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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JR91
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Mr McQuitty BL (instructed by Campbell & Caher, Solicitors) for the applicant
Mr Robinson QC with Mr Henry BL (instructed by the Crown Solicitor's Office)
for the proposed respondent

QUINLIVAN J

Introduction

[1] The applicant, JR91, is a serving police officer in the Police Service of Northern Ireland (hereinafter "PSNI"). He is challenging the decision of the PSNI, made under its Service Confidence Procedure (SCP), to subject the applicant to a risk management plan, which, in summary terms, imposes limitations on the work that the applicant can undertake as a serving police officer.

[2] Mr McQuitty BL appeared for the applicant, instructed by Campbell & Caher, Solicitors. Mr Robinson QC with Mr Henry BL, appeared for the proposed respondent, instructed by the Crown Solicitor's Office. I am indebted to Counsel for the quality of their oral and written submissions.

[3] In 2017, the applicant was the subject of a criminal investigation, involving allegations of Assault Occasioning Actual Bodily Harm against a woman with whom he had been involved in a sexual relationship. Her identity has been anonymised and she is known as K in these proceedings. The applicant was advised that the PPS had made a decision not to prosecute him on 22 February 2018.

[4] The applicant at that time had been made subject to a misconduct allegation under the Police (Conduct) Regulations (NI) 2016. He was suspended from duty for a period and interviewed by the Professional Standards Department (PSD) of the

PSNI. Ultimately, a decision was taken, on the basis of legal advice, not to proceed with the misconduct allegations.

[5] On or about January 2019 the applicant was advised that he was being made subject to the PSNI's Service Confidence Procedure. There were a number of stages to the Service Confidence Procedure: initially a Service Confidence Panel was convened which made recommendations to the Nominated Assistant Chief Constable (ACC Todd); thereafter ACC Todd concluded that the applicant should be subject to the Service Confidence Procedure and imposed a risk management plan, in line with the Panel's recommendations; following an appeal from the decision of ACC Todd to DCC Martin, the decision that the applicant should be subject to a risk management plan was upheld, albeit the decision and the particulars of the restrictions varied from the previous decisions. Ultimately, it is that final decision, dated 8 July 2019, which is challenged by way of judicial review, although the applicant complains of various procedural irregularities, leading he submits to unfairness, which occurred at each stage of the process. The applicant further complains that the decision was irrational, in breach of his Article 8 rights and that the Service Confidence Procedure itself is unlawful.

[6] Judicial review proceedings were issued against the PSNI on 4 October 2019. Anonymity was subsequently granted to the applicant by Mrs Justice Keegan. The applicant lodged an amended leave application on 15 September 2020. The leave application proceeded before me on 12 October 2020. The hearing did not conclude on that date and the applicant made a further application to amend his Order 53 statement, which application was lodged on 4 November 2020. The hearing concluded before me on 6 November 2020.

The Background and History

[7] The applicant is a serving police officer within the PSNI with a number of years' service. In and about August 2016 the applicant, who is married, began a sexual relationship with a woman known as K and this relationship continued until in and about the Summer of 2017 when the relationship became known to the applicant's wife and K's husband.

[8] On 20 August 2017, K went to the PSNI to make a complaint that the applicant's wife had been harassing her.

[9] During the course of making this complaint K made a number of disclosures about the nature of her sexual relationship with the applicant which caused police concern. According to the statement of a female police officer, K claimed that she had sustained injuries in the course of her sexual relationship with the applicant, including: three broken ribs; black eyes; being choked unconscious on a number of occasions; and sustaining cuts, on each side of her body, from her wrist to her waist with an unknown object (police observed scarring from her wrist to her elbow and did not examine K further as she was fully clothed). She further claimed that these

sexual acts derived from the 'Daddy Dom/Little Girl' community, where the dominant character would play the part of 'Daddy' and the submissive character would play the role of a little girl, who does what 'Daddy' tells her to do. The police statement notes that K stressed that she had consented to being injured whilst engaging in sexual acts with the applicant. According to the police officer's statement, K presented as extremely upset when making these disclosures. Further, as she left the police station she stated that she was worried that she would end up dead.

[10] On 24 August 2017 K again attended the police station where she made a statement of complaint against the applicant's wife. She was further interviewed by police about the allegations she had made in relation to the applicant. That interview was recorded on a Body Worn Video by one of the police officers and a transcript of the interview is available. In broad terms she repeated the allegations summarised above and I simply note the following:

(i) She repeated on more than one occasion that this was a relationship between two consenting adults and that the nature of the relationship was something which had been discussed at length, including the nature of any physical assaults which were consented to.

(ii) She further suggested that the applicant had initially struggled with the violent/bondage aspect of the relationship.

(iii) She stated that she had never attended hospital in relation to any of the injuries she had sustained but repeated that she had sustained the injuries she had described.

(iv) She suggested that at one stage during the relationship she had volunteered to sign a consent form in case something went "horribly wrong".

(v) She made clear that she did not want the applicant to suffer any adverse consequences as a result of what she had said.

(vi) She refused to sign a witness statement and did not then, nor has she since, made a formal complaint against the applicant.

[11] A PACE interview was conducted with the applicant on 29 September 2017 in relation to an allegation of Assault Occasioning Actual Bodily Harm. The applicant made a 'No Comment' interview.

[12] Following that interview, a decision was made by the PSNI to investigate the applicant for gross misconduct arising from the allegations which had been made by K and a Discipline Branch Investigating Officer was appointed. A Regulation 16 Notice was served on the applicant on 11 October 2017.

[13] The PPS made a decision not to prosecute the applicant on 21 February 2018. The reason given for the decision not to prosecute the applicant was the absence of a formal complaint by K and her refusal to consent to her medical records being accessed, consequently there was no evidence to prove the existence of injuries.

[14] In the course of the internal police misconduct investigation, the applicant's phone was seized and examined, nothing of an evidential nature was found.

[15] The applicant was interviewed on 28 June 2018 by the Professional Standards Department under the misconduct regulations. He confirmed that he had had a sexual relationship with K. He stated that K initiated the sadomasochism element of the relationship. He disputed a number of the statements made by K in that while he accepted that he had consented to some of what she suggested, such as: role play, wrestling, handcuffing, he maintained that he had refused to participate in erotic asphyxiation or branding and cutting. He denied that he had caused any of the injuries that K had alleged in her account to police. He maintained that he had been uncomfortable with this aspect of the relationship but went along with it because of a veiled threat by K that she would tell his wife about their relationship.

[16] He accepted that the Daddy Dom/Little Girl aspect of the relationship had occurred which, as he described it, involved K dressing up and his treating her like a little girl. He said this role play was not confined to the sexual aspect of the relationship but was a role play that featured throughout the relationship. He confirmed that the role play included K and the applicant playing their respective roles and in the course of that role play having sexual relations.

[17] The applicant denied cutting the applicant in the manner she had described. He denied causing her the injuries she had described, such as breaking her ribs and he denied any involvement in asphyxiation.

[18] Following the disciplinary investigation and upon consideration of the report of the Investigating Officer, on 29 September 2018, the Appropriate Authority, Supt McCaughan, concluded that the applicant had a case to answer and recommended that a misconduct hearing be held to determine whether he was guilty of Gross Misconduct. Thereafter, a decision was made, on foot of legal advice, that the misconduct proceedings be abandoned.

[19] Following that decision, in December 2018, Supt McCaughan, recommended to T/Chief Supt Bond that she initiate the Service Confidence Procedure. A Service Confidence Panel was established. It should be observed, in the context of an allegation of apparent bias that the membership of the Panel, which comprised six people, included: Supt McCaughan and T/Chief Supt Bond.

[20] Under the SCP, the Service Confidence Panel is not the decision-maker, rather the panel makes a recommendation to the Nominated Assistant Chief Constable. In

the instant case the panel recommended that: in order to regain confidence in the officer; and, to protect public confidence in the PSNI, the SCP should continue and that the applicant should:

(i) Not remain in his current role, nor should he be permitted to return to his previous role.

(ii) Be redeployed within District Policing to somewhere that he would not have 'face to face' contact with children or vulnerable persons for a minimum period of 12 months,

(iii) Be excluded from applying for a role which requires enhanced vetting for a period of 36 months.

(iv) Be prevented from applying for particular roles within the PSNI.

(v) Be prevented from serving in a particular geographic area.

[21] The decision of the Service Confidence Panel was communicated to the applicant by letter dated 18 February 2019. The applicant was then given an opportunity to make written representations to the Nominated Assistant Chief Constable, ACC Todd and by correspondence dated 1 March 2019 he made written representations to T/Chief Supt Bond, wherein he raised issues about the fairness of the Service Confidence Procedure and also made representations in relation to the substantive decision and the recommendations made by the panel.

[22] Thereafter, he sought, in advance of any decision by the ACC: full disclosure of all materials considered by the Panel; and an opportunity to make written representations to the ACC in light of that material.

[23] The applicant was provided with the transcripts of his interview with the Professional Standards Department and received those before making written representations to ACC Todd.

[24] ACC Todd's decision was purportedly made on 30 April 2019 and communicated to the applicant under cover of an email of the same date. However, it is apparent from my reading of the documents submitted (and there is of course no affidavit evidence from PSNI at this juncture) that ACC Todd, initially made a decision on or about 17 April 2019. The applicant was copied into an email exchange which attached the decision which was entitled 'Appeal against Decision under Service Confidence Procedures - Applicant's name.' The decision then reads as the outcome of an *appeal* from the panel's decision.

[25] Thereafter, on 30 April 2019, the applicant received a further email, communicating the decision. This decision was entitled 'Decision under Service Confidence Procedures – Applicant's name.' The decision is essentially in the same

terms as the earlier decision. As will appear further below, the applicant complains that ACC Todd fundamentally misunderstood his role when making his decision and, in the submissions before this Court the proposed respondent did not dispute that ACC Todd had initially treated his role as that of someone determining an appeal. Thereafter, it appears he was advised of the error and issued the decision communicated to the applicant on 30 April 2019.

[26] The applicant appealed the decision to DCC Martin on 3 May 2019. A decision issued on 8 July 2019 and was received by the applicant on 11 July 2019. The applicant thereafter issued proceedings. In fact, although the outcome of the decision was communicated to the applicant on 11 July 2019, it was not until after the issue of pre-action correspondence that DCC Martin's reasoned decision was communicated to the applicant.

Amenability of Decision to Judicial Review

[27] A significant focus of both the applicant and proposed respondent's submissions to this Court was on the issue of whether the applicant could proceed by way of judicial review in relation to decisions made under the SCP. While I wish to acknowledge the submissions both oral and written from both parties, I propose to deal with this issue somewhat more shortly than is reflected in the detailed submissions received by me. I have read all of counsels' written submissions and considered all of their oral submissions on this issue and, whilst I do not recite them all below, they have been taken into account.

[28] The proposed respondent relied heavily on the case of *JR26* [2009] NIQB 101. In that decision, Weatherup J relied upon a judgment of the English Court of Appeal in *R (Tucker) v The National Crime Squad Director General* [2003] EWCA Civ 3.

[29] The applicant sought to persuade me that *JR26* was wrongly decided and contended that the approach in *JR26* was wrong and that the correct test was that articulated by Kerr J in *Re McBride's application* (1999) NI 299 wherein he said at p310:

> "It appears to me that an issue is one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally and not merely on an individual or group. That is not to say that an issue becomes one of public law simply because it generates interest or concern in the minds of the public. It must affect the public rather than merely engage its interests to qualify as a public law issue. It seems to be equally clear that a matter may be one of public law whilst having a specific impact on an individual in his personal capacity."

[30] The proposed respondent did not dispute the correctness of the principle outlined in *McBride* but rather contended that *JR26* represented the application of *McBride* to cases involving the SCP.

[31] I propose to deal with the applicant's submission on *JR26* very shortly. I am not persuaded that *JR26* was incorrectly decided or represented some departure from *McBride.* Neither do I consider that *JR26* represents, or purports to represent, a definitive judgment that a challenge to the SCP is not susceptible to judicial review. I propose to review those authorities which are most relevant to the issues in this case, including *JR26,* and apply them to the case before me.

[32] *JR26* was concerned with a challenge taken to decisions made under the SCP, as is the instant case. In *JR26* the PSNI advised the applicant that they had received intelligence from several sources which indicated that the applicant was engaged in illegal drug activity. Disciplinary proceedings were initiated but didn't proceed. Ultimately the PSNI used the SCP and as a result of the Procedure the applicant was transferred from the crime team to new duties within the PSNI.

[33] The respondent contended that this was a private law dispute and not a public law dispute that should be subject to judicial review. Weatherup J relied in his judgment on *Tucker* referred to above. Key to his consideration of *Tucker,* was the reliance which had been placed in *Tucker* on the approach of Pitchford J in *R(Hopley) v Liverpool Health Authority* (30 July 2002 u.r) who identified three questions in determining whether or not there was a public law element in the case:

> "(i) Whether the defendant was a public body exercising statutory powers.
>
> (ii) Whether the function being performed in the exercise of those powers was a public or private one.
>
> (iii) Whether the defendant was performing a public duty owing to the claimant in the particular circumstances under consideration." (21)

[34] In *Tucker* which I will discuss further below, the Court concluded that the third criterion had not been met. In *JR26* Weatherup J concluded, at (22) that:

> "In considering whether there is an element of public law I do not accept that the transfer decision taken in the present case can become a public law issue amenable to judicial review by focusing on the potential for disciplinary proceedings, when the function being performed by the decision-maker related to procedures that are implemented only in the event that disciplinary

> procedures are not appropriate or achievable. Nor do I accept that the respondent was performing a public duty owed to the applicant. The decision that is the subject of this application is not subject to judicial review."

[35] Before dealing with *Tucker* I want to refer to another judgment from this jurisdiction, that of *Farrell, Constable Sean & anor* [2008] NIQB 159 which is relevant. This is a decision of Gillen J, as he then was. In that case the applicants challenged decisions transferring them from duty at Dungannon PSNI station to duty at Enniskillen and Omagh PSNI stations. The background to the case was that allegations of bullying had been made against both applicants, albeit it appears that disciplinary proceedings had not been initiated.

[36] The issue of the justiciability of the decision was raised and the judgment of *Tucker* referred to the Court. Gillen J referred to paragraphs 22, 27 and 32 of *Tucker* and went on to state at (16):

> " . . . I consider the current case is distinguishable from Tucker's case because of the disciplinary element present. These men are not being transferred because of operational needs as opposed to organisational requirements in a disciplinary setting."

[37] Gillen J also referred to a judgment of the English High Court in *R(O'Leary) v Chief Constable of Merseyside* [2001] EWHC Admin 57. *O'Leary* was a judicial review of a decision to transfer the applicant to uniform duties rather than to CID in light of a background of disciplinary charges. The applicant successfully judicially reviewed his redeployment on the grounds of procedural fairness.

[38] *Tucker* was concerned with a Detective Inspector who had been seconded to the national crime squad and whose secondment was subject to summary termination. The terms of his contract had provided that the Director General could, in exceptional circumstances, terminate his secondment without notice. The background to the termination was a covert investigation into drug related crime. Whilst other officers were returned home for disciplinary investigation, the appellant was returned to his home force without disciplinary investigation but on the basis that the Director General had lost confidence in his management performance.

[39] In *Tucker* the Court of Appeal concluded that the decision of the Director General was not amenable to judicial review however the discussion which precedes the reference to *Hopley* is relevant. At (13) the Court of Appeal stated:

> "13. The boundary between public law and private law is not capable of precise definition, and whether a decision has a sufficient public law element to justify the

> intervention of the Administrative court by judicial review is often as much a matter of feel, as of deciding whether any particular criteria are met. . . .
>
> 14. The starting point, it seems to me, is that there is no single test or criterion by which the question can be determined."

[40] Thereafter, having cited with approval the passage from *Hopley* quoted above, the Court of Appeal stated:

> "Applying those criteria, with which I agree, to the present case it seems to me clear that the third criterion was not met. The Deputy Director General in sending the Appellant back to his force was not performing a public duty owed to him. The decision taken in relation to the Appellant was specific to him. . . . it was taken because of perceived deficiencies in his skills and conduct as an NCS officer. It was an operational decision taken because it was decided that he fell short of the particular requirements that were necessary to work in the NCS."

[41] That passage did not, however, conclude the Court of Appeal's consideration of the issues. In a discussion about the *Nature of the decision* commencing at (32) the Court of Appeal highlighted the fact that:

> "There was no disciplinary element to the decision in the Appellant's case. He was returned to his force because the Respondent had lost confidence in his ability to carry out his responsibilities. It seems to me that this was an entirely operational decision similar to the kinds of decision that are made with officers up and down the country every day of the week. Examples are transferring officers from uniform to CID or from traffic to other duties. These, to my mind, are run of the mill management decisions involving deployment of staff or running the force. They are decisions that relate to individual officers and have no public element. . . . The decision is different where, however, disciplinary proceedings have been taken against an officer and the ordinary principles of fairness have been breached."

[42] *Tucker* also cited the judgment of *O'Leary* discussed above, with approval.

[43] The applicant also referred me to a judgment of the English High Court *R(Woods & ano'r) v Chief Constable of Merseyside Police* [2015] 1 WLR 539. This case

involved the use of the Service Confidence procedure in relation to the applicants. That court considered the judgment in *Tucker* and asked itself the question 'Is there a Sufficient Public Law Element?' and went on to state:

> "24. I remind myself that in Tucker the court said that this question is decided often as much as a matter of feel rather than whether any particular criteria are met. D is a public body and Cs have no private law remedy. I have to focus on the third question elicited from the Hopley decision, namely whether D was performing a public duty owed to Cs in the particular circumstances under consideration. I have come to the conclusion that D was."

[44] In the discussion that followed in *Woods* the court*:*

(i) Rejected the suggestion that the SCP was quasi-disciplinary (28).

(ii) Identified as a distinguishing factor from *Tucker* the fact that the procedure "has the capacity to be far from temporary" in contrast to the one-off decision in *Tucker.* (28)

(iii) Further identified as a distinguishing factor the fact that being subject to an SCP was likely to be a significant disadvantage to anyone applying for promotion. (28)

[45] My analysis of the judgments referred to above is that the decision as to whether or not the decision is amenable to judicial review is "not capable of precise definition, and whether a decision has a sufficient public law element to justify the intervention of the Administrative court by judicial review is often as much a matter of feel, as of deciding whether any particular criteria are met." (*Tucker* at (13)). The overarching question in my view is whether there is a public law element to the decision in the instant case.

[46] I agree with the applicant that the starting point is *McBride* and as noted above, that is not disputed by the proposed respondent.

[47] In the instant case I have reached the conclusion that the applicant has established that there is an arguable case that this decision is amenable to judicial review. As noted in *McBride*:

> "an issue is one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally and not merely on an individual or group."

[48] The proposed respondent is a public body and, in my opinion, it is arguable that the exercise being performed by the PSNI in the instant case is a public one. The Service Confidence Procedure is designed to "manage risks posed when confidence in the integrity, honesty and trust of an officer has been lost." The context in which that finding has been arrived at in relation to the applicant is important. I am inclined to accept that not every instance of the Service Confidence Procedure being used will render the decision susceptible to judicial review. However, in the instant case the context in which the decision is made is that DCC Martin has formed an honest belief that the allegations made by K, which include allegations of violent assault upon her by a serving police officer, are more likely to be true than not. That is an issue in respect of which it appears to me, "involves a matter of public interest in the sense that it has an impact on the public generally and not merely on an individual or group." (*McBride)* In my view the issues raised in the SCP in the instant case means that the exercise being performed by PSNI is a public one, and one which has an impact upon the public generally.

[49] It assists I think if one looks at the issues raised in this case from the perspective of the position of the general public. Against the backdrop of criminal and disciplinary proceedings taken against the applicant, were the PSNI to fail to consider the question of whether the applicant's alleged conduct raised serious concerns or gave rise to issues of risk management, this would clearly raise issues of legitimate public concern. It seems to me to follow that the decision in the instant case has a public law element and is amenable to judicial review.

[50] An issue which arises from the authorities referred to above, which I should address, is the issue of whether or not there is a *disciplinary* element to these proceedings. *Woods* rejects the suggestion that the SCP is "quasi-disciplinary.' Equally, *JR26* concludes that the fact that had it been possible to disclose the information to the applicant would have resulted in criminal or disciplinary proceedings does not convert an otherwise operational or management decision into a disciplinary decision. Both authorities are directly concerned with the SCP, *Woods* is not binding upon me, but the approach adopted accords with that adopted in *JR26*. I consider myself bound by *JR26* on this issue.

[51] I should further note that as well as my general approach to the issue of public interest outlined above, other factors which have influenced my decision are the factors identified in *Woods:* namely, the fact that the procedure is likely to be far from temporary; and the fact that an SCP is likely to be a significant disadvantage to the applicant in terms of accessing promotion in the future.

[52] For the aforementioned reasons, I am of the view that the applicant has an arguable case that the imposition of the SCP in the instant case is amenable to judicial review.

Procedural Fairness

[53] The applicant makes a number of complaints about procedural fairness. Some of those complaints are specific to aspects of the procedure, in that he complains about apparent bias in relation to the membership of the Service Confidence Panel and ACC Todd's misunderstanding of his role. Other complaints are relevant to the overall Procedure thus, in general terms, he complains about non-disclosure throughout each stage of the procedure, likewise he complains about the absence of an oral hearing at various stages of the procedure.

[54] In relation to the first category of complaints, I am mindful that, although there may be merit in a discrete complaint about a particular aspect of the procedure, the final decision was that of DCC Martin and the right to an appeal is capable of rectifying problems which arose at earlier stages in the procedure. A complaint about the Service Confidence Panel or ACC Todd may therefore, ultimately be rectified by an appeal procedure which is conducted fairly. The question for the Court will be whether any complaint about the earlier stages of the proceedings led to an unfairness which compromised the fairness of the proceedings as a whole. It is proposed to address the issues which arise at each stage of the process in turn.

Service Confidence Panel

Applicant's Right to be Heard – Lack of an Ethical Interview

[55] The applicant makes two complaints about the right to be heard which appear to me to overlap. He firstly complains that the PSNI failed to conduct an 'ethical interview' and further complains that he was not given an opportunity to be heard, either orally, or in writing, in advance of the panel's decision to make recommendations to ACC Todd.

[56] The Service Confidence Procedure provides that when:

> "serious concerns exist about the conduct of an officer, those concerns will be addressed by instigating criminal or misconduct proceedings wherever possible ... This Service Confidence Procedure (SCP) will only be used when this is not possible, for example where then information is credible intelligence that cannot be used in an investigation, or when proceedings have been concluded and yet serious concerns remain."

[57] The Service Confidence Procedure provides at Part 5 that where:

> "'serious concerns' exist it may be appropriate to conduct an ethical interview with an officer so they can answer the

> concerns and be advised of the potential for invoking the SCP. . . .
>
> An ethical interview is not a disciplinary interview. The purpose of the ethical interview is to raise concerns with an individual with a view to managing the concerns or *give them an opportunity to respond to the allegation or information, offer an explanation,* or improve their ethical behaviour." (Emphasis added)

[58] In my view the applicant's complaint about the lack of an ethical interview and the failure to allow the applicant to make representations in advance of the panel determining whether the SCP should proceed is without merit. I say this because it seems to me apparent, on any analysis, that the applicant was aware of the case against him at this stage and also because of the preliminary nature of the exercise being performed by the panel.

[59] The applicant had been investigated in relation to an alleged AOABH. In the course of that investigation he had been interviewed by the PSNI and was informed about the allegations which had been made against him.

[60] He was then subject to misconduct proceedings. In the course of those proceedings, as is apparent from the transcript of the interview with the Professional Standards Department he had seen the transcript of K's Body Cam interview with police and he was questioned in detail about the allegations made. He took the opportunity to give a full response to those allegations. He admitted some aspects of the allegations and denied others.

[61] The applicant was fully aware that the reason a panel was convening in order to determine whether the SCP should continue was because of the allegations made by K. He had already had two opportunities to respond to those allegations and in the latter interview with PSD he had availed of that opportunity in full.

[62] On the issue of the ethical interview, as noted above, an ethical interview is not mandatory. Its purpose is to "raise concerns with an individual with a view to managing the concerns or *give them an opportunity to respond to the allegation or information, offer an explanation,* or improve their ethical behaviour." The applicant had, in the interview with the PSD been given an opportunity to respond to the allegations made and to provide an explanation for his conduct. In my view therefore, the failure to offer an ethical interview, did not amount to a departure from the SCP on the facts of the instant case, nor did it give rise to any procedural unfairness.

[63] I form the same view in relation to the failure to give the applicant an opportunity to make representations, orally, or in writing. I note in this regard that we are looking at a very preliminary stage in the SCP, namely the stage at which a

panel was convened to determine whether the SCP should continue and to make recommendations to the decision-maker, the Nominated ACC. The applicant was going to have an opportunity to make representations to the Nominated ACC in response to the decision of the panel and the recommendations made. In my view no unfairness flowed from the decision not to conduct an ethical interview, nor from the decision not to permit the applicant to make representations, either orally, or in writing, in advance of the panel convening.

Non-Disclosure

[64] The issue of non-disclosure is an issue raised at each stage of the process. Ultimately it is an issue I propose to review when looking at DCC Martin's decision and considering the fairness of proceedings as a whole.

Apparent Bias

[65] The applicant's initial Order 53 complained about the presence of T/C Supt Bond on the Panel. Upon receipt of the Panel's minutes, the applicant became aware of the presence of Supt McCaughey on the Panel. In his amended Order 53 statement of 15 September 2020, he alleged apparent bias in relation to both officers.

[66] It is firstly useful to look at the role of the Service Confidence Panel in the overall scheme of the Procedure. The Procedure states at (7) that "[o]n receipt of 'serious concerns' the Chief Superintendent, Professional Standards (or deputy) may convene a Service Panel. … The purpose of the panel is to consider the nature of the concerns, consider the risks that are posed, and to make a recommendation to the relevant Assistant Chief Constable (ACC) for decision." The Procedure identifies a number of persons who may comprise the panel, including the Chief Superintendent Professional Standards (as chair).

[67] In relation to the complaint about the presence of T/ Chief Supt Bond, it is my view that this complaint is without merit. The Procedure clearly envisages that if someone identifies 'serious concerns' about an individual officer, this should be drawn to the attention of the Chief Superintendent who will then convene a panel. The Procedure further envisages that the Chief Superintendent will sit on the panel. That is what happened in this case. Whilst I acknowledge that the Chief Superintendent will act as a filter for 'serious concerns' and can refuse to convene a panel in an appropriate case I am not persuaded that, having received a communication of 'serious concerns' the fact that the Chief Superintendent convenes a panel, and thereafter sits as chair of the panel, as envisaged by the Procedure amounts to apparent bias. I therefore dismiss the application for leave on this issue.

[68] I have greater difficulty when it comes to the role of Supt McCaughey. As outlined above, Supt McCaughey had a role in the disciplinary proceedings against the applicant. He was the Appropriate Authority and conducted an initial assessment of the applicant's conduct based upon the report of the Investigating

Officer. He arrived at a determination that misconduct proceedings for gross misconduct should be brought against the applicant and when those misconduct proceedings were not in a position to proceed he raised 'serious concerns' with T/Chief Supt Bond, within the meaning of the Service Confidence Procedure, recommending initiation of the Service Confidence Procedure.

[69] I have read the terms of Supt McCaughey's decision recommending Disciplinary Proceedings. I don't repeat them in full but I note that in the course of his recommendation he states that:

> "I have formed a reasonable belief that the officer does have a case to answer for discreditable conduct. The officer had admitted behaviour in interview that could, on one interpretation of the facts by a reasonable misconduct hearing, represent discreditable conduct, as it could severally impact upon the confidence of vulnerable victims, colleagues and the wider public in the officer's ability to be a competent and well conducted Constable.
>
> . . .
>
> … It is my honestly held belief that the impact upon public confidence (most particularly that of victims of abuse or vulnerable adults) is so serious in this case as to require the matter to be placed before a misconduct hearing."

[70] It seems to me in view of the purpose of the Service Confidence Panel which was to consider the nature of the concerns and the risks posed, *prima facie* the applicant has raised an arguable case that Supt McCaughey's presence on the Service Confidence Panel raises an issue of apparent bias.

[71] I am mindful that the Service Confidence Panel is merely a first stage in the procedure, it simply makes a recommendation as to whether the Procedure should continue or not, and makes recommendations to the Nominated ACC. The ACC is the primary decision-maker and thereafter a further appeal lies. It is thus a very preliminary stage of the procedure and in considering issues of procedural fairness the Court will look at the proceedings as a whole and ultimately, it appears to me that the manner in which the appeal before DCC Martin was conducted is relevant to the question of whether Supt McCaughey's presence on the panel undermined the procedural fairness of the entire process. This is therefore a matter I will review upon consideration of the appeal mechanism.

ACC Todd

ACC Todd's Mischaracterisation of his Role

[72] The applicant had complained about this issue under a number of headings; error of fact; error of law; and irrationality.

[73] I have outlined above the manner in which ACC Todd's decision was communicated to the applicant. Initially, he was copied into an email exchange, which enclosed a decision which described itself as a decision in an 'Appeal'. The second email, which was sent to him directly, re-framed the decision as a first instance decision.

[74] The applicant complains about this second decision in that he states that the language used by ACC Todd suggests that he was still acting in appellate mode. I have looked at both decisions and the second essentially amounts to a re-framing of the first.

[75] I accept, on the basis of the papers before the Court that ACC Todd initially formed the view that he was determining an appeal from the panel. (It is my understanding from the proposed respondent's skeleton argument that this is not disputed.). Thereafter, according to the Skeleton Argument lodged on behalf of the proposed respondent, he revisited his decision when this was brought to his attention.

[76] I accept therefore, that in the first instance, ACC Todd misdirected himself as to his role. It is apparent, in light of the *second* decision issued by ACC Todd that, by whatever means, he became aware that he had so misdirected himself and that he issued a further decision to the same effect as his first decision and purported to make that decision as a first instance decision. It seems clear that, at the time that he issued his second decision he understood that he was the decision-maker, rather than acting in an appellate capacity.

[77] While the applicant has characterised the decision as: an error of law; an error of fact; and, irrational, it appears to me that the real issue here is whether ACC Todd's mischaracterisation of his role in the first instance, caused procedural unfairness. I say this primarily because the applicant had an appeal from ACC Todd's decision and he availed of that appeal. Thus, procedural irregularities or errors of law or fact can be corrected on appeal, and if corrected the applicant could not complain of the earlier error. In considering issues of procedural fairness the Court will look at the proceedings as a whole and therefore the manner in which the appeal before DCC Martin was conducted is relevant to the question of whether ACC Todd's error fatally undermined the procedural fairness of the entire process. This matter will therefore be reviewed on consideration of DCC Martin's decision.

Non-Disclosure, Reasons & Human Rights.

[78] The applicant further complains about: non-disclosure; the absence of reasons; and breach of his human rights. In summary terms, I am of the view that these are matters properly reviewed in relation to the final stage of the process, the decision of DCC Martin. A failure of disclosure can be rectified at appeal stage and the issue of whether or not the applicant's human rights have been breached is ultimately a question to be determined in light of DCC Martin's decision. The issue of reasons may be relevant to overall procedural fairness. The absence of a fully reasoned decision at the first stage may impact on the efficacy of an appeal.

DCC Martin

[79] DCC Martin determined the appeal from the decision of ACC Todd. He received written representations from the applicant but did not hear from him orally.

Non-Disclosure

[80] Because of the non-disclosure issues which had been raised generally in the course of these proceedings and because there was documentation before the Court which had not been available to the applicant over the course of the SCP but obtained subsequently, I sought clarification from the proposed respondent as to what documents had been before ACC Todd and what documents had been before DCC Martin and also whether there were any additional documents before either decision-maker which were not now available to the applicant and before the Court.

[81] The proposed respondent helpfully provided the Court with a schedule of documents before each decision-maker and confirmed that the Court and applicant now had access to all relevant documents.

[82] On the assumption that the Skeleton Argument is correct it appears that ACC Todd did not have a number of relatively important documents, including: the Transcript of the Body Worn Video recording of K; and, the statements of evidence of the police officers who had interviewed K. This suggests that his assessment about K's ability to consent and her relative vulnerability, issues identified by him in his decision, don't come from a consideration of K's own account of events, nor the observations of the police officers who interviewed her. In order to make an assessment about K he was therefore relying upon the Investigating Officer's Report (a document which the applicant had sought over the course of the Procedure) and the transcript of the interviews with the applicant.

[83] It also appears that he did not have the minutes of the Service Confidence Panel, nor the Appropriate Authority initial Misconduct Assessment. That being said it does mean that those documents would not have informed his assessment of

the applicant's conduct, so I am not convinced that their absence is to the applicant's detriment.

[84] I identify this issue at this stage because it does appear to me to add legitimacy to the applicant's concerns about ACC Todd's approach to his decision-making and whether it amounted to 'light-touch review' as opposed to an independent assessment of the materials.

[85] DCC Martin appears to have had access to all relevant documentation, save for two statements from the police officers who interviewed K. It is not apparent to me that any prejudice flows to the applicant from the absence of those statements. The real question is as to whether any procedural unfairness flows from the failure to disclose these documents to the applicant over the course of the Service Confidence Procedure.

[86] Before reviewing the documents which were not disclosed it is worth looking at DCC Martin's conclusions. DCC Martin concluded that:

> "having read all the information provided to me, I have formed the honest belief that the allegations, made by K, are more likely to be true than not. She had no reason to lie to the police about the extent of the behaviour given that, her only intention in attending the police station was to ask the police to have [the applicant's] wife stop harassing her."

[87] I have reviewed documents which have, since these proceedings commenced, been provided to the applicant. It appears to me that the following documents were of particular relevance:

(i) The decision of the PPS.

(ii) The transcript of the interview with K.

(iii) The statements of the police officers who interviewed K and who made observations about her demeanour.

[88] The decision of the PPS is of some significance in that, whilst it was communicated to the applicant that a decision had been made not to prosecute him, in their communication to the PSNI, the PPS stated as follows:

> "This is a concerning case. K has credibly disclosed to Police that the defendant engages in physical abuse of her which appears to be sexually motivated. K repeatedly asserted that any assaults were consensual. However, having watched the Body Worn Video footage, this lady

> is upset at times and I consider that she is a vulnerable person. She fears that she will die during these sessions but her only concern about this is that the defendant be protected from prosecution should this happen. This is not the attitude of a reasonable person. A person can consent to common assault only. If K has sustained wounds or broken bones, this cannot be consented to in law. It is an offence, however, to prove an offence we need evidence that the assault was more than a common assault which means obtaining medical evidence or at least witness evidence or photographs of more than trivial injured along with either a complaint from K or some other evidence as to how the injury was sustained …"

[89] The PPS clearly formed the view that K was a credible witness, a vulnerable witness and raised issues about whether she could properly consent to the behaviours alleged.

[90] Coupled with the absence of that document, during the course of the SCP the applicant did not have access to K's transcript. I accept that he had sight of this document previously when interviewed in June 2018, but it is a lengthy document. The SCP took place over the period January 2019 through to July 2019 and I would not expect the applicant to have retained sufficient recollection about the full nuances of that document over the course of the Procedure.

[91] It is also not apparent to me that the applicant had access to the statements of the two police officers who interviewed K. Their observations about K's presentation would, in my view, have informed the assessment of others that she was a credible witness.

[92] It appears to me therefore that, documentation which, in my opinion, could be said to lend weight to the assessment that K was a credible witness, was not available to the applicant over the course of the SCP. It appears to me that this documentation should have been available to the applicant so that he had a proper understanding of the full case against him.

[93] The applicant did have his own response to the allegations, in which he makes some admissions as to K's allegations and some denials. But making available to the applicant his own account, does not in my view meet the needs of procedural fairness in this case.

[94] It is my view, that in all the circumstances, the issue of non-disclosure of relevant materials to the applicant over the course of the SCP raises an arguable case that the proceedings were not procedurally fair and I propose to grant leave on this issue.

[95] I leave open for argument at the substantive hearing, the issue as to the extent of documents which ought to have been disclosed and the proper timing of disclosure in the scheme of the SCP.

[96] It further appears to me that it is arguable that, at some stage in the substantive procedure, before ACC Todd and/or DCC Martin, consideration ought to have been given to hearing from the applicant. The issues giving rise to the invocation of the SCP relate to the relative credibility of K and the applicant and it appears to me that it is *arguable* that consideration ought to have been given to permitting the applicant to be heard so that the decision-maker had an opportunity to make an assessment of his credibility.

Irrationality

[97] The applicant complains that the decisions of the Service Confidence Panel, ACC Todd and DCC Martin are irrational. I propose to focus on the decision of DCC Martin which is essentially the decision under challenge.

[98] I propose to deal with this issue fairly shortly. It appears to me that the challenges raised under the head of irrationality are essentially challenges to the merits of the decision.

[99] In my view it was open to DCC Martin, upon consideration of the totality of the evidence, to accept the evidence of K and reject that of the applicant. I accept, as outlined above, that in doing so he must proceed in a manner which is procedurally fair to the applicant and in this case, it is arguable that in arriving at that decision he did so in a manner which was not procedurally fair. That issue aside, however, I do not consider that the challenges to the rationality of DCC Martin's decision have merit

[100] I refuse leave on this ground of challenge.

Human Rights

[101] The applicant contends that DCC Martin's decision amounts to a breach of the applicant's rights under article 8 ECHR.

[102] I sought some particularisation of this claim from the applicant and in a Supplementary Skeleton Argument he identified the following issues, which I will paraphrase:

(i) The fact that he was being subjected to significant restrictions and limitations in his job due to his involvement in a consensual sexual relationship.

(ii) The allegations will continue to be discussed by senior police officers for as long as this process lasts.

(iii) The applicant is, by virtue of these restrictions, subject to a constant reminder of his marital infidelity.

[103] In the course of oral argument I was referred to the decision of *R(L) v Commissioner of Metropolis* in relation to the 'right to forget' and also the decision of the Strasbourg Court *Denisov v Ukraine* [2018] ECtHR 76339/11.

[104] I accept that the definition of 'private life' is a broad one. In *Denisov v Ukraine* the Court stated that in cases falling within employment-related scenarios:

> "the Court applies the concept of "private life" on the basis of two different approaches: (a) identification of the "private life" issue as the reason for the dispute (reason-based approach) and (b) deriving the "private life" issue from the consequences of the impugned measure (consequence-based approach)." §102

[105] In part the applicant appears to characterise his case as a 'reason-based approach.' He suggests that it is moral judgment about the nature of the sexual relationship which took place between two consenting adults which forms the PSNI's decision. However, it appears to me that the applicant's approach to this issue betrays a misunderstanding of the PSNI's approach to this issue. The police concerns expressed in their decisions are not about a consensual sexual relationship between two adults. Rather they arise from a concern that K's disclosures may be true, in other words it may be true that the applicant has engaged in violent assaults against K, in the course of his sexual relationship with her. On that analysis, it does not appear to me that the case falls within the 'reason-based approach'.

[106] In terms of the 'consequence-based approach', the applicant also complains about the impact of the measures on the applicant's private life. However, in such cases: "the analysis of the seriousness of the impugned measure's effects occupies an important place." §110

> "It is thus an intrinsic feature of the consequence-based approach within Article 8 that convincing evidence showing that the threshold of severity was attained has to be submitted by the applicant. As the Grand Chamber had held, applicants are obliged to identify and explain the concrete repercussions on their private life and the nature and extent of their suffering and to substantiate such allegations in a proper way …" §114

[107] In my view, having considered the approach of the Grand Chamber in *Denisov,* the applicant has not demonstrated that the threshold of severity was attained such as to engage the 'consequence-based approach'.

[108] In those circumstances I am not satisfied that the applicant's Article 8 rights are engaged. Even were I to conclude that they were engaged, I am of the view that the limited nature of the 'interference' such as it is, is necessary for the prevention of crime, and the protection of the rights and freedoms of others. This is in a context where the applicant is a serving police officer with all the duties and responsibilities which flow from that office. I reject the applicant's application for leave on this ground.

Policy Challenge

[109] The applicant also challenges the SCP policy, on the basis that it is: irrational; ultra vires; and it represents a breach of Article 8 ECHR. I propose to deal with this issue in relatively short compass.

[110] The irrationality challenge amounts to a comparison between the PSNI's SCP and that of other police forces. I am not persuaded that it is the function of the Court to engage in a comparative exercise, as between the policies. I have concluded that the implementation of the Policy is amenable to judicial review on the grounds of procedural fairness. I also accept that, if I were to conclude that the manner in which the Policy was implemented, breached the applicant's Convention rights then any decision arrived at under the Policy would be amenable to challenge. In the circumstances I don't consider that the issues identified add anything of substance to the applicant's case. Neither do I accept that the policy is *ultra vires* s.33(1) of the Police (NI) Act 2000.

Action Plan

[111] The applicant in an amended Order 53 statement, lodged during the course of the proceedings, essentially complains about the absence of an 'action plan' in the recommendations made by DCC Martin, such that the PSNI provide a means by which the applicant can seek to restore confidence.

[112] I am of the view that there is no good reason why this issue was only pleaded at this late stage in proceedings, over a year after the substantive decision. That the applicant was to be subject to recommendations has been known to the applicant since he received the panel's decision in early 2019. It was open to him, during the SCP to submit that an 'action plan' would be a more appropriate way in which to manage risk, he has never done so.

[113] In circumstances where this is an issue which could have been raised during the procedure itself and was not raised until October 2020 I am of the view that leave on this issue should be refused on the grounds of delay.

Conclusion

[114] I am granting the applicant leave on the grounds that he has raised an arguable case that the proceedings before the SCP were unfair as follows:

(i) Non-disclosure to the applicant over the course of the SCP of relevant documents.

(ii) The failure to hear directly from the applicant.

[115] I am also going to grant leave on the issue of the adequacy of the reasons given by ACC Todd. I have not formed a view as to their adequacy or otherwise, but it appears to me that given that the Court will be looking at the issue of procedural fairness as outlined above, this is a matter which ought properly to be considered.

[116] I have identified, in looking at the proceedings before the Service Confidence Panel, an issue about apparent bias. I have further identified shortcomings in the proceedings before ACC Todd, in terms of his understanding of his role and in light of the documents which were not before ACC Todd. I am not currently persuaded that these shortcomings impacted upon the *overall* fairness of the procedure, or impacted adversely on DCC Martin's decision, and it seems to me that this is what the applicant would need to establish. I have however decided to grant leave on these grounds and both the applicant and the respondent are on notice as to the approach I propose to take to these issues, namely, I will consider whether these issues impacted upon the overall fairness of the procedure.