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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION  
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY GARETH WATSON  
FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE POLICE SERVICE OF NORTHERN IRELAND  
(CONDUCT) REGULATIONS 2016

AND THE POLICE SERVICE FOR NORTHERN IRELAND  
Respondent

AND THE PSNI PROFESSIONAL STANDARDS DEPARTMENT  
Intervener

Mr Ian Skelt QC with Mr Michael Egan BL (instructed by Edwards & Co, Solicitors) for  
the Applicant

Mr Mark Robinson QC with Mr Mark McEvoy BL (instructed by the Crown Solicitor's  
Office) for the Respondent

Mr John Beggs QC (instructed by PSNI Legal Services Branch) for the Intervener

## COLTON J

### *Introduction*

[1] The applicant is a constable in the Police Service of Northern Ireland ("PSNI"). On 26 April 2016 as part of the application process to join the PSNI he completed a Security Check and Counter Terrorist Check Questionnaire ("the Questionnaire").

[2] The applicant began training as a constable on 15 January 2017. He completed his training and attested as a police constable on 26 June 2017.

[3] Section 14 of the Questionnaire required him to enter, inter alia, “details of any other full or part time employment you have held within the last five years giving the most recent employment first.”

[4] Subsequent to attestation it emerged that in answering question 14 of the Questionnaire he failed to disclose two periods of part-time employment as a sales assistant being:

- (i) a period of employment as a sales assistant with Matalan between October 2011 and July 2014; and
- (ii) part-time employment with Statement Menswear in Portadown between January 2015 and October 2016.

[5] It further emerged that in the course of his employment with Matalan he had been subject to disciplinary procedures culminating in a verbal warning for gross misconduct. In the course of his employment with Statement Menswear he made unauthorised payments to himself on 10 occasions between 18 December 2015 and 26 September 2016 totalling £1,675. On or about 13 October 2016 he took a loan from Amigo Loans for £2,000 to repay the unauthorised payments to his employer and shortly thereafter he did so.

[6] After the PSNI became aware of this information the applicant was the subject of a misconduct charge under the Police Service of Northern Ireland (Conduct) Regulations 2016 (“the 2016 Regulations”), served on 19 March 2021. The charge in full was in the following terms:

“On or about 26 April 2016 you made a false declaration on your Security Check and Counter Terrorist Check Questionnaire (“the Questionnaire”). You failed at any time thereafter to correct the falsity.

**Particulars**

- (i) On 2 October 2011 you became an employee of Matalan at Craigavon.
- (ii) On 14 November 2012 you were in receipt of a letter concerning disciplinary matters from the Craigavon store manager.
- (iii) On 19 February 2013 you were in receipt of a letter concerning disciplinary matters from the same Craigavon store manager.

- (iv) On 27 February 2013 you were the subject of a disciplinary interview by the assistant store manager at Craigavon.
- (v) On 26 March 2013 you were in receipt of a letter from a customer service manager at Matalan advising you that no further action was being taken against you.
- (vi) On 6 January 2014 you were in receipt of a letter concerning another disciplinary matter from an admin manager at Matalan.
- (vii) On 11 January 2014 you were interviewed by Matalan for gross misconduct.
- (viii) On 14 January 2014 you were in receipt of a letter from the Craigavon store manager issuing you with a verbal warning for gross misconduct.
- (ix) On or about 13 July 2014 you left the employment of Matalan at Craigavon.
- (x) On or about January 2015 you started to work for Statement Menswear in Portadown.
- (xi) Between 18 December 2015 and 26 September 2016 you made unauthorised payments from Statement Menswear to yourself on 10 occasions, totalling as follows:
  - (a) 18 December 2015 - £100
  - (b) 5 January 2016 - £100
  - (c) 11 July 2016 - £150
  - (d) 1 August 2016 - £165
  - (e) 12 August 2016 - £175
  - (f) 15 August 2016 - £200
  - (g) 22 August 2016 - £220
  - (h) 26 August 2016 - £210
  - (i) 30 August 2016 - £175
  - (j) September 2016 - £200

- (xii) On or about 13 October 2016 you took a loan from Amigo loans in the sum of £2,000 to repay the unauthorised payments to your employer and shortly thereafter you did so.
- (xiii) On or about 26 April 2016 you signed the Questionnaire as part of the process for joining the PSNI.
- (xiv) Section 14 of the Questionnaire required you to enter inter alia "details of any other full or part-time employment you have held within the last five years giving the most recent employment first."
- (xv) Your periods of employment by Matalan and Statement Menswear were both within the five years prior to 26 April 2016.
- (xvi) The Declaration on the final page of the Questionnaire stated inter alia as follows: "I declare that the information I have given is true and complete to the best of my knowledge and belief, and I understand that any false statement or deliberate omission in the information I have given in this questionnaire may disqualify me from employment ... Or make me liable to disciplinary action, which may include dismissal."
- (xvii) You knew or ought to have known that such a Questionnaire was a serious and solemn document which requires absolute honesty and integrity.
- (xviii) Despite signing the said Declaration, in Section 14 of the Questionnaire you entered one employer (Asda) and omitted to include details of your employment with Matalan and Statement Menswear.
- (xix) Though you were not a Constable when you signed the said Questionnaire as aforesaid, the panel nonetheless has jurisdiction to consider these allegations.

- (xx) You began training as a Constable on 15 January 2017.
- (xxi) At no stage before or after you attested as a Constable did you seek to correct the false declaration on the Questionnaire.
- (xxii) Your said conduct was in breach of the following articles of the PSNI Code of Ethics scheduled to the Police (Conduct) (NI) Regulations 2016:
  - (a) Article 1.10, in that your said conduct is likely to bring discredit upon the police service;
  - (b) Article 7.1, in that your said conduct on or about 26 April 2016 lacked integrity and continued;
  - (c) Article 7.5, in that your said conduct amounts to an act of dishonesty on or about 26 April which continued.
- (xxiii) Your conduct amounts to gross misconduct."

[7] Under the 2016 Regulations the respondent appointed a panel (ACC McEwan, Supt Foy and Ms Mann-Kler) ("the Panel") to hear and determine the misconduct charge against him.

[8] The applicant applied to stay the proceedings on the ground that the panel lacked jurisdiction to hear a charge based on allegations which pre-dated his attestation as a constable.

[9] In a written decision dated 4 May 2021 and delivered on 5 May 2021 the panel refused the application to stay the proceedings. The panel's conclusions were as follows:

**"Conclusion**

- 43. For this reason, we conclude that from the moment of attestation, bearing in (sic) the prospective terms in which it (sic) couched, though not before, an officer in the member's position is under an immediate and ongoing duty to ensure that his superiors are in receipt of full disclosure of any and all information previously sought, including

information sought and required on the vetting form. Indeed, we noted that the terms of the declaration in the vetting form expressly include the provision that 'I understand, too, that the information provided may be subject to ongoing checks where they are necessary and proportionate.' For us, this is the issue at the heart of this case.

44. While in any given set of circumstances, whether in this case or any other case, there may be good reasons or reasonable excuses (and we must be extremely careful not to venture any speculation about what these might be for reasons which should be self-evident) for the absence of certain information in a Security Check and Counter Terrorist Check Questionnaire, in our judgment an attested officer is not absolved from correcting or completing that disclosure immediately and certainly as soon as practicably possible upon attestation. We understand this to be an ongoing, career-long obligation. Thus, we conclude that having considered the arguments, submissions, authorities and legislation, and having accorded appropriate and necessary weight to each, we have jurisdiction to entertain the complaint, and shall proceed to hear the evidence."

[10] It is this conclusion that is challenged in these proceedings. In particular, the applicant seeks the following relief:

- “(a) An Order of Certiorari quashing the impugned decision.
- (b) A declaration that the panel lacks jurisdiction to hear and determine the charge.
- (c) A declaration that the impugned decisions were ultra vires and have no force or effect.
- (d) An Order of Mandamus to stay the proceedings.
- (e) A declaration that the decisions were in breach of the applicant’s rights under Article 6 and 8 of the ECHR.

- (f) Such further or other relief as this honourable court shall deem necessary.”

[11] On 16 August 2021 the applicant was granted leave to seek judicial review against the Chief Constable of the Police Service of Northern Ireland, on whose behalf the panel acted.

[12] On 15 September 2021 the court also granted leave to the Professional Standards Department of the PSNI (in effect the prosecuting authority before the panel) to intervene in these proceedings.

[13] The court is grateful to counsel who appeared in this matter for their helpful written and oral submissions.

#### *The Statutory/Legal Framework*

[14] The statutory arrangements for the receipt, classification and investigation of complaints about the conduct of members of the PSNI and the bringing of disciplinary proceedings are contained in Part VII, sections 52-59 of the Police (Northern Ireland) Act 1998 (“the 1998 Act”).

[15] Further, by Part VI of the Police (Northern Ireland) Act 2000 (“the 2000 Act”) there was established the Northern Ireland Policing Board (“the Board”) with power conferred on the Board, pursuant to section 52(1) to issue a Code of Ethics (“the Code”) laying down the standards of conduct of behaviour required of police officers.

[16] The pre-amble to the Code includes the following:

- “A. Policing is an honourable profession that plays an important part in the maintenance of a just and fair society. The people of Northern Ireland have the right to expect the Police Service to protect their human rights by safeguarding the rule of law and providing a professional Police Service.
- B. Police officers are required to respect and obey the law at all times and will be held personally responsible and accountable for their own acts or omissions.
- ...
- D. Public confidence in the Police Service is closely related to the attitude and behaviour of officers

towards members of the public, in particular their respect for the human rights and fundamental freedoms of individuals as enshrined in the European Convention on Human Rights.

...

F. This Code of Ethics is intended:

1. to lay down standards of conduct and practice for police officers; and
2. to make police officers aware of their rights and obligations under the Human Rights Act 1998 and the European Convention on Human Rights.

...

J. Any conduct whether, on or off duty, which brings or is likely to bring discredit on the Police Service may be investigated in order to establish whether or not a breach of the Code has occurred. A breach of the Code may result, in appropriate circumstances, in a criminal or disciplinary investigation, either by the Office of the Police Ombudsman or the Police Service."

[17] Of particular relevance to this case are the articles in the Code which set out the misconduct offences within the professional disciplinary context referred to in the charge against the applicant, including in particular:

- (a) By Article 1.10, the duty "whether on or off duty - (not to) behave in a way that is likely to bring discredit upon the police service."
- (b) By Article 7.1, the duty "to act with integrity towards members of the public and their colleagues where the confidence of the police service is secured and maintained."
- (c) By Article 7.5 "police officers shall not commit any act of corruption or dishonesty."

[18] Section 52(2) of the 2000 Act provides that in preparing the Code of Ethics the Chief Constable and the Board shall have regard to the terms of the declaration to be made by a police officer on attestation. The wording of the declaration is contained in section 38(1) of the 2000 Act in the following terms:



"I hereby do solemnly and sincerely and truly declare and affirm that I will faithfully discharge the duties of the office of constable, with fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all individuals and their traditions and beliefs; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof according to law."

[19] The final pieces of the statutory architecture are the 2016 Regulations which were made by the Department of Justice in exercise of the powers conferred by sections 25, 26 and 59(8) of the 1998 Act.

[20] These Regulations create the jurisdiction to prosecute allegations of misconduct or gross misconduct against members of the PSNI.

[21] Regulation 3 is entitled "Interpretation and Delegation" and provides the following definitions:

- "(a) "member" means a member of the police service;
- (b) "the member concerned" means the member in relation to whose conduct there has been an allegation;
- (c) "police officer" means a member of a police force;
- (d) "the Police Service" means the PSNI or the PSNI Reserve."

[22] Regulation 5(1) provides that the Regulations apply:

"where an allegation comes to the attention of an appropriate authority which indicates that the conduct of a member may amount to misconduct or gross misconduct."

[23] "Appropriate authority" for the purposes of this case means the Chief Constable.

[24] Regulation 10 provides the appropriate authority with the power to suspend an officer subject to the provisions set out therein.

[25] Regulation 12 "Assessment of Conduct" provides as follows:

“12. –(1) Subject to paragraph (6) the appropriate authority shall assess whether the conduct which is the subject matter of the allegation, if proved, would amount to misconduct or gross misconduct or neither.”

Regulation 12(4) provides as follows:

“(4) Where the appropriate authority determines that the conduct, if proved, would amount to gross misconduct, the matter shall be investigated.”

[26] The remainder of Part 3 of the 2016 Regulations provide for “due process”:

- (a) By regulations 13 or 14, appointment of a fair investigator.
- (b) By regulation 15, an investigation to “(a) gather evidence to establish the facts and circumstances of the alleged misconduct or gross misconduct; and (b) assist the appropriate authority to establish whether there is a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer.”
- (c) By regulation 16, to provide the officer with written notice of, inter alia, “the conduct that is the subject matter of the allegation and how that conduct is alleged to fall below the appropriate standards” and the officer’s rights under the 2016 Regulations.
- (d) By regulation 18, the officer’s right to make representations to the investigators.
- (e) By regulation 19, provision for interviews.
- (f) By regulation 20, the investigator must submit “a written report on his investigation to the appropriate authority” which “shall (a) provide an accurate summary of the evidence; (b) attach or refer to any relevant documents; and (c) indicate the investigator’s opinion as to whether there is a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer.”

[27] Part 4 of the 2016 Regulations provides the mechanics for the charging of the officer, disclosure and disciplinary proceedings, whether by way of a meeting (for misconduct simpliciter, at which the highest sanction is a final written warning) or hearing (for gross misconduct at which dismissal without notice is available).

[28] Finally, the Police Appeals Tribunal (Northern Ireland) Rules 2012 provides a fully self-contained Code for Appeals by officers convicted of gross misconduct.

*What did the panel actually decide?*

[29] At the hearing a preliminary issue arose in relation to what the panel actually decided.

[30] Before the panel the appropriate authority made three arguments opposing the applicant's application for a stay of the proceedings. Firstly, it was argued that the 2016 Regulations did confer jurisdiction to prosecute an officer for pre-attestation misconduct - the "interpretation point."

[31] Secondly, it was argued that the applicant had consented to the jurisdiction of the 2016 Regulations when he signed his application to join the PSNI - "the consent point."

[32] Thirdly, it was contended that jurisdiction was conferred on the panel on the basis that there was an ongoing obligation on the applicant to correct the alleged falsity in his questionnaire - "the ongoing duty point."

[33] The panel upheld "the ongoing duty point."

[34] At the hearing the respondent and the intervener argued that the panel did not come to a conclusion on the first two points.

[35] On this issue the court concludes that an analysis of the ruling can only lead to the conclusion that the panel did, in fact, reject the first point. On a very basic level this is clear from the first sentence in its conclusion where the panel concluded that:

"From the moment of attestation, bearing the prospective terms in which it is concluded, though not before, an officer in the member's position is under an immediate and ongoing duty to ensure that his superior is in receipt of full disclosure ..."

[my underlining]

[36] This is also, in the court's view, clear from the reasoning leading to the conclusion and the focus on the attestation being the point at which a police constable can properly understand and grasp "applicable ethical standards and obligations" - see para 37. At para 36 the panel emphasises the distinction between pre-attestation and post-attestation conduct.

[37] The consent issue is less clear cut. The panel does not come to any express conclusion on this issue, having been content to accept jurisdiction on the basis of the “ongoing duty” argument.

[38] Mr Skelt, on behalf of the applicant, argued that the court should not, nor should the intervener be permitted to raise the first two arguments in this judicial review. The Order 53 statement is confined to a challenge to the decision actually made by the panel. He submits that it would be unfair to the applicant if the court were to come to a conclusion that in fact the panel did have jurisdiction under the interpretation point or the consent point. He points out that, neither the respondent nor the intervener, sought to judicially review the decision of the panel.

[39] Mr Robinson and Mr Beggs argue that the panel was correct to find an “ongoing duty” on the part of the applicant.

[40] In relation to the two other points raised Mr Beggs invites the court to provide guidance. He submits that the case raises an important point of wider public interest. He says this issue may well arise again and there is an absence of authority on the points raised.

[41] The court agrees with Mr Beggs’ submission. The case does raise an important point of wider public interest, in respect of which there is a lack of authority.

[42] It is clear from the panel’s decision that it was anticipated by all parties that the outcome would be subject to significant scrutiny. Thus, at para 5 the panel says:

“Both counsel were unambiguous in indicating to us that the outcome of the application would be subject to significant scrutiny, including, potentially, a review by a court or tribunal of superior jurisdiction to this panel, which has the duty of performing the function at first instance of finding facts and thereby regulating the conduct of police officers.”

[43] Furthermore, the respondent and intervener have, in light of this consideration, not pressed the point that there is an alternative remedy available to the applicant in the form of an appeal via the Police Appeals Tribunal Regulations (Northern Ireland) 2016. Ordinarily, given the availability of this alternative remedy a judicial review would not be countenanced. Therefore, the court does propose to consider the three points raised before the panel.

### *General Principles*

[44] Before turning to the specific points raised by the parties, it is important to set out some important general principles. The primary purpose of the 2016 Regulations is to secure and maintain public confidence in the police service and its members. Such public confidence is an essential element of the rule of law.

[45] These principles are well set out in the College of Policing “Guidance on outcomes in Police Misconduct Proceedings” which sets out three propositions at para 2.3 in the following terms:

- “(a) The primary purpose is not to punish the officer but to protect public confidence in, and the reputation of, the police service by holding police officers accountable and making clear that improper behaviour will not be left unchecked;
- (b) A secondary purpose is to be declaratory of high professional standards, by demonstrating that misconduct of a certain kind will not be tolerated;
- (c) A final purpose is to protect the public and/or officers or staff by, in appropriate cases, preventing the officer from committing similar misconduct again by excluding them from the police service.”

[46] This is reinforced by the nearly identical PSNI Guidance on outcomes, which at para 1.1 states that it “reflects the guidance issued by the College of Policing.”

[47] There is ample, well-established case law, which supports these basic principles. Thus, in *R(Green) v Police Complaints' Authority* [2004] UKHL 6 at [78] Lord Carswell said:

“78. Public confidence in the police is a factor of great importance in the maintenance of law and order in the manner which we would regard as appropriate in our polity. If citizens feel that improper behaviour on the part of police officers is left unchecked and they are not held accountable for it in a suitable manner, that confidence will be eroded.”

[48] In similar vein, in *Salter v Chief Constable of Dorset Police* [2012] EWCA Civ 1047 the Court of Appeal of England and Wales endorsed the opinion of Bernard J at first instance that the high standards of honesty and integrity expected of lawyers applied with equal force to police officers; at para [21] Maurice Kay LJ says:

“Although police officers do not have a fiduciary client relationship with individual members of the public or the public at large, they do carry out vital public functions in which it is imperative that the public have confidence in them. It is also obvious that the operational dishonesty or impropriety of a single officer tarnishes the reputation of his force and undermines public confidence in it. In these respects, the similarities between solicitors and police officers justify the analogy provided that, ultimately, the decision-maker, be it the PAT or a judge of the Administrative Court, appreciates at all times that the index case falls to be assessed in the context of policing.”

[49] At para [28] Burnton LJ says:

“An actual or perceived lack of integrity disqualifies a person from acting as either a constable or in a police supervisory role.”

[50] These statements of principle also find expression in the PSNI Code of Ethics and the DoJ Guidance, para 1.1 of which states that:

“It underpins the Code of Ethics which sets out the standards of behaviour the police service and the public expect of members” and that “any failure to meet these standards may undermine the important work of the police service and public confidence in it.”

[51] The essential submission of the applicant is that the panel’s jurisdiction is created by and is limited by the express statutory regime.

[52] The applicant is charged with a breach of the Code of Ethics. The foreword to the Code by the Chair of the Northern Ireland Policing Board contains the following passages:

“The Board believes that by carrying out their duties whilst paying strict attention to the ethical framework of the Code, the public can be sure that police officers have acted in an honourable, effective and human rights compliant manner. ...

Moreover, a police service that demonstrates through the actions of its officers that it is impartial ... can secure the respect, support and help of local communities and is

likely to be able to tackle crime and keep people safe more effectively.”

[53] In his concluding paragraph the Chair says:

“The Board’s overarching aim is to secure for all the people of Northern Ireland an effective, efficient, impartial, representative and accountable police service which secures the confidence of the whole community.”

[54] In his introduction to the Code the Chief Constable of the PSNI states that the Service:

“... recognises that the reputation and integrity of our officers is critical to confidence in policing.”

[55] The introduction goes on to state:

“Officers who uphold the principles of the Code, demonstrate the highest standards of integrity and professionalism as they prevent and detect crime ...”

[56] In the pre-amble at para F the following appears:

“This Code of Ethics is intended:

1. To lay down standards of conduct and practice for police officers; ...”

[57] Para J provides:

“Any conduct, whether on or off duty, which brings or is likely to bring discredit on the Police Service may be investigated in order to establish whether or not a breach of the Code has occurred. A breach of the Code may result, in appropriate circumstances, in a criminal or disciplinary investigation, either by the Office of the Police Ombudsman or the Police Service.”

[58] Turning to the specific breaches alleged in this case para 1.10 provides:

“Whether on or off duty, police officers shall not behave in a way that is likely to bring discredit upon the Police Service.”

[59] Para 7 provides:

**“Integrity**

Article 7 of the Code reinforces Articles 1.1 and 1.5 requiring officers to respect and obey the law at all times. This article requires you to:

- Act with integrity towards the public and your colleagues in order to secure confidence in the police service.”

[60] Under the heading “Corruption or Dishonesty” Article 7.5 provides:

“Under Article 7.5, officers must not commit any act of corruption or dishonesty. Such acts include:

...

- Knowingly making false, misleading or inaccurate oral or written statements or entries in any record or document required for police purposes.”

***Pre-Attestation Conduct/The Interpretation Point***

[61] The applicant submits that it is clear from all of the above that the Code applies to the conduct of police officers whether on or off duty. The applicant only became a police officer after his attestation on 26 June 2017 and, therefore, the misconduct alleged which took place on 26 April 2016 is outwith the Code and, thus, the panel lacks jurisdiction to determine the complaint. This argument is further supported by regulation 5(1) of the 2016 Regulations which relates to the conduct of a “member.” Since a “member” means a member of the police service and misconduct under regulation 5 means a breach of the Code it is argued that it follows that pre-attestation conduct cannot come within the ambit of the regulations under which the complaint has been made.

[62] In these circumstances the applicant argues that the panel correctly rejected the appropriate authority’s primary argument that the 2016 Regulations created jurisdiction to prosecute allegations of misconduct prior to attestation.

[63] Having rejected this argument, Mr Skelt argues that the panel erred in law in concluding that the applicant was subject to a continuing duty, post attestation, to correct the alleged false declaration in the questionnaire. It is argued that in reality this was a contrivance and an attempt to “reach-back” to pre-attestation conduct and was impermissible.



[64] Mr Skelt argues that there is no such duty expressed within the Code itself. He points to the authority of *Beckwith v SRA* [2020] EWHC 3231 (Admin) which dealt with regulations enforced by the Solicitors' Regulatory Authority ("SRA") in relation to the professional conduct of solicitors. In that case the court held that it was not for it to add to or otherwise reformulate the statutory scheme which applied to solicitors. It was held that there was no basis in law to interpose any additional requirement into the SRA Handbook Principles under which a complaint had been brought.

[65] Mr Skelt argues that the alleged duty is entirely vague and poses the question to what type of conduct does it apply? Over what timescale? For how long would the duty exist? He argues that the need for clarity is particularly acute when an allegation of dishonesty is made.

[66] Mr Skelt points out that it would be open to the PSNI to provide a mechanism for checking the accuracy of any declaration post-attestation. By way of example the PSNI could have required newly attested officers to confirm the contents of any previous declarations which would provide a simple answer to the scenario in this application.

[67] In summary, therefore, the applicant argues that it is not permissible for the panel to extend a tightly confined regulatory scheme. The decision of the panel has wide implications, by extending the regulatory scheme to a potentially very wide ambit.

[68] The applicant points to the way in which former police officers are treated as being supportive of this submission. He argues that former police officers are not subject to disciplinary procedure under the 2016 Regulations even for conduct committed whilst they were police officers. A similar scenario led to a change of the law in England and Wales after some public controversy in cases where officers facing serious misconduct allegations arising during their police service retired or left the police service on grounds of ill-health. In response Parliament made the Police (Conduct) Complaints and Misconduct on Appeal Tribunal (Amendment) Regulations 2017, regulation 5 of which substantially amended regulation 5 of the 2012 Regulations (in substance similar to regulation 5 of the 2016 Regulations in this jurisdiction). The effect of the amendment is that officers who are alleged to have done acts falling within the 2012 regime (i.e. acts of misconduct while serving as police officers but which came to the attention of the AA after 22 November 2012) and who retired or resigned on or after 15 December 2017 may now still be pursued for gross misconduct in certain circumstances. Officers who have done acts following the 2012 regime but who have already retired or resigned before 15 December 2017 cannot be pursued for misconduct, so the 2017 Regulations are not retrospective in that effect.

[69] Applying this analogy Mr Skelt points out that Parliament has not sought to extend the 2016 Regulations to capture a conduct of a person who is not an attested constable.

[70] In considering this matter it is useful to return to some aspects of the questionnaire which have given rise to this application. It is a government document created for the purposes of a security check/counter terrorist check. Self-evidently, such a check is necessary for someone such as the applicant applying for a public office such as a police officer.

[71] The questionnaire clearly sets out at paragraph 8 that “all national security vetting decisions may only be taken by government departments, agencies, the armed forces or police forces. All the available information is taken into account to reach a reasoned decision on an individual’s suitability to hold a security clearance.”

[72] Paragraph 9 points out that:

“Security clearances may be refused or withdrawn where:

...

- Personal circumstances, current or past conduct, indicate that an individual may be susceptible to pressure or improper influence;
- Instances of dishonesty or lack of integrity cast doubt upon an individual’s reliability;
- Other behaviours or circumstances indicate unreliability.”

[73] The questionnaire highlights that:

“Failure to disclose relevant circumstances or information is likely in itself to be regarded as evidence of unreliability and would be taken into account when assessing your suitability for security clearance. It is therefore in your own interest to be honest and open in the information you provide in this questionnaire.”

[74] The declaration signed by the applicant provides:

“I understand, too, that the information provided may be subject to ongoing checks where they are necessary and proportionate.”

[75] Importantly, the declaration signed by the applicant includes the following:

“I declare that I have read and understood the statement of HM Government’s policy on vetting on page 3 of this questionnaire.

... I declare that the information I have given is true and complete to the best of my knowledge and belief and I understand that any false statement or deliberate omission in the information I have given in this questionnaire may disqualify me from employment (including employment in connection with Crown contracts, if applicable) or make me liable to disciplinary action, which may include dismissal.”

[76] In the court’s view the contents of the questionnaire are unambiguous as to the importance of full and accurate disclosure and the potential implications of any such failure. The declaration is self-evidently an integral and fundamental element of the process by which the applicant was ultimately appointed to the public office of a police officer.

[77] Returning to the interpretation of the statutory architecture in play here, at first blush, Mr Skelt’s argument appears attractive.

[78] However, when analysing the Regulations and the Code of Ethics it seems to the court that jurisdiction is conferred by reason of an officer being a serving member of the PSNI rather than by reference to when the alleged misconduct occurred. Indeed, it is for this reason that retired officers have not been deemed subject to the disciplinary regime. Thus, regulation 3 refers to “the member concerned” as the member in relation to whose conduct there has been an allegation. It does not say that this relates to a member in respect of whose conduct whilst a police officer there has been an allegation. Thus, regulation 5 applies in respect of “the conduct” of someone who is “a member” i.e. a police officer. As long as the person against whom the allegation of misconduct is made remains a police officer, they are subject to the jurisdiction of the Regulations.

[79] The regulations which deal with the investigation of alleged misconduct, namely regulations 12 through to regulation 20 do not indicate any temporal prohibition on a misconduct investigation, nor do they prohibit investigation by PSNI or PONI in respect of misconduct which occurred prior to attestation.

[80] It seems to the court that this is anticipated by the questionnaire itself which expressly refers to the potential to be liable to disciplinary action which may include dismissal in the event of any false statement or deliberate omission in the

information given in the questionnaire. The court asks rhetorically to what “disciplinary action” could this refer, if not the disciplinary procedures applicable to a successful applicant who is appointed to the public office in respect of which the questionnaire was related?

[81] It seems to the court that this interpretation is entirely consistent with the purpose of the police disciplinary scheme, namely to secure and maintain public confidence in the police service and its members.

[82] In the course of submissions the intervener referred to examples to make good this point. Whilst the panel found such examples unhelpful it seems to the court that they do illustrate the weakness of the applicant’s arguments. Thus, Mr Beggs referred to a scenario where a police constable is discovered formerly to have been a member of a violent far right organisation but somehow navigated the questionnaire and vetting procedures without being found out. By way of further example he refers to a scenario whereby a police constable is discovered to have a history, prior to attestation, of sexual harassment of women but somehow navigated the questionnaire and vetting procedure without being found out.

[83] He argues that it would be inconsistent with a purposive interpretation of regulation 5 to say that in the above factual scenarios the potential damage to public confidence in the PSNI were incapable of legal remedy.

[84] On the applicant’s interpretation, the Chief Constable would be compelled to retain these two officers in the PSNI without any option to have the matter investigated by the Professional Standards Department.

[85] In terms of case law Mr Beggs referred the court to the judgment in *L v Prosthetics and Orthoptist Board* [2001] EWCA Civ 837 when at para [31] the court cited with approval the case of *R v General Council of Medical Education* [1861] 3 E and E 525 to this effect:

“Medical practitioners are not amenable to the jurisdiction of the Council, under [section 29], until they had been registered. But if, at the time of their ... adjudication by the council to have been guilty of infamous professional conduct, they are registered, the section applies, and it is immaterial at what time the ... misconduct ... may have been committed. It is said that this construction makes the act retrospective. It does so to a certain extent, but not in the general sense in which the rule against giving a retrospective operation of statutes is understood.”

Further, at [32] the court observed as follows:

“It would be absurd if conduct committed the week before registration had to be ignored, whereas conduct during the week after would lead to a striking off from the register. In my view, it is not in truth to hold that the decision of the disciplinary committee in the future, albeit considering past conduct, can lead to registration being cancelled for the future.”

[86] The court is careful in drawing conclusions from case law which deals with different regulatory regimes. As in the case of *Beckwith*, referred to by Mr Skelt the cases of the *Prosthetics and Orthoptist Board and the General Council of Medical Education* were dealing with different schemes.

[87] Looking at the provisions of the scheme itself, having regard to the principles of the importance of regulatory schemes in the context of either professionals or those holding public office and, in particular, the importance of maintaining public confidence in public office the court agrees with Mr Beggs’ submission that the better and correct interpretation of the Code of Ethics for the PSNI is that it seeks to apply to those who are police officers even if they were not at the time of the misconduct since that is consistent with the maintenance of public confidence in the PSNI.

[88] The applicant’s interpretation of the Regulations is inimical to public confidence in policing.

#### *Consent*

[89] In relation to the consent point the court takes the view that the applicant could not consent to any unlawful process and his purported consent would not be sufficient to confer jurisdiction. The relevance of the matters set out in the questionnaire, in the court’s view, point to the panel having jurisdiction on the basis that it can investigate pre-attestation conduct provided it relates to a serving member. That is the disciplinary action contemplated in the questionnaire, in the court’s view.

#### *Ongoing Duty*

[90] In relation to the ongoing duty point the court concludes that the panel was correct in deciding that it had jurisdiction to hear the complaint on the basis of such a duty. In this regard the general principles and the analysis in relation to the interpretation point set out above are also relevant.

[91] That there is an ongoing duty is reinforced by the contents of the questionnaire which have been set out already. The importance of completing the questionnaire honestly and with integrity was abundantly clear from the contents itself which the applicant declared he had read and understood. Equally, the potential consequences of a failure to provide true and complete information was also made clear.

[92] I do not agree with Mr Skelt's submission that the alleged duty is entirely vague or that the allegation of dishonesty is ill-defined or equivocal.

[93] I make it clear, as did the panel, that it is not for the court to determine whether, in fact, there has been any dishonesty by the applicant or whether that dishonesty amounts to misconduct. In the course of submissions Mr Skelt made valid points about the applicant's youth and other matters which could be deployed in answer to the allegations themselves. In this regard the distinction between pre-attestation conduct and post attestation conduct will undoubtedly be relevant. However, in the court's view, the panel does have jurisdiction to consider the complaint of misconduct both on "the interpretation point" and on the basis of an "ongoing continuing duty." To paraphrase Mr Robinson's submission on behalf of the panel the court agrees that it is arguable that a police officer cannot stay silent when he knows well that he has gained entry to the profession based on a proffered falsehood, since to do so was to maintain an active and continuing falsehood. The PSNI has jurisdiction to adjudicate on whether in fact there has been such a falsehood and whether it amounts to misconduct.

#### *Article 8 ECHR*

[94] Mr Skelt supplements his argument by arguing that the applicant's Article 8 ECHR rights are engaged and that the interference of those rights by reason of the arguments summarised above is not in accordance with law or in any way proportionate.

[95] In relation to this argument I accept the applicant's Article 8 rights are, indeed, engaged. As a result of the disciplinary process he risks losing his chosen career as a police officer with the resultant loss of income, security of office and a respected career. Should he be removed from office on the basis of gross misconduct this will inevitably blight his future career prospects.

[96] However, in light of the court's analysis of the scheme and the factual context of this application the court concludes that any interference with the applicant's Article 8 rights is in accordance with law, pursued for a legitimate aim and is proportionate. As will be seen the court has concluded that the misconduct charge is in accordance with the statutory regime which itself is plainly in accordance with law and pursued for a legitimate aim. In terms of proportionality and the balancing act between the applicant's rights and the importance of the lawful application of the

Regulations Mr Skelt focused on what he says are vague and wide ranging allegations of dishonesty which lack necessary precision. In the court's view this argument is misconceived. Whether or not they amount to gross misconduct the allegations themselves are clear. The disciplinary procedure itself is clearly Article 8 compliant and provides adequate procedural safeguards for the applicant. The court therefore concludes that the interference with the applicant's Article 8 rights in bringing proceedings under the 2016 Regulations is lawful.

### *Conclusion*

[97] In conclusion the court determines as follows:

- (i) The panel was correct to find an "ongoing duty" on the part of the applicant.
- (ii) The 2016 Regulations permit prosecution of alleged pre-attestation misconduct of a serving police officer.
- (iii) The fact that the panel has jurisdiction to consider this complaint is not, of course, determinative of the complaint. The panel will be entitled to take into account when the alleged misconduct occurred, the reasons for any alleged misconduct, the overall circumstances in which the alleged misconduct took place, whether it relates to the profession of policing and ultimately whether it does amount to misconduct.
- (iv) The Regulations set out a fair and Article 8 compliant procedure for the consideration of the complaint made against the applicant.

[98] The application for judicial review is refused.