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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JR305
FOR JUDICIAL REVIEW

Mr Stephen McQuitty KC (instructed by Edwards & Co, Solicitors) for the Applicant
Mr Aidan Sands KC (instructed by the Crown Solicitor's Office) for the Respondent

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McALINDEN J

Introduction

[1] The applicant, a police trainee, challenges a decision made on 8 August 2023 by Chief Superintendent Walls, on behalf of the Chief Constable, to refuse the applicant vetting clearance. On 7 November 2023, judicial review proceedings were commenced by way of an Order 53 statement. On 16 November 2023, the applicant was granted anonymity so as to protect the identity of the complainant in related criminal proceedings and leave was granted on the papers by Colton J on limited grounds set out at paras 5.1(i), 5.1(ii) and 5.1(iii)(c) of the applicant's Order 53 statement. The applicant contends that the impugned decision contained errors of law and fact, was arrived at on a procedurally unfair basis and was Wednesbury unreasonable/irrational in that clearly material matters were not taken into account. The applicant seeks to have the impugned decision quashed and for the Chief Constable to be required to consider his vetting status afresh in accordance with a lawful procedure.

[2] As a result of the refusal of vetting clearance, the applicant is now the subject of internal police proceedings brought by the Chief Constable under regulation 6 of the Police Trainee Regulations (Northern Ireland) 2001 and by agreement those proceedings have been stayed pending the final determination of these judicial review proceedings. It is accepted by the applicant that if the impugned decision withstands judicial scrutiny, it is inevitable that the applicant's status as a police trainee will be terminated under regulation 6 of the 2001 Regulations as vetting clearance is necessary

for the applicant to be able to take part in training. See *R (On the application of Victor) v Chief Constable of West Mercia Police* [2023] EWHC 2119 at para [75].

[3] The judicial review challenge came on for hearing on 2 May 2024. After a full day's hearing the matter was adjourned until 19 June 2024 and concluded on that date. I am grateful to counsel for the quality of their written and oral submissions and I am grateful to their instructing solicitors for the comprehensive and easily navigated trial bundle and bundle of authorities provided to the court in this case. Any pagination referred to in this judgment will refer to pages in sections A, B or C of the trial bundle or the separate authorities bundle.

[4] It is important to set out the events which led to the taking of the impugned decision by Chief Superintendent Walls on 8 August 2023.

[5] It is common ground that the applicant applied to become a PSNI Officer in November 2017 and was ultimately successful in securing a training place in the "1710" intake. The applicant was informed that his vetting was approved in February 2019 and on 2 May 2019 a letter was directed to him (Trial Bundle Section B page 82) in which he was erroneously informed that he had been appointed to the PSNI as a Student Officer. As is confirmed by Chief Superintendent Wright in para 12 of his first affidavit sworn on 16 January 2024, (Trial Bundle Section C page 3), the applicant was not a Student Officer and was not, therefore, subject to the PSNI Code of Ethics, which is the code issued by the Police Board under section 52 of the Police Act (Northern Ireland) 2000 which, *inter alia,* lays down the standards of conduct and practice for police officers.

[6] The letter dated 2 May 2019, advised the applicant that he should attend the Police College at Garnerville on 23 May 2019 for induction and that the training programme would formally start on 23 June 2019.

[7] On 15 May 2019, an eighteen-year-old woman made an allegation to the police that on the morning of the same day, the applicant had raped her in a house in Newtownabbey. The crux of her allegation was that in the early hours of 15 May 2019, she had taken a taxi with a couple of her friends to this house and when she arrived, the owner of the house, the applicant and a couple of other males were already there. After having taken some drugs, she had gone to sleep in a single bed in a downstairs bedroom with her clothes on. She was woken by the applicant who asked her where everyone else was and left the room and came back in and asked her if he could get into bed with her as all the other beds were occupied and she agreed. She went back to sleep and later on that morning, she woke up and the applicant was penetrating her vagina from behind with his penis. In her police interview conducted on 24 May 2019, the complainant indicated that when she went to bed earlier that morning, she was wearing a pair of jeans, socks, a snake print top and a jacket. She had also borrowed a second jacket from another male present in the house because she was cold. In relation to underwear, she was wearing a Calvin Klein thong but no bra. (Trial Bundle Section B page 145). When she woke up to discover the applicant having sex with her,

she was wearing nothing but her top rolled down to her waist. She was wearing nothing on her bottom half. (Trial Bundle Section B page 149). The complainant alleged that when she realised what was happening, she immediately shouted: "no stop, get off me." The applicant then got off her saying: "I'm getting off. I'm getting off." The complainant then immediately went to another bedroom where her friend had spent the night with another male. (Trial Bundle Section B page 150).

[8] This male, whose house it was, made a statement to the police on 25 June 2019 in which he stated that at 10am on 15 May 2019, he woke up and heard screaming. He got up and opened his bedroom door and found the complainant standing there naked apart from her top which was around her waist. She looked as if she had just got up and was in complete hysterics. She was crying and heavy tears were rolling down her face. This male took her into the bedroom and the complainant's friend who had spent the night in the room with this male then wrapped a duvet around the complainant. The complainant was crying heavily and said: "I woke up and he was having sex with me." (Trial Bundle Section B page 94).

[9] The ABE interview of the complainant which was conducted on 24 May 2019 also dealt with the issue of the complainant's state of intoxication and/or impairment at the relevant time. She informed the police that she had gone to Thompson's Garage at about 10:00pm on 14 May 2019 and then went to a couple of house parties in the Holyland area about 2:00am on 15 May 2019 and then went back at her friend's house at about 5:00am on that date. Her friend then received a telephone call inviting them up to the house in Newtownabbey where a male who they knew from Thompson's Garage lived. (Trial Bundle Section B page 112 to 119). The complainant stated to police that she had "two shots and two double vodkas" in Thompson's Garage and then had wine while at a house party in the Holyland area. (Trial Bundle Section B page 114). She described herself in her ABE interview as being very drunk when she left that house party. She then informed the police that she had consumed five or six doubles of vodka and Redbull in Thompson's Garage. (Trial Bundle Section B page 117). When she went to the house in Newtownabbey, she consumed some more wine. (Trial Bundle Section B page 125). In addition to alcohol, the complainant stated that both MDMA and Ketamine were available in the house in Newtownabbey but she only had one or two "keys" of MDMA. She didn't see the applicant take any drugs because her impression was that he was very drunk and that he was on the sofa sleeping while she was conversing with others and then he was taken upstairs to bed by one of his friends. (Trial Bundle B pages 126 to 137).

[10] Following a complaint being made to the PSNI, the applicant was arrested at his home in Newtownabbey and was taken to Antrim Custody Suite where he was interviewed in the presence of a solicitor on 15 May 2019 and then released. He was interviewed for a second time in the presence of a solicitor on 23 July 2019. During his first interview, the applicant stated that he went to a friend's house at about 10:30pm on 14 May 2019 and consumed some Chinese food and alcohol with two friends. Another male friend arrived at the house at about 2:00am on 15 May 2019 and then three girls arrived at the house between 3am and 3:30am. The girls were not

drinking but then: "drugs started to come out onto the table" so the applicant went upstairs into one of the bedrooms. He was in bed for about three hours when one of his friends came up to the bedroom and said he wanted to use the bedroom to have sex with one of the girls. (Trial Bundle Section B page 163).

[11] The applicant stated that he then went downstairs again and began looking for a phone charger in the kitchen. He stated that he could not find a phone charger so he went into the downstairs bedroom where the complainant was sleeping and asked the complainant if she had his phone charger and was told by the complainant that she did not have his phone charger and did not know where it was. The applicant then went back out of the bedroom to look for his phone charger. The applicant stated that he then went back into the bedroom where the complainant was sleeping and asked her if it was alright if he got into bed beside her because he had been: "kicked out of the bed upstairs." The complainant said: "no problem." The applicant then got into bed with the complainant and matters progressed to the extent that the applicant specifically asked the complainant whether she was sure she wanted to do this and he explained to the police that: "I didn't know what state she was in and she was like yeah and she was like she nodded her head and said yeah and after that we had sex …" (Trial Bundle Section B page 163).

[12] The applicant then stated that they both fell asleep and when he woke up at 10:30am or 11:00am they were both naked and the applicant went to reach across to get out of bed and go home and as he was getting out of bed, the complainant woke up: "completely flustered and was in panic and tears and all and I was in hysterics that I couldn't believe what way she reacted after saying that to me and then she went into her friends, into her friend with my friend … in the other room and they … just said it was better for me to go …" (Trial Bundle Section B page 163).

[13] The applicant accepted that his friend's house was "not too far away from" his house. (Trial Bundle Section B page 164). In terms of the applicant's state of intoxication, he stated that he had one shot of vodka and three litres of cider and that he was drunk. (Trial Bundle Section B page 166). He subsequently stated that he had a further glass of cider after the three girls arrived at the house. (Trial Bundle Section B page 173). He stated that he did not know any of the three girls that arrived at the house at between 3am and 3:30am and had never had a conversation with any of them before that night. He went on to state that he had assumed that it was going to be a boys' night and that: "I was just going out drinking just sit with my mates and then as soon as I seen drugs on the table, I just went up to bed … Because … wouldn't want to get involved in any of it." (Trial Bundle Section B page 168). The applicant stated that he had planned in advance to spend the night at his friend's house. (Trial Bundle Section B page 169).

[14] The applicant stated that after the three girls arrived, they did not seem to have any alcohol with them but: "then I … seen the drugs and like the bags and stuff so I just decided I would take myself out of the situation and go up to bed …" (Trial Bundle Section B page 170). He stated that he was aware at the time that the girls had

been on a night out in Thompson's Garage, a well-known Belfast city centre venue. (Trial Bundle Section B page 175). In relation to production of drugs, he stated: "… there was a plate and then I seen all like the white powder on the plate …" He then stated that one of the girls (not the complainant) said she had a bag of MDMA (Methylenedioxy methamphetamine, a Class A drug commonly referred to as Ecstasy) and then as soon as the applicant: "seen the bag I just took myself upstairs and that was it." (Trial Bundle Section B page 175).

[15] The applicant stated that one of the girls (not the complainant) took a bag out of her pocket and informed those present that it was MDMA. It wasn't in tablet form but was crushed up. This girl then started putting it out on the plate and then used her credit card to make lines with it. The applicant stated that he got up and left before anyone started to take any drugs. (Trial Bundle Section B page 177).

[16] The applicant was asked about the bed in which the complainant was sleeping and he was able to inform police that it was a single bed and it was well above floor level in that one had to ascend a set of ladders to get into the bed. (Trial Bundle Section B page 184). It was daylight at the time the applicant got into bed with the complainant. (Trial Bundle Section B page 185). The applicant informed police that he was wearing all his clothes at that stage apart from his shoes and he stated that he thought that the complainant had a top and her jeans on. (Trial Bundle Section B page 185).

[17] The applicant was asked about a three-seater sofa which was in the living room and why he thought a single bed with a person in it would have been more comfortable that a three-seater sofa. He stated that: "I'd just got out of the other bed and I just wanted to get into a bed and there was no blankets or anything on the sofa." (Trial Bundle Section B pages 204-205).

[18] During his second police interview which took place on 23 July 2019, the applicant was asked about what the complainant was wearing when he went into the bedroom where she was sleeping. He stated: "… just the only thing is about the jackets and stuff, when I came in she, she was just wearing that top …" He stated that there were two blankets on the bed but one of them was at the very bottom of the bed. It wasn't over her. (Trial Bundle Section B page 215).

[19] During this interview there was a discussion about the applicant just being accepted into the Police Training College at Garnerville. He was asked: "… if you're in a party where there's drugs … and you're supposed to be starting … a career as a police officer, distance yourself altogether why not leave the house?" The applicant responded: "I know." He was then asked: "You know you live in Newtownabbey you don't live that far away … Why not just leave altogether?" (Trial Bundle Section B page 219).

[20] The applicant's responses to these questions lie at the heart of this case. He candidly stated: "I know it was my mistake for doing that and being in that house in

the first place and then I'd already mentioned it to my dad." He explained that his friend's house: "was sort of like that and then I had lied to my dad and told him that I wasn't staying at … house." He went on to state: "that's my mistake for even being in his house in the first place." He was specifically asked whether his friend's house was the kind of place where there had been drugs previously. He stated that it was and that it was his fault for being there. (Trial Bundle Section B page 220).

[21] When asked about whether he had any interaction with the complainant before going into the room in which she was sleeping to enquire about the phone charger, the applicant stated that: "I didn't say one word to her before." When asked if he had been attracted to the complainant ("do you fancy her?"), he answered that: "No, I didn't. I couldn't even tell you what she looks like really." (Trial Bundle Section B page 225).

[22] The applicant was again asked why he did not sleep on the sofa in the living room and he answered: "I just came out of a bed and then I didn't think there was any blankets or anything there…." The applicant was then shown photographs of the sofa taken by the police when they examined the premises shortly after the report of rape was made and it was pointed out to the applicant that there was a red throw or blanket on the sofa. He then stated: "… it was just more I'd just come out of bed so I was like oh I just want to go in back into bed." (Trial Bundle Section B page 226). When asked during this interview what the complainant was wearing, the applicant was able to remember that the complainant "was wearing skin tight jeans, black ones and a pink sort of top …" (Trial Bundle Section B page 231).

[23] When describing what happened in the bedroom that morning the applicant again stated that he had asked the complainant is she was sure she wanted to have sex because he knew she had been in Thompson's Garage and he: "knew she's obviously been drinking if she's in a nightclub." (Trial Bundle Section B page 232). He was then asked the following question by the interviewing officer: "Ok so is it fair to say then the potential for a situation like this could go very wrong and was that in your head?"

[24] Again, the applicant's response to this question goes to the crux of this case. He responded in the following manner:

> "Yeah, yeah a hundred, a hundred and ten percent that's like I always think about that before like certain situations like even the situations when the drugs was there I was thinking ah right I thought this was just gonna to be me and my two mates at the start of the night after a football match, we got a Chinese, we're going to have a couple of drinks, started thinking this is all going to be fine, but then it just escalated as soon as I seen the drugs I was like there's something I'm not getting involved in, took myself out of bed, ah up to bed 'cos I didn't want to be involved in it … But then I know it's my mistake where I shouldn't even

> have been in the house …" (Trial Bundle Section B pages 232-233).

[25] Near the end of the second interview the applicant returned to the subject of the complainant's state of mind in relation to consent to sexual intercourse and he stated:

> "I had the initiative to even like I, I knew to ask her 'cos I knew she'd been on a night out before so I was just like she could be drunk or whatever here even though I didn't see her drink or anything I was just like are you sure you want to do this and she was like yes." (Trial Bundle Section B page 299).

[26] It is quite clear from the applicant's comments to the police in his second interview under caution that he knew the complainant had been on a night out and that she could be drunk "or whatever" even though he did not see her "drink or anything …" In the context of crushed MDMA being poured from a bag produced by one of the three girls onto a plate and then divided into lines by the same girl using a credit card, it is an inescapable conclusion that the "whatever" must refer to the complainant being under the influence of drugs and the "anything" must refer to the actual taking of the drugs that the applicant saw being prepared for use. He was at pains to emphasise to the police at the end of his interview that he knew that the complainant could be drunk "or whatever" ie drunk or under the influence of drugs even though he hadn't seen her drink "or anything" ie imbibe alcohol or take drugs and that's why he made a point of asking her if she wanted to engage in sexual intercourse.

[27] By correspondence dated 16 May 2019, the applicant was informed that his vetting was suspended and as a result he did not attend the induction event and did not commence the training course. On 13 May 2020 the applicant was informed by the relevant authorities that he would not face prosecution for any offences arising out of the complainant's complaint of rape. The reason for this prosecutorial decision was as follows:

> "There is insufficient evidence to provide a reasonable prospect of a conviction for the offence of rape in the circumstances described by (the complainant); the evidence of (the applicant) is convincing and it appears that (the complainant) may have been mistaken in her belief of what was occurring. Even if in the sleep after the sexual intercourse described by (the applicant), he had accidentally penetrated or moved in towards her vagina, there is no evidence of an offence by him. It is not considered that there is sufficient evidence to establish that penetration occurred at a time when (the applicant) knew

> that (the complainant) was asleep. (The complainant) gives no evidence of any sexual activity earlier in the evening. She had consumed a significant amount of alcohol and had taken MDMA. She makes no mention of taking off the two jackets … gave her, yet (the applicant) says she was not wearing them when he came in. The evidence overall indicates that (the complainant's) memory is severely adversely affected by her alcohol and MDMA consumption and she has no memory of participation in the sexual intercourse earlier in the morning. I direct No Prosecution …"
>
> (Trial Bundle Section C page 75).

[28] The applicant's vetting clearance was reinstated after consideration of this decision. On 29 June 2020 a senior police officer made the following note:

> "Clearance was suspended 16/05/20 due to rape investigation.
>
> PPS directed NO Prosecution 12/05/20.
>
> Based on the above report and the presumption of innocence, there is no reason to refer to VP (in line with previous decisions made by VP) and clearance can be reinstated."

In this context the reference to "VP" is a reference to the Vetting Panel. (Trial Bundle Section C page 75A). The applicant was informed of this decision on 30 June 2020 and was due to commence his training in September 2020. However, family illness caused him to defer this start date and he actually commenced his training in January 2021.

[29] On 28 February 2021, the police were made aware by the PPS that the complainant had requested a review of the prosecutorial decision and on 9 August 2021, the applicant was informed that he would face prosecution for rape after all. On the same date the applicant was also informed that his vetting was suspended as was his status as a police trainee.

[30] The criminal trial subsequently came on for hearing in Laganside Court before HHJ McColgan KC sitting with a jury in late May 2023 and on 30 May 2023, the applicant was acquitted by a 10/2 majority verdict. The investigating officer considered that it was appropriate for him to provide a report to the body responsible for the conduct of vetting procedures within the PSNI. Following the acquittal of the applicant, the investigating officer proffered the following opinions:

> "It is the view of the investigating officer that (the applicant) did not have to go into the room where the complainant was sleeping, he could have slept on the sofa which was available. The defendant gave no real explanation for seeking out the room where the victim was sleeping other than he wanted to sleep in a bed. In that room there was quite a large clothes horse blocking access to the bed. Why take the trouble to try to get past this obstruction? Furthermore, the complainant was sleeping in an elevated single bunk bed which for the two of them to be in together would pose obvious comfort issues. If (the applicant's) sole motivation was somewhere to sleep then why not sleep on the sofa, which was available. This is something the defendant could not fully answer. Also (the applicant) has been accepted into PSNI training college to begin his student officer training to prepare him for a career in the Police. Despite this he attended a party where Class A drugs were being consumed. (The applicant) knew he was going to be a police officer yet he put himself in that difficult position of being a witness to drug taking and not removing himself from the situation. This puts his judgment and integrity into dispute. It is also the feeling of the investigating officer that although (the applicant) was acquitted after trial at the Crown Court. It was not a unanimous acquittal. The not guilty verdict of 10-2 was enough to find him not guilty however it meant that two people on the jury though beyond a reasonable doubt that (the applicant) was guilty of rape. There is no doubt that (the applicant) will have been effected (sic) by his involvement in the Criminal Justice System. This process will undoubtedly affect his judgment should he be accepted into the police. He will come into contact with vulnerable females regularly during the course of his duties and as such will have to deal with them with empathy, understanding and impartiality. The fact that he was a defendant in a Crown Court rape trial will in the investigating officer's view render him incapable of discharging his duties in a professional impartial way."
> (Trial Bindle Section C pages 82-84)

[31] A Vetting Panel was convened to review the vetting status of the applicant and the decision of the Vetting Panel was issued on 10 July 2023. (Trial Bundle Section B pages 303-305). The minutes of the Vetting Panel meeting are also contained in the Trial Bundle in Section C, at pages 87 to 91. The material parts of the Vetting Panel's decision read as follows:

> "The vetting process does not seek to establish innocence or guilt. Vetting works to a different standard of proof than criminal matters and the Panel do not need to prove that an applicant is unsuitable 'beyond a reasonable doubt'. Rather whether the circumstances of an individual present a risk to the organisation.
>
> The nature of the criminal charge brought against you was extremely serious. The Panel noted the circumstances surrounding the incident and the fact that you decided to attend and remain at a party whilst a Student Officer, where Class A drugs were available. This alone shows a lack of judgment on your part.
>
> Despite your "not guilty" outcome, it was the direction of both PSNI Rape Crime Unit and PPS that you should be prosecuted. Your case did not reach a unanimous "Not Guilty" verdict and two members of your jury were of the belief, beyond a reasonable doubt, that you had committed the offence of rape.
>
> Our communities and our organisation need to be assured that we all abide by the highest of standards rightly expected of those whose role it is to uphold the law. Therefore, we need to ensure that any incident that may bring the Service into disrepute or undermine public confidence in policing is robustly challenged.
>
> The Panel were of the opinion that the case against you would cause significant reputational damage. This would have a detrimental effect on public confidence in policing. The Panel were also concerned that the charges held against you are also recorded and thus would negatively impact your operational capabilities as a police officer."

The applicant was informed by this correspondence that the Vetting Panel's decision was not to reinstate the applicant's clearance and the applicant was also informed that he had the right to have the decision reviewed by an Independent Assessor. (Trial Bundle Section B pages 303-305).

[32] From the minutes, entitled "Vetting Panel comments" it would seem that there were two separate discussions of the applicant's case with individuals identified as "DS", "GM", "TS" and "RM" being actively involved in the first discussion on some date on or after 28 June 2023. Thereafter, on 4 July 2023, a further discussion took place with individuals identified as "CB", "EM", "BF" and "LM" being actively involved in the discussion. (Trial Bundle Section C pages 87-91).

[33] The following is recorded as having been stated during the first discussion:

> GM: "… there were drugs at the house the Student Officer was at, and they didn't leave the situation. Felt the applicant put themselves in a position by entering a bedroom with a girl in a state of undress, who had taken drugs, reflected poor decision making."
>
> TS: "They have had involvement with the court system and this would be raised if they were an Officer attending a case."
>
> RM: "Agreed the Student Officer should have left as soon as they were aware drugs were present and they should never have put themselves in the position with a female."
>
> DS informed the meeting that: "… vetting does not have to establish innocence or guilt, based on what has been presented there may be grounds for reputational risk."
>
> RM referred to the impact of such cases on "public confidence". (Trial Bundle Section C page 88).

[34] During the second discussion, the following views were expressed:

> CB: "… the incident casts doubt on the individual's judgement as they did not remove themselves from the environment and furthermore placed themselves in a position of vulnerability ... there would be a reputational risk regarding this given the nature of the investigation."
>
> EM: "There is significant risk of reputational damage with this applicant, however this is weighed against the fact that the case eventually went to trial and the applicant was found not guilty. There is also the impact of this process on the applicant themselves, and how that may manifest in their dealings with the public as a police officer. I wonder if an interview may be beneficial to explore this further?"
>
> BF: "The rationale for rejection involves trust and public confidence in policing. The subject was prosecuted indicating there was a case to answer for rape and two of the jury found him guilty beyond all reasonable doubt. Although he is innocent of this serious criminal offence, the fundamental role of the Police Service is to protect the

> public and investigate crime. This includes protecting the vulnerable and investigating sexual crime which requires mutual trust. There will always be a doubt regarding what occurred and the alleged crime is so serious that public confidence would be damaged if vetting clearance was granted. I have also other concerns notwithstanding the rape allegation. He was at a party with friends where MDMA was freely available, just prior to joining the police. Further, the circumstances of getting into bed with a stranger who was intoxicated and drugged is evidence of poor judgment."
>
> LM: "During this house party the applicant has witnessed the possession and consumption of a Class A drug and engaged in sexual intercourse with a female who had consumed drugs and alcohol which resulted in an allegation of rape against the applicant."

[35] In deciding to withhold vetting clearance LM stated that he/she had regard to the following considerations:

> "Does the applicant pose a risk to the community or the service eg reputational damage or operational capability being compromised … Honesty considerations which may present evidence of unreliability."

LM concluded:

> "… the applicant has admitted being at a party in which drugs have been present. He insinuates that he wished to remove himself from the situation but does not take proactive steps to do as he remains in the property. Nor does he take appropriate steps to report drug misuse to the police which would be considered the correct course of action of a PO or anyone about to become one. This demonstrates poor decision making and not characteristic of someone wishing to protect the community from harm and indeed poses a risk to the community as he observed people consume the drugs which could have been fatal to the person consuming it … The applicant through his attendance at the house party has been identified as a suspect of sexual violence and been subsequently acquitted by a court of law … he states that he was aware that the IP in this case was in the possession of drugs. It could therefore be assumed that she had taken them and whilst I acknowledge the steps he outlines to obtain consent from

> the IP, he demonstrates poor decision making again in this moment by not considering if he was obtaining a 'true consent' given the misuse of drugs … I have also considered if operational capabilities could be compromised as a result of the allegations made against the suspect and acknowledge the opinion of the IO of the rape investigation that the applicant would be negatively impacted by the trial and this would negatively impact upon their ability to engage with victims of sexual crime. I feel it would be unfair to assume this of the applicant without further information on how it has impacted him and therefore my decision to reject is not based on this at this time … the decision to reject is based on 2 areas of poor decision making which could compromise the safety of the community and lead to reputational damage of the PSNI. " (Trial Bundle Section C pages 88-91).

[36] By letter dated 20 July 2023, the applicant, through his solicitor, requested a review by the Independent Assessor of the decision of the Vetting Panel not to reinstate the applicant's vetting clearance. In this correspondence (Trial Bundle Section B pages 17-23), the applicant's solicitor highlighted the fact that initially there was a decision not to prosecute which means that a view was formed that there was insufficient evidence to provide a realistic prospect of a conviction and/or the prosecution was not in the public interest. Following this decision, the applicant's vetting clearance was reinstated. Following the reversal of the decision not to prosecute, a trial occurred and the applicant was acquitted. The point made by the applicant's solicitor is that since vetting clearance was restored after the decision not to prosecute was taken, with the case then proceeding to trial on the same evidence, it is difficult to understand the justification "to not reinstate our client's vetting following the due process of a criminal trial wherein he was acquitted, when the trial proceeded on the same evidence that not only satisfied the initial direction of 'no prosecution' but also the decision to re-instate his vetting in June 2020." The solicitor highlighted the fact that the "decision to re-instate his vetting was made in June 2020 when the circumstances of the incident including the presence of drugs was reasonably known to the decision makers."

[37] The applicant's solicitor also highlighted the fact that in the period of time between the date on which the PPS indicated that they were going to review the decision not to prosecute (18 June 2021) and the date on which the decision to proceed with a prosecution was made (9 August 2021) the applicant's vetting must have remained in place as he continued at the Police College. The solicitor also made the argument that the fact that the not guilty verdict was a majority verdict was utterly irrelevant. The solicitor also stressed that the evidence at the trial was that the applicant "was not involved in obtaining, taking or observing drugs being taken … When the three females arrived, they produced drugs at which point our client immediately retreated to an upstairs bedroom. It is submitted that this is evidence of

his good judgment … It is respectfully submitted that it would be unreasonable to suggest that he should have entirely removed himself from the property in the early hours of the morning. It is accepted that he had consumed alcohol and having done so he would be unable to drive himself home, which again, we would submit is evidence of his good judgment." It was pointed out that the applicant was not a Student Officer on 15 May 2019. He had not attended an induction day by that stage and was, therefore, "not aware of the implications of the Code of Ethics, as he did not know that they existed. Quite simply, the Code of Ethics did not apply to him on this date."

[38] The applicant's solicitor emphasised the point that when the applicant attended the premises on the night in question, he had no idea that drugs would be available to be taken. It was further argued that no reputational damage would accrue to the PSNI by the reinstatement of the applicant's vetting clearance as he had been acquitted of any criminal wrongdoing by a jury after a Crown Court trial lasting six days. Further, it was argued by the applicant's solicitor that this incident was unlikely to cause reputational damage to the PSNI because year in year out fully fledged police officers are prosecuted for a variety of offences and it is simply not correct to assert that such prosecutions cause significant reputational damage to the organisation. It was argued that the potential for reputational damage was further diminished by the fact that the matter was not widely reported in the media and indeed one journalist stated to the applicant that she was not going to report on the matter because she did not believe the complainant's account. The applicant's solicitor stated that it was incorrect to assert that the charges held against the applicant are recorded and that this in turn would impact on the applicant's operational capabilities as a police officer. The solicitor emphasised that the applicant has no criminal record and that "these matters will not be publicly recorded against him nor will the events of trial eg transcripts of the evidence be made publicly available. Importantly, he would also be under no obligation to report them to the PPS if and when he would attend court as a prosecution witness in his capacity as a police officer."

[39] The solicitor also asserted that the applicant's scores in all aspects of his training placed him within the top three candidates and this demonstrates the applicant's suitability to perform the role of a police officer. Finally, it was argued that none of the matters that are specifically referred to in regulation 12(4) of the 2001 Regulations (a conviction, a breach of a court order or a conviction) which are included in the matters which may be taken into account by a Vetting Panel and none of the matters set out in the Guidance for Applicants which would constitute bars to appointment are relevant to this case.

[40] The Independent Assessor who reviewed the decision of the Vetting Panel was Sir John Gillen, who with characteristic industry produced his report on 27 July 2023. (Trial Bundle Section C pages 308-318). He commenced his report by reciting details of all the material he had been provided with, including the minutes of the Vetting Panel's discussions and the applicant's solicitor's correspondence. He stated that in light of all this information, he did not find it necessary to request any additional

information to carry out his function. He stated that in his view the correct approach for him to adopt was to ensure that consideration is given to all aspects of the applicant's character, including positive and negative factors, and to "undertake an evaluative assessment of all matters relevant to the consideration of whether it has been demonstrated by the applicant that he is of good character and could enjoy the confidence of the public if appointed to this post. This involves the perusal of any relevant mitigating circumstances in relation to the flaws in his application."

[41] Sir John Gillen prefaced his decision by highlighting three matters. He stated that he did not consider: "that the direction of both the PSNI Rape Crime Unit and PPS that the applicant should be prosecuted would be a reason to refuse to reinstate the applicant's vetting clearance. The verdict of the jury must be respected irrespective of the directions given." Sir John Gillen went on to state that: "the fact that the jury did not reach a unanimous "Not Guilty" verdict and two members of your jury were of the belief, beyond reasonable doubt, that the applicant had committed the offence of rape is irrelevant. Our system of justice must unreservedly respect the final outcome of the jury verdict irrespective of whether it is unanimous or a majority verdict." The third matter specifically highlighted by Sir John Gillen was that: "the suggestion that the charges held against the applicant were also recorded and thus would negatively impact your operational capabilities as a police officer is not in my view an adequate reason to refuse reinstatement. The fact that the applicant has been charged with a serious offence cannot, per se, be enough to justify a refusal of vetting approval where the applicant has been acquitted of the charge."

[42] Sir John Gillen went on to state that he agreed with the decision of the Vetting Panel not to reinstate the applicant's vetting clearance because the reputation of the PSNI: "depends on those who serve as police officers observing high standards of integrity, good behaviour and sound judgment." He referred to "recent events in the Metropolitan police and elsewhere in relation to violence against women and girls" having dented public confidence in the police. He stated that irrespective of the applicant's acquittal, his behaviour: "fell far short of all three requirements." He stated that it was completely unacceptable for an aspiring police officer to continue to be present in a location where illegal drugs were being possessed and taken. Not only should he have immediately absented himself from this scenario but he should have reported the illegal drug use to the police. Instead, he remained overnight in this situation. Far from distancing himself from this scenario and objecting to what was happening, he engaged in sexual intercourse with one of the miscreants. Sir John Gillen questioned how the public could ever have confidence in such an officer. He stated that the fact that the applicant did not take drugs himself is insufficient mitigation. He concluded that the applicant's behaviour did not reflect the high standards to be demanded of a PSNI recruit and that those who behave in this manner impugn the integrity of the PSNI.

[43] Sir John Gillen stated that the applicant had demonstrated extremely poor judgment and derisory decision making in getting into a single bunk bed (having had to surmount an obstructive clothes horse) and having sexual intercourse with a young

female in a state of undress who had consumed drugs and alcohol in circumstances when either he could have obtained a taxi to leave or else slept on the couch where, contrary to what he asserted, there was a blanket. "This was a situation rife with danger from his point of view and yet he persisted recklessly in this behaviour."

[44] Sir John Gillen concluded by stating that a key component of a police officer's duty is to protect and understand vulnerable members of society. It was likely that the complainant had consumed a great deal of alcohol and had taken drugs and as such was in a state of vulnerability. He stated that the applicant had: "availed of this situation to have sexual intercourse with her when she was naked. Irrespective of her consenting to sexual intercourse this is not the kind of behaviour that the public expect police officers to engage in … I am satisfied that to reinstate vetting clearance to the applicant would impair public confidence in the PSNI and damage its reputation."

[45] The final stage of the decision-making process was the consideration of the matter by the Chief Constable or a senior police officer nominated by him. The police officer who was nominated by the Chief Constable and who carried out this role and made the final decision was Chief Superintendent S Walls and his letter to the applicant is dated 8 August 2023. (Trial Bundle Section B page 319). Having considered all that material referred to above, Chief Superintendent Walls refused to restore the applicant's vetting clearance on the grounds that the applicant had been present in a house where drug consumption was occurring. Even though he removed himself from the room in question and had gone upstairs, he did not leave the property as he should have done and he did not report the drug taking to the police. Further, the applicant had engaged in sexual intercourse with one of the individuals who was consuming drugs and that the applicant's decision to have sexual intercourse with a female who had consumed drugs was reckless in that it is likely that the consumption of drugs made this female vulnerable. In this case, Chief Superintendent Walls is the decision maker and it is his decision which is the target of the applicant's challenge.

[46] The applicant, through his solicitor, directed a pre-action protocol Letter to the Chief Constable of the PSNI on 6 September 2023. (Trial Bundle Section B pages 324-332). The response to the PAP correspondence is dated 5 October 2023. (Trial Bundle Section B pages 333–337). As noted above, the Order 53 statement in this case was served on 7 November 2023 and this was supported by an affidavit from the applicant sworn on the same date. (Trial Bundle Section B pages 9–15). The affidavit evidence served by the respondent consisted of two affidavits sworn by Chief Superintendent Stephen Wright on 16 January 2024 (Trial Bundle Section C pages 1-4 and trial bundle Section C pages 92–94 respectively). All relevant matters of fact averred to in these affidavits have been recited above.

[47] The regulatory framework and supporting published guidance relevant to this case is contained in the bundle of authorities at pages 5-88 and the Trial Bundle Section C pages 5-11.

[48] Part III of the Police (Recruitment) (Northern Ireland) Regulations 2001 deals with the vetting of applicants who wish to become police trainees. Regulation 12 (Bundle of Authorities pages 31-32) deals with the establishment and functioning of the Vetting Panel. Under regulation 12(1), the Vetting Panel is appointed by the Chief Constable, with one member ("the independent panel member") being nominated by the Policing Board, and its function is to: "… decide, in any case which is referred to it, on his behalf and subject to his direction and control – (a) on the suitability of any candidate for appointment as a police trainee …" Regulation 12 (1A) refers to "unsuitability." Regulation 12(3A) states that the matters which a panel may take into account in deciding on the "suitability" of a candidate for appointment as a police trainee: "shall be determined under regulation 2C of the Police Trainee Regulations (Northern Ireland) 2001."

[49] Regulation 2C (Authorities Bundle pages 46-47) states that it is for the Chief Constable to determine the matters which may be taken into account in deciding the suitability of a candidate for appointment as a police trainee but this apparently wide discretion is limited in that a conviction in any jurisdiction which has resulted in the imposition of a sentence of imprisonment or detention (whether suspended or not) will automatically render a person unsuitable for appointment. Apart from that, any conviction, any breach of a court order or the receipt of a police caution may be taken into account when assessing suitability. Further, the issue of suitability is dependent on the provision by the applicant of satisfactory character references and the provision of: "such other information as to his suitability for appointment."

[50] A candidate who is deemed by the panel to be "unsuitable" can request that the decision is reviewed by an Independent Assessor appointed under regulation 13 of the Police (Recruitment) (Northern Ireland) Regulations 2001. (Bundle of Authorities pages 32-33). The Independent Assessor is appointed by the Secretary of State in consultation with the Policing Board. The Independent Assessor must be given access to all the materials that the panel had access to and can request additional material from the Chief Constable. The Independent Assessor must make a report to the Chief Constable stating whether he agrees or disagrees with the panel's decision and may make such recommendations as he considers appropriate. Before making a report to the Chief Constable, the Independent Assessor may require the panel to reconsider the question of a candidate's suitability and to resubmit its decision to the Independent Assessor for review.

[51] In the context of regulation 13, any references to the Chief Constable include a reference to a senior officer nominated by the Chief Constable. Following receipt of the Independent Assessor's report the Chief Constable or nominated senior officer may take such action as he considers necessary including consulting with the Independent Assessor and "shall advise him of the action he intends to take." At the end of the process, the Chief Constable or senior officer shall make arrangements for the candidate to be informed whether he is suitable for appointment and shall advise the candidate whether the Independent Assessor agrees or disagrees with the Chief Constable's decision. Regulation 15 (Authorities Bundle page 34) places some

restrictions on the independent panel member and the Independent Assessor in relation to the disclosure of information received by either person in the performance of his role under the regulations. The restrictions have no bearing on the outcome of this case.

[52] The "Explanatory Note" attached to the regulations (Authorities Bundle pages 38-39) states that: "The Patten Report recommended that those appointed to be police constables should have to complete their initial training successfully before acquiring all the powers, duties and privileges of a police officer. The Police (Northern Ireland) Act 2000 gives effect to this recommendation." The "Explanatory Note" goes on to state that: "The final decision as to a candidate's suitability rests with the Chief Constable but the candidate must be informed of the Independent Assessor's conclusion."

[53] Under regulation 6 of the Police Trainee Regulations (Northern Ireland) 2001 (Authorities Bundle pages 50-51), the Chief Constable may terminate a police trainee's period of service if the Chief Constable considers that the police trainee: "is not likely to become an efficient or well-conducted constable on completion of his period of service as a police trainee."

[54] The official guidance in relation to the vetting process is contained in Service Instruction (SI) 1717 which was initially published on 23 March 2017 and reviewed on 23 November 2022. (Trial Bundle Section C pages 5-11). It states that the overarching aim of the PSNI is to "Keep People Safe". SI1717 states that it is essential that: "all individuals, regardless of their role, understand and contribute to the shared purpose and show that we care, we listen and we act." PSNI vetting procedures are: "designed to support and embed this and gain the confidence of the whole community." SI1717 goes on to state that: "A thorough and effective vetting system is a key component in assessing an individual's integrity. It helps to reassure the public that appropriate checks are conducted on individuals in positions of trust." It goes on to explain that vetting exists to protect the integrity, reputation, assets and data of the PSNI: "from persons and organisation intent on or capable of disrupting the integrity, security and values of the PSNI." It states that it is the aim of the vetting process to "provide appropriate levels of assurance as to the trustworthiness, integrity and reliability of all police officers …"

[55] Included in the Trial Bundle in Section B at pages 50-55, are the relevant portions of "Constable Recruitment 2020 Guidance for applicants." Although this is stated to be relevant "specifically to the 2020 recruitment process", the guidance in respect of vetting has not changed in any relevant respect and so it is worthwhile to highlight some aspects of the guidance relating to this subject. The guidance specifically states that:

> "If during the vetting process there is information that requires further clarification, you may be invited to attend an interview with the Service Vetting Unit."

This relates to the stage of the process before the matter is referred to the Vetting Panel. The Service Vetting Unit is separate from the Vetting Panel. The guidance continues:

> "If during the vetting process there is information that gives cause for concern with regard to your suitability, your application may be referred to the (PSNI Recruitment Vetting) Panel who will decide on your suitability."

In relation to the role of the Independent Assessor, the guidance states:

> "The Independent Assessor will review your case. The Independent Assessor may request additional information from the Panel following your appeal. This may delay any vetting decision as your application may have to be returned to the Panel to be re-considered. The Independent Assessor's review will be forwarded to the Chief Constable's Representative (Assistant Chief Constable) who is the final arbiter. There is no further appeal mechanism."
>
> (Trial Bundle Section B pages 50-51).

[56] Turning to the grounds of challenge in this case. The applicant contends that the impugned decision (the decision made by Chief Superintendent Walls) constitutes an error of law and/or fact because the impugned decision: "is premised on an unproven allegation that the applicant knew that the woman he had sex with ('L') had consumed illegal drugs and that L was vulnerable at the time (due, *inter alia*, to her consumption of drugs). In fact, the applicant did not know this when he had sex with L. There is, therefore, a dispute of primary fact on this issue."

[57] Having carefully considered the entirety of the papers in this case and having listened attentively to the able submissions of senior counsel for both parties, I am convinced that this point is utterly without merit. The applicant was at pains at the end of his second interview with the police to stress that he was careful to enquire about the complainant's consent to sex because he knew she could be drunk or under the influence of drugs. In coming to this conclusion, I rely on the applicant's own words during his police interviews which are set out in paras [20] to [26] of this judgment. There is no dispute of primary fact. The decision in this case was made on the basis of what the applicant himself stated in his interviews to police. He may now wish to attempt to put a gloss on what he actually meant when he was being interviewed by the police and what he actually knew at the time when he decided to have sex with the complainant but having carefully considered all the relevant material in this case, I am convinced that the operative decision is not premised on an unproven allegation. Far from it. It is premised on the case specifically made out by the applicant during his police interviews.

[58] The applicant argues that following the decision of *Victor* [2023] EWHC 2119 at para [48] *et seq*, it is generally unfair to use a vetting procedure (as opposed to a misconduct procedure) when there is a dispute of primary fact. It is argued that the primary facts in dispute in this matter include:

> "(i) The applicant's knowledge about whether L had taken drugs;
>
> (ii) The applicant's knowledge about whether L was otherwise vulnerable;
>
> (iii) The circumstances giving rise to sexual intercourse including whether L initiated sexual contact and whether the applicant confirmed her consent prior to sex.

[59] Irrespective of the applicability of any principles, guidance or advice contained in the *Victor* decision, I cannot accept that these matters are in dispute. I have concluded that the applicant's knowledge of the complainant's consumption of alcohol and drugs and her resulting vulnerability are as set out by the applicant in his police interviews (paras [20] to [26] above). In relation to the circumstances giving rise to sexual intercourse, it is quite clear that Chief Superintendent Walls' decision was made on the basis that the applicant's account was accurate. The decision was made on the basis of the applicant's version of events. There were no disputed primary facts which are either relevant or material to the decision of Chief Superintendent Walls.

[60] The claim that the Independent Assessor and the Chief Constable both made adverse factual findings against the applicant where they had no power to do so is unsustainable. No material or relevant facts giving rise to the decision were in dispute. The material and relevant facts which formed the basis for Chief Superintendent Walls' decision were facts put forward by the applicant.

[61] In relation to the argument that the Independent Assessor is not empowered to make any factual findings whatsoever given the limits of his role as imposed by regulation 13(5) – to give a report to the Chief Constable saying whether he agrees or disagrees with the panel and to make recommendations, I also conclude that this argument is utterly without merit. How can the Independent Assessor form a valid, robust and cogent opinion one way or another unless that opinion is based on his conclusions as to facts based on all the material he has access to?

[62] It is argued that the Independent Assessor should have exercised his power under regulation 13(6) to require the Vetting Panel to reconsider their decision. Why on earth should he have done so? He agreed with the decision of the Vetting Panel. Why would he request a Vetting Panel to reconsider a decision that he ultimately

agreed with? In the conscientious performance of his role and function as an Independent Assessor, Sir John Gillen highlighted matters and issues where he differed from the Vetting Panel but he agreed with their ultimate decision; and Chief Superintendent Walls, having regard to the decision and reasoning of the Vetting Panel and the report from Sir John Gillen, the Independent Assessor, concluded for the reasons set out at para [45] above that the applicant's vetting should not be reinstated. The core facts replied upon by Chief Superintendent Walls when coming to his decision were not in dispute. Chief Superintendent Walls' decision is the operative decision in this case and if the applicant is to succeed in this judicial review challenge, he must satisfy the court that Chief Superintendent Walls' decision is unlawful. Any alleged flaws, shortcomings or errors in the reasoning of the Vetting Panel or indeed of the Independent Assessor are largely irrelevant if it is clear that these matters did not form the building blocks of the decision made by Chief Superintendent Walls and I find that the required clarity exists in this case.

[63] It is alleged that the applicant was not properly informed of the case against him and was not given the opportunity to respond to the case prior to the impugned decision being made. It is argued that the initial decision of the Vetting Panel made no reference to the applicant being aware that L had consumed drugs prior to sexual intercourse or to any recklessness in that regard. It is argued that the Vetting Panel concentrated only on the fact that the applicant had decided to attend and remain at a party where Class A drugs were available whilst a Student Officer. It is argued that it was on this basis that the applicant made his representations through his solicitors. It is argued that when the Independent Assessor considered the case, there was a significant change in the case against the applicant and that Chief Superintendent Walls effectively adopted this new case as the basis of his decision but without telling the applicant about the significantly expanded case against him, without disclosing the Independent Assessor's report and without disclosing the report from the investigating officer. It is argued that all these matters constitute breaches of the principles of procedural fairness.

[64] Having carefully weighed up these arguments, I do not accept that the decision of Chief Superintendent Walls is vitiated by reason of procedural unfairness as I do not consider that the applicant has established that there was a material change in the focus of the case against the applicant or that Chief Superintendent Walls' decision was made on the basis of material which the applicant did not have an opportunity to address. Further, having carefully considered the content of the applicant's pre-action protocol letter, his affidavit and the submissions of his senior counsel, there does not appear to have been any attempt made by or on behalf of the applicant to set out or refer to any material or any arguments which are fresh, different, novel or additional to those already provided and made by the applicant or to argue that if any such material or arguments had been brought to the attention of the Independent Assessor or the Chief Constable, they would have been relevant to the issues which formed the basis of Chief Superintendent Walls' decision and could have had a material bearing on the outcome of that decision.

[65] In relation to various points raised by the applicant as set above, it is important not to lose sight of the purpose and aims of the vetting process. The Vetting Panel's decision commenced with the following statement:

> "The vetting process does not seek to establish innocence or guilt. Vetting works to a different standard of proof than criminal matters and the Panel do not need to prove that an applicant is unsuitable 'beyond a reasonable doubt.' Rather whether the circumstances of an individual present a risk to the organisation."

[66] The Vetting Panel specifically referred to the fact that the applicant chose to remain at a party where Class A drugs were available. This is an undisputed fact which the Vetting Panel considered showed a lack of judgment on the part of the applicant. The Vetting Panel went on to state that:

> "Our communities and our organisation need to be assured that we all abide by the highest of standards rightly expected of those whose role it is to uphold the law. Therefore, we need to ensure that any incident that may bring the Service into disrepute or undermine public confidence in policing is robustly challenged.
>
> The Panel were of the opinion that the case against you would cause significant reputational damage. This would have a detrimental effect on public confidence in policing."

[67] When one considers the contents of the investigating officer's report to the Vetting Service, it is clear that the one issue which finds expression in the decision of Chief Superintendent Walls which, it must be remembered, is the decision under challenge in this case, is the failure of the applicant to remove himself from a house where illegal drugs were being taken. The investigating officer argued that this put the applicant's judgment and integrity into dispute. The applicant did address this issue and through his solicitor stated that his action of leaving the room and going upstairs once illegal drugs were produced showed good judgment. The other matters raised in the correspondence of the investigating officer found expression in the Vetting Panel's decision which the applicant challenged by exercising his rights under regulation 13.

[68] When the applicant sought a review by the Independent Assessor, his solicitor directed lengthy and detailed correspondence to the Independent Assessor challenging the reasoning and decision making of the Vetting Panel. The first substantive point made by the applicant's solicitor was that since vetting clearance was restored after the decision not to prosecute was taken, with the case then proceeding to trial on the same evidence, it is difficult to understand the justification "to not reinstate our client's vetting following the due process of a criminal trial

wherein he was acquitted, when the trial proceeded on the same evidence that not only satisfied the initial direction of 'no prosecution' but also the decision to re-instate his vetting in June 2020." The solicitor highlighted the fact that the "decision to re-instate his vetting was made in June 2020 when the circumstances of the incident including the presence of drugs was reasonably known to the decision makers." (Emphasis added).

[69] This clearly demonstrates that the applicant and his legal team were acutely aware of the importance that the Vetting Panel had attached to the applicant's decision to remain at a house party where Class A drugs were being taken. Indeed, the point made by the solicitor was that it was utterly inconsistent to reinstate the applicant's vetting after the decision not to prosecute him was taken without any referral to the Vetting Panel and then to refer the applicant to the Vetting Panel after his acquittal in respect of the rape charge on account of the undisputed fact that the applicant's reaction and behaviour in response to the presence of Class A drugs in the house was known when the decision to reinstate his vetting was made and that state of knowledge did not materially change thereafter.

[70] In this regard, the applicant has a point in that there appears to be an inconsistency of approach based on the same facts. However, that does not assist the applicant in that it could be strongly argued that it was poor decision making on the part of the relevant police officer to decide not to refer the matter to the Vetting Panel after the decision not to prosecute because of the overall factual matrix as revealed in the material available to that police officer at that time.

[71] In the correspondence referred to above, the applicant's solicitor also stressed that the evidence at the trial was that the applicant: "was not involved in obtaining, taking or observing drugs being taken … When the three females arrived, they produced drugs at which point our client immediately retreated to an upstairs bedroom. It is submitted that this is evidence of his good judgment … It is respectfully submitted that it would be unreasonable to suggest that he should have entirely removed himself from the property in the early hours of the morning. It is accepted that he had consumed alcohol and having done so he would be unable to drive himself home, which again, we would submit is evidence of his good judgment." In essence, this was the justification proffered on behalf of the applicant who, at that time, had been accepted onto the police trainee course and was waiting to start that course for him remaining in a house where Class A drugs were being taken. He had left the room and had gone to bed. He couldn't drive home because he had consumed alcohol. This is all asserted to be evidence of his good judgment.

[72] Firstly, it is important to note that Chief Superintendent Walls' decision was not based on the proposition that the that applicant was in any way involved in obtaining, taking or actually observing drugs being taken. It is clear, however, that he saw drugs being prepared for consumption and he could have been in no doubt that they were going to be consumed there and then. That was why he left the room.

[73] Secondly, the submissions made by the applicant's solicitor on his behalf, fly in the face of what the applicant told the police in his police interviews. He told the police that he did not live that far away from his friend's house where he stayed that night. He told the police that he had lied to his father as to where he was staying because his friend's house was a house where drugs had been produced and taken in the past. He admitted to the police that: "I know it was my mistake for doing that and being in that house in the first place and then I'd already mentioned it to my dad." He explained that his friend's house: "was sort of like that and then I had lied to my dad and told him that I wasn't staying at … house." He went onto state: "that's my mistake for even being in his house in the first place." He was specifically asked whether his friend's house was the kind of place where there had been drugs previously. He stated that it was and that it was his fault for being there. (Trial Bundle Section B page 220). At a later stage of the same interview, he stated: "But then I know it's my mistake where I shouldn't even have been in the house…" (Trial Bundle Section B pages 233).

[74] The applicant's solicitor emphasised the point that when the applicant attended the premises on the night in question, he had no idea that drugs would be available to be taken. However, the applicant told the police that he lied to his father about where he was staying that night because drugs had been produced and taken in that house previously. Despite all the matters that have been accepted by the applicant as set out in the preceding paragraph of this judgment, it was argued that no reputational damage would accrue to the PSNI by the reinstatement of the applicant's vetting clearance.

[75] In relation to the issue of the circumstances surrounding the engagement by the applicant in sexual intercourse with the complainant, the applicant argues that he was not given an opportunity to address this issue and deal with the matters relied upon by Chief Superintendent Walls in his decision letter. However, it is important to note that when the applicant had the opportunity to raise new matters in respect of this issue in his pre-action protocol letter and his affidavit, he patently failed to do so. Much more importantly, however, the matters referred to by Chief Superintendent Walls in his decision letter both in respect of the drugs and in respect of the sexual intercourse are and were matters which were by and large accepted by the applicant when interviewed by the police. It was accepted by the applicant when interviewed by the police that he had been present in a house where drug consumption was occurring. Even though he removed himself from the room in question and had gone upstairs, he did not leave the property as he should have done and he did not report the drug taking to the police. He has never proffered any form of excuse or reason for not reporting the drug taking to the police. Further, there is no dispute that the applicant did engage in sexual intercourse with one of the individuals who was consuming drugs and, in relation to the applicant's state of knowledge of such consumption, it is abundantly clear from his police interviews that he was sufficiently concerned about the state of the complainant due her consumption of alcohol and drugs that he specifically asked her if she consented to have sex.

[76] In his decision letter, Chief Superintendent Walls stated that he had formed the opinion that the applicant's decision to have sexual intercourse with a female who had consumed drugs was reckless in that it is likely that the consumption of drugs made this female vulnerable. In relation to this specific issue, it has to be remembered that the applicant was specifically questioned by the police about the risks inherent in his behaviour that morning and it is worthwhile repeating how the applicant addressed those questions. When describing what happened in the bedroom that morning the applicant stated that he had asked the complainant whether she was sure she wanted to have sex because he knew she had been in Thompson's Garage and he: "knew she's obviously been drinking if she's in a nightclub." (Trial Bundle Section B page 232). He was then asked the following question by the interviewing officer: "Ok so is it fair to say then the potential for a situation like this could go very wrong and was that in your head?"

[77] He responded in the following manner:

> "Yeah, yeah a hundred, a hundred and ten percent that's like I always think about that before like certain situations like even the situations when the drugs was there I was thinking ah right I thought this was just gonna to be me and my two mates at the start of the night after a football match, we got a Chinese, we're going to have a couple of drinks, started thinking this is all going to be fine, but then it just escalated as soon as I seen the drugs I was like there's something I'm not getting involved in, took myself out of bed, ah up to bed 'cos I didn't want to be involved in it…But then I know it's my mistake where I shouldn't even have been in the house …"
>
> (Trial Bundle Section B pages 232-233).

The applicant subsequently made the point to the police that:

> "I had the initiative to even like I, I knew to ask her 'cos I knew she'd been on a night out before so I was just like she could be drunk or whatever here even though I didn't see her drink or anything I was just like are you sure you want to do this and she was like yes."
>
> (Trial Bundle Section B page 299).

[78] These are the applicant's own words, volunteered to police during an interview under caution with the applicant's legal representative present during the interview. Chief Superintendent Walls was perfectly entitled to conclude that such behaviour was reckless and in the absence of any dispute about the underlying facts, it cannot be properly argued that the principles of procedural fairness required that the applicant

be formally and specifically afforded the opportunity to comment on the issues of recklessness and vulnerability. These were evaluative conclusions arrived at by Chief Superintendent Walls in light of his examination of the facts and circumstances of the case. The underlying relevant and material facts and circumstances are not in dispute and the applicant has yet to argue that his behaviour on the morning in question, in failing to refrain from engaging in sexual intercourse with a person who was in reality a complete stranger to him, and who in all likelihood had taken Class A drugs as well as alcohol, was not reckless and extremely fraught with risk. There is no procedural unfairness point in this case.

[79] My consideration of all the material in this case, allows me to conclude that the approach followed in this case by the decision maker was the approach advocated by Sir John Gillen, in that consideration was given to all aspects of the applicant's character, including positive and negative factors, and that an evaluative assessment of all matters relevant to the consideration of whether it has been demonstrated by the applicant that he is of good character and could enjoy the confidence of the public if appointed to the position of police trainee has been lawfully carried out.

[80] In his report to the Chief Constable, Sir John Gillen strongly emphasised the need for our system of justice (and that must include any vetting process) to unreservedly respect the final outcome of the jury verdict, irrespective of whether it is a unanimous or a majority verdict and regardless of whether the police or PPS had considered that the test for proceeding with a prosecution was satisfied in this instance. Sir John Gillen also stated that the fact that the applicant had been charged with a serious offence cannot *per se* be enough to justify a refusal of vetting approval where the applicant has been acquitted of the charge. There can be no criticism of these statements of principle.

[81] Of central importance are Sir John Gillen's comments about the potential for reputational damage flowing from the actions and decisions taken by the applicant on the morning in question. He stated that the reputation of the PSNI: "depends on those who serve as police officers observing high standards of integrity, good behaviour and sound judgment." He referred to "recent events in the Metropolitan police and elsewhere in relation to violence against women and girls" having dented public confidence in the police. He stated that irrespective of the applicant's acquittal, his behaviour: "fell far short of all three requirements." He stated that it was completely unacceptable for an aspiring police officer to continue to be present in a location where illegal drugs were being possessed and taken. Not only should he have immediately absented himself from this scenario but he should have reported the illegal drug use to the police. Instead, he remained overnight in this situation. Far from distancing himself from this scenario and objecting to what was happening, he engaged in sexual intercourse with one of the miscreants. Sir John Gillen questioned how the public could ever have confidence in such an officer. He stated that the fact that the applicant did not take drugs himself was insufficient mitigation. He concluded that the applicant's behaviour did not reflect the high standards to be demanded of a PSNI recruit and that those who behave in this manner impugn the integrity of the PSNI.

[82] The applicant's behaviour in engaging in sexual intercourse with the complainant was described by Sir John Gillen as demonstrating extremely poor judgment and derisory decision making. He stated: "This was a situation rife with danger from his point of view and yet he persisted recklessly in this behaviour." The applicant as much as accepted this in his police interviews and he was at pains to emphasise that in light of the concerns which he had about the complainant's condition, he specifically asked her if she was consenting to engaging in sexual intercourse. In offering justification for his behaviour that morning, the applicant chose to concentrate on the steps he took to satisfy himself in relation to the issue of consent. However, the entirely appropriate focus of the decision maker, the Independent Assessor and the Vetting Panel in the performance of an evaluative judgment was the decision making of the applicant in engaging in any form of sexual activity with the complainant, bearing in mind what had transpired prior to that activity taking place.

[83] Sir John Gillen concluded by stating that a key component of a police officer's duty is to protect and understand vulnerable members of society. It was likely that the complainant had consumed a great deal of alcohol and had taken drugs and as such was in a state of vulnerability. He stated that the applicant had: "availed of this situation to have sexual intercourse with her …" He concluded that this was "not the kind of behaviour that the public expect police officers to engage in …" and he opined that: "to reinstate vetting clearance to the applicant would impair public confidence in the PSNI and damage its reputation."

[84] There is nothing new, surprising or novel here. The applicant was aware of what the purpose of the vetting process was and what matters would be looked into during that process. The issues raised by Sir John Gillen were clearly appropriate issues and they were issues that were, in general terms, raised with the applicant during his police interviews and the key and central matters relied upon by Sir John Gillen and ultimately by the decision maker were, by and large, matters that were accepted by the applicant during his interviews. In this case there is no legal foundation or basis for the applicant to be given access to the Independent Assessor's report to the Chief Constable so that the applicant could comment on the same prior to the Chief Constable or the relevant senior officer on his behalf making the final decision on the restoration of vetting approval.

[85] Finally, the applicant alleges irrationality on the part of the Chief Constable in failing to take account of the fact that the applicant did not see the complainant taking drugs; that it was the complainant who instigated the sexual intercourse and that the applicant had specifically asked the complainant if she consented to having sex. There is a high threshold to cross when arguing irrationality. The applicant does not come close to surmounting that high threshold. Chief Superintendent Walls does not base his decision on the applicant seeing the complainant taking drugs. It is clear from the complainant's ABE interview that the complainant had taken drugs before engaging in sexual intercourse. (See paragraph 9 above). She had also consumed alcohol. These

matters go a long way towards establishing a clear risk that that the complainant was in a vulnerable condition prior to engaging in sexual intercourse. What is centrally relevant to the decision in this case is the applicant's state of knowledge or belief as to the condition of the complainant at the time and it is clear that he was concerned about her condition in relation to drink and drugs and that is why he specifically asked her if she consented to having sex. The point being made by Chief Superintendent Walls is that applicant's decision to have sexual intercourse with a female who had consumed drugs was reckless in that it is likely that the consumption of drugs made this female vulnerable. There is nothing irrational about that conclusion. It is entirely rational and appropriate and, what is more, the applicant has not put up one cogent argument to challenge the rationality or appropriateness of that conclusion.

[86] In relation to the other matters which are alleged to form the basis of the irrationality challenge, the decision of the Chief Superintendent was premised on the acceptance of the applicant's account of the sexual encounter with the complainant. This was an entirely rational approach to take.

[87] During the course of oral submissions, senior counsel for the applicant, forensically dissected the reasoning of the Vetting Panel and the Independent Assessor and highlighted a number of matters which he stated were clear examples of either factual inaccuracies or flawed reasoning. In order to do justice to the applicant's case, I will now deal with the general thrust of the applicant's arguments in relation to these matters.

[88] Reference is made to the applicant being wrongly described as a "Student Officer" in correspondence dated 2 May 2019 (Trial Bundle Section B page 82) and the Vetting Panel's decision dated 10 July 2023 (Trial Bundle Section B page 303). This is clearly erroneous but is of no consequence because it is accepted by both parties that the applicant was a police trainee who was subject to vetting approval and was neither subject to the PSNI Code of Ethics at the time nor liable to be dealt with by way of misconduct proceedings.

[89] Reference is also made to the passage in the Vetting Panel's decision in which it is stated that the applicant: "decided to attend and remain at a party whilst a Student Officer where Class A drugs were available." The point made on behalf of the applicant is that when he went to his friend's house that night, he had no inkling that the three girls were going to arrive at the house early the next morning with drugs. However, this alleged factual inaccuracy was not imported, translated or transposed into the decision of Chief Superintendent Walls and it is, therefore, irrelevant. However, it cannot be ignored that the applicant during his police interviews did accept that there was a history of drug taking at that house and that he actually lied to his father about where he was staying that night because of that known history.

[90] Reference is also made to the reliance placed by the Vetting Panel on the decision to proceed with the prosecution and the ten to two majority verdict which was interpreted as meaning that two members of the jury were convinced that the

applicant had raped the complainant. These issues were the subject of discussion by Sir John Gillen in his report to the Chief Constable and he specifically voiced his disagreement with the Panel in respect of these issues. In any event, these issues were not translated or transposed into the decision of Chief Superintendent Walls and, therefore, they are irrelevant. A similar point was made by the investigating officer in his report to the police vetting service. Sir John Gillen's comments on the Vetting Panel's reasoning apply equally to the reasoning of the investigating officer. The investigating officer referred to the applicant's ability to perform his duties as a police officer in a professional and impartial way being incapacitated by reason of his experiences in the Crown Court. The Vetting Panel considered that the applicant's operational capabilities as a police officer would be negatively impacted by his experiences. Again, Sir John Gillen specifically stated his disagreement with the views expressed by the Vetting Panel in respect of these issues. In any event, these issues were not imported, translated or transposed into the decision of Chief Superintendent Walls and, therefore, they are irrelevant.

[91] Great emphasis is placed on references in the minutes of the Vetting Panel's discussions to the complainant being in a state of undress or naked when the applicant went into the bedroom or got into bed with her and to the applicant actually seeing the complainant take drugs. It is also argued that the Independent Assessor also fell into error by concluding that the complainant was naked when the applicant got into bed with her. What the complainant was or was not wearing when the applicant got into bed with her is not clear. The applicant's accounts during his police interviews are that it was daylight at the time the applicant got into bed with the complainant. (Trial Bundle Section B page 185). The applicant informed police that he was wearing all his clothes at that stage apart from his shoes and he stated that he thought that the complainant had a top and her jeans on. (Trial Bundle Section B page 185). During his second police interview which took place on 23 July 2019, the applicant was again asked about what the complainant was wearing when he went into the bedroom where she was sleeping. He stated: "… just the only thing is about the jackets and stuff, when I came in she, she was just wearing that top…" He stated that there were two blankets on the bed but one of them was at the very bottom of the bed. It wasn't over her. (Trial Bundle Section B page 215). At a later stage of the same interview, he stated that the complainant: "was wearing skin tight jeans, black ones and a pink sort of top …" (Trial Bundle Section B page 231).

[92] Having carefully considered these matters, I am satisfied that any disputed or unsupported findings, assumptions or conclusions about the complainant's state of dress or undress when the applicant got into bed with her are irrelevant in that they are not translated or transposed into Chief Superintendent Walls' decision and it is obvious from the clear and cogent reasoning of Sir John Gillen, the Independent Assessor, that the issue of the complainant's vulnerability arose primarily and substantially from her consumption of alcohol and drugs. In relation to the significance to be attached to any references to the applicant actually observing Class A drugs being consumed, I am satisfied that these are immaterial in that no such finding or opinion was translated or transposed into Chief Superintendent Walls'

decision. The important issue was that the applicant saw drugs being prepared for use in the living room and because of that he left the room and then later when he was about to engage in sexual intercourse with the complainant, he was sufficiently concerned about her consumption of alcohol and drugs that he specifically asked her if she consented to having sex.

[93] None of the matters ably raised by senior counsel on behalf of the applicant have infected the decision making of Chief Superintendent Walls so as to constitute material errors of fact which would vitiate that decision and compel the court to quash it.

[94] I now intend to deal briefly with the various legal authorities relied upon by the applicant's senior counsel in mounting this challenge against the decision taken by Chief Superintendent Walls. I have already touched upon the applicant's reliance upon the *Victor* decision at paras [58] and [59] above. The *Victor* case involved a challenge to the decision of a Chief Constable to discharge a police probationer under the English equivalent of regulation 6 of the Police Trainee Regulations (Northern Ireland) 2001. In para [46] of *Victor* there is a reference to the case of *Verity* [2009] EWHC 1879 at paras [23] and [24]:

> "the ability to discharge under regulation 13 depends not on whether on an objective basis the probationer would not become an efficient police constable but on whether the Chief Constable *considers* that he does" (original emphasis). This means that a challenge to such a decision on factual grounds can only succeed if irrationality is established in which regard "the Chief Constable must be allowed a substantial degree of deference." (Authorities Bundle page 167).

[95] As far as the applicant is concerned, the important point to take away from the *Victor* case is that the court was of the view that if there were major disputed factual issues in the context of a vetting assessment, then a procedure akin to that which is mandated during a conduct investigation should be adopted in order to ensure fairness. However, such enhanced procedural safeguards are not necessary when the facts are accepted or not otherwise in dispute. See para [62] of the judgment. (Authorities Bundle page 173). As stated earlier in this judgment at paras [58] and [59] above, I have concluded that the matters which formed the basis of the decision in this case are not in dispute and, therefore, any such enhanced procedural safeguards do not need to be implemented.

[96] The Scottish case of *C v Chief Constable of Strathclyde Police* [2013] CSOH 65 considered the question of whether a conflict over the primary facts was sufficiently great as to make it unfair for the Chief Constable to make use of the standard procedure for discharging a police trainee rather than giving the police trainee the protections available under the Conduct Regulations. The court stated at para [27] of

the judgment (Authorities Bundle page 460) that in all cases, it was essential to determine precisely what material is to be relied upon for regulation 13 purposes (equivalent to regulation 6 of the Northern Ireland regulations), and to ensure that there is no dispute of fact in that material that could render the standard regulation 13 procedure unfair. In paras [43] and [44] of the judgment, Lord Drummond Young highlights the importance of affording the police trainee with the opportunity to make written and oral submissions with the added protection of full disclosure to ensure that those submissions were meaningful and on point. (Authorities Bundle pages 461-462). Again, these proposed additional procedural safeguards are only necessary when there is a significant conflict over the primary facts. I have concluded that no such conflict exists in this case and, therefore, the *Strathclyde* case does not assist the applicant.

[97] Both parties referred me to the case of *Watson* [2024] NICA 7 which was handed down by the Northern Ireland Court of Appeal in January 2024. The relevant passages of the judgment of Scoffield J are found at paras [56] and [58]. (Authorities Bundle pages 510-511). In para [56] there is a reminder of the importance of maintaining public confidence in the police service which is an important aspect of the rule of law. Improper behaviour which occurs before an individual becomes a member of the police service might well render that person unfit to be entrusted with the office of constable and its attendant powers and it is important that such matters come to light and have appropriate consequences. In para [58] Scoffield J opines that the appropriate means of addressing pre-attestation conduct which renders a candidate unsuitable for service as a police constable is in a robust vetting regime.

[98] The applicant also relied upon the case of *Balajigari* [2019] EWCA Civ 673, an immigration decision of the English Court of Appeal; in particular, paras [45] and [60]. In these paragraphs of the judgment, the Court of Appeal discussed the requirements of procedural fairness. Reference was made to the House of Lords decision in *Doody* [1994] 1 AC 531. (Authorities Bundle page 118). In summary, the duty to act fairly will readily be implied into a statutory framework even when the legislation is silent and does not expressly require any particular procedure to be followed. There is a presumption that an administrative power will be administered in a manner which is fair in all the circumstances. The standards of fairness are not immutable but may change with the passage of time, both in general and in their application to decisions of a particular type. What fairness demands is dependent on the context of the decision, including the statutory framework within which it is taken. Fairness will very often require that a person who may be adversely affected by the decision is given an opportunity to make representations either before the decision is taken or after it is taken with a view to procuring its modification or in some cases both before and after. Since the person affected usually cannot make worthwhile representations without knowing what factors may weight against his interests, fairness will very often require that he is informed of the gist of the case that he has to answer. Significant issues of credibility relating to primary facts relevant to the decision to be made would warrant the conducting of an interview in which these matters would be put to the person concerned to afford the person the opportunity to deal with those

matters. Procedural fairness is conducive to better decision-making because it ensures that the decision-maker is fully informed at a point when a decision is still at a formative stage. It also shows respect for the individual whose interests are affected who will know that they have had the opportunity to influence a decision before it is made. The right to be consulted minimizes the risk of the decision maker's mind becoming unduly fixed before representations from the person affected by the decision are belatedly received and considered.

[99] I cannot possibly take issue with any of these statements of principle and, indeed, I conclude that the process that was followed in this instance adheres to the spirit of those principles and that no further enhanced procedural safeguards were warranted in this case because of the lack of dispute in respect of the central facts of the case.

[100] Finally, reference was made to the UKSC decision on *R (Osborn) v Parole Board* [2013] UKSC 61 and, in particular, para [2] of Lord Reed's judgment in that case. In summary, in that case, the UKSC provided guidance as to when an oral hearing should be convened in the context of a Parole Commissioners' determination in relation to the liberty of a prisoner. Lord Reed JSC stated that when considering whether any particular procedure complies with the common law standards of procedural fairness, it is impossible to define exhaustively the circumstances in which an oral hearing will be necessary, but the circumstances will often include the situations where there is a dispute in relation to important factual issues or where the issue of the individual's credibility looms large. Neither issue arises in this case. Further, no request was made by or on behalf of the applicant for an oral hearing at any relevant time.

[101] In summary, the authorities referred to and relied upon by the applicant cannot, in my view, be legitimately interpretated as mandating more extensive disclosure to the applicant during the process or a fuller explanation concerning the matters which were relevant to the decision that had to be made in this case being given to him than was provided in this case. These authorities cannot, in my view, be read as mandating the provision of some form of oral hearing in this case prior to the decision regarding vetting clearance being made. For all the reasons set out in this judgment, I am satisfied that there are no legitimate grounds upon which the decision of Chief Superintendent Walls can be challenged and I, therefore, dismiss the applicant's challenge and I award the respondent its costs against the applicant.