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Case Nos:
QB-2019-001742
QB-2019-001743

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2021

Before :

MR JUSTICE KERR

- -

Between :

RICHARD PRIOR AND 128 OTHERS	**Claimants**
- and -	
THE COMMISSIONER OF POLICE OF THE METROPOLIS	**Defendant**
And between :	
JUSTIN FIELDING AND 267 OTHERS	**Claimants**
- and -	
THE COMMISSIONER OF POLICE OF THE METROPOLIS	**Defendant**

- -
- -

Mr Elliot Gold and Mr Jonathan Davies (instructed by **Simons Muirhead Burton LLP**) for the **Claimants**
Mr Jason Beer QC and Mr Jonathan Dixey (instructed by **Weightmans LLP**) for the **Defendant**

Hearing dates: 5-8, 12-16, 19 and 23 July 2021

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE KERR

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is 10:00am on Friday, 8 October 2021.

Mr Justice Kerr :

Introduction

1. These are claims by police officers against the defendant (**the Commissioner**) for unpaid remuneration they allege is due to them. There are two actions, each with multiple claimants. In all, there are 397 claimants. They are police officers "employed" by the Commissioner.

2. I will at times in this judgment use the language of employment although their relationship with the Commissioner is in some respects different from that of conventional employees. They serve on terms with statutory underpinning and they hold the office of police constable at common law.

3. The claimant officers perform certain special duties known as Royal and Specialist Protection (**RASP**) duties. As the acronym RASP suggests, their special duties involve protecting persons of rank and importance, and their families; individuals who could be vulnerable to unwelcome attentions from persons with malign intent.

4. The sums said to be owing to them relate to performance of certain RASP duties for which, they say, they have not been fully remunerated as required under their terms and conditions of service. Much debate at trial centred on whether they are entitled to be paid in respect of periods when they are not in full operational mode, yet not completely free from work related obligations.

5. Broadly, there is a distinction between being on duty and being off duty. If an officer is on duty, they receive pay for working; if off duty, they receive either nothing or, if anything, some form of compensation for restrictions on their time and activities, for example being away from home or being "on call".

6. The claimants are trained and qualified in the use of weapons, including firearms. I heard evidence about the impact of that on rights to remuneration. I also had to look at the work patterns of the claimants and the habits, movements, locations and residences of some of their "principals", i.e. those they protect.

7. The court sat in private to hear most of the evidence on those matters, for obvious reasons I gave in a brief extempore judgment at the pre-trial review. The content of that evidence could assist persons wishing harm to this country. Consequently, there is a confidential annex to this judgment, to remain unpublished, in which I address those parts of the evidence.

8. In this publicly available judgment, I will cover the parts of the evidence suitable for publication and the corresponding publishable parts of my reasoning and conclusions, as well as the submissions of the parties informing them. The material not suitable for publication are dealt with in the confidential annex, as indicated by a cross-reference in the form "**[CA (1)]**", "**[CA (2)]**", and so forth.

The Claims

9. For convenience and brevity (and with no disrespect for rank or discourtesy intended), I will tend to refer to officers as "Mr" or "Ms" rather than by rank, except where their rank is directly relevant to the issue under discussion.

10. In the first action (the **Prior** claims), there are seven lead claimants: Steven Roberts, Andrew Sowerby, Samantha Self, Craig Bloomfield, Andrew Stapleton, Simon Hammett and David Exell. Five are what are called static protection officers. One (Mr Stapleton) is a close protection officer. One (Mr Exell) is an "Aztec" officer. These terms are explained further below.

11. These claimants claim the "Away from Home" allowance (**the AFH allowance**) on numerous occasions in respect of the period from 18 July 2012 to 30 November 2020. On some of those occasions they claim, in addition, a "hardship allowance" payable where, if AFH allowance is payable, they do not have sole use of a bathroom at their accommodation (**the hardship allowance**).

12. These and some other allowances are sometimes called, collectively, "Winsor" allowances, after Sir Thomas Winsor who produced two reports in 2011 and 2012 (further mentioned below) from which have emerged the allowances that, informally, bear his name.

13. In the second action (the **Fielding** claims), there are five lead claimants: Justin Fielding, John Ball, Andrew Thorogood, Emma Atkins and Glenn Spencer. All five are close protection officers. All have at times performed the more specific role of personal protection officer, a role sometimes performed by close protection officers.

14. In the Fielding claims, the claimants claim overtime payments on numerous occasions in respect of the period from 18 July 2012 (or 6 May 2016 in some cases) to 7 June 2021. These claims are made on the basis that the relevant claimants were on duty at the relevant times.

15. In the alternative, the Fielding claimants claim two of the Winsor allowances, i.e. the AFH allowance and (sometimes) the hardship allowance. The periods of these alternative claims have the same start dates, 18 July 2012 (6 May 2016 in some cases), but a different end date, 30 November 2020 as in the case of the Prior claims.

16. The reason why the claim for Winsor allowances in both actions ends on 30 November 2020 is that from 1 December 2020, a new "protection allowance", with which I am not directly concerned in this judgment, came into effect.

17. The Commissioner denies that the Fielding claimants are entitled to any overtime payments. They were not, she contends, on duty at the relevant times. In both the Prior and Fielding claims, the Commissioner submits that the claimants were properly paid for the hours they worked and were not eligible for the AFH or hardship allowances.

18. The Commissioner further submits in both actions that certain of the claimants were properly remunerated for the occasions that they worked away from home overnight, via a system of payments reflecting a notional minimum 16 hour working day, irrespective of the number of hours actually worked; whereas a normal working day would last less than 16 hours (**the 16 hour day**).

19. The Commissioner submits, further, that certain of the claimants in both actions were also paid, and accepted, a "special escort allowance" (**the SEA**); and that this comprised a monthly payment intended to compensate officers for long hours worked and time spent away from their homes.

20. In both actions, the Commissioner accepts that the claimants are entitled to payment of an "on call" allowance (**the on call allowance**) on any occasion when they met the criteria for that allowance. In respect of many occasions on which the claimants claim overtime or Winsor allowances, the Commissioner's case is that they are entitled to the (lower) on call allowance.

21. The Commissioner also pursues a defence of set-off founded on a notional restitution claim against the claimants, to the extent that any of the claims succeed. She says the claimants, or some of them, would be unjustly enriched if permitted to retain sums paid by the Commissioner in addition to receiving as a debt (or damages) sums claimed in these actions in respect of the same periods.

22. That defence of set-off is opposed. The claimants would not, they say, be unjustly enriched if permitted to recover and keep the sums claimed in these actions. They would not thereby be remunerated twice over for the same work or in respect of the same period. They rely on estoppel by representation and on a defence of change of position. If necessary, they invoke article 1 of the first protocol to the European Convention on Human Rights (**ECHR**).

23. The issues I have to decide are, therefore, whether the claimants are entitled under their terms and conditions of service to the payments they claim in respect of overtime and Winsor allowances for the relevant claim periods; and, if so, whether their entitlement is defeated by the defence of set-off arising from payment of the SEA and the 16 hour day.

24. The claimants have, in their opening skeleton argument, distilled the first of those two issues - entitlement to the elements of remuneration claimed – as boiling down to (i) whether an officer retaining a firearm overnight means the officer remains on duty and therefore entitled to overtime; and (ii) the meaning of the provision conferring entitlement to the AFH allowance and, in particular, the phrase "held in reserve" in that provision.

The Facts

25. I include in my outline of the facts some developments in the law, forming an important part of the factual context. To preserve a sense of proportionality, I will confine my account to the generic facts in broad overview and do not include an account of the work done by the individual claimants during particular shifts.

26. The office of constable, now called police officer, is a historic blend of common law and statute. The claimants' account starts with the Statute of Winchester 1285, enacted with the purpose "to abate the power of felons". The office developed over the centuries and has always been distinct from the master and servant relationship now called employment.

27. Police officers may not join a trade union or take industrial action (Police Act 1919, sections 2 and 3) but are represented by the Police Federation, created by section 1. It is now, in England and Wales, the Police Federation for England and Wales (**the Federation**) (and see now section 64 of the Police Act 1996).

28. Under provisions traceable back at least to section 4 of the Police Act 1919, pay and conditions of service are set by regulations made by the Secretary of State. To assist the collective bargaining process, the Police Negotiating Board Act 1980, section 1, created the Police Negotiating Board (replacing a predecessor called the Police Council).

29. The pay and conditions of service of police officers are now governed by regulations made under section 50 of the Police Act 1996 (**the 1996 Act**), which also consolidated earlier provisions already mentioned. Numerous sets of Police Regulations have been made down the years, reflecting negotiations. The documents are full of correspondence about pay and allowances, frequently interpreted differently by the Commissioner and the Federation.

30. That includes correspondence from 1981 to 1995 referring to "royalty protection officers" on "royalty protection duties" relating to "special plain clothes and special escort allowances" and overtime. The Metropolitan Police Service (**MPS**) headed by the Commissioner has been performing such duties for many years. That correspondence referred to what amounts were payable and in what circumstances, under regulations then in force.

31. From 3 July 2000, section 96A was added to the 1996 Act, making provision for the performance by the "metropolitan police force", i.e. the MPS (and later other police forces) of their "national or international functions" (section 96A(1)). Those functions relate to (see section 101(1)) the protection of prominent persons or their residences, national security, counter-terrorism or service for any other national or international purpose.

32. Protection duties are not all carried out by officers of the MPS. Some "service level agreements" were before me, specifying a division of labour for protection of principals outside the MPS's area. Very broadly, they provide … **[CA (1)]**.

33. The Police Regulations 2003 (**the 2003 Regulations**) introduced "determinations" by the Secretary of State of what terms and conditions would be, rather than the regulations

themselves making those determinations. The Secretary of State was required to make determinations (regulation 46) of matters relating to duty (regulation 22); pay (regulation 24); overtime (regulation 25); allowances (regulation 34) and determinations (regulation 46).

34. I need not set out the detailed wording of the 2003 Regulations. There were two subsequent amendments to regulation 46, dealing with determinations (from 1 April 2015 and from 19 August 2016). The amendments dealt with considerations the Secretary of State was required to undertake before making determinations. The relevant determinations here predated them.

35. The first determination relating to duty was made as early as 28 March 2003 and had effect from 1 April 2003, the same date as the 2003 Regulations. It comprised a Home Office circular, numbered 023/2003 and numerous annexes including "Annex E". It dealt with (among other things) hours of duty, variable shift arrangements, duty rosters, public holidays, rest days and monthly leave days, and treating travelling time as duty.

36. Also relevant is "Annex G" to the same circular of 28 March 2003, dealing with overtime with effect from 1 April 2003 (later amended slightly but not materially, as I understand the parties' common position). It dealt with compensation for remaining on duty after the end of a tour of duty and being "recalled to duty" between two rostered tours of duty. The claims of the Fielding claimants to overtime payments are governed by Annex G.

37. At this point in the narrative it is convenient to introduce the claimants. They are all RASP officers, as they are now called; formerly, they served in units known as "SO1" or "SO14". They all serve in the MPS but do not have special terms and conditions of service. The 2003 Regulations and the determinations apply across the board, to police officers of all forces.

38. The RASP officers have their own specific duties and are authorised to carry weapons. They take great pride in their work, protecting persons of rank and importance. Their earnings are among the highest received by officers in the MPS and other forces. They are highly respected for their important work. **[CA (2)]**.

39. There are various kinds of RASP officers, with differing duties, as I now briefly explain. **[CA (3)]**.

40. The seven lead claimants in the **Prior** claims all have distinguished records of service as RASP officers. Mr Roberts, an SPO, joined the MPS in about 1999 and became an SPO, joining the then SO14 (protection of royalty), in June 2004. Mr Sowerby has about 18 years' service, 12 as an SPO. Ms Self joined the MPS in about 2000, becoming an SPO on the royalty side in 2009 and on the ministerial side since 2019.

41. Mr Bloomfield joined the MPS in about 2006 and became an SPO in SO14 from April 2009. Mr Stapleton has served in the MPS since 1985 and joined SO14 in April 1999 as a CPO. Mr Hammett, now an inspector, joined the MPS in 1994 and SO14 from May 2015. Until recently, he was in charge of certain important RASP operations in Scotland. Mr Exell joined the MPS in the late 1990s and joined SO14 in June 2013. He works as an Aztec.

42. Mr Prior himself has been since 2017 the lead Federation representative for the RASP officers serving in the MPS. He is not a lead claimant. He joined the MPS in 1996 and has performed a variety of roles, including that of SPO with SO14 from October 2000. He has also played an important part in the negotiations between the MPS and the Federation forming the background to these proceedings.

43. The five lead **Fielding** claimants have also provided distinguished service as RASP officers. They are all CPOs who have also, at times, performed the more specific role of PPO. Mr Fielding joined the MPS in April 1993 and became a CPO with SO1, as it then was, in 2008. Mr Ball has over 33 years' service with the MPS. In 2000, he joined what became SO1. Mr Thorogood joined the MPS in 1994 and became a reserve Aztec within SO1 from 2002 to 2008. He became a full time CPO from November 2012.

44. Ms Atkins joined the MPS in 1992. In 2004, she joined what became (later, in 2006) SO1. She currently works as a PPO. Mr Spencer was a police officer in Nottinghamshire from about 1999, before joining the MPS in SO14 from 2009. From 2012 to 2018 he was a CPO; since then, he has worked as a PPO permanently assigned to a particular principal.

45. For the Commissioner, I had many witness statements from senior officers involved in the performance of RASP duties in varying ways. I heard oral evidence from Mr Zander Gibson, Operational Command Unit (**OCU**) Commander of RASP from July 2016 to October 2020; Sir Craig Mackey, Deputy Commissioner of the MPS from 2012 to 2018; and Mr Neil Basu, now an Assistant Commissioner at the MPS and head of specialist operations.

46. I heard much evidence about **[CA (4)]**.

47. I was also shown a vast quantity of documents from about 2000 to 2010 discussing and considering other issues relevant to the arguments in this case, dealing with subjects such as a protection officer's place of duty, variable shift patterns, travelling time counting as duty time, recall to duty, being on standby overnight, travelling with a principal and payment of the SEA to those performing close protection duties.

48. Those documents may be (subject to proportionality) useful background, but many of them expressed views or "guidance" about what, in the opinion of MPS managers or the Federation, the then applicable provisions meant. As such, though not without probative value, they are far from conclusive and of limited assistance to me in interpreting the later provisions (to which I am coming shortly) stating the conditions of service of the Prior and Fielding claimants.

49. Of greater assistance were various job advertisements and job descriptions. These were relied on by the Commissioner to support her proposition that the role of protection officer, in many cases, necessarily and frequently requires the officer to stay overnight away from home, to be with the principal when the principal is on travels. This obvious proposition was not, in any case, seriously disputed by the protection officers who gave evidence.

50. However, some protection officers would travel more than others. SPOs would tend to travel less than CPOs and PPOs since the former would tend to be based at a particular location. As in any occupation requiring travel for some, travel and time away from

home was popular with some and less so with others; but only up to a point could it be a matter of choice whether to travel and spend time away from home.

51. There was much evidence about the role of protection officers in protecting royal persons during the summer months at certain locations in Scotland. Protection officers could be required to go there but it was generally unnecessary to use compulsion since the posting was popular and on the whole there were more volunteers than places available. The pay was attractive, the air is clean, there were opportunities to engage in outdoor pursuits between duty shifts and restaurants for eating out.

52. On 1 October 2010, the then Home Secretary appointed Sir Thomas Winsor to review the remuneration and conditions of service of police officers and staff in England and Wales and to make appropriate recommendations. The first of two "Winsor reports" (**Winsor Part 1**) was presented to Parliament in March 2011.

53. On the subject of overtime, discussed in section 2.5 of Winsor Part 1, there were three recommendations:

> "Recommendation 6 – Determination Annex G, made under Regulation 25 of the Police Regulations 2003, should be amended to replace time and a third premium pay for casual overtime with plain time. The minimum hours for being recalled between duty should be abolished and instead paid at plain time for the hours worked, with travelling time.
>
> Recommendation 7 – Determination Annex H, made under Regulation 26 of the Police Regulations 2003, should be amended to remove double time premium pay and the notice period of five days for working on a rostered rest day. Time and a half premium pay should be payable for working on a rostered rest day with fewer than 15 days' notice.
>
> Recommendation 8 – Determination Annex H, made under Regulation 26 of the Police Regulations 2003, should be amended to allow the payment of overtime at double time for 25 December and seven other days chosen for the next financial year by the officer before 31 January. Cancellation with fewer than 15 days' notice should require the authority of an Assistant Chief Constable."

54. In section 2.7 of Winsor Part 1, staying away from home was discussed. The resulting three recommendations are the forerunner of what became the AFH allowance, the hardship allowance and the on call allowance. They stated:

> Recommendation 11 – Police officers on mutual aid service should be paid for the hours they are required to work each day, plus travelling time to and from the place of duty. Where those hours coincide with the unsocial hours period, or the duty has been required at short notice and they are eligible for the new overtime rates, the officer should be paid at the applicable premium rates.
>
> Recommendation 12 – The definition of 'proper accommodation' should be revised to describe a single occupancy room with use of en suite bathroom facilities. Where such accommodation is not provided, the officer should receive a payment of £30 per night. The current definition of 'higher standard accommodation' should be removed and not replaced.
>
> Recommendation 13 – Officers held in reserve on a day and who have not been paid for any mutual aid tour of duty that day, should receive the on-call allowance of £15 for that day."

55. The Commissioner's case is that these arrangements concerned "mutual aid", a statutory concept underpinned by section 24 of the 1996 Act, whereby the resources of one police force are made available to another force. The use of mutual aid in this way went back to an agreement called the Hertfordshire Agreement of 1984, designed to deal with the policing of the celebrated miners' strike which began that year.

56. The claimants' case is that these recommendations were aimed not just at mutual aid requiring out-of-area public order policing; they also embraced situations in which policing outside an officer's area could be required for other reasons requiring an officer to be "held in reserve"; for example, a specialist deployment, policing national events such as the Olympics, or an ad hoc response to a major incident such as a terrorist attack.

57. In April 2011, the Secretary of State asked the Police Negotiating Board to explore reaching agreement on the recommendations in Winsor Part 1. No agreement was reached in relation to recommendations 6, 7, 8, 11, 12, and 13 quoted above. These were then referred to an arbitral body called the Police Arbitration Tribunal, which issued its award (not binding on the Secretary of State) in January 2012.

58. The tribunal accepted recommendations 7, 8 and 12 without modification. In relation to recommendations 6, 11 and 13, it decided:

> "Recommendation 6 – Casual overtime
>
> MODIFIED. The premium rate of time and one third to be retained for casual overtime, with payment of travelling time for recalls between tours of duty. The minimum hours payment for being recalled to be abolished as proposed.
>
> …
>
> Recommendation 11 – Mutual Aid
>
> MODIFIED. Both sentences of Recommendation 11 are accepted as worded. In addition, officers on mutual aid who are unable to return home are to receive a new 'Away from Home Overnight Allowance' of £50 per night.
>
> …
>
> Recommendation 13 – Held in reserve
>
> MODIFIED. Officers held in reserve who are unable to return home are to receive the new 'Away from Home Overnight Allowance' of £50 per night."

59. The tribunal explained its reasoning for modifying recommendations 11 and 13 at paragraph 64 of its decision, as follows:

> "**Recommendations 11 and 13 – Mutual Aid and Held in reserve**
>
> 64. ….. The Tribunal's understanding of the Winsor Report Part 1 proposal is that if officers are held in reserve and are unable to return home they would receive essentially the same reward as if they were fulfilling their duties at their normal place of work – plus traveling time and a payment of £15, equivalent to the proposed on-call payment. [The issue of on-call is dealt with separately in paragraph 74 below.] The Tribunal accepts the Winsor Report Part 1's proposal that officers on mutual aid or held in reserve should be

> paid for the actual hours worked, but it also recognises that disruption is caused to officers' lives, especially their family lives, and the fact that officers are/can be directed to be on mutual aid or held in reserve. The compensation measures proposed in the Winsor Report Part 1 are a major change from the existing arrangements. In the Tribunal's view, there should be an element of additional compensation for officers who are held in reserve and unable to return home (whether this is in their own force or on mutual aid operations). Therefore, the Tribunal has calculated, by approximate reference to the hourly rate for constables (at the 8th point on their scale), that an amount of £50 should be paid as an 'Away From Home Overnight Allowance'. The existing 16-hour payment would cease. However, the new allowance will be some recompense particularly for officers who are held in reserve for protracted periods. …"

60. On 30 January 2012, the Secretary of State announced that she intended to accept and implement the arbitral tribunal's recommendations. Two days later, the Home Office issued circular 006/2012, to the same effect, saying she was "minded to introduce" the changes to police officer remuneration and conditions as recommended; these were then summarised.[1]

61. Sir Thomas Winsor then proceeded to prepare his report on the second part of his review. The second part (**Winsor Part 2**) was presented to Parliament in March 2012. For present purposes, it concerned overtime (section 9.2) and the on call allowance (section 9.4). On overtime, recommendations 103 and 104 did address the position of, specifically, protection officers, stating as follows:

> "Recommendation 103 – The Police Regulations 2003 should be amended to provide the Commissioner of the Metropolitan Police with the authority to determine an appropriate level of buy-out of the casual overtime of specialist protection officers.
>
> Recommendation 104 – The Commissioner of the Metropolitan Police should determine an appropriate buy-out of the casual overtime of specialist protection officers which results in a greater harmonisation of the pay of specialist and royalty protection officers, and which takes appropriate account of the unique requirements of specialist protection officers."

62. In relation to the on call allowance, recommendations 112 to 114 stated as follows:

> "Recommendation 112 – A national on-call allowance for the Federated ranks should be introduced from April 2013. The amount of the allowance should be £15 for each daily occasion of on-call after the officer in question has undertaken 12 on-call sessions in the year beginning on 1 April.
>
> Recommendation 113 – The national on-call allowance should be reviewed by the new police pay review body in its first triennial review when better management data are available.
>
> Recommendation 114 – Forces should compile clear management data on the voluntary deployment of officers on-call."

63. Paragraph 9.4.4 described what was meant by being "on call":

[1] Although I was provided with a perplexing 30,000 plus pages of documents, not in chronological order, I could not find this circular anywhere in the bundles but was able to find it online.

> "An officer who is on-call is essentially off duty and free to undertake the majority of his personal pursuits. For this reason, on-call does not qualify for overtime, for which the officer becomes eligible once the recall to duty has taken place. I reiterate, however, that in readiness for duty, it is necessary that the officer is:
>
> - contactable by telephone or pager;
> - available to return to duty within a reasonable period of time;
> - able to obtain access to appropriate transport; and
> - fit for duty [*footnote: includes not having consumed alcohol*]."

64. Again, the staff and management sides were unable to agree on implementing these recommendations and the matter was referred to the Police Arbitration Tribunal which reported in December 2012, leading to the issue of a further circular of importance in this case, Home Office circular 010/2012.

65. That circular was published by the Home Office, in the name of the Secretary of State, on 16 April 2012, making amendments retrospectively from 1 April 2012 to certain determinations under the 2003 Regulations to implement recommendations from the Winsor review.

66. I have what appears to be the text of the circular. It refers to, among many other things, amendments to "Annex U", in summary. There must therefore, I suppose, have been an original text of Annex U to some other document not before me, probably the original determinations of 2003.

67. According to an annex to the Commissioner's opening skeleton argument, the amended text of Annex U as at 16 April 2012 (effective from 1 April 2012 but not found in my copy of the circular 010/2012) introduced the AFH Home allowance and the hardship allowance, as follows:

> "**11) AWAY FROM HOME OVERNIGHT ALLOWANCE**
>
> a) A member of a police force in the rank of constable, sergeant, inspector or chief inspector shall be paid an allowance of £50, to be known as the away from home overnight allowance, in respect of every night on which the member is held in reserve.
>
> b) Subject to sub-paragraph (c), a member is held in reserve for the purposes of this paragraph if the member is serving away from his normal place of duty (whether because the member has been provided for the assistance of another police force under section 24 of the Police Act 1996 or otherwise) and is required to stay in a particular, specified place rather than being allowed to return home.
>
> c) A member is not held in reserve if the member is serving away from his normal place of duty only by reason of being on a training course or carrying out routine enquiries.
>
> **12) HARDSHIP ALLOWANCE**

a) A member of a police force shall be paid an allowance of £30, to be known as the hardship allowance, in the circumstances set out in sub-paragraph (b).

b) The allowance shall be paid in respect of every night when the member:
i) is held in reserve, within the meaning of paragraph (11), and
ii) is not provided with proper accommodation.

c) For the purposes of sub-paragraph (b)(ii) 'proper accommodation' means a room for the sole occupation of the member, with an en suite bathroom."

68. In the months that followed, discussions took place over what the new text of the determination should be taken to mean and how the new provisions should be applied. During those discussions, as it later turned out, 18 July 2012 became the start date for the period of the present claims, established by becoming the commencement date for a "standstill" agreement agreed between the parties.

69. The lack of consensus at that time over the new allowances is shown by a meeting held on 10 August 2012 of the MPS joint negotiating committee, of which the minutes record:

"**Away from Home Allowance:**

• Some officers outside the MPS are receiving it

• Within the MPS, SO are holding claims back whilst awaiting clarification over claims

NC explained that there are 2 main issues from the federation perspective ('Routine Enquiries' and 'Training'). Having spoken to Ian Rennie's office (National Federation) a meeting had been arranged between the Home Office and the Federation in August to discuss these. The Home Office position is that the determinations are 'clear enough'.

Special Escort Allowance:

Some claimants of the above 'Away from Home' allowance are already in receipt of SEA - which would seem illogical and 'paying twice for the same thing'."

70. The MPS's position, set out in a position paper tabled at the meeting, was:

"• Officers for whom it is a regular, foreseeable part of their duty to be away from home overnight will be excluded from claiming; examples are protection officers, undercover, surveillance, witness protection and those posted overseas (this list is not exhaustive). In most of these cases, the normal place of duty is away from home.

• The existing framework of allowances and payments in respect of Royalty Protection recognise to some extent the long hours and away from home nature of the role. So 'Away from Home' cannot apply to any officer in receipt of Special Escort Allowance.

• Protection officers' 'normal place of duty' is with the principal (and this argument has been used in relation to favourable tax treatment by HMRC). In addition, after 28 days a temporary place becomes a normal place and this may apply in some Royalty deployments."

71. The Federation not surprisingly begged to differ, otherwise it is unlikely these proceedings would have been brought. As I have said, there are numerous instances of

contentious exchanges or expressions of opinion by one side or the other stating positions broadly corresponding to the contentions of the parties in this case. Since their character is that of submission rather than authoritative interpretation, their utility is often minimal.

72. With the new on call allowance shortly to come into effect, the MPS circulated a document dated 26 March 2013, a "Joint Agreement with the Federated Ranks", i.e. those represented by the Federation (which includes the claimants). There was a "clear distinction" between being "recalled to duty" and being "on call". The former can happen to any officer any time but is expected to be used only in cases of urgent and unforeseen events.

73. The latter, then commanding a £15 per day allowance, is (the authors averred) "a predetermined requirement ... to be available … outside working hours." The document went on to remind officers of their obligations when on call: to be contactable by telephone or pager, available for duty within a reasonable time, with access to appropriate transport, and fit for duty, including being sober.

74. From 1 April 2013, the necessary further determination was made by Home Office circular 007/13, to introduce the new on call allowance. It appears that this too took the form of an amendment to "Annex U".

> "**13) On Call Allowance**
>
> (1) A member of the rank of Constable, Sergeant, Inspector or Chief Inspector shall receive an allowance of £15 in respect of each day on which he spends any time on-call.
>
> (2) In paragraph (1) 'day' means a period of 24 hours commencing at such time or times as the chief officer shall fix after consultation with the joint branch board, and the chief officer may fix different times in relation to different groups of members."

75. Over the following year, there was further debate about when the allowances were payable to RASP officers serving in the MPS. This took place against a background of negotiations, meetings and even litigation between the Federation and the MPS, which is not uncommon.

76. After the determination of April 2012 creating the AFH allowance, the discussion focussed on, among other things, the meaning of "routine enquiries", the phrase at the end of paragraph 11(c) of Annex U: an officer is "not held in reserve if the member is serving away from his normal place of duty only by reason of being on a training course or carrying out routine enquiries".

77. As a result, the MPS issued a "Guidance Note" on payment of the AFH allowance and hardship allowance, approved by the Deputy Commissioner, Sir Craig Mackey, on 8 July 2014. It referred to an "interim" agreement between the MPS and the Federation that a routine enquiry should mean "a deployment away from home for reason or purpose which routinely occurs as part of the role and responsibilities, for example a regular meeting or conference".

78. This meant, the author continued, that according to the MPS, RASP officers (including SPOs) were among those not entitled to the AFH; they were performing routine enquiries when staying away from home because it was part and parcel of their role to do so. The exception was SEG (special escort group) officers who were not regarded as protection officers and not routinely deployed away from home.

79. A later guidance note dating from October 2014 gave a different example, this time of a non-routine enquiry, in the following terms: "deployment away from home in connection with an investigation or arrest for example, in the case of a detective who has to conduct criminal enquiries which during the investigation then require them to stay away from home. This is not part of a routine and therefore the claim is payable."

80. After that, there were some emails from RASP officers **[CA (5)]**.

81. The period from 1 November 2014 to 31 March 2015 was the period that later became the first of two agreed sample periods for the purpose of determining the entitlement of the Prior and Fielding claimants to the backdated allowances claimed in these proceedings. Those of the claimants who had, as at 1 November 2014, already joined the cohort of RASP officers, have therefore produced tables in their witness statements explaining the dates and duties they undertook during that period and the rationale for claiming their entitlement.

82. In the middle of that period, from 26 January 2015, Mr Basu and Mr Paul Deller (of the Federation) were engaged in a discussion and consultation process on conditions of service of officers in the then SO1 and SO14 OCUs, pending their forthcoming merger due to take place in July 2015. This followed on from a review of protection arrangements by Deputy Assistant Commissioner Patricia Gallan, the details of which I need not rehearse.

83. Also in the middle of what became the first agreed sample period, with effect from 1 March 2015, the Secretary of State made a further determination by Home Office circular 004/15 that paragraph 11 of Annex U dealing with the Away From Home Allowance would be changed to refer to readiness for "immediate deployment" and to expand the concept of "routine enquiries".

84. The circular stated that the purpose was to "clarify the intention" of the allowance; "to remove any scope of misinterpretation"; to "provide further clarification". The amendments "do not alter the intention of the original determination". The "original determination" must have been that heralded in circular 010/2012, introducing the Away From Home Allowance, rather than any earlier determination.

85. The changed wording was as follows, with the added words indicated in italics:

> "**11) AWAY FROM HOME OVERNIGHT ALLOWANCE**
>
> a) A member of a police force in the rank of constable, sergeant, inspector or chief inspector shall be paid an allowance of £50, to be known as the away from home overnight allowance, in respect of every night on which the member is held in reserve.
>
> b) Subject to sub-paragraph (c), a member is 'held in reserve' for the purposes of this paragraph if the member is serving away from his normal place of duty (whether

> because the member has been provided for the assistance of another police force under section 24 of the Police Act 1996 or otherwise) and is required to stay in a particular, specified place *overnight* rather than being allowed to return home *by reason of the need to be ready for immediate deployment*.
>
> c) A member is not 'held in reserve' if the member is serving away from his normal place of duty only by reason of being on a training course or carrying out routine enquiries. *For the purposes of this paragraph 'routine enquiries' means activity which forms part of the member's role or normal duties where due to the nature of that role or duty, or due to the distance from the home station, the member is unable to return home. It is for the chief officer to determine a member's role or normal duties, including whether there is an expectation within that role or those duties that the member is to travel or to work away from home*."

86. After that, the discussions between Mr Basu and Mr Deller continued until June 2015, when they culminated in a "formal offer" set out in a letter from Mr Basu of 3 June, with terms annexed to it to take effect from 1 July 2015, referred to in some of the documents (and below) as **the interim agreement**. It was regarded as "interim" because the MPS was discussing with the Home Office the more durable long term solution of introducing a new protection allowance.

87. The Commissioner (as the letter stated) remained "bound by the provisions of the Police Regulations and Determinations … and is not at liberty to remunerate officers outside the scope of this." The proposal was that constables and sergeants in personal protection roles would be remunerated as set out in the annex "and subject to the interpretation of those Regulations and Determinations detailed therein".

88. As to the "Winsor Overnight" and AFH allowance, the MPS position remained that "the role or normal duties of Protection Officers involve travel and the need to stay overnight and away from their normal place of duty and that, therefore, these allowances will not apply". The on call allowance would, however, be payable, as well as a "fixed notional number of hours of overtime to compensate for the requirement to be on an 'Enhanced level' on call".

89. Further, "[d]eployment in HRLI environments is … not considered routine, and … the [AFH and overnight] allowance may be claimed in respect of such deployments in future. **[CA (6)]**.

90. The detail was fleshed out in the annex. It included withdrawal of the SEA for constables and sergeants. The "fixed notional number of hours of overtime to reflect the time spent on standby" had yet to be decided, but the annex stated that "if the officer is required to recommence duty this would amount to a recall to duty". The changes were communicated in an email (forwarded to officers concerned on 4 June 2015) from Commander Alistair Sutherland, then the officer in charge of the protection function within the MPS.

91. In a further letter from Mr Basu to Mr Deller of 17 June 2015, the notional fixed number of hours of overtime to reflect time spent "on standby" was effectively fixed at 16 hours, unless longer hours were actually worked. This was in addition to entitlement to (subject to meeting the criteria relating to readiness for duty) the then £15 per night on call allowance. As Mr Basu explained:

> "in line with current operating protocols at SO1, where protection officers who are assigned to a Principal are required to be continuously available to undertake an activity directly related to that protection deployment, and the criteria detailed below are met, then the basis for their remuneration will be payment between commencement of protection duties and … **[CA (7)]**, or the end of protection duties, whichever ls later.".

92. The merger of SO1 and SO14 then took place in July 2015, to form the RASP unit. The new regime then began to operate, after a slight delay, from 1 August 2015, as set out in the interim agreement. Not all RASP officers claimed the £15 a night on call allowance, however. They feared it could undermine their position of disagreement with the MPS's view that they were not entitled (other than in HRLI deployment cases) to the AFH or hardship allowances.

93. There matters rested, to the dissatisfaction of the Federation and the RASP officers, who continued with their duties while the Federation attempted to change the mind of the MPS, unsuccessfully. The long term solution in the form of a protection allowance did not at that stage materialise. Chief Superintendent Zander Gibson, by then in charge of the RASP unit, explained in a detailed email to CPOs of 25 July 2017 that the position would remain the same, apart from some procedural changes with regard to claiming the on call allowance.

94. In the same month, Inspector Hammett, one of the lead **Prior** claimants, became the Scotland Operations Inspector, responsible for coordinating protection activities there, in addition to other responsibilities in London. He relinquished the latter responsibilities in December 2020, but continues to lead a small team responsible for RASP deployments in Scotland.

95. By May 2018, the disagreement had become potentially litigious. Solicitors acting for some of the current claimants wrote a letter before claim. In the following month, what later became the second agreed "sample period" for testing these claims began. The period ran from 1 June to 31 December 2018. I therefore have tabulated accounts from the claimants setting out their evidence of what their deployments and duties were during that period.

96. These claims were brought, in both actions, on 15 May 2019. Pleadings were exchanged in the usual way and amendments were made. The matter proceeded towards trial alongside the small number of further developments I now mention to complete this outline of the facts. There was originally a counterclaim for the return of monies paid (if, contrary to the defence, the claimants' main case was good) in error.

97. From 1 September 2019, the on call allowance was increased from £15 to £20 per night. During the rest of that year and most of the following year, 2020, the discussions, meetings, emails continued as the litigious dispute, ably case managed by Master Cook, edged towards trial of the agreed sample claims.

98. On 7 September 2020, the long awaited new protection allowance was introduced by a further determination (amending Annex U by adding a new paragraph 13A); but with effect from 1 December 2020. It is unnecessary to set out the wording of the protection allowance determination of 7 September 2020. It came into effect after 30 November 2020, the last date in respect of which the **Prior** and **Fielding** claimants claim the AFH and hardship allowance.

99. The Commissioner discontinued her counterclaims in the two actions on 29 April 2021. The claim for notional restitution has proceeded, since then, only as a defence of set-off, if it is needed. Finally, from 7 June 2021, the **Fielding** claimants made an application to reamend their particulars of claim. For that reason, 7 June 2021 became the end date for their claim for overtime payments.

Submissions, Reasoning and Conclusions

100. The parties made detailed submissions on the correct approach to the interpretation of an instrument such as a statutory determination by the Secretary of State under the 2003 Regulations. I do not find it necessary to rehearse and discuss the body of law laid before me through the diligence of counsel, though I am grateful for their efforts. The parties were, in the end, not much at odds, if at all, on the approach the court should adopt. Both accepted that the court can look at *travaux préparatoires* including Winsor Parts 1 and 2.

101. The claimants submitted straightforwardly that the language must be interpreted in a wholly objective way, without reference to subjective intent and the focus must be on the language used, which cannot be ignored unless the consequences of applying the language used would be absurd. Words should bear their ordinary meaning in the general context in which they are used.

102. The Commissioner reminded me that a ministerial determination is not a contract. She noted that determinations are mandatory under the 2003 Regulations. She accepted, with one qualification, that the subjective intent of the Minister was not relevant and the attribution of intent is an objective exercise. The qualification related to the amendment to Annex U that took effect from 1 March 2015.

103. The determination giving effect to that amendment, the Commissioner noted, made clear the minister's intention that it should serve merely to clarify and not to alter the meaning of the words previously used. As the meaning had previously been ambiguous, the amendment should be treated as removing the ambiguity and confirming what the law had always been (cf. *Inland Revenue Commissioners v Joiner* [1975] 1 WLR 1701, per Lord Diplock at 1715-1716).

104. The Commissioner commended the approach of McCombe J (as he then was) in *R (Barwise) v Chief Constable of West Midlands Police* [2004] EWHC 1876 (Admin) where, in a different factual context, he favoured a "permissive construction which I recognise can be applied to documents, enacted under statutory authority, which are not themselves subordinate legislation" ([29]).

Overtime; retention of firearm overnight

105. The issue of overtime arises in the **Fielding** claims. The five claimant CPOs claim overtime payments on certain occasions in respect of the period from 18 July 2012 (or 6 May 2016 in some cases) to 7 June 2021. **[CA (8)]**.

Claimants' submissions

106. I paraphrase the claimants' main points as follows. **[CA (9)]**

107. The claimants submitted that an officer could earn overtime performing a task during what would otherwise be a rest period, without a specific instruction, on each occasion, to perform the task; it was enough that their orders or duties required the task to be performed: *Allard v. Chief Constable of Devon and Cornwall Constabulary* [2015] ICR 875, per Patten LJ at [21].

108. The Supreme Court decision relied on by the Commissioner, *Royal Mencap Society v. Tomlinson-Blake* [2021] ICR 758 was not in point because it was confined to the statutory context of the National Minimum Wage Regulations 1999 and 2015. The decision was, said the claimants, "policy driven" and was not authority that in all cases where a person was asleep while on call, the person was not on duty.

109. In the context of health and safety regulation, the wider concept of being at the employer's "disposal" was held sufficient by the Court of Justice of the European Union; the employee was on working time where "the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests" (*DJ v. Radiotelevizija Slovenija*, Case C-344/19, [2021] IRLR 479, at [37]).

110. On the evidence and law, the claimants submitted that **[CA (10)]**.

Commissioner's submissions

111. The main arguments of the Commissioner in response may be paraphrased as follows. Overtime is payable as the Secretary of State determines in cases within regulation 25(1) of the 2003 Regulations in respect of time "for which he remains on duty after his tour of duty ends" (regulation 25(1)(a)) or "for which he is recalled between two tours of duty" (25(1)(b)).

112. The Secretary of State has determined in Annex G, subject to regulation 25 and Annex G itself, that overtime is payable for time "for which he remains on duty after his tour of duty (or … a rostered shift) ends…" (paragraph 1(a)); or "for which he is recalled between two tours of duty (or … rostered shifts)…" (paragraph 1(b)).

113. The **Fielding** claimants assert in their pleaded case that they meet those tests but they did not meet those tests at any relevant time. **[CA (11)]**

114. The Commissioner cited eight reasons why that was so, which I can state very briefly:

(1) Police officers are exempt from the prohibition against possession of firearms because they are servants of the Crown, whether on or off duty (Firearms Act 1968, sections 7 and 54). **[CA (12)]**

……

(5) The claim to overtime payments is inconsistent with regulation 25(2) of the 2003 Regulations. While regulation 25(1)(b) permits payment of overtime (if the Secretary of State so determines) where an officer "is recalled between two tours of duty", by regulation 25(2) "recall" to duty "does not include a warning to be in readiness for duty if required…".

(6) The claim is inconsistent with the approach of the Court of Appeal in *Crosby v. Sandford* (1979) 78 LGR 85, where a police dog handler was found to be recalled to duty between two tours of duty only for the one hour per day required to care for the dog at home; and *Allard v Chief Constable of Devon & Cornwall Constabulary* [2015] ICR 875, where receipt of a call from an intelligence source while off duty amounted to a recall to duty for the duration of the work done in receiving and processing the information.

(7) The claim is inconsistent with the Supreme Court's approach in *Royal Mencap Society v Tomlinson-Blake* [2021] ICR 758: it is an unnatural use of language to say that someone is working while they are expected to be asleep. Being required to wake up and work if called on, to respond to an emergency, was not the same as working while asleep. Only the time spent actually responding to an emergency, including taking the call, counted as work. The time asleep was being available to work, not actually working.

(8) The situation of a CPO or PPO who is stood down for the night fits with the criteria for entitlement to the on call allowance which, the **Fielding** claimants agree, is payable provided the officer satisfies those criteria that night. Some have claimed and received the allowance for some nights, in effect seeking payment twice over and inconsistently with having been on full duty those same nights.

Reasoning and Conclusions

115. I prefer the Commissioner's submissions and can state my reasons briefly, since they largely echo her submissions. The structure of the 2003 Regulations, the determinations and the negotiating history do not support the claimants' idea of a binary distinction between being on duty or off duty. The on call allowance and the criteria for entitlement to it demonstrate the existence of a state in between the two extremes.

116. It is, therefore, not the case that an officer must necessarily be on "duty" in the fullest sense merely because they remain in a state of readiness to start a period of full "duty" after being stood down for the night. Regulation 25(2) of the 2003 Regulations makes this point clear.

117. The existence of the 16 hour day arrangement does not undermine that conclusion and does not help to elucidate the meaning of "duty" and being on duty. It was clearly introduced as a pragmatic measure to deal with a temporary difficulty, i.e. the dissatisfaction of RASP protection officers being unable to relax fully at night, pending the introduction of a bespoke protection allowance to address the issue on a more sound and permanent basis.

118. I adopt, respectfully, the approach of the Court of Appeal in the cases of *Crosby* (the dog handler case) and *Allard* (the covert human intelligence source case). When an officer has to perform a work related task during what is otherwise non-work time, an express instruction to perform the task is not needed; a standing instruction will do. And, in such a case, the time spent performing the task is duty time; the officer is recalled to duty to do the work.

119. The decision of the Supreme Court in the *Mencap* case is not on all fours and directly in point because the words of the relevant statutory provisions were different. The

reasoning in that case is nevertheless of relevance here because the proposition that a person is unlikely to be working while asleep is a general one.

120. The Court of Justice's broader approach to work time in the *Radiotelevizija Slovenija* case is less relevant and does not assist me here, firstly because the issue arose in the different context of health and safety law; and secondly, because the court's description at [37] of the "constraints" which "very significantly" curtail the worker's freedom to manage their time and pursue their own interests, closely resembles the state of being on call in the present context.

121. Nor do I accept that **[CA (13)]**.

122. In sum, I think the on call allowance criteria aptly characterise the "in between" state in which the officer meeting those criteria is neither fully on duty nor fully off duty. On call arrangements are common not just in the police forces; doctors and judges, among others, observe such arrangements. There is nothing unusual about them. Whether the amount of the on call allowance (£15 per night, subsequently rising to £20) may seem a bit meagre is not a matter for the court.

123. In the light of that analysis, I have considered the claims of the **Fielding** lead claimants to overtime based on their tabulated records of occasions when they retained a firearm overnight during the two agreed sample periods. They were asked about some of those instances in cross-examination, assisted by a "deep dive" analysis of their activities on those occasions.

124. Their proposition was that **[CA (14)]**.

125. For reasons I have briefly explained, I do not accept that proposition. While there was much discussion in the oral and written evidence about readiness for immediate deployment (also in the context of the AFH allowance, to which I am coming), I do not think it denotes anything more than readiness to be recalled to duty when on call.

126. For completeness, I accept still less that any officers concerned remained on duty overnight in a small number of instances where the assertion that the officer remained on duty was advanced on some alternative basis; notably, the occasions in November and December 2018 when Mr Fielding was teaching on a course in Cheshire and did not retain a firearm overnight.

127. For those reasons, the overtime claims of the **Fielding** lead claimants do not succeed. I turn next to the question of the AFH allowance.

Away From Home (AFH) allowance; "held in reserve"

128. This issue arises in the **Fielding** claims, as an alternative to the overtime claim discussed above; and in the **Prior** claims. The court is required to consider the meaning of the provision conferring entitlement to the AFH allowance and, in particular, the phrase "held in reserve".

Claimants' submissions

129. The claimants' main arguments are, in my paraphrase, the following. **[CA (15)]**. The obligation to work away from home as a normal part of the role is an artificial construct

found in documents prepared after issue of these proceedings, probably with them and the forthcoming protection allowance in mind.

130. **[CA (16)]**.

131. Public order policing away from an officer's home base should not amount to "routine enquiries" even if the officer so deployed regularly carries out public order policing on their home turf and specialise in doing so. An officer deployed away from home in such circumstances would, Mr Gibson accepted, be paid the AFH allowance. Nor was there any clear basis for treating HRLI deployments as outside "routine enquiries", differently from a deployment in Great Britain.

132. An officer travelling from home, or from a normal place of work to a temporary deployment, was entitled to travel in duty time. If they did not first go to the normal place of work they were entitled to travel in duty time, less the time for the normal journey to work. Those posted to temporary deployments often could not get home for the night because it was too far. When they went home at the end of the temporary deployment, their travel home was in duty time.

133. There was no basis in the 2003 Regulations or elsewhere for compelling officers to be "on call". This was a voluntary matter as was accepted by the MPS in various documents. On the other hand, an officer could be compelled to return to duty on being "recalled to duty"; if so, they would be entitled to travel in duty time to the location of the duty.

134. A RASP officer's normal place of duty is the base at which they are based when not deployed elsewhere, i.e. for SPOs, the palace or other location where they regularly work; and for CPOs and PPOs, either London generally, or the location where they have their locker, keep their kit and attend for administrative purposes such as appraisals; which is also the location shown on the various business cards produced by the claimants to the court.

135. That interpretation of "normal place of duty" is supported by the definition of "workplace", "permanent workplace" and "temporary workplace" in section 339 of the Income Tax (Earnings and Pensions) Act 2003. Various employment income manuals produced by Her Majesty's Revenue and Customs (**HMRC**) commenting to the same effect were also relied upon. The "normal place of duty" is not a temporary place where the officer goes to stay near their principal.

136. Therefore, an officer deployed from London to Manchester for public order policing would, unless instructed to stay in Manchester, i.e. away from home, be entitled to commute daily to and from London in duty time, an obviously impracticable proposition. The obligation to stay overnight in Manchester to avoid that impracticability entitles that officer to receive the AFH allowance because the officer is away from home overnight.

137. The same analysis applies if a RASP officer is deployed abroad, say in Canada (a non-HRLI deployment). The RASP officer is instructed to go to Canada, to stay away from home and obviously cannot go home each night, still less in duty time. The officer is deployed overnight away from their normal place of duty and is entitled to the allowance.

138. In such cases, there is no need for an instruction to stay in a specific hotel or other location. It is enough that the officer is required to stay away from home overnight, in the particular city, town or other area where next day's duty will be performed.

139. The reasoning in Winsor Part 1 (see paragraph 2.7.18) recognised that deployments away from home are not confined to mutual aid cases - which is also evident from the words "or otherwise" in Annex U paragraph 11(b). An example given was of an officer deployed out of his force's area due to special expertise and required to start work at that location as it would be too far to travel back home each night, in duty time.

140. A RASP officer posted to, say, Scotland is not excluded from the AFH allowance under the "routine enquiries" exception in paragraph 11(c). If that were right and routine enquiries were equated to an officer's normal daily duties, the public order specialist officer deployed from London to Manchester would also be within the exception. The treatment of HRLI deployments as not "routine enquiries" cannot be properly differentiated from RASP officer deployments in this country or in non-HRLI deployments abroad.

141. At the time of the Annex U determination in April 2012, "enquiries" bore the meaning of the ordinary English word, i.e. enquiring into events. It did not include performance of specialist policing duties such as public order policing or protection duties. It is wrong to distort the ordinary meaning of enquiries to give effect, illegitimately, to a subjective intention of the Secretary of State.

142. With the amendment in 2015, the Secretary of State gave chief officers the power to determine an officer's normal role or duties and, thereby, effectively to determine the meaning of "routine enquiries" for that officer. The Secretary of State thereby exercise her power under regulation 34(1)(b)(ii) of the 2003 Regulations to "confer on … the chief officer, such functions … in relation to … conditions" for payment of allowance as she "thinks fit".

143. By doing so, the Secretary of State did not clarify the meaning of Annex U but, rather, altered its meaning. If she intended to deprive the claimants of the AFH allowance from 1 March 2015, where previously it had been payable, that would be inimical to the purpose of the regulation 34 power exercised, applying the well known *Padfield* principle. To avoid that conclusion, the court should interpret "routine enquiries" in the same narrow sense in the amended version.

144. Finally, there is insufficient evidence to conclude that the Commissioner decided travelling and staying outside London was a normal part of a protection officer's duties, despite the claimants' realistic acceptance that many of them do stay outside London and travel away from home much of the time. On any view, any such decision cannot have applied to SPOs who work at one location and many of whom never go to serve in Scotland.

Commissioner's submissions

145. The Commissioner's response was as follows, again in my paraphrase. First, the Winsor allowances were intended to replace the mutual aid provisions of the Hertfordshire Agreement; they were not intended to bestow the benefit of the AFH

allowance (and the hardship allowance) on officers who happened to be working away from their homes or their normal place of duty overnight.

146. Next, RASP officers are not "held in reserve" within Annex U, paragraph 11, either before or after that paragraph was amended from 1 March 2015. The amendment did not alter the meaning of the provision; it only served to clarify it by removing an ambiguity that gave rise to much discussion and correspondence in the period before the amendment. Thus, no text was removed or altered. Text was only added.

147. An officer is not held in reserve even if they are serving away from their normal place of duty, if that officer is at the time undertaking an activity which forms part of the member's role or normal duties, where due to the nature of that role or duty, or due to the distance from the home station, the member is unable to return home overnight. That proposition applies to the RASP officers in this case who work away from home.

148. The job advertisements and descriptions show that CPOs have to serve away from their homes as part of their role and normal duties. The SPOs are not in a different position. The specifications for their job include likely service at five or more locations in this country, being palaces or other royal residences. The SPOs may also have to serve overseas if that is necessary, following the movements of those for whom they are required to provide protection.

149. Several of the SPO claimants (Mr Roberts, Mr Sowerby, Ms Self, Mr Bloomfield and Mr Hammett) regularly travel to Scotland to serve there. While this is a popular posting, if all vacancies were not filled by volunteers, SPOs could be required to serve there or elsewhere in this country or, indeed, overseas. As for the Aztecs such as Mr Exell, the job advertisement states: "applicants must be willing to perform duties away from home for protracted periods".

150. Further, RASP officers working away from home, the Commissioner submits, are carrying out "routine enquiries". This agreed position dates back before the amendment to Annex U. Thus, on 12 April 2013 an MPS News Release informed officers that the MPS had "reached an interim agreement with the Police Federation that a routine enquiry should be defined as 'a deployment away from home for a reason or purpose which routinely occurs as part of the role and responsibilities, for example, a regular meeting or conference'".

151. The function of determining the role and normal duties of an officer and whether the role and duties have to be performed while staying away from home overnight falls to the chief officers, as clarified in the amended version of Annex U. But there is no requirement for any formal determination by a chief officer. There is ample evidence in numerous documents that such a determination has been made in case of RASP officers.

152. A second condition precedent to the payment of the AFH allowance is that the officer concerned must be "immediately deployable". (This must mean "ready for immediate deployment" which are the words found in the amended paragraph 11(b); the words "immediately deployable" do not appear in Annex U.) The claimants' assertions that they were immediately deployable mean, at the most, that they were on call and could easily be recalled to duty.

153. The "normal place of duty" in Annex U is not the same as the "usual place of duty", which is a term used for other purposes and a red herring. An officer's "usual place of duty" has to be a police establishment and could not be a principal's residence or other non-police premises. There is no definition of the normal place of duty. It just means where an officer works. RASP officers' roles are *sui generis*; often, they do not set foot in police premises.

Reasoning and Conclusions

154. First, the fact that the amendment to Annex U was prefaced by a statement that its purpose is merely to clarify the "intention" of a previous version and not to alter its meaning, is not conclusive in favour of its meaning remaining unaltered. If the language used inexorably led to the opposite conclusion, the court would give effect to that conclusion, rejecting the *ipse dixit* of the Secretary of State.

155. It is, in the usual way, for the court to determine the correct interpretation of a normative document, including a statutory determination of the Secretary of State. It is not for the latter but for the court to rule on the construction of the words used, whether or not they lead to the conclusion subjectively intended by the Secretary of State that the meaning remained unchanged.

156. Having said that, in this instance I accept the submission of the Commissioner that, objectively construed, the amendment made with effect from 1 March 2015 did not substantially alter the meaning of Annex U, paragraph 11. The procedural and negotiating history supports the contention that "normal place of duty" and "routine enquiries" were regarded as ambiguous, making it difficult to agree on when an officer was "held in reserve".

157. The clear purpose of the amendment was to resolve the ambiguity and end the controversy. I see no reason to reject the Commissioner's contention that the language used succeeded in that ambition. No text was removed or substituted; text was only added to lend clarity to the meaning of "held in reserve" and to delineate more clearly the scope of the "routine enquiries" exception.

158. The added words remained consistent with the language of the unamended version. They did include an added element: the chief officer's power to determine an officer's "role or normal duties" and whether there was an "expectation within that role or those duties" that the officer must travel or work away from home. That power existed already but was made explicit: a chief officer can give reasonable instructions to subordinates in the normal way.

159. In construing the provision, I must bear in mind that it is not specific to RASP officers. It applies to officers generally, within and outside the RASP command and the MPS. The wording, therefore, is generic. The words are not chosen with specialist protection duties, or any other type of policing duty, at the forefront of the drafter's mind.

160. The intriguing phrase "routine enquiries" must be approached with some care, bearing that in mind. I will come back to that phrase but for now I mention that "enquiries" is a time honoured word with a well known ring to it (as in "helping police with their enquiries"). It is associated with the conventional paradigm police function of detecting crime and enforcing the criminal law.

161. Yet, some officers' duties do not require them to make any "enquiries". RASP officers do, no doubt, make them quite often but they also spend long periods not making any. The same is true of other police duties: for example, directing traffic, maintaining public order, recommending colleagues for promotion, posting officers to Scotland, and so forth.

162. In my judgment, the amendment from 1 March 2015 makes clear that routine enquiries include plenty of police duties that are not really enquiries at all. I also think that such was the position before the amendment made the contrary unarguable. With those general observations in mind, I now take a closer look at the wording of the provision, using the amended version.

163. The first sub-paragraph, 11(a), states when the AFH allowance is payable. It is payable for nights when the officer is "held in reserve". The second sub-paragraph, 11(b), states the factual circumstances in which an officer is "held in reserve". If such are the circumstances, the officer is entitled under 11(a) to the AFH allowance, subject to an exception. The exception is defined in the third sub-paragraph, 11(c).

164. The exception in (c) covers cases where an officer would (under (b)) be "held in reserve" but is not because the factual circumstances in (c), delineating the exception, exist. Sub-paragraphs (b) and (c) must be read together and in sequence; if an officer would be entitled to the AFH allowance under (b), they are entitled to it unless they are disentitled by the application of (c).

165. As to sub-paragraph (b), I accept the submission of the claimants that cases where an officer is "serving away from his normal place of duty" are not confined to mutual aid cases where one force lends an officer to another force. That interpretation cannot be correct, given the words "or otherwise" following on from the reference to "assistance of another police force".

166. However, it seems likely that the large majority of cases where (b) applies will be mutual aid cases. Commonplace examples would be a Yorkshire based officer having to stay at a London hotel to help police the Olympics, or an MPS officer going up to Newcastle to help police a demonstration there. In such cases, the AFH allowance is likely to be payable.

167. There is unlikely to be any reason for the exception in sub-paragraph (c) to apply in such a case. It is unlikely that the officer's superior chief officer will have made any decision determining that the officer's role or normal duties entail out-of-area policing of that kind; the officer's forays out of their area are likely to be ad hoc and outside the normal run of duties.

168. It may be otherwise, however, if the officer is what might be termed a "specialist peripatetic"; for example, a senior and experienced co-ordinator of public order policing with a regular role travelling to coordinate public order policing of demonstrations or sporting events up and down the country as and when the need arises. If that were the position, the exception in (c) might well apply.

169. What kind of case would fall within "or otherwise" in the bracketed phrase "whether because the member has been provided for the assistance of another police force under section 24 of the Police Act 1996 or otherwise"? It is not easy to think of non-mutual

aid examples. A HRLI deployment of a RASP officer could be a case in point. **[CA (17)]**.

170. Staying with the words in (b), "required to stay in a particular, specified place", to which the word "overnight" was added from March 2015, it does not in my judgment matter whether the officer is required to stay at a particular hotel or barracks or billet or whether they are permitted, as Mr Gibson would readily allow, to stay at a convenient place of their choosing, such as a friend's house. I do not agree with the submission that a "particular, specified place" refers more narrowly to a pinpointed location such as a school gym or barracks.

171. The place may be sufficiently particularised and "specified" by a requirement of proximity to next day's duty; for example, in a public order policing case involving travel to Newcastle, the specified place could be expressed as (though without a need for formality) as "any suitable accommodation within easy reach of the Tyne Bridge where next day's demonstration is due to take place".

172. I come next to the meaning in both (b) and (c) of "normal place of duty" within the phrase "serving away from his normal place of duty". The first and obvious point, from which neither side dissented, is that the phrase must bear the same meaning in (b) as in (c). The second point, again uncontroversial, is that for an ordinary police officer based at a police station, the station is likely to be the normal place of duty.

173. In the case of a RASP officer, the issue is more difficult because, as the Commissioner submitted, the role is *sui generis* and outside the normal run of policing and also because travel is treated by the Commissioner – the chief officer within (c) in the case of RASP officers – as an inherent part of the role, as shown by numerous job descriptions and advertisements.

174. After considerable reflection, I reject the submission of the claimants based on a tax law approach that a RASP officer has only one "permanent" or "normal" place of duty and that other places to which they accompany their principals are "temporary" or not "normal" places of duty. I accept the submission of the Commissioner that the RASP roles are by their nature at least potentially peripatetic and not tied to any particular location as the normal place of duty.

175. The job descriptions, the advertisements and the other documents such as briefing notes on specific postings support the proposition that RASP officers are or can be required to deploy away from home not just by way of exception to a normal role performed from a home base, but as part of their normal duties. Indeed, in my judgment mobility and selfless accompaniment of the principal is part of the very raison d'être of a RASP officer.

176. RASP officers are justly proud of their mobility and versatility. It is one reason why their professionalism commands such respect. It is also a reason why they are difficult to fit into the "normal place of duty" rubric and why a special protection allowance has been found necessary. I have come to the conclusion that for the purposes of sub-paragraphs (b) and (c) (which have nothing to do with tax law, about which I say nothing), the position is as follows.

177. First, the position is not that the RASP officers have no normal place of duty. That would be a difficult interpretation to justify given that (b) and (c) both point strongly towards every officer having a normal place of duty. Second, they do not have more than one normal place of duty at a time. That would be difficult to square, again, with the use of the singular noun "place" rather than "place or places" of duty.

178. In my judgment, the RASP officers have one normal place of duty, which changes rapidly and frequently as they move around with their principals or in advance of them, or otherwise in the performance of their duties, with or without the principals. The claimants' normal place of duty is, broadly, usually the place shown in the left hand column of the tabulated records of deployments in their witness statements.

179. If they travel from London to Cairo, their normal place of duty is, first, London for a time and then, Cairo for a time, until they move on. I think that interpretation most faithfully respects both the language of sub-paragraphs (b) and (c) and the reality of a RASP officer's role.

180. In deciding to adopt that interpretation, I have not overlooked the point that some RASP officers travel a lot, some may travel only occasionally and others perhaps not at all. I have had to consider carefully whether the analysis may be different for different types of RASP officer. I appreciate that SPOs, in particular (as their name suggests) tend to be more static than CPOs and PPOs.

181. In the end, I reject an analysis which would treat the normal place of duty differently in the case of different kinds of RASP officer. I think the analysis is the same for all kinds, including Aztecs such as Mr Exell. I return to the point that mobility is inherent in the role and that this is clearly understood and overwhelmingly demonstrated by the job advertisements and descriptions.

182. Where SPOs normally work at a single location, for example a palace in the London area, the normal place of duty is that palace. But, the normal place of duty would change to another location for the duration of a posting to, say, Portsmouth if the SPO were sent there to provide protection to royalty during a naval ceremony or the return of a task force from overseas. For the duration of the posting, it would be normal for the SPO to be working in Portsmouth.

183. I come next to the words at the end of (b) added from March 2015: "by reason of the need to be ready for immediate deployment". In my judgment, they read better if they are treated as following on after the other added word "overnight". These words are, as already noted, applicable to police officers generally and not just to RASP officers or MPS officers.

184. The sense is that the officer is held in reserve if they are serving away from the normal place of duty and are required to stay at "a particular, specified place overnight"; "by reason of the need to be ready for immediate deployment"; "rather than being allowed to return home".

185. Thus, it is the need to be ready for immediate deployment from the specified overnight accommodation that prevents the officer from returning home. Home is too far away. The "immediate deployment" would normally refer to the start of the next day's shift, to be performed away from the normal place of duty.

186. If my analysis is correct, RASP officers are not "held in reserve" within (b) because they are not serving away from their normal place of duty even if they are accompanying a principal from one place to another, within this country or overseas. The exception is that HRLI deployments are treated, pragmatically, as working away from the officer's normal place of duty. The rationale appears to be that HRLI deployments are treated as optional and not compulsory.

187. I do not need to decide the point, but it may be that the Commissioner has determined, or may be taken to have determined, within (c) that the "role or normal duties" of a RASP officer do not include HRLI deployments. Therefore, coming back to (b), a HRLI deployment *is* served away from the officer's normal place of duty; inhospitable HRLI accommodation is regarded as a "specified" place where the RASP officer is "required" to stay overnight.

188. The above explanation may be open to the objection that if HRLI deployments are optional, the RASP officer involved would not be "required" under (b) to stay at the inhospitable HRLI accommodation overnight. However, since I am not asked to decide whether HRLI deployments give rise to an entitlement to the AFH allowance, I do not think I need say more about them.

189. Since the RASP officer claimants in this case are not, in my judgment, held in reserve within (b) when protecting their principals at the various locations concerned, the issue whether they are then disentitled from receiving the AFH allowance by reason of the exception in (c) does not arise. The exception is relevant to those who, if it applies, are entitled to the AFH allowance under (b).

190. Nevertheless, I propose to say a few words about the scope of the exception in (c), in case it assists. If a person would be entitled under (b), the disentitlement under (c) arises in two categories of case: first, where serving away from the normal place of duty occurs "only by reason of being on a training course" and, second, where it occurs "only by reason of … carrying out routine enquiries".

191. The first of those two exceptions is straightforward and requires no further elaboration. The second exception requires me to return to "routine enquiries", to which a definition was added as clarification from 1 March 2015. The first part of the definition is that routine enquiries means "activity which forms part of the member's role or normal duties".

192. It is for the chief officer to determine the "role or normal duties" and whether there is an expectation that they be done away from home (see the concluding words of (c)). As already noted, routine enquiries is not a phrase with any specific RASP association; to the contrary.

193. Thus, a London based MPS officer going to Yorkshire (or, for that matter, Barbados) to interview a witness in a murder investigation would appear (subject to any chief officer determination to the contrary) to be disentitled from the AFH allowance because interviewing witnesses is a routine enquiry which is expected to be done away from home. Relevant witnesses are often likely to be out of the officer's area.

194. In such a case, there may be two different reasons why the officer is unable to return home each night. The first is "the nature of that role or duty". That would appear to

include duties that by their nature need to be carried out in the dead of night. The second is "the distance from the home station". That is likely to be the most common: where the "home station" is too far away to travel back to each night.

195. Applying that reasoning, I have considered the tabulated record of deployments relied upon by each of the lead claimants in the **Prior** and **Fielding** claims. I have also considered the written and oral evidence of those deployments and the duties performed, including the "deep dive" analysis done by the Commissioner, some of which was put to the claimants in cross-examination.

196. I conclude that in none of the cases relied on during the agreed sample periods is the claimant concerned entitled to the AFH allowance (or, it follows, the hardship allowance). I reject the claimants' submissions in so far as they are not consistent with my analysis. I do not accept that Annex U paragraph 11 was amended from 1 March 2015 in order to disentitle officers from receiving the AFH allowance, in breach of the *Padfield* principle of public law.

The defence of set-off; unjust enrichment

197. This third and final issue arises only if, contrary to what I have decided above, the **Fielding** claimants are entitled to overtime and/or all the claimants are entitled to, on at least some occasions, the Winsor allowances. The issue that would then arise is whether their entitlement is tempered by the Commissioner's defence of set-off arising from payment of the SEA and the 16 hour day.

Commissioner's submissions

198. The Commissioner's principal submissions in support of her defence of set-off were the following, as I paraphrase them. First, before the merger of SO1 and SO14 to form the RASP command, officers in SO1 were paid the minimum 16 hours per day even if, as was the norm, fewer than 16 hours were actually worked that day; while officers in SO14 were paid the SEA, intended to compensate them for long hours and time spent away from home.

199. The set-off defence is maintained in respect of the 16 hours per day payment only in the case of the **Fielding** lead claimants; and in the case of the **Prior** claimants, against Ms Self and Mr Exell in respect of the 16 hours per day payment and against Mr Stapleton only in respect of the SEA.

200. The SEA, paid annually to royalty protection officers including Mr Stapleton, is described in detail in an annex to the Commissioner's opening skeleton argument. I have explained above the terms and effect of the interim agreement, implemented from 1 August 2015. It included withdrawal of the SEA for constables and sergeants, but not for inspectors such as Mr Stapleton.

201. The basis of the restitution set-off defence, initially pursued also as a counterclaim, was explained thus in the Commissioner's opening skeleton:

> "Those payments were made by the Commissioner – in conjunction with other payments – in the belief that this was in consideration for the work, and the circumstances of that work, undertaken by the Claimants. In those circumstances, the amounts paid should be set off in order to avoid the Claimants' being paid twice for the same work undertaken.

…

> If, contrary to the Commissioner's case, the Claimants are entitled to overtime pay and / or allowances, the sums previously paid were paid on a mistaken basis and the Claimants should not be permitted to recover twice for the same work. The basis on which the Commissioner intended to benefit the Claimants or some of them should be treated as vitiated. Money paid under a mistaken belief of the payer as to the existence of a liability to pay is recoverable (*e.g. National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654).
>
> … It would be unjust for the Claimants to retain payments made whilst also recovering sums for any unpaid overtime and / or allowances. As such, any sums to which the Court finds the Claimants are entitled should be set off against those already paid."

202. Following the reasoning of Lord Steyn in *Banque Financière de la Cité v. Parc (Battersea) Ltd* [1999] 1 AC 221, at 227, the Commissioner relied on the four aspects of the cause of action there set out. Has the claimant been benefited, in the sense of being enriched? Was the enrichment at the defendant's expense? Was the enrichment unjust? Are there any applicable bars or defences? The issues here concerned the third and fourth requirements; the first two were clear.

203. The Commissioner must prove that the enrichment was unjust. If she does, the claimants must then prove facts amounting to an applicable bar or defence. Whether an enrichment is unjust should be considered in light of any benefits for which a claimant must give credit (*School Facility Management Ltd v Governing Body of Christ the King College* [2021] EWCA Civ 1053, per Popplewell LJ at [79]-[85]).

204. The enrichment was unjust here. There is generally a right of recovery in mistaken overpayment cases. Indeed, they are the paradigm case of restitution for unjust enrichment. In cases of doubt as to whether the payment made was due, the payer is not disqualified from restitution "provided the doubt does not overwhelm the mistake" (*Jazztel plc v. Revenue and Customs Commissioners* [2017] EWHC 677 (Ch) per Marcus Smith J at [30]).

205. In the words of her closing submissions (with my italicised insertions):

> "the Commissioner's mistake was that she [*believed that she*] was not lawfully able to pay AFH allowance to these officers and [*that*] therefore the disruption and inconvenience to their private and family lives that was necessarily involved in working away from home fell to be compensated by other means – namely the payment of a notional period of 16 hours pay, or the payment of the SEA. "

206. The premise of the set-off defence is that the court must have decided (which I have not, as it turns out) that the AFH allowance is due. At one point, it was suggested on behalf of the Commissioner that she had not had the power to make payments of the SEA and the 16 hour day payments and that they should be returned to her because they had been paid *ultra vires*.

207. The Commissioner does not pursue that contention. She does not now rely on the *ultra vires* doctrine as a basis for seeking set-off of SEA and 16 hour day payments against AFH payments. She submits that if the AFH allowance is due (contrary to what was her belief), the SEA and 16 hour day payments were lawfully made, were not paid *ex gratia* and were paid as compensation for long hours and nights spent away from

home; but that they should not have been paid and would not have been had the Commissioner known that the claimants were entitled to the AFH allowance.

208. As to the defences advanced, I was referred to some of the usual cases and to the illuminating discussion in the judgment of HHJ Paul Matthews (sitting as a judge of the High Court) in *Officeserve Technologies (in liquidation) v. Annabel's (Berkeley Square) Ltd* [2018] 3 WLR 1568 about the relationship, in restitution cases, between a defence of estoppel and a defence of change of position; see the judgment at [44]-[54] on the continuing relevance of the vexed decision in *Avon County Council v. Howlett* [1983] 1 WLR 605.

209. The defences advanced - change of position, estoppel by representation and ECHR article 1, first protocol - must fail. Any change of position would have to make restitution inequitable; it is not inequitable where claimants have been paid twice over for the same work. The only representation was that officers were entitled to the 16 hour day payment, not that they were entitled to it and the AFH allowance as well. The first protocol does not alter common law restitution principles; it is not engaged by set-off, for no "possession" is taken.

Claimants' submissions

210. The claimants' main arguments in response to those arguments can be paraphrased in the following way. There is no visible consistent reason why the SEA has been paid over the years, starting in 1910. The reasons given for paying it have varied over the years. Documents going back to 1981 are relied on. Though the reasons given relate in some way to duties performed by recipients of the SEA, beyond that there is no clear and consistent rationale.

211. The minimum 16 hours per day payment was paid as a temporary measure on the merger of SO1 with SO14, pending the introduction of a protection allowance, which did not arrive until December 2020, much later than expected, though it had been under consideration since 2012 as documents dating from then onwards show.

212. The new allowance was intended to be based on the notion of (in Sir Craig Mackey's words) "enhanced stand by with a firearm". The interim agreement reached in June 2015 and consequent introduction of the minimum 16 hour day (and withdrawal of the SEA from constables and sergeants) was reached against the background of legal proceedings that had already been issued, in December 2014, and which were subsequently settled.

213. The claimants set out in detail the documentary history of the complex twists and turns of the discussions and negotiations (called "documentary archaeology" by the Commissioner), to show, as I understand it, that any mistake as to the legal position was surrounded by doubts and contentious arguments about the legal position and what it might be found to be in litigation if agreement were not reached.

214. Thus, in a nutshell, I understand the claimants' position to be that the supposed mistake about the legal position occurred in the context of complex and contentious collective bargaining, with give and take on both sides. The suggestion that there would be double recovery if the 16 hour day, or the SEA, were paid in addition to the AFH, must be

measured against the countervailing consideration that officers had for years been undercompensated.

215. I hope the above brief paraphrase does justice to the detailed written arguments and references to the documents in the claimants' closing submissions. As to the law, my paraphrase can be equally brief and I need not cite all the cases. The claimants made the following main points.

216. First, the cause of action for unjust enrichment is well known to be flexible and while the categories of unjust enrichment are not closed, the cases do not include any where the mistake made is that the party claiming thought she was *not* empowered to make a payment, as distinct from a case where that party wrongly thinks she *must* make a payment or mistakenly overpays.

217. It was the Commissioner's choice to pay the SEA and the 16 hour day. The fact that some other form of payment (the AFH allowance) was thought not to be due but, in fact, was due, does not mean the Commissioner thought she was *obliged* to make any compensatory payment. She must have known she was not bound to do so but chose to do so to maintain good industrial relations and stave off litigation.

218. The present case is therefore very unlike a standard case of erroneous overpayment such as *Avon County Council v. Howlett*. The payments made under the interim agreement were lawfully made (the *ultra vires* argument having been abandoned) and in consideration of work done. The protection allowance was not then yet payable. There is no real enrichment or injustice in the payments, in those circumstances.

219. Further, it is not apt to think in terms of a failure of consideration, a private law concept. The claimants here do not work under employment contracts; they hold office. There is no inconsistency between paying, lawfully, in accordance with statutory powers, an allowance and an hourly overtime rate covering the same work period.

220. The claimants also made detailed submissions, if it were necessary to do so, on the defence of estoppel by representation, the defence of change of position, and the Human Rights Act 1998, read with ECHR article 1, first protocol. I do not find it necessary to set these out at length.

221. They submitted that both defences must succeed, if the claim were otherwise good; and that allowing the set-off would be an interference with the right to peaceful enjoyment of the claimants' possessions, namely the amounts paid to them which the Commissioner now seeks to recoup through set-off.

222. Finally, they complained that the Commissioner was guilty of delay in asserting a right to recoup amounts paid to the claimants. She first did so as late as 3 July 2019, by way of a counterclaim asserting that she was entitled to do so. Until then, she had acquiesced in the enrichment, if there was one; but should have pursued her claim without delay (*vigilantibus non dormientibus succurit lex*).

Reasoning and Conclusions

223. If it were necessary for me to decide this issue, I would reject the Commissioner's submissions and accept those of the claimants. In my judgment, the claimants have not

been enriched by payments made under a mistake. They have done their job and been paid certain amounts for doing it.

224. The Commissioner turns out (on the hypothesis that the AFH allowance is due) to have paid them on a different basis but still on the basis that they should be appropriately rewarded for their labour. On the hypothesis I am considering (that the AFH allowance and hardship allowance were due, were not paid and must now be paid), I accept that the amounts paid turn out to have been calculated on a wrong basis in the past.

225. The AFH and hardship allowance were (on this hypothesis) wrongfully withheld and that will now be put right. On the other hand, the wrong withholding of AFH allowance has been tempered by payment of SEA and 16 hour day payments instead.

226. The Commissioner and her agents knew or must be taken to have known when they agreed to or decided to pay the SEA and the 16 hour day, that the issue of how RASP officers should be compensated for working long hours and having to stay away from home was a controversial one.

227. The manner in which the Commissioner decided to approach that issue in a climate of uncertainty, negotiation, threats of litigation and issue of proceedings (subsequently settled), was a matter for her to consider, balancing the need to maintain good industrial relations, observe her legal obligations as she considered them to be and if possible avoid court proceedings which could produce an outcome different to the basis on which she had been proceeding.

228. The court should not permit the Commissioner, using the vehicle of a restitution claim, to undo retrospectively decisions she made but now regrets, to make payments which, she accepts, were not *ultra vires* and not made *ex gratia* but in consideration of work done by the claimants. I do not think it is right to say the claimants have been unjustly enriched where the payments made were earned.

229. There is no unjustified windfall in this case, unlike in straightforward "overpayment in error" cases, such as *Avon County Council v. Howlett*. Here, the decisions made on behalf of the Commissioner may mean that she ends up paying more than she otherwise would have decided to do, but it does not mean the claimants have received a windfall and should return it.

230. It means only that they will have received, lawfully, more than they would have received, in return for their work, than if the Commissioner had refused to make the SEA payments and had refused to honour the promise made to observe the interim agreement with the 16 hour day arrangement.

231. If the Commissioner had refused to make those payments, for example by tearing up the interim agreement before any judicial determination of entitlement to the AFH allowance, there could have been consequences; for example, worse industrial relations or more extensive or protracted litigation. By making the payments, she increased her ability to avoid those consequences.

232. For those brief reasons, I would reject the foundation of the Commissioner's set-off defence. I doubt whether restitution claims will often have a place in the rough and tumble of industrial relations and collective bargaining. Where payments are made by

a public body such as the MPS, they may be wrongly calculated by simple arithmetical error. That is a different matter. Or they may be made unlawfully, *ultra vires*. That too is a different matter. The present case involves neither of these two phenomena.

233. I do not find it necessary to consider in detail the defences of change of position and estoppel by representation; nor the impact of ECHR article 1, first protocol and the Human Rights Act 1998. They do not arise.

234. The change of position defence is likely to be fact specific; it would depend what each recipient had spent money on, and in what circumstances. The estoppel defence would appear to be weak for the reasons advanced by the Commissioner. The human rights arguments would be unlikely to make any difference to the common law of restitution if the set-off defence would otherwise succeed at common law, as the Commissioner submitted.

Disposal

235. For those reasons, and for the reasons further elaborated in the confidential annex, the claims do not succeed and are dismissed. The defence of set-off, had it arisen, would have failed; a notional restitution claim against the claimants is not made out. I will hear the parties on consequential matters.