Panel decision on Chief Constable Byrne's stay application

30 April 2018

A. The appropriate legal test

1. Chief Constable Byrne applied to us for a stay of these gross misconduct proceedings. We have read Counsel's skeleton arguments, heard detailed oral submissions and have the authorities referred to us by Counsel. We have reached the view that the cases of *R v Chief Constable of Merseyside Police ex parte Merrill* [1989] 1 WLR 1077 and *AG's reference no 1*. [1992] QB 630 [1992] 3 WLR 9 are quite capable of reconciliation as identified in the cases of *R (on the application of Redgrave) v Commissioner of Police of the Metropolis* QBD [2002] EWHC 1074 at paras [39]-[40] and *Wilkinson v CC of West Yorkshire* [2002] EWHC 2353 at paras [49]-[56]. We accept it is possible to have a stay occasioned by inherent rather than specific prejudice, but we think the "ultimate quest" in dealing with the Chief Constable (CC)'s application is whether a fair trial can be held (see *Wilkinson* at [56]). We will apply the 2 categories of cases pertinent for staying proceedings as referred to in *Warren v AG for Jersey* (2011) UKPC 10 at para [22] (where Lord Dyson recalls his judgment in *R v Maxwell* [2010] UKSC 48*).* The first category is where proceeding would not lead to a fair trial and the second is where the framework has been so compromised that it would offend the Court's sense of propriety to continue. We note the balancing test referred to in para [23] of *Warren*, taken from the House of Lords case of *R v Latiff* [1996] 1 WLR 104.

2. It must be right that the criminal law principles on staying proceedings relating to abuse of process are adapted for the professional disciplinary context. This will impact on the way this Panel can address or cure existing or potential prejudice. Another principle which is key in these proceedings is the need to maintain public confidence in policing (see *CHRE v GMC and Saluja* [2007] 1 WLR 3094 at para [130]). But that does not mean that it would be right to bypass those authorities on abuse of process jurisdiction which arose from criminal proceedings such as *Maxwell, Latiff* or *Warren*. We disagree with Mr Boyle for the CC when he says authorities such as *Warren* and *Saluja* should be distinguished because those are not police misconduct cases. The principles contained in those case are quite capable of being applied in the regulatory field. Moreover, in *Redgrave* Mr Justice Moses noted at paras [37]-[38] that some factors relevant to trials upon an indictment would have no application to disciplinary proceedings, but that there was little difference between the principles applying to both types of proceedings.

3. We note in *R (on the application of Clinton) v GMC* [2017] EWHC 3304 - a judicial review of a disciplinary case concerned with the Medical Practitioners Tribunal Service - the High Court was referred to and relied upon cases arising in the criminal justice jurisdiction as well as regulatory authorities. Mr Justice Choudhury said there that the principles referred to by Goldring J in *Saluja* were of "*general application in cases involving a stay*". We likewise consider it right to consider principles which arise in the criminal domain as well as in the regulatory context.

4. We find it is appropriate to apply the two-stage test as identified above, as well as the decision in *AG's reference No.1*, to these disciplinary proceedings, with specific regard to how we as a panel can have acute regard for impropriety, be it with regard to collusion of witnesses or lack of early explanations in interview by an accused officer. Our decision regarding a stay is one for the discretion of this Panel, having regard to all the relevant factors (see para [24] of *Clinton*).

5. Having identified the appropriate legal test, we move on to consider the different elements of the stay application by the CC along with the Appropriate Authority (AA)'s response.

B. Relevance of Severity Assessment (SA) – see Police Reform Act 2002 Sch 3 at 19B

6. The CC argued he was not served with a SA as required by the regulations s and there was substandard compliance regarding consultation. Also he said neither the Investigating officer (IO) nor the AA were sufficiently familiar with the appropriate framework or guidance, whether in relation to the spirit or the letter of the regulations. In terms of the consultation, the CC believed the AA's letter of 24 April 2017 was ill-judged as it gave an impression of bias as well as ignorance of the HO guidance.

7. The AA replied that only a small delay arose from the corrected SA process. We remind ourselves that there was an attempt at consultation in February and then properly carried out in March 2017. We cannot conclude that the flaws in the SA procedure resulted in any harm to the CC's interests. We note that the IO was not swayed by the factors raised in the AA's 24 April letter.

C. The lack of more than one Reg 16 Notice. See Police Complaints and Misconduct Regs 2012 (PCMR) and Reg 15 of Police Conduct Regs 2012 (PCR).

8. The CC submitted that the spirit of the regulations as well as the wording itself required that new allegations unearthed via the investigation ought to have led to new Reg 16 notices which would in turn have required a further response from himself.

9. The AA asserted that any harm caused by there being only one Reg 16 Notice was minimal and capable of being cured by-

    a. the disclosure that had already taken place,
    b. the CC's Reg 22 response and
    c. the Panel's handling of the evidence going forward.

10. The AA noted that it was in the spirit of the regulations and even beyond their scope that CC had been sent many more statements on 30 March 2017.

11. The Panel view it as a breach of natural justice that the CC was not aware of the full accusations against him until receiving the Reg 21 charges. The lack of more than one Reg 16 notice undermined the intended sequence of the regulatory framework.

12. Although the AA have said that virtually all of the allegations contained in the Reg 21 notice were set out in statements provided to the CC prior to service of his Reg 18 PCMR response, when one compares the Reg 16 notice and the Reg 21 notice, there is a difference in the extent of actual particulars. It is not reasonable for an accused to have to guess which parts of which witness statements – or notes recording what a witness may say – will eventually form part of charges brought against him or her. However, we see from the Reg 18 notice that the Chief Constable was indeed able to respond to allegations made against him in the statements served on 30 March 2017 – such as his reference to the statement of Sergeant Miles at page 6 of her 22 March 2017 statement as part of his reply to Allegation 6 (see para [173] on page 41 of the Reg 22 Response). Importantly, even had he not done so, the CC received the Reg 21 PCR Notice on 29 September and was able to fully respond to it by 3 November 2017 when his Reg 22 response was served. He had over 6 months from the time of that September disclosure to when the hearing began in April 2018 and will have had a further 2 months by the time the substantive hearing commences on 2 July 2018. We do not see in such circumstances how the lack of further Reg 16 notices prejudiced the CC's ability to defend himself at the disciplinary hearing.

13. Accordingly we agree with the AA that there is no significant prejudice or lasting harm occasioned by this breach.

14. Neither do we accept that the Reg 16 Notice of 1 March 2017 was served unreasonably late.

D. Lack of interview within investigation

15. The CC said this was a breach of natural justice, even if it was not specifically required by the regulations nor part of local practice when misconduct only was under consideration.

16. The AA contended no harm was caused by the lack of an interview and stressed that none was specifically required by the regulations.

17. Interestingly CC Jones, DS Taylor and the Police and Crime Commissioner (PCC) Keane all tended to agree that it was regrettable that an interview had not occurred and the PCC was surprised to learn this step had not taken place. Because of this we wondered if the PCC was either not aware of HO Guidance on investigatory interviews or if he possibly did not realise the matters under investigation were only thought to be misconduct.

18. The Panel's view on the lack of an investigatory interview is that not allowing the subject of an investigation the opportunity to comment in interview on the allegations raised against him or her, clearly shows the potential for a breach of natural justice.

19. Here we are concerned about the missed chance of arguing – in an interview - that the allegations only amounted to misconduct. But we do not feel that such a lost chance was significant for reasons we will come to.

E. Disclosure

20. The lack of disclosure after 30 March up until 29 September 2017 is said by the CC to be a breach of natural justice. The AA said the IO had gone beyond his duty in disclosing many more statements on 30 March. The CC's getting nothing more during that period was an inevitable, if unfortunate consequence of the misconduct-only assessment.

21. The view of the Panel is that disclosure may have been inadequate but we find it difficult to identify any serious prejudice it has caused to the CC's case which has not already been cured, or which we cannot remedy via our role as the decision-making Panel.

F. Case to Answer – Reg 19 PCR 2012

22. The CC submitted that the decision was not lawful or reasonable and complained of its lateness (almost 2 months after the IO report).

23. The AA explained the timetable leading up to 17 August and the AA's Counsel averred the Reg 19 decision was lawful. He said it was reasonable to ask the IO such questions in the letter of 17 August.

24. We conclude the queries to the IO should have been addressed earlier. The Panel's view is that the letter sent to the IO on the afternoon of 17 August is problematic. It strongly suggests that the AA was not confident he had the full facts even after the Case to Answer (CTA) decision had been taken and communicated to the CC. It also implies a lack of focus upon the report and its addenda.

25. However we note the CTA test identified by PCC Keane was agreed by IO Jones in his recent statement. We find it is lawful and plausible for the AA to take a different view, and even considering our concerns about the timing of the letter to the IO, his conclusions were reasonable.

26. The right test for determining a CTA assessment (as acknowledged by CC Jones in his April 2017 statement) is that set out in the IPCC circular of 21 April 2017 and considered by the Court of Appeal *in R. (on the application of Chief Constable of West Yorkshire) v IPCC* [2014] EWCA Civ 1367; [2015] ICR 184, that is: not to reach final conclusions as to whether misconduct had been committed, or to resolve conflicting evidence, but only to express an opinion whether there was a case to answer. This involves recognising that potentially conflicting evidence could be evaluated in a number of ways, and applying one's mind to the question of whether a reasonable disciplinary body could on the balance of probabilities make a finding of misconduct or gross misconduct.

27. Nothing in the statutory framework or Guidance prevents the AA from reaching a decision on CTA prior to an interview taking place or disclosure having occurred. We do feel it is regrettable that the CC did not receive full disclosure and also have an

opportunity to comment on the case against him by interview or otherwise before the CTA decision was taken. These lapses do not reflect well on the IO or the AA's conduct during this process. However and importantly, we are not convinced that had these steps taken place, a fundamentally different outcome would have followed, particularly focusing on the nature of the CTA test.

G. Conclusion

28. In summary we recognise and agree with the CC that the procedure followed here has fallen short of the standard we would expect from adherence to the regulations and the guidance. We make no judgment as to the reason for this, be it the explanation of overwork and absences from workplace, inexperience and insufficient attention to detail, or a rush to judgement by the AA.

29. We believe the consequence of this poor procedure was a degree of unfairness to the CC and an affront to natural justice and to the spirit of the regulations. This does have the potential to discredit public confidence in police misconduct investigations.

30. Yet a pivotal issue was whether the CTA decision was reasonably reached and here we are not persuaded that it was not.

31. We further recognise the flaws in the procedure have caused the CC significant anxiety and inconvenience. A high degree of stress however will almost always arise from being subject to an investigation.

32. Mr Boyle for the CC said if he had to label which category his stay application fell under, he would identify it as a category 2 case. We however considered both categories.

33. Taking into account all the factors set out above, it is the Panel's clear view that category 1 is not satisfied as a fair hearing can still proceed, albeit we will be mindful of our need to address ongoing fairness in this hearing, as Counsel has alerted us to.

34. In terms of category 2, we note Mr Beggs for the AA said that one could have a category 2 case without *male fides,* where it would offend the court's sense of propriety to proceed. We find the bulk of the procedural failures arose from a lack of familiarity with the regulatory framework by both NYP and the AA and a failure to take responsibility to engage with that framework. We do not agree that even when the need for bad faith is set aside, that unconscionable conduct by NYP or the AA has been demonstrated; consequently we do not strictly need to consider the balancing test. But in case we are wrong, we do go on to carry out this test. We note that an infinite variety of cases can arise when carrying out this balancing exercise, and how our discretion should be exercised will depend on the particular circumstances of this case. When considering this second category of case we are concerned with protecting the integrity of the regulatory police disciplinary framework and are thus required to strike a balance between the competing public interests to ensure that (1) breaches of the regulatory framework do not undermine public confidence in the regulatory

system, and (2) those officers charged with serious offence are brought to misconduct proceedings.

35. Given the need to balance against each other competing interests, we find the weight to give to such priorities will depend upon the individual circumstances of the case. It is not always the case that fairness in proceedings will trump the need to determine a grievance, particularly where prejudice is not irredeemable. Similarly the public policy need to discourage workplace misconduct by the bringing of regulatory proceedings will not necessarily outplay a breach of natural justice where departures from the framework in question are unconscionable.

36. It was submitted for the AA that very little prejudice was caused here since the substance of the allegations was disclosed to the CC prior to his Reg 18 PMR response. In our judgment a significant point is that little prejudice has been caused to the CC since the bulk of the evidence relied upon by the AA was disclosed to him when the Reg 21 charges were served on 29 September 2017 and thus he was able to answer such charges in his Reg 22 response, which the Chair allowed him extra time to complete.

37. We do not think the suspension occurring when it did, assists either party's submissions.

38. Mr Boyle placed considerable weight upon the inability of his client to have his say on the evidence before the AA prior to the CTA decision, since that lost opportunity led to the decision to bring gross misconduct allegations. With that decision came the risk of dismissal and the fact of a public hearing. It was said that that flaw cannot be cured as the CTA decision was to proceed with gross misconduct charges. Our view is that the chance of persuading the AA to proceed with misconduct only charges was very slim, bearing in mind the test to be applied.

39. So in summary with regard to category 2, we are not persuaded, despite our real concerns as to the weaknesses of some elements of the procedure, that the requisite threshold has been reached or that the balance operates in favour of our taking the exceptional step to stay these proceedings. We have born in mind the conditional nature of the police disciplinary process as described by the Court of Appeal in *R v Chief Constable of the Merseyside Police, Ex p Calveley* [1986] QB 424; [1986] 1 All ER 257 CA (see page 434) – here the stated departures from a fair process are not of the level of severity to require a stay.

40. We reserve the right to make recommendations in due course about how to avoid a lack of familiarity with the investigatory framework in future cases.

R Crasnow QC

M Parr CB

Prof Sir Robert Boyd

Final written decision 30 April 2018