no. 58], [60]; Albert and Le Compte, cited above, [36]; Diennet, cited above [Diennet v.France, 26 September 1995, Series A no. 325-A], § 34; and Gautrin and Others v. France, 20 May 1998, [42], Reports 1998-III).
>
> 193. If, however, the appellate court has full jurisdiction, the lack of a hearing before a lower level of jurisdiction may be remedied before that court (see, for example, Malhous, cited above [Malhous v the Czech Republic [GC]. No. 33071/96, 12 July 2001], [62], and, in a disciplinary context, A. v. Finland (dec.), no. 44998/98, 8 January 2004, and Buterlevičiūtė v. Lithuania, no. 42139/08, §§ "52-54, 12 January 2016)."

112. In applying these principles to the applicant's case, the Grand Chamber observed, at [203], that in disciplinary proceedings which entail the imposition of penalties, the issues of fact may be just as crucial as the legal issues for the outcome of the proceedings. In that case, the factual evidence concerning the applicant's conversations with other judges was decisive. The accusations against her were likely to result in removal from office or suspension from duty. At [198], the Grand Chamber stated that the proceedings were in writing and the applicant did not have an opportunity to make oral representations. The disciplinary body "did not hear any evidence from witnesses, although it was not only the applicant's credibility that was at stake but also that of crucial witnesses", namely, the judges who had made the allegations against her. The Grand Chamber concluded, at [214], that these factors, among others, resulted in a violation of Article 6(1).

113. The Claimant also referred me to two other cases in the professional disciplinary context, in which it was held that an oral hearing was required: *Muyldermans v Belgium* (1993) 15 RHRR 204, at [64] (a post office employee accused of theft); and *Bakker v Austria* (43454/98) (2004) 39 EHRR, at [30], [31], (refusal of authorisation to practise as a self-employed physiotherapist).

Equality of arms and disclosure

114. The right to a fair hearing includes the requirement for "equality of arms", which means that it is necessary to strike a fair balance between the positions of the parties, including consideration of their access to relevant evidence.

115. In *Regner*, the applicant was employed by the Ministry of Defence when his security clearance was revoked. Throughout the proceedings, which included court hearings, he was refused access to classified documents which explained the reason for the revocation. The ECtHR concluded that there was no violation of Article 6. It held, at [146], that the adversarial principle and the principle of equality of arms were

fundamental components of a fair hearing, but could be restricted in certain circumstances and stated:

> "147. However, the rights deriving from these principles are not absolute. The Court has already ruled, in a number of judgments, on the particular case in which precedence is given to superior national interests when denying a party fully adversarial proceedings (Miryana Petrova, cited above, §§ 39-40, and Ternovskis, cited above, §§ 65-68). The Contracting States enjoy a certain margin of appreciation in this area ….
>
> 148. The Court reiterates, moreover, that the entitlement to disclosure of relevant evidence is not an absolute right either. In criminal cases it has found that there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the party to the proceedings……
>
> 149. In cases where evidence has been withheld from the applicant party on public interest grounds, the Court must scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the person concerned ….."

116. In *Tariq v Home Office* [2011] UKSC 35, the claimant was employed by the Home Office as an immigration officer; his security clearance was withdrawn; and he was suspended from work. The issues were whether Article 6 required a minimum level of disclosure of the basis and reasons for the decision, alleged by the claimant to have been tainted by race discrimination, and whether it was lawful to exclude him from a closed material procedure/special advocate procedure in the Employment Tribunal.

117. The Supreme Court held that the closed material procedure was compatible with Article 6, and there was no absolute requirement that the details of allegations should be disclosed where the interests of national security required secrecy: see Lord Hope at [83], and Lord Dyson at [139] – [146].

Examination of witnesses

118. In disciplinary proceedings, there is no absolute right to cross-examine witnesses. In *R (Bonhoeffer) v General Medical Council* [2011] EWHC 1585 (Admin), Stadlen J. (with whom Laws LJ agreed) reviewed the authorities and set out the following general principles:

> "108. From this review of authorities I derive the following propositions:

i) Even in criminal proceedings the right conferred by Article 6(3)(d) to cross-examine is not absolute. It is subject to exceptions referable to the absence of the witness sought to be cross-examined, whether by reason of death, absence abroad or the impracticability of securing his attendance.

ii) In criminal proceedings there is no "sole or decisive" rule prohibiting in all circumstances the admissibility of hearsay evidence where the evidence sought to be admitted is the sole or decisive evidence relied on against the defendant.

iii) In proceedings other than criminal proceedings there is no absolute entitlement to the right to cross-examine pursuant to Article 6(3)(d).

iv) However disciplinary proceedings against a professional man or woman, although not classified as criminal, may still bring into play some of the requirements of a fair trial spelt out in Article 6(2) and (3) including in particular the right to cross-examine witnesses whose evidence is relied on against them.

v) The issue of what is entailed by the requirement of a fair trial in disciplinary proceedings is one that must be considered in the round having regard to all relevant factors.

vi) Relevant factors to which particular weight should be attached in the ordinary course include the seriousness and nature of the allegations and the gravity of the adverse consequences to the accused party in the event of the allegations being found to be true. The principal driver of the reach of the rights which Article 6 confers is the gravity of the issue in the case rather than the case's classification as civil or criminal.

vii) The ultimate question is what protections are required for a fair trial. Broadly speaking, the more serious the allegation or charge, the more astute should the courts be to ensure that the trial process is a fair one.

viii) In disciplinary proceedings which raise serious charges amounting in effect to criminal offences which, if proved, are likely to have grave adverse effects on the career and reputation of the accused party, if reliance is sought to be placed on the evidence of an accuser between whom and the accused party there is an important conflict of evidence as to whether the misconduct alleged took place, there would, if that evidence constituted a critical part of the evidence against the accused party and if there were no problems associated with securing the attendance of the accuser, need to be compelling reasons why the requirement of fairness and the right to a fair hearing did not entitle the accused party to cross-examine the accuser."

119. In *R (Gannon) v Chief Constable of Merseyside* [2009] EWHC 2133 (Admin), which concerned disposal of a misconduct allegation under the Accelerated Misconduct Hearing procedure, HH Judge Pelling said, at [12]:

> "12. It is plainly necessary that a disciplinary hearing should be fair not least because of the potentially grave consequences of such proceedings for someone in the position of the Claimant. Fairness requires that there be a hearing at which an accused officer has the opportunity to question the witnesses against him where he disputes the factual allegations made by those witnesses…." However a Part 4 hearing is by its nature time consuming and expensive. Unnecessary delay in the disposal of proceedings against officers accused of gross misconduct is not in the public interest. The 2008 Regulations attempt to balance the need for fairness so far as the accused officer is concerned with the public interest in speedy disposal. The Fast Track procedure was created in order to provide a cheaper and quicker alternative where fairness could be achieved without the need for a Part 4 hearing. Where the material facts alleged to constitute gross misconduct are either admitted or are incapable of realistic dispute, then the focus of any hearing should be on whether the facts alleged or incapable of realistic dispute amount to gross misconduct and on any mitigation. It is only in relation to a case where there is no or no realistic dispute as to the facts alleged and/or there is no or no realistic dispute as to any factual evidence relevant to whether the factual allegations constitute gross misconduct that the Part 5 procedure will be fair."

120. In *R (G) v Governors of X School*, at [80], Lord Dyson stated that the relevant barring authority did not operate a procedure for oral hearings with cross-examination and observed:

> "There must be very few cases where the lack of an oral hearing (with examination and cross-examination of witnesses) would make it unduly difficult for the ISA to make findings of fact applying its own judgment to the material. It is only in very few cases that a decision-making body is faced with a conflict of evidence which it resolves solely or even primarily on the basis of the demeanour shown by the witnesses. There is usually something else. It may be that the account given by one person is self-contradictory or inconsistent with the account that he or she gave on a different occasion; or doubt may be cast on its accuracy by a document; or one account is supported by the evidence of other apparently credible and reliable witnesses, whereas the other stands on its own; or one account is incredible or at least improbable. In any event, as Lord Bingham of Cornhill said in The Business of Judging (2000), p 9, "the current tendency is (I think) on the whole to distrust the demeanour of a witness as a reliable pointer to his honesty." At pp 9 -13, he

> developed this view and supported it with references to a number of statements by judges and advocates."

Legal representation

121. In *R (G) v Governors of X School* the Supreme Court held that, if Article 6(1) applied, the applicant would have been entitled to legal representation in the initial disciplinary proceedings because of the gravity of the consequences of being placed on the barred list (per Lord Dyson at [71]).

122. In *Kulkarni v Milton Keynes Hospital* [2009] EWCA Civ 789, where a doctor was denied the opportunity to have legal representation at internal disciplinary proceedings for a serious allegation, the Court of Appeal held, per Smith LJ:

> "67 …. had it been necessary for me to make a decision on this issue, I would have held that article 6 is engaged where an NHS doctor faces charges which are of such gravity that, in the event they are found proved, he will be effectively barred from employment in the NHS.
>
> 68 The next question is whether, in the context of civil proceedings, article 6 implies a right to legal representation. In my view, in circumstances of this kind, it should imply such a right because the doctor is facing what is in effect a criminal charge, although it is being dealt with by disciplinary proceedings. The issues are virtually the same and, although the consequences of a finding of guilt cannot be the deprivation of liberty, they can be very serious."

'Independent and impartial tribunal'

123. Article 6(1) requires determination by a tribunal which is independent of the parties and the executive. Administrative decision makers were described by Lord Hoffman in *Begum v Tower Hamlets* [2003] UKHL 5 at [33] as lacking in independence "virtually by definition". This principle was applied by the ECtHR in *Petrova v Bulgaria*, at [39] – [40].

124. Where the initial decision is made by an administrative decision-maker, the lack of independence may be overcome or cured if the decision is subject to a review by a court that has full jurisdiction and does provide the guarantees of Article 6(1). Full jurisdiction means "jurisdiction to deal with the case as the nature of the decision requires" (*Begum v Tower Hamlets* [2003] UKHL 5, at [5]).

125. This issue has been extensively considered by the courts.

126. In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, the House of Lords held that although the Secretary of State was not independent and impartial, the planning system together with the availability of judicial review was compliant with Article 6.

127. In *Bryan v United* Kingdom [1995] ECHR (application no. 19178/91) the ECtHR considered the scope of a planning appeal to the High Court and found it was sufficient to ensure compliance with Article 6.

128. In *Begum v Tower Hamlets*, the House of Lords held that the right of appeal to the County Court on judicial review-type grounds conferred full jurisdiction in the context of homelessness decisions made by a housing officer and then reviewed by a senior officer. In *Ali v Birmingham City Council* [2010] UKSC 8, [2010] 2 AC 39, the Supreme Court found no unlawfulness in a similar decision-making process. A challenge to that aspect of the decision was dismissed by the ECtHR in *Ali v UK* (application no. 40378/10) (2016) 63 EHRR 20.

129. While the availability of judicial review or a statutory appeal has been found sufficient in many contexts, it may not be curative if the lack of independence at an earlier stage is particularly objectionable.

130. For example, *Tsafyo v UK* (application no. 60860/00) [2006] ECHR 981 concerned the lawfulness of a process used to determine applications for housing and council tax benefit. Applicants could seek a review of an initial decision by the Housing Benefit Review Board ("HBRB"), which in turn was subject to judicial review. The ECtHR concluded that the process was in violation of Article 6 because the HBRB fundamentally lacked objective impartiality as its members were councillors of the local authority which would be required to make the payment. In reaching this conclusion, at [46] it relied upon the judgment of Moses J. in *R (Bewry) v Norwich City Council* [2001] EWHC Admin 657 where he identified the connection of the councillors to the Council, and concluded that the "lack of independence may infect the independence of judgment in relation to the finding of primary fact in a manner which cannot be adequately scrutinised or rectified by judicial review".

131. In *Fazia Ali v United Kingdom* [2016] ECHR 78, the ECtHR followed *Runa Begum* in finding that the statutory right of appeal to the County Court provided judicial scrutiny of sufficient scope to satisfy the requirements of Article 6. The Court distinguished *Tsfayo* because of the absence of the fundamental lack of objective impartiality identified in that case.

Conclusions

132. The College of Policing submitted that police vetting decisions are not disciplinary proceedings. They are management decisions which are concerned with the assessment of trust and risk in connection with police duties and powers. Despite this, they have many features in common with disciplinary proceedings – investigation of allegations which can lead to sanctions including dismissal – and the ECtHR in *Regner* and *Petrova* has held that vetting withdrawals can engage Article 6.

133. The Defendant sought to distinguish *Nunes v Portugal* on the basis that it concerned disciplinary proceedings in which allegations had to be proved, whereas this case was concerned with a vetting process in which the truth of the allegations did not have to be proved; there only needs to be reasonable grounds for suspicion. This lower standard of proof does not require the calling and testing of witnesses in an oral hearing. I do not accept this submission, for the reasons advanced by the Claimant. The lower

threshold of proof does not automatically translate into a lesser need for fairness. A bare allegation might, on the face of it, amount to grounds for reasonable suspicion, but cease to be so once the allegation has been tested or denied. Furthermore, the strength of the suspicion and credibility of the information is an essential consideration in the proportionality assessment at stage 2 of the vetting test.

134. It was common ground before me that the decisions in this case were made by members of the MPS who were plainly not independent. There is nothing inherently wrong with vetting decisions being taken internally provided they were examined by an independent tribunal: see *Petrova v Bulgaria*, at [39].

135. I accept that the availability of judicial review provides a sufficient independent review of a decision to withdraw vetting clearance to cure the lack of independence in the decision-making process within the MPS and to fulfil the requirements of Article 6. The Administrative Court will be able to assess whether, on the evidence, the decision-maker could properly conclude that there were reasonable grounds for suspecting the conduct in question, under stage 1 of the vetting test. Indeed, it performs this exercise in other contexts: see *R (Mercury Tax Group) v HMRC* [2008] EWHC 2721 (Admin) at [31]; *R (AB) v Chief Constable of Wiltshire Police* [2011] EWHC 3385 (Admin) at [36]. It will also be able to consider the adequacy and lawfulness of the proportionality exercise conducted under stage 2 of the vetting test.

136. However, it is very rare indeed for the Administrative Court to hear oral evidence, and it can safely be assumed that it would not do so in a case of this nature where findings of fact have been made by the decision-maker. Therefore, if and insofar as it is necessary to test the credibility and reliability of the police officer and any complainants by hearing oral evidence, that can only be done at the initial stage under the current vetting procedures.

137. In reaching my conclusions, I have borne in mind that, in the context of professional disciplinary proceedings which determine civil rights and obligations under Article 6(1), the ECtHR has held, where the allegations are grave and the consequences are sufficiently far-reaching, that the proceedings are analogous to criminal proceedings, such that due process guarantees, similar to those conferred by Article 6(2) and (3) will be held to apply. See *Albert and Le Compte v Belgium* (1983) 5 EHRR 533, para 39, referred to in *R (Kuzmin) v General Medical Council* [2019] EWHC 2129 (Admin), per Hickinbottom LJ at [37] – [38].

138. In my judgment, the following procedural safeguards are required in a vetting review of a serving police officer where Article 6(1) is engaged because the outcome might be removal of minimum vetting clearance.

139. The vetting review officer should give the police officer detailed written notice of any allegations or other vetting concerns which are under consideration, supported by relevant evidence. I was informed by the Claimant that the notice which he received only contained very brief summaries. Generally, I consider that very brief summaries will be insufficient. However, as the Claimant already had full details from previous proceedings, there was no unfairness or violation of Article 6 on this occasion. As demonstrated by the cases of *Regner* and *Tariq*, the duty to disclose will be relaxed, as appropriate, where the material is sensitive and disclosure is contrary to the public interest. That issue did not arise in this case.

140. The police officer should be invited to respond to the written notice fully, and to provide details of any supporting evidence. He should be informed that he is permitted to seek advice from a police friend at this stage.

141. Applying the guidance in *Nunes v Portugal* and the authorities cited therein, together with *Muyldermans v Belgium* and *Bakker v Austria*, a hearing will generally be required. This is particularly so since any appeal will be determined on the papers and any judicial review will not hear witnesses or make findings of fact. This will be the only opportunity to test the veracity and reliability of the police officer and any complainants.

142. However, as exceptions to the general rule, the vetting review officer may decide that there will be no injustice to the police officer if a hearing is not held, because:

    i) on the material before him, there is no possibility that vetting clearance will be withdrawn;

    ii) there are no issues of credibility or contested facts which necessitate a hearing, and it is fair and reasonable to reach a conclusion on the written material;

    iii) the police officer waives any right to a hearing.

    This is not intended to be an exhaustive list of the exceptional circumstances that may arise.

143. Applying the principles set out above in *Nunes*, *Bonhoeffer*, *R (G) v Governors of X School*, and *Gannon*, there is no absolute right to call or cross-examine witnesses. However, if an application to do so is made, the vetting review officer should allow it if, in their judgment, the relevant evidence is likely to be significant in the determination of an important and disputed factual issue.

144. I consider that the seriousness of the allegations against the Claimant, combined with the real possibility of dismissal and a barring order for at least 3 years, mean that he should have been given the opportunity to call witnesses and cross-examine complainants, on important contested issues, to satisfy the requirements of fairness and the right to a fair hearing.

145. The police officer may attend the hearing with a police friend and he may be represented by a legal representative. I am satisfied, applying *R (G) v Governors of X School* and *Kulkarni*, that a right to legal representation arose in the Claimant's case because of the gravity of the allegations against him, and the likelihood of a withdrawal of vetting clearance, dismissal, and being placed on the barred list for at least 3 years. I consider that the same will apply to others in the class of vetting reviews where Article 6(1) is engaged.

146. In conclusion, Article 6 was engaged in the Claimant's case. His Article 6 rights were breached by the failure to consider and determine whether he should be afforded the opportunity to call witnesses or cross-examine complainants, and by not giving him the opportunity to be legally represented.

147. For these reasons, Ground 2 succeeds.

Ground 3

Parties' submissions

148. Under Ground 3, the Claimant submitted that the statutory procedures for determining allegations of misconduct, with their extensive procedural safeguards, ought not to be frustrated by determining allegations through the Defendant's internal vetting regime. He relied upon the authorities which were cited and applied by Eyre J. in *R (Victor) v Chief Constable of West Mercia Police* [2023] EWHC 2119 (Admin), at [49]. Having determined after a rigorous statutory process, such as that contained in the Conduct Regulations, that an officer need not be dismissed, only to decide thereafter on the same facts and rationales in vetting that they must be dismissed, frustrates the statutory provisions and is therefore unlawful.

149. The Defendant, supported by the College of Policing, submitted that he has not elected to consider allegations of misconduct in a vetting review, rather than through the misconduct procedures, and he would not be permitted to do so in law, having regard to paragraphs 2 and 11 of Schedule 3 to the Police Reform Act 2002, and the duty in Part 3 of the Conduct Regulations to investigate complaints and conduct matters.

150. The Conduct Regulations provide for investigation and if necessary proceedings to consider a specific allegation of breach of the Standards of Professional Behaviour, whereas vetting is a different process involving a multi-factorial assessment of risk on a wider body of material.

Conclusions

151. The parties referred me to a number of authorities.

152. In *R (Monger) v Chief Constable of Cumbria Police* [2013] EWHC 455 (Admin), where the claimant, a Special Constable, faced disputed allegations of misconduct, the High Court held that the Defendant could not lawfully bypass the procedural safeguards in the 2008 iteration of the Conduct Regulations by relying on regulation 3 of the Special Constables Regulations 1965 to compel the claimant to retire. Supperstone J. held, at [7]:

> "In my judgment, Parliament cannot have intended that in a case of misconduct which, as in a case such as the present, led to a dismissal, a police force can choose to bypass the 2008 Regulations, specifically issued to lay down appropriate procedures and safeguards for police officers, including Special Constables, in cases of misconduct."

153. In *C v Chief Constable of the Strathclyde Police* [2013] CSOH 65, a probationary police constable, aged 19, was the subject of an allegation of rape and indecent assault by an 18 year old complainant who alleged that he had encouraged her to drink excessive quantities of alcohol. He claimed that sexual intercourse was consensual. A second complainant, a friend of the first, alleged that, on a different occasion, the police constable had also encouraged her to drink too much alcohol and propositioned her,

which she declined. Neither criminal nor misconduct proceedings were proceeded with because of weaknesses in the evidence against the police constable, in particular, the complainant's refusal to provide a statement. The police constable was discharged from the force under regulation 13 of the Police (Scotland) Regulations 2004 on the ground that the Chief Constable did not consider he had the required qualities to be an efficient and well conducted police constable.

154. In the Outer House, the Lord Ordinary refused the police constable's petition, holding, at [22], that the chief constable was not prevented from proceeding with the regulation 13 proceedings because they were concerned with different and wider issues than the misconduct proceedings. He also found, at [31] and [33], that the allegation of rape was "properly" disregarded in the regulation 13 proceedings, which only considered the undisputed facts that he had invited the two women to his home, made them vulnerable through excessive alcohol and made sexual advances to them.

155. In *Victor*, a probationary police officer was found to have committed misconduct, on facts which she largely admitted, and she was given a final written warning. On review, her vetting clearance was then withdrawn and she was discharged under regulation 13 of the Police Regulations 2003 because she was no longer able to continue with her apprenticeship.

156. Eyre J. accepted as a general principle that:

> "49. Where a person or body has a power expressed in wide or general terms then that power cannot be used to defeat the intention of other provisions directed to the particular circumstances and giving protections or imposing restrictions intended to apply in those circumstances. Lord Bingham expressed the principle thus in *R v Liverpool CC ex p Baby Products Association* (November 1999): "a power conferred in very general terms plainly cannot be relied on to defeat the intention of clear and particular statutory provisions". Similarly, the majority in *R(Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 explained, at [51], that wide-ranging prerogative powers could not be used to "frustrate the purpose of a statute or a statutory provision, for example, by emptying it of content or preventing its effectual operation"."

157. Eyre J. reviewed the authorities and observed at [62]:

> "62. My understanding of the effect of the general principles set out above and of those decisions concerning constables is that where there is an issue as to whether particular conduct took place the protections provided by the Conduct Regulations should not be circumvented. In such cases the procedures laid down by those regulations should normally be followed. A failure to do so is likely to mean that a dismissal based on the misconduct is unlawful as in Monger. However, where the conduct (or at least the relevant acts) amounting to misconduct is admitted or otherwise not in dispute then it is not necessarily

> the position that the use of other procedures instead of or in addition to those of the Conduct Regulations is precluded. It is clear from *Farmer* and the *Strathclyde Police* case that it can be lawful to dispense with a probationer's services other than through the misconduct route even when the basis for taking that course is behaviour which could amount to misconduct. The critical question in such a case will be whether the effect of the course adopted is (a) to undermine or subvert the protections provided for a constable accused of misconduct or (b) amounts instead to the legitimate use of a different power for its intended purpose. The lawfulness of the action will depend on both the particular circumstances and the particular procedures which are being used. In relation to the former the presence or absence of a factual dispute will be of great significance and is normally likely to be determinative. As to the latter there will need to be close analysis of the nature and purpose of the powers being used."

158. At [65], Eyre J. observed that the circumstances in *Victor* differed from those considered in *Monger* and the *Strathclyde* cases where there had been no finding of misconduct and no sanction imposed.

159. The Judge concluded:

> "90. The factors supporting the view that the Vetting Decision was lawful are compelling. It is to be remembered that this not a case where the allegation against the Claimant was dismissed in the misconduct proceedings or where an assertion of gross misconduct had been made and rejected by a panel with a subsequent vetting decision being based on disputed facts. Here there was no material dispute of fact.
>
> 91. No one factor is determinative by itself but looking at matters in the round the position is that the misconduct proceedings and the review of the Claimant's vetting clearance were different processes in which different, but related, criteria were applied. Moreover, and significantly the Vetting Code of Practice and the APP to which the Defendant was required to have regard called for the review to be undertaken in these circumstances. For such a review to be undertaken properly it could not simply mirror the outcome in the misconduct proceedings but had to be a genuine review of the vetting clearance having regard to all the considerations relevant to such a review. Although there is force in the Claimant's point that primacy should be accorded to the conclusion reached in the misconduct proceedings as to the measures necessary to maintain professional standards and public confidence it cannot outweigh the factors in favour of lawfulness. In particular it cannot prevail against the fact that the requirement that there was to be a review of the Claimant's vetting clearance is strongly indicative that this was to be a full and not an attenuated review.

> The Claimant did not go as far as to say that there should not be a review but her case amounts to saying that the only lawful outcome of such a review in these circumstances would be for her recruitment vetting clearance to remain in place. That would render the review a pointless exercise in circumstances such as those of the Claimant and, indeed, in most cases where the constable in question does not have an enhanced vetting clearance. The APP requires the review to be undertaken whenever misconduct proceedings result in a written warning or a final written warning. If the Claimant's position is correct that means the APP requires an exercise to be undertaken in all such cases even though in very many of them that exercise will be pointless. The unlikelihood of the APP being intended to have that effect strongly indicates that the review called for by section 8.50.1 was to be a full review not constrained by the outcome of the misconduct proceedings.
>
> 92. The ultimate outcome of the misconduct, vetting, and regulation 13 processes was that the Claimant was discharged in circumstances where her conduct had not resulted in dismissal under the Conduct Regulations. That, however, was not because the vetting or regulation 13 processes unlawfully subverted the outcome of the misconduct proceedings but instead because those processes were applied properly and by reference to the criteria applicable and relevant to them in the particular circumstances. It follows that the Vetting Decision was not unlawful even though it led to the discharge of the Claimant."

160. I have found these authorities of assistance in analysing the issues, but they are all distinguishable from this case on the facts and the legal basis for dismissal/discharge. In *Strathclyde* and *Victor*, the Chief Officers were exercising a statutory power to discharge probationers under regulation 13 of the Police Regulations 2003 on specific grounds. In *Monger*, the Chief Officer was exercising a power under regulation 3 of the Special Constables Regulations 1965 to compel the claimant to retire.

161. In *Victor*, proceedings under the Conduct Regulations resulted in a finding of misconduct and a sanction (a written warning) and there was no material dispute on the facts. In this case, the allegations of rape were strongly disputed; after detailed investigations, there were findings of "no case to answer"; as there were no findings of misconduct, no sanctions were imposed; and therefore the APP guidance at paragraph 8.50.1 was not engaged.

162. It is significant that in *Strathclyde*, the Court found that, in the subsequent regulation 13 dismissal procedure, the Chief Officer had "properly" disregarded the allegation of rape because it was disputed and never proved in the conduct proceedings. He only made his decision on the matters that the Court found were undisputed.

163. In my judgment, as a matter of principle, the statutory misconduct procedures are the intended and proper legal route for the consideration and determination of allegations of misconduct against police officers. As the Defendant rightly accepts, he is required to consider allegations of misconduct through the misconduct procedures, having

regard to paragraphs 2 and 11 of Schedule 3 to the Police Reform Act 2002, and the duty in Part 3 of the Conduct Regulations to investigate complaints and conduct matters.

164. Moreover, the statutory misconduct procedures provide important procedural safeguards for officers, and are intended to comply with the fair hearing requirements of Article 6. Those safeguards should not be circumvented, directly or indirectly, by the use of more informal internal vetting procedures.

165. How then should allegations of misconduct be considered if they arise in the course of a vetting review?

166. The Code of Practice sets out the tests to be applied in vetting decision-making, at paragraph 5.6:

> "….. Having gathered the necessary information and intelligence, each case must be decided on its own merits, taking all relevant information into account. Assess the risks posed by the individual to the public and the police service, giving consideration to threats, vulnerability and impact. In making a decision, this does not establish a precedent, as each case is considered on its own merits.
>
> In making vetting decisions where adverse information has been considered, the decision maker must apply the vetting test.
>
> 1. Are there reasonable grounds for suspecting that the applicant, a family member or other relevant associate:
>
> - is, or has been, involved in criminal activity
>
> - has financial vulnerabilities (applicant only)
>
> - is, or has been, subjected to any adverse information
>
> 2. If so, is it appropriate, in all the circumstances, to refuse vetting clearance?"

167. It was common ground between the parties that this test is derived from the judgment of Coulson J. in *R (A) v Chief Constable of 'C' Constabulary* [2014] EWHC 216 (Admin), [2014] 1 WLR 2276, at [42], albeit that *A* concerned allegations of association with criminal activities on the part of a third party provider of recovery and breakdown services to the police, not vetting of police personnel. I agree with the Claimant that it is important to bear in mind the underlying legal basis for the test, which was set out by Coulson J. at [26] to [34]:

> "(a) Reasonable grounds for suspicion
>
> 26 *In Secretary of State for the Home Department v MB* [2007] QB 415, the Court of Appeal dealt with the problem of control orders under the Prevention of Terrorism Act 2005. Section 2(1) of the 2005 Act allowed the Secretary of State to make control

orders if he or she had reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity. Lord Phillips of Worth Matravers CJ said, at paras 59—60:

> "59. The test of reasonable suspicion is one with which the Strasbourg court is familiar in the context of article 5.1(c) of the Convention. "Having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence": *Fox, Campbell and Hartley v United Kingdom* (1991) 13 EHRR 157, para 32.
>
> 60. Whether there are reasonable grounds for suspicion is an objective question of fact. We cannot see how the court can review the decision of the Secretary of State without itself deciding whether the facts relied upon by the Secretary of State amount to reasonable grounds for suspecting that the subject of the control order is or has been involved in terrorism-related activity."

27 The second part of the test under section 2(1) required a consideration by the Secretary of State of whether it was necessary, for the purposes of protecting the public, to make a control order. Lord Phillips CJ said, at para 63:

> "Whether it is necessary to impose any particular obligation on an individual in order to protect the public from the risk of terrorism involves the customary test of proportionality. The object of the obligations is to control the activities of the individual so as to reduce the risk that he will take part in any terrorism-related activity. The obligations that it is necessary to impose may depend upon the nature of the involvement in terrorism-related activities of which he is suspected. They may also depend upon the resources available to the Secretary of State and the demands on those resources."

This decision was upheld by the House of Lords [2008] AC 440.

28 In *Secretary of State for the Home Department v AF* [2007] EWHC 651 (Admin) at [132] Ouseley J said: "reasonable grounds for suspicion requires the existence of facts or information which would satisfy an objective observer that the person may have done acts within section 1(9) [of the 2005 Act]"

29 There is considerable authority for the proposition that intelligence, without more, is capable of giving rise to reasonable suspicion: see, for example, *Hussien v Chong Fook Kam* [1970] AC 942, 949 and *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286, 294 and 296.

(b) Sufficiency of evidence

30 Plainly, the best evidence of involvement in criminal activity is the existence of relevant criminal convictions or cautions. But the NVP expressly recognises that there may be circumstances in which security clearance will be refused because of intelligence which falls short of the certainty provided by convictions or cautions. There are a number of decisions in which the courts have stressed the need for such material to be used cautiously, usually in the context of enhanced criminal record certificates: see, for example, *R (C) v Chief Constable of Greater Manchester Police* [2010] EWHC 1601 (Admin) and *R (K) v Chief Constable of South Yorkshire Police* [2013] EWHC 1555(Admin); [2013] ACD 343.

31 When considering intelligence of this kind, the decision-maker (and subsequently the court) must bear in mind what Lord Nicholls of Birkenhead said in *In re H (Minors) (Sexual Abuse: Standard of Proof)*[1996] AC 563, 586:

> "When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability . . . Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation . . . The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

(c) The balancing exercise

32 To the extent that the vetting process under the NVP involves a balancing exercise, between the interests of the police and public on the one hand, and the interests of the person being vetted on the other, I consider that a helpful approach is that set out by the Supreme Court in *R (L) v Comr of Police of the Metropolis (Secretary of State for the Home Department intervening)* [2010] 1 AC 410. That was another case concerned with an enhanced criminal record certificate ("ECRC") and the disclosure of information. It was concerned with the sort of information caught by section 115(7)(a) of the Police Act 1997 which, as Lord Neuberger of Abbotsbury MR said at para 77, could include information which either was not relevant or only peripherally relevant but which would unfairly blacken the applicant's name, unjustly prejudice her prospects of obtaining the post, or simply embarrass her. The issue was whether the

> information "ought to be included", which provided the requisite balancing exercise. Lord Neuberger MR went on, at para 81:
>
> > "Having decided that information might be relevant under section 115(7)(a), the chief officer then has to decide under section 115(7)(b) whether it ought to be included, and, in making that decision, there will often be a number of different, sometimes competing, factors to weigh up. Examples of factors which could often be relevant are the gravity of the material involved, the reliability of the information on which it is based, whether the applicant has had a chance to rebut the information, the relevance of the material to the particular job application, the period that has elapsed since the relevant events occurred, and the impact on the applicant of including the material in the ECRC, both in terms of her prospects of obtaining the post in question and more generally."
>
> As he put it, the issue is essentially one of proportionality.
>
> 33 This approach was reiterated more recently by Lang J in *R (A) v Chief Constable of Kent Constabulary* [2013] EWHC 424 (Admin) at [57] where she said:
>
> > "In my view, she should at this stage have considered all the questions in paragraph 18 of the Guidance, namely: (a) is the information from a credible source? (b) are there any special circumstances which lead the decision maker to consider that the information is unlikely to be true? (c) is the information so without substance that it is unlikely to be true?"
>
> 34 The judge stressed that the credibility or reliability of the allegations was a relevant factor to consider in the proportionality balancing exercise, because otherwise the decision-maker is not considering whether the means employed were proportionate to the legitimate aim pursued, or whether a fair balance had been struck between the interests of the community and the protection of the individual's rights. This approach was not criticised in the subsequent appeal."

168. In support of the submission that the threshold for "reasonable grounds to suspect" is low, and far less than the evidence required to convict, Mr Beggs KC referred me to *Parker v Chief Constable of Essex Police* [2017] EWHC 2140 (QB), at [31] – [33], and in the Court of Appeal, at [115][16].

169. Unfortunately, on a literal reading of the test in the Code of Practice, the reviewer only has to have reasonable grounds for suspecting that the applicant is or has been subject to any adverse information. As Mr Beggs KC rightly accepted, the reviewer should be

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considering, not merely whether there is adverse information against the officer, but whether facts or information exist which would satisfy an objective observer that the officer may have committed the acts alleged in the adverse information.

170. In my judgment, where an allegation has been considered and finally determined in misconduct proceedings, by a finding of "no case to answer" or a finding that no misconduct has been proved, usually there will not be any reasonable grounds for suspecting that the officer may have committed the act alleged, save in exceptional cases, for example, where significant new evidence has come to light. The determination in the misconduct proceedings should be respected and accorded primacy. So, in this case, the vetting officers should have made their assessment on the basis that, in the light of the findings of no case to answer, there were no reasonable grounds for suspecting that the Claimant committed the rapes as alleged in allegation B (Judgment/[12]) and allegation D (Judgment/[19]), and therefore those allegations should be disregarded. That was not the approach adopted by the vetting officers in this case.

171. In a case where a vetting officer alights upon evidence of misconduct which was not considered or determined in the misconduct proceedings, I consider that the appropriate course will usually be to pause the vetting process and refer the new allegation for consideration by the appropriate authority, to determine whether misconduct proceedings should be instigated. I note that paragraph 15 of the draft 2024 regulations makes express provision for this ("Identification of potential misconduct during vetting review") but that clause has been omitted from the draft 2025 regulations.

172. This situation arose in this case, and provides a useful illustration. In allegation B, the complainant and the Claimant referred to sexual activity in the complainant's car whilst parked in the Tesco car park. The Conduct Matter Investigation Report did not treat this as evidence of misconduct, nor did the Integrity Assurance Unit in its review on 10 June 2022. However, the Vetting Review Decision concluded, at paragraph 5.4.3, that the Claimant's conduct engaging in sexual activities in public places on more than one occasion could bring the police service into disrepute and damage the trust and confidence between the police and public. This wording echoes the description of "Discreditable Conduct" in the Standards of Professional Behaviour in Schedule 2 to the Conduct Regulations, which are referred to in section 1.3 of the APP, and relied upon in paragraph 5.4.2 of the Vetting Review Decision.

173. In the appeal decision, Commander Russell referred to this finding at paragraph 16. It was then taken into account in paragraph 17 as part of a significant body of information over a period of time which justified removal of vetting. Mr Beggs KC explained to me that sexual activity in the Tesco car park was the basis (at least in part) for the reference in paragraph 17 to "self-acknowledged risky behaviour that …. could damage the public's trust and confidence in policing". Commander Russell placed particular weight on this in the penultimate sentence of paragraph 17:

> "On this basis, I believe the threshold has clearly been met – there is significant adverse information within the allegations which is unlikely to be entirely devoid of truth, plus LDM's admitted risk taking behaviour, plus his lack of respect to colleagues." (*emphasis added)*

174. This was a new allegation, of which the Claimant was not given advance notice, and which the vetting officers apparently treated as Discreditable Conduct under the Standards of Professional Behaviour. Mr Beggs KC submitted it could amount to the criminal offence of offending public decency, and accepted that, if it was to be relied upon, it ought to have been referred as a potential conduct matter by the vetting decision makers. In my view, that would have safeguarded the Claimant against circumvention of the misconduct procedures.

175. For these reasons, Ground 3 succeeds.

Ground 4

Parties' submissions

176. The Claimant submitted that Parliament did not intend vetting dismissals to be determined under the Performance Regulations. They do not come within the meaning of "gross incompetence" and the third stage meeting procedure is inapplicable.

177. Alternatively, if vetting dismissals are within the scope of the Performance Regulations, the proposed third stage meeting procedure frustrates the operation of the Performance Regulations, by stripping them of their content and efficacy, including the safeguards of disciplinary proceedings that are compliant with Article 6 ECHR. As the panel has no power to re-open the vetting decision, the process deprives the officer of any meaningful opportunity to challenge the finding of gross incompetence.

178. The Defendant, supported by the College of Policing, submitted that loss of vetting clearance could come within the definition and scope of "gross incompetence". Referring a police officer to a stage three hearing did not frustrate either the safeguards or protections of the Performance Regulations.

Conclusions

179. The Performance Regulations apply to "unsatisfactory performance or attendance" by a police officer which is defined in regulation 4(2) as "an inability or failure of a police officer to perform the duties of the rule or rank the officer is currently undertaking to a satisfactory standard or level".

180. There are specific provisions in place for "gross incompetence" which is defined in regulation 4(1) as:

> "a serious inability or serious failure of a police officer to perform the duties of the officer's rank or the role the officer is currently undertaking to a satisfactory standard or level, without taking into account the officer's attendance, to the extent that dismissal would be justified…".

181. Applying the clear and natural meaning of the language used, in their statutory context, the terms "performance or attendance" and "gross incompetence", as defined, clearly relate only to an officer's competence, and his performance of his duties. They do not

include circumstances where an officer is able and willing to perform his duties, but is prevented from doing so because his vetting has been withdrawn.

182. The structure of the Performance Regulations, in particular, the first, second and third stages, demonstrate that their purpose is to tackle and, if possible, improve under-performance.

183. The Home Office Guidance describes the aim of the procedures as follows:

> "14.3 The aim of the procedures is to improve performance and attendance in the police service and they are intended to be positive and supportive. All such procedures should be dealt with in a timely manner, while maintaining confidence in the procedures. Early intervention by line management is often the best practice ….
>
> 14.4 In general terms, the test of a good outcome will be improvement in performance and attendance. There will, however, be cases where it will be appropriate for managers to take formal action and the procedures are outlined in this section.
>
> ….
>
> 14.7 Therefore, in making a decision whether the performance or attendance is unsatisfactory or not, the person(s) conducting the meeting will need to exercise reasonable judgement and give appropriate careful consideration to the evidence."

184. Regulation 32 specifies six sets of circumstances in which a third stage meeting may be required without a prior first or second stage meeting. Withdrawal of vetting is not specified.

185. The Defendant relied on sub-paragraph (1)(a) which applies where the appropriate authority "decides that the performance of a police officer constitutes gross incompetence". However, the Claimant's case does not fall within the scope of sub-paragraph (1)(a) because the terms "performance" and "gross misconduct" do not include circumstances where an officer is able and willing to perform his duties, but is prevented from doing so because his vetting has been withdrawn.

186. Alternatively, if (contrary to my view) vetting dismissals are within the scope of the Performance Regulations, the proposed procedure frustrates their operation by stripping them of their content and procedural safeguards. The officer is deprived of any meaningful opportunity to challenge the allegation of gross incompetence. The panel is not able to assess or determine the allegation of gross incompetence, in a fair disciplinary hearing which complies with Article 6. The withdrawal of the minimum level of clearance is a *fait accompli* which the panel is not permitted to re-open, and therefore the findings of gross incompetence and the outcome of dismissal are inevitable.

187. Mr Matthew Cane, General Secretary of the Police Federation, made a witness statement on 2 January 2025 which exhibited an anonymised decision of a third stage

meeting panel in the case of a police officer ("Y") whose vetting clearance had been withdrawn, together with the Defendant's Case Summary for the panel.

188. The Case Summary stated as follows:

> "20. In summary, it is the AA's submission that where an officer's vetting clearance is removed, the officer will be grossly incompetent because:
>
> (a) Recruitment Vetting is the lowest level of vetting and is a requirement of every MPS officer's role; and
>
> (b) In any event, the officer will be unable to perform their role to a satisfactory level because they will be unable to have unsupervised access police assets including police information, systems and premises.
>
> **The Issues for the Panel**
>
> First issue: Gross Incompetence
>
> 21. The panel must decide pursuant to regulation 45(1)(c) whether "the performance of the officer concerned constitutes gross incompetence, unsatisfactory performance or neither".
>
> 22. The withdrawal of PC [Y]'s RV clearance has rendered him grossly incompetent.
>
> There can be no dispute that:
>
> (a) PC [Y]'s vetting clearance was withdrawn on [date].
>
> (b) PC [Y] appealed that decision.
>
> (c) The appeal was dismissed ….
>
> (d) There has been no challenge to the vetting appeal decision by way of judicial review.
>
> 23. While PC [Y] complains about the decision to withdraw his RV clearance or the appeal process, that is not a matter over which the panel has any jurisdiction. The vetting clearance decision (and appeal) stands as a lawful and binding public law decision until such time as it is quashed following any successful claim for judicial review. No such remedy has been sought by PC [Y].
>
> 24. Therefore, this panel is concerned solely with the question of whether the withdrawal of RV clearance renders PC [Y] grossly incompetent and, if yes, the appropriate outcome.

> 25. As to whether the withdrawal of his vetting clearance has rendered PC [Y] grossly incompetent, the panel must consider whether, pursuant to regulation 4(1), he has "a serious inability … to perform the duties of the officer's rank or the role the officer is currently undertaking to a satisfactory standard or level…to the extent that dismissal would be justified".
>
> 26. The AA submits that PC [Y] does have such a serious inability. Without vetting clearance, PC [Y] cannot have unsupervised access to police premises or any access to police information systems. He cannot perform the duties of his rank or role at all, let alone to a satisfactory standard or level. A police officer cannot realistically be found alternative police duties or an alternative police role that does not require any vetting clearance.
>
> 27. This much is recognised in the Vetting Code of Practice at [5.87] and APP Vetting at [8.47.4]….
>
> 28. Accordingly, the AA submits that PC [Y] is grossly incompetent and, moreover, that there is no other finding reasonably open to the panel in circumstances of the case."

189. The panel accepted the Defendant's submissions and decided that the loss of vetting clearance rendered PC [Y] "grossly incompetent" and dismissed him with immediate effect.

190. The panel's reasons were as follows:

> "There is no dispute that PC [Y] had his vetting removed on [date] ….He appealed the decision which was dismissed on [date]. Prior to losing his vetting he had the most basic level of vetting (Recruit Vetting). In the absence of any vetting, he is unable to attend police premises unaccompanied and is unable to access any police information or any of the police systems, including the computers.
>
> As a panel we are in no position to challenge or review that decision. PC [Y] could have judicially reviewed that decision but has chosen not to do. In these circumstances, it is submitted by the Appropriate Authority that PC [Y] is grossly competent as he has "a serious inability to perform the duties of his rank or role to a satisfactory standard or level.
>
> On behalf of PC [Y] it is submitted that in the absence of any proof of any wrongdoing by the officer, it would be wrong to find the officer is grossly incompetent. It is submitted the Performance Regulations require this panel to make a finding based upon his performance and ought not to make a finding against him based merely on the fact that he has lost his vetting,

> and it is only for that reason that he cannot perform his role to a satisfactory standard."
>
> *[Reference to Code of Practice paragraph 5.7 and APP paragraph 8.74.4]*
>
> …. We find that the loss of his vetting clearance, in accordance with the above Code and APP renders PC [Y] "grossly incompetent"."

191. I have no doubt that the Claimant's case will be dealt with in the same manner under the Performance Regulations, with the same outcome.

192. I have considered the cases of *Watson v Police Service of Northern Ireland* [2024] NICA 7 and *R (Chief Constable of the Thames Valley Police) v Legally Qualified Chair* [2024] EWHC 1454 (Admin), in which the courts held that misconduct which occurred prior to attestation as a police constable was outside the jurisdiction of the relevant Conduct Regulations, but failure to disclose such misconduct could amount to misconduct under the Conduct Regulations. The courts observed, in *obiter dicta*, that another possible way of addressing non-disclosure of past misconduct was by withdrawal of vetting clearance, and dismissal for gross incompetence under the relevant Performance Regulations. However, those courts did not have the benefit of hearing the submissions made by the Claimant in this case which have identified the legal flaws in this route.

193. In my judgment, it is clear that the procedure under regulation 32 of the Performance Regulations has been adopted as a mechanism to overcome the absence of any lawful statutory procedure for a vetting dismissal. However, I do not consider that it is fit for purpose. As the panel has no power to re-open the vetting decision, the process deprives the officer of any meaningful opportunity to challenge a finding of gross incompetence. The panel merely confirms a decision that has already been made, by an internal vetting regime which is not Article 6 compliant. Where basic vetting clearance has been withdrawn, the only outcome open to the panel is dismissal.

194. Under this process, the normal safeguards afforded by the Performance Regulations at a third stage meeting on grounds of gross incompetence are ineffective. These safeguards include a full hearing, where evidence will be considered and witnesses may be called, in which the panel will determine whether or not gross incompetence has been established. If a finding of gross incompetence is made, before an outcome is determined, the panel must have regard to the officer's personal record and any mitigation or references he may put forward, but this is meaningless if the only available outcome is dismissal. There is a right of appeal to the Police Appeals Tribunal but it will be subject to the same restrictions as the panel.

195. In my view, dismissal without notice for gross incompetence will be a serious stain on a police officer's record when seeking alternative employment, in addition to the loss of vetting clearance. It ought not to be imposed without an effective and fair hearing.

196. For these reasons, Ground 4 succeeds.

Ground 5

197. In view of my conclusions on Grounds 1 to 4, the vetting decisions in the Claimant's case will have to be quashed and re-considered. In those circumstances, I consider that it is inappropriate for me to determine the rationality challenge under Ground 5.

Final conclusion

198. The claim for judicial review is allowed on Grounds 1 to 4, and the Defendant's decision to withdraw the Claimant's vetting, which was upheld on appeal, and to refer him to a third stage meeting, will be quashed by order of the Court.

199. Although the Claimant has alleged that the terms of the Code of Practice and the guidance in the APP are unlawful in some respects, his claim has only been made against the Defendant, not the College of Policing or the Secretary of State and therefore it would not be appropriate for the Court to make any order in regard to the Code of Practice and the APP. I anticipate that, in the light of my judgment, and any judgment on appeal, revisions to the Code of Practice and APP will be considered and implemented where appropriate. However, the lawfulness of the non-statutory procedure considered in this judgment may shortly be superseded by a new statutory scheme for vetting. After careful consideration of Counsels' submissions, I have concluded that the proposed declarations are not appropriate in this case, because the key conclusions in the judgment ought to be read in their proper context, in the judgment as a whole.