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Case No: AC-2022-BHM-000118

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
The Priory Courts, 33, Bull Street, Birmingham B46DS

Date: 14 November 2023

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)

- -

Between :

The King **on the application of IXF (a protected party) by his litigation friend OZM**	**Claimant**
- and -	
Chief Constable of West Mercia Police	**Defendant**

- -
- -

Leonie Hirst (instructed by **Hodge Jones and Allen Solicitors**) for the **Claimant**
Mark Ley-Morgan (instructed by **West Mercia Police Legal Services**) for the **Defendant**

Hearing date: 15 September 2023
Draft Judgment circulated: 13 October 2023

Judgment Approved by the court for handing down (subject to editorial corrections)

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HHJ WORSTER :

Introduction

1. On 5 September 2019, the Claimant was arrested by officers of the West Mercia Police, and kept in custody overnight. He was bailed the next morning. On 9 September 2019, the Claimant's mother made a complaint to the West Mercia Police ("WMP") about the treatment of her son by the police during that period. That complaint was "not upheld" by a Senior Complaints and Misconduct Manager in the Professional Standards Department of the WMP. The decision letter is dated 21 December 2021 ("the first decision").

2. The Claimant appealed. The Defendant's Independent Appeals Panel agreed with the original finding, and the appeal was "not upheld". The decision letter is dated 22 March 2022 ("the appeal decision"). That is the decision challenged in this claim.

3. The Claim Form was issued on 22 June 2023. It seeks (1) a declaration that the appeal decision of 22 March 2022 was unlawful; and (2) an order quashing the decision and requiring the Defendant to refer the matter to the IOPC.

4. The Claimant relies upon four grounds, which are summarised at paragraph 3 of the Statement of Facts and Grounds. He contends that:

    1. *[the appeal decision] … was irrational and inadequately reasoned, particularly in light of the evidence demonstrating potential abuse of police powers and the use of arrest and detention as a deterrent against individuals with mental illness. The appeal panel failed to apply the correct threshold to consideration of the Claimant's appeal;*

    2. *Alternatively, the decision breached the Defendant's investigative duty under Article 3 ECHR in circumstances where there was a clear allegation of Article 3 ill-treatment;*

    3. *The decision failed to comply with relevant statutory guidance, in that the Defendant did not consider or investigate the Equality Act 2010 issues arising from the complaint, and breached the PSED in s149 EA 2010;*

    4. *The determination that there was no onward right of appeal to the IOPC was contrary to statutory guidance.*

5. Permission was given by HHJ Tindal on all four grounds on 19 January 2023. I heard the claim at a hearing on 15 September 2023 and reserved judgment. Where I refer to documents by page number in square brackets, the reference is to the page number of the bundle of documents used in the hearing before me. The court was also aware that the Claimant has brought a claim against the Defendant in the County Court for damages for wrongful arrest and false imprisonment arising from this arrest. Mr Ley-Morgan is instructed for the Defendant in that matter also.

The Complaint

6. It is common ground that the Claimant was well known to the WMP prior to 5 September 2019. The WMP had carried out over 50 "welfare checks" in the preceding 12 months, usually following reports by the Claimant or members of his family that he was expressing thoughts of self-harm or suicide. At 16.53 on 5 September 2019, the

Claimant's father called the WMP. The details of the call were summarised in the police log in the following way [221]:

> *I have received a message from my ex-partner [the Claimant's mother] about our son … She said [he] is threatening to kill himself and set himself on fire. I received the message approximately 45 minutes ago.*

7. The email the Claimant had sent to his mother said this [184]:

> *I can't do this anymore I want to hurt myself I'm that frustrated and fed up. I'd rather set fire to myself properly than just my hands, there is no help. I'm broken*

The terms of the email were available to the decision makers on the appeal.

8. The information provided to the WMP was that the Claimant had petrol in his property. The call handler called the fire brigade, and two police officers were sent to the Claimant's property. The police arrived at 17.11 and were let in by the Claimant. They were wearing body cameras. There was footage of the first 34 minutes of their stay, but the cameras were then switched off. The impression is that the Claimant seemed to be calmer, and the two officers spent over two hours talking to him, and making inquiries with other agencies in an attempt to get him some help. It is of note that the Mental Health Crisis team refused to provide the Claimant with assistance. They had some considerable experience of his issues, and (I summarise) required that he controlled his drinking before they could help.

9. There is a dispute as to some aspects of what happened subsequently. The Defendant denies the Claimant's version of events as set out in the Statement of Facts and Grounds [63/7]. The process of Judicial Review is not one which allows for the resolution of those matters. The civil claim the Claimant has begun may prove a more appropriate forum. In any event, the focus of this claim is on the investigation and determination of the subsequent complaint. I have read the police records from the time, and note the way the Claimant puts the case, but I concentrate on the information which was before the relevant decision makers.

10. I start with the terms of the complaint, which outline the particular matters of concern. Given the issues, I set it out in full:

> *I was contacted by my son [IXF] on 5th September 2019, he info[r]med me that he was feeling suicidal. He suffers from Bi-Polar type 2, depression, [agoraphobia] and has anxiety attacks on a regular basis, this is something which the police are aware of. I contacted my ex-husband as I am currently away on holiday and asked him to deal with this matter due to me being away. He was also unable to get over to Telford. Therefore, as a last resort he called 101 and asked for a 'Safe and Well' check to be done to check [IXF's] safety. This was done and without our expressed wishes or complaint, they arrested [IXF] for making malicious communications to us, by simply informing us that he felt suicidal. In no way was [IXF] acting maliciously. He is a mental health patient desperately seeking help. The officers took [IXF] to Telford Police Station, where he was degraded with treatment which I believe contravenes the Human Right Act. He was denied the use of a toilet without an audience despite having diarrhoea. He was spoken to extremely poorly by officers, sworn at and denied any contact with us, his next of kin. He was left on the floor, having a panic attack, with officers just looking on. [IXF] was interviewed without an*

> *appropriate adult being present. He still does not understand what happened and clearly had no comprehension at the time. An ambulance was called due to [IXF] having a panic attack and difficulty breathing. Whilst he was on the floor a paramedic asked why the arrest took place, the officers replied to her 'Because he has pissed my boss off!' [IXF] was taken to Princess Royal Hospital in Telford and given medication. A nurse from the hospital called me to inform me of [IXF's] arrest and inform me of how he was medically. [IXF] was taken back to the police station, where he was bailed with conditions, these were that he was not to inform either myself or his father when feeling suicidal or wanted to self harm or else he could face arrest and imprisonment. The police intervention has made matters a thousand times worse and now he is afraid to reach out for help when he needs it most. The full facts of the complaint I wish to remain with me until you contact me and ask for them directly. I will add that I have already tried to raise a concern and complaint via the borough Commander who requested a Sergeant contact me. They did so, promising to contact me further with some answers. They have failed to do so.*
>
> *I would imagine for such an offence you would require my co-operation as a witness. You have not yet asked for this. Furthermore, by you creating me as a witness your officers have contravened the victims charter. I am appalled by the actions of the officers involved. I fear that your officers' heavy handed approach could lead to further suicide and self harm attempts and I require urgent contact from you to prevent this. I feel it only fair to warn you I have already contacted the press. I am also in talks to instruct a solicitor who specialises in such matters.*

11. The complaint can be seen as falling into two parts. The first is that a man with mental health issues had been arrested for making malicious communications when the recipient of the communication had asked for a safe and well check and had made no allegation that the Claimant had been acting maliciously. The second relates to the allegations of degrading treatment following that arrest. The complaint was allocated to Inspector Pinchin to investigate. His initial report did not deal with all matters to the satisfaction of the Professional Standards Manager, but after further work she was satisfied that the issues had been answered "as best they can" [179].

The investigation and the first decision

12. Grounds 1 and 2 in this claim raise issues as to the reasons for and necessity of the arrest, and the ill-treatment of the Claimant whilst he was detained. In this section of the judgment I concentrate on the material relevant to those matters. The report prepared by Inspector Pinchin is dated 22 October 2019 [175]. It summarises the complaint, sets out details of the events of 5-6 September 2019, and lists the material considered in the course of the investigation, including reports from Inspector Brennan, the custody officer on duty and the two officers who attended the Claimant's property, and then comments on the particular allegations in turn.

13. The first is the decision to arrest. It says this:

> *Insp Brennan provides an account which includes detailed rationale to his decision to arrest. It includes the fact that he faced with a serious allegation/threat that we were left with no other option. He lives in a semi-detached property and he threatened to set alight his H/A with him inside, causing danger not only to him, but to his neighbours. Once this threat had been temporarily negated by officers being present it is clear officers then attempt to*

allow other agencies to deal with [h]is mental health issues. All other medical areas then were exhausted – Crisis, Ambulance, MH services etc. The report speaks of the necessity to remove him from the address as he had threatened to set himself alight causing danger to himself and his neighbours, ensuring safe guarding for him and holding him to account for his actions.

Insp Brennan details the persistent calls made by [IXF] to the police, causing a nuisance. Please note that Insp Reilly has since commended this action following a multi-agency meeting as follows:

> *"[IXF] has been in custody a couple of times now and quite rightly so. He was arrested last time for Mal Comms towards his mother and father and was bailed. Spot on. He has an alcohol issue and personality disorder and fully understands exactly what he is doing. Consequences are massive when dealing with those who have personality disorders and the consequence of arrest, bail and potential court proceedings really do help reduce the demand from those who suffer with those mental health conditions. The group have looked at alternative measures to assist [IXF] outside of custody and will continue to do this. They have seen a huge difference already with [IXF] following his arrest and bail. Please continue to do what you have done already. It is working."*

My personal opinion is that Insp Brennan was left with no other option. All other avenues had failed and he was unable to safely leave Alan in the address on his own. I spoke with the complainant about this, explained the rationale but she wholly disagrees with this decision to arrest.

14. Inspector Brennan made the decision to arrest the Claimant. His account of the reasons for the arrest is set out in a written report he prepared for the investigation dated 27 September 2019 [229]. Here he explains the "rationale" for that decision. He begins by referring to the many calls the police had made to the Claimant's home over the previous 12 months, the majority of which arose because the Claimant had threatened to take his own life. He gives examples of those threats. The next section gives details of the incident on 5 September 2019 in much the same terms as the report from Inspector Pinchin. The final section is headed Decision to Arrest. Given the importance of the issue to the claim, I set out the section in full:

> *As the Duty Inspector during this incident I take full responsibility for the decision to arrest Alan for an offence of 'persistently making use of a public communication network to cause annoyance, inconvenience or anxiety', contrary to section 172(2) and (3) of the Communications Act 2003.*
>
> *A person is guilty of this offence if for the purposes of causing annoyance, inconvenience or anxiety to another he sends by means of a public electronic communications network a message that he knows to be false, causes such a message to be sent, or persistently makes use of a public communications network. An electronic communications network covers telephones, computers, the internet, e-mail, social media, paper messages and so forth.*
>
> *[IXF] had threatened to set fire to himself, which, in my view, had caused such anxiety to [his father and mother] that they were triggered into calling the emergency services. Moreover, the call hander was also caused needless anxiety*

because that person called the Fire Brigade and would not have done so unless they perceived a real risk of fire.

[His father] had told the police that[IXF] had made threats to kill himself more than one hundred times before. I was therefore satisfied that the messages were persistent in their nature.

I approached [IXF's] threat with the mind-set that he needed to be held accountable for his actions and that having mental health problems did not excuse him from committing a crime.

Threatening to set oneself on fire is extremely serious and in the absence of anything else the emergency services are bound to treat the threat as credible. Indeed, [IXF] told the attending officers that he had previously set himself on fire and that he had doused himself the day before.

[IXF] lives in a residential area in a semi-detached house and so the consequences of setting himself on fire could have been disastrous, not only for him, but also for his neighbours, as the flames could rapidly spread to adjoining properties.

Article 2 of the ECHR places a duty on me to protect life and my priority during this incident was not only to safeguarding [IXF] but also to protect the wider community from his actions.

At the centre of my decision making were the police code of ethics and the force mission to protect people from harm.

I quickly evaluated that police were required at the scene to protect life and to enforce the law.

I assessed the threat as being potentially fatal and considered my powers and policies, in particular para 25 of Sarjantson vs Chief Constable of Humberside [2014] QB 411, which states that if the police know or ought to know of a real and immediate risk to a person's life from an act or acts of violence, they must do all that can reasonably be expected to prevent the risk from materialising.

I determined that [IXF] needed to be removed from the property 'somehow' and that it was not safe to leave him there alone, at least until professional help could be sought. There was no option to call family members to support him as they have repeatedly told the police that they live too far away to do anything.

I was aware that the Crisis Team had been consulted at the address and that this had not successfully resolved the issue. I considered calling an ambulance to take [IXF] to A&E, but in my experience I knew that the hospital would only call the Crisis Team, to whom he had already spoken with on the phone without making any real progress. This approach had been tried numerous times before, and failed, and so I posited that holding [IXF] to account for his actions may be the only way of breaking the cycle and that to do so was in his best interests.

I had already identified a suspected offence (as above) and I now turned to the necessity criteria under Code G of the Police and Criminal Evidence Act 1984. Specifically, my aims at that point were to prevent [IXF] from causing physical injury to himself or any other person; to prevent him from suffering physical

injury; to prevent loss or damage to property; to protect a vulnerable person and to allow the prompt and effective investigation of an offence.

I concluded that [IXF] should be arrested and through my Sergeant I asked the attending officers to take him into custody. I have since reviewed this decision and I am satisfied that it was the correct course of action and I will repeat my actions if presented with the same set of circumstances in future.

In a recent High Intensity Service User Group Meeting professionals agreed with my rationale to arrest [IXF] stating that he knows exactly what he is doing. They advise that consequences are important for people with personality disorders. I hope this helps the complainant to understand why I took this decision to arrest [IXF] and if it assists then I will gladly meet with her in person to discuss the incident and answer any questions.

15. Pausing there. The report refers to the Claimant being arrested for an offence pursuant to section 172 of the 2003 Act. There are two points. Firstly, in 2019 section 172 had long since been repealed. Consequently the grounds were drafted on the basis that the Claimant had been arrested for an offence that did not exist. The explanation is that the reference to section 172 was a typographical error. Inspector Brennan meant to refer to section 127. Consequently Ms Hirst did not pursue the "non existent offence" line of argument. Secondly, in the course of his submissions, Mr Ley-Morgan informed the Court that the Defendant's case in the civil claim which the Claimant had brought in relation to this arrest, was that he had been arrested under section 1 of the Malicious Communications Act 1988. The terms of the two sections are similar but different. It was unclear how it was said that this affected the claim for Judicial Review, but it seems to me that the answer is that I should consider the claim on the basis of the material before the relevant decision makers. Consequently, I approach the issues relating to the arrest on the basis that it as made pursuant to section 127 of the 2003 Act.

16. The relevant terms of section 127 provides as follows:

(2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—

(a) sends by means of a public electronic communications network, a message that he knows to be false;

(b) causes such a message to be sent; or

(c) persistently makes use of a public electronic communications network.

17. The power to arrest without warrant is governed by section 24 of the Police and Criminal Evidence Act 1984. The relevant terms provide as follows:

(2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it.

(3) …

(4) But the power of summary arrest conferred by subsection (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question.

(5) The reasons are—

...

(c) to prevent the person in question—

(i) causing physical injury to himself or any other person;

(ii) suffering physical injury;

(iii) causing loss of or damage to property;

...

(d) to protect a child or other vulnerable person from the person in question;

(e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;

18. Having considered Inspector Brennan's report, Inspector Pinchin's opinion was that Inspector Brennan was left with "no other option"; in other words no other option but to arrest the Claimant. All other avenues had failed and he was unable to leave the Claimant safely at his property on his own. The Professional Standards Manager agreed with Inspector Pinchin's view when reaching her decision not to uphold the complaint.

19. The second aspect of the complaint relates to the treatment of the Claimant. In addition to the other documents I refer to above, Inspector Pinchin watched the body worn video (although this only covered the opening 34 minutes at the Claimants house) and the CCTV footage of the Claimant's custody in the holding cell at the police station and the charge desk. In the report, he also says that he had spoken with the Claimant's mother "at length", although she disagrees with that. I deal only with the matters relevant to this claim.

20. Inspector Pinchin saw no evidence of either officer speaking to the Claimant rudely or abruptly, or swearing at him. He says that at least one of the officers had the Claimant in sight when he was writhing on the floor of the corridor, save for about 10 seconds. A detention officer then came in, examined the Claimant and called an ambulance. He deals with the allegation that the Claimant was only being allowed to use the toilet if the door was left ajar. This is said to be the correct procedure when the detainee is stating that they are suicidal. The interview without an appropriate adult on the morning of 6 September 2019 is justified by the custody Sergeant's reliance upon the hospital's conclusion following a mental health review, that the Claimant had capacity. The Sergeant also undertook a face to face assessment. The complaint includes reference to a paramedic asking the police officers why the Claimant had been arrested, and their reply that "he pissed my boss off". The police officers deny the allegation, and the paramedic had apparently been spoken to and said that he could not remember that being said.

21. The only issue Inspector Pinchin regarded as being substantiated was that the Claimant had been left writhing in pain on the floor of the corridor by the holding cell. The CCTV showed that one of the officers kept him in sight save for about 10 seconds, and the Inspector's view was that there was no risk to the Claimant. In context, risk here is risk to the Claimant's safety, rather than risk of escape. He regarded the officers' view that the Claimant was feigning this injury as understandable, given that they had been with him for a number of hours by this stage and that during that time "he had been

creating issues with them". He also notes that the paramedics who were called could find nothing wrong with the Claimant. That said, he concluded that this did not "look good" and he suggested "management advice" for the officers. Again, the Professional Standards Manager agreed with these views and with the recommendation made.

The Appeal

22. The Claimant appealed. His solicitors made written submissions by letter dated 24 February 2022 [181]. At (a) the letter makes a number of representations in relation to the decision to arrest. The same points are made in a number of different ways:

    (i) At 2.4 – 2.5 there is a challenge to the decision to arrest. In particular it is disputed that there was sufficient basis for a police offer to form the necessary reasonable suspicion that an offence had occurred under the Malicious Communications Act 2003. At 2.6 the investigation report is criticised for failing to assess whether the officers held the necessary reasonable suspicion that an offence had been committed, and that (in particular) there was a lack of malice. At other places in the letter there are references to the report being inadequately reasoned.

    (ii) At 2.8 the Claimant's solicitors refer to the alleged necessity for the arrest. The report from Inspector Pinchin refers to this being for the Claimant's safety. However, that is not reflected in the custody record, which says this:

    > *Reason Arrest necessary: Prompt and effective investigation – to interview – as thought unlikely person would attend voluntarily. PACE Code G 2.9 (e)(i)(a)*

    (iii) At 2.10-2.12 the letter refers to the failure of the report to consider the

    > *"criminalisation of vulnerable adults suffering from mental health issues in crisis experiencing thoughts of self ham or suicide"*

23. At (b), the letter makes a number of representations about the "degrading treatment" the Claimant is said to have suffered. These are the allegations that the Claimant was left writhing on the floor in pain whilst he was experiencing a severe anxiety attack, that he could have been provided with more privacy in order to use the toilet, and that he felt humiliated and distressed as a result of the actions of the police. It is to be noted that there was no representation to the effect that the complaint and the appeal should be dealt with by the IPCC. Indeed, paragraphs 1.15 and 1.16 of that letter expressly contemplate an appeal to the Independent Appeals Panel [182].

The Statutory Guidance

24. The appeal process was to be conducted in accordance with the Statutory Guidance to the police service issued by the Independent Police Complaints Commission. The guidance current at the material time was the guidance as amended in May 2015 ("the Statutory Guidance"). Appeals are dealt with in section 13 of the Statutory Guidance.

25. The relevant paragraphs are as follows:

    13.2 An appeal offers a final opportunity to consider whether the complaint could have been handled better at a local level and, where appropriate, to put things right. If a complainant is still dissatisfied after an appeal he or

she may seek to challenge the appropriate authority's decision through judicial review.

13.5 Consideration of an appeal must involve a fresh consideration of the case. Although it is not a re-investigation it should not merely be a 'quality check' of what has happened before.

13.7 The complainant's appeal contains their representations, which must be given due consideration.

13.13 When determining who should consider the appeal, the local policing body or the chief officer should ask the following questions:

iii. if proved, would the conduct as described in the complaint either justify criminal or misconduct proceedings or involve the infringement of a person's rights under Article 2 or 3 of the European Convention on Human Rights?

13.15 If the answer to any of these questions is yes, the right of appeal is to the IPCC.

13.16 The test listed at 13.13 iii above must be applied to the substance of the complaint, not applied with hindsight after the complaint has been dealt with. It means that if the appropriate authority cannot satisfy itself from the complaint as presented that the conduct complained about, if proved, would not lead to criminal or misconduct proceedings against a person serving with the police or infringe Article 2 or 3 of the European Convention on Human Rights, any appeal in relation to that complaint must be dealt with by the IPCC regardless of how the complaint has been dealt with or any findings in relation to the complaint.

26. In addition to the provisions I refer to above, section 13.63 of the Statutory Guidance provides that when deciding whether the outcome is a proper one, the focus should be on whether the outcome is appropriate to the complaint, not simply on the process followed to reach that outcome, and that the decision should be made on the basis of the evidence available.

27. A key aspect of the Claimant's case is that the Defendant failed to follow this guidance when conducting the appeal. But it is also important to see it as part of the context for a reading of the decision letter on the appeal. With those matters in mind, I note the following:

Are the conclusions reached reasonable in light of the evidence?

13.94 The appropriate authority should have looked at every allegation that the complainant has made, for example, in a statement or letter of complaint. If the investigation has not answered the allegations that have been made, the person dealing with the appeal should consider whether this was an appropriate and proportionate approach, taking into account the substance and circumstances of the case. If not, it may be appropriate to uphold the appeal on this ground. The person dealing with the appeal should continue to assess the findings in relation to those allegations that have been dealt with.

> *13.95 The person dealing with the appeal must consider whether the conclusions of the investigation are supported by the evidence available, and ensure that a clear rationale is being made to link the evidence to the conclusions.*

29. The next sub-heading is:

> *Has the investigation been carried out in a proportionate manner and has sufficient evidence been gathered?*
>
> The guidance as to proportionality is at section 13.96. It is unnecessary to set it out here. The point is that the appeal panel is to consider the issue.

30. Paragraph 13.98 provides as follows:

> *Have the right decisions been made about whether or not the complaint(s) that have been investigated should be upheld?.*
>
> *13.98 Guidance in paragraphs 11.18 to 11.24 outlines where a complaint should be upheld. The person dealing with the appeal should have regard to this guidance when reviewing an appeal and considering whether a complaint should have been upheld. A decision on whether each complaint has been upheld or not should be clear from the file and the person dealing with the appeal should satisfy him or herself that the correct decisions have been reached. If the person dealing with the appeal decides that the findings need to be reconsidered then the appeal should be upheld and the appropriate authority must then re-investigate the complaint. It is the final decision made by the appropriate authority as to whether each complaint is upheld or not that is subject to appeal, not any findings made by an investigator to the appropriate authority. Such findings and their rationale may, however, be useful in considering whether the right decisions have been reached.*

The Decision Letter

31. The Appeal Panel met on 18 March 2022 and decided not to uphold the appeal. The decision letter is dated 22 March 2022 [97-98]. It is two pages long. It deals with some matters in greater detail than others, but overall it is surprisingly brief. I return to the content of the letter below.

Ground 4

32. Whilst the issue of whether the appeal should have been referred to the IPCC appears as ground 4, logically it is the first point to consider. If the Claimant is right, then the appeal decision is unlawful for that reason alone. As I understand it, the Claimant's case here is twofold.

    (1) Firstly, that when the appeal was made, the chief officer of police should have referred it to the IPCC pursuant to paragraphs 13.13(iii), 13.15 and 13.16 of the Statutory Guidance.

    (2) Secondly, that there is an "onward right of appeal to the IOPC"; see paragraph 65 of Ms Hirst's skeleton argument. In other words, that the assertion by the appeal panel that its decision was final was unlawful because there is a right of appeal to the IOPC.

33. The Defendant disputes both aspects of the Claimant's case on Ground 4. On the first, the underlying question is whether the conduct alleged was sufficient to justify misconduct proceedings. This is not a case where there is any prospect of criminal proceedings against the police officers concerned. Mr Ley-Morgan submitted that the misconduct alleged fell well short of what would be required for misconduct proceedings. He referred to the Standards of Professional Behaviour by which "misconduct" is defined, and submitted that at most this was a case of honest mistake. The allegations came nowhere near the threshold for the infringement of a person's rights under Article 3 of the ECHR. Ms Hirst focussed more on the allegations made in the complaint about the police officers watching the Claimant writhe on the floor, and his treatment at the police station.

34. This was not an issue which was specifically raised with the chief officer of police when the appeal was made. Indeed, as I have noted, the Claimant's solicitors made representations which appeared to confirm that the correct appeal body was the Independent Appeals Panel. Consequently it is not surprising that the chief officer of police has not expressed reasons for referring the matter to the Panel. I can properly assume that the chief officer was satisfied that the allegations did not warrant referring the appeal to the IPCC. Given the nature of the allegations made in the complaint, such a decision was clearly within the range of reasonable decisions open to the chief officer. The decision was not an unlawful one.

35. The right of "onward appeal" turns on a reading of the Statutory Guidance. Firstly the language used is only really consistent with one appeal.

    (i) Paragraph 13.2 refers an appeal offering "**a** final opportunity to consider …" and provides in terms that if a complainant is still dissatisfied after an appeal, they may challenge the decision by judicial review.

    (ii) Paragraph 13.9 refers to "**The** right of appeal …".

    (iii) Paragraph 13.12 provides that an appeal will be considered by **either** the chief officer **or** the IPCC.

    (iv) Paragraph 13.13 provides a mechanism by which the chief officer determines who should consider "**the** appeal".

    (v) Paragraphs 13.14 and 13.15, and the flowchart on internal page 102 of the Statutory Guidance confirm that this is an either/or route of appeal.

    [my emphasis]

    The language is clear. It is hard to see how the language can permit an "onward" right of appeal, or some further right of appeal. Once the decision is made, the appeal follows the route provided by the Statutory Guidance.

36. Nor is there any obvious need for an onward or further right of appeal. If the allegations are such that the complainant considers that the appeal should be heard by the IPCC, they can say so when the appeal is made, and if the chief officer makes a decision which they regard as wrong, they can judicially review that decision. There is a need for an appeal process, and for complaints against the police to be properly investigated and dealt with. But there is also a need for finality. I agree with Mr Ley-Morgan that the argument that there is some onward or further right of appeal is misconceived.

Ground 1

37. The essence of the Claimant's case on ground 1 is that the appeal decision is unlawful because the appeal panel:

    (i) failed to apply the Statutory Guidance;

    (ii) reached conclusions which were not rational or supported by the evidence; and

    (iii) failed to give adequate reasons.

38. The first line of argument is that the appeal panel have applied the wrong test. Ms Hirst relies in particular upon the Stautory Guidance at paragraph 13.5, and the requirement that there be a "fresh consideration of the case" and not merely a quality check. She submits that the panel have simply reviewed the first decision, asking whether the outcome and the process were reasonable and or proportionate.

39. Mr Ley-Morgan responds to the point by making reference to the opening section of the decision letter. This indicates that the appeal panel have considered "all the information available" and have "reviewed the detailed papers containing the original complaint, the actions of the investigating officer, and the grounds of the appeal and representations made by both yourself and your client". The letter then says that:

> *On this occasion, the panel agreed with the original findings of the Appropriate Authority, in that the complaint against the police is not upheld*.

    He submits that this shows that there has been a fresh consideration of the case.

40. The problem with that submission is that, after a paragraph summarising the complaint, the decision letter says this at the foot of first page and over to the top of the second:

> *The panel agreed that the AA determination on the elements of the original complaint, in that the actions taken were deemed to be proportionate and appropriate, the panel felt that the BWV provided was conclusive evidence of the events that took place during the incident, which often contradicted the view of your client.*
>
> *As previously set out, this appeal process is not a reinvestigation of your complaint nor of the original incident.* ***It seeks to establish whether your complaint was handled in a reasonable and proportionate manner. To that end, as part of this process, what would constitute reasonable and proportionate has been considered, as per statutory guidance.***
>
> [my emphasis]

41. The next three paragraphs of the letter deals with aspects of the complaint relating to the Claimant's treatment whilst in custody at the police station. That indicates that the panel have indeed looked afresh at the material relating to those matters, rather than just reviewed the first decision. The letter ends with these two paragraphs:

> ***The purpose of this process is to examine how your clients complaint was handled and whether he received a reasonable and proportionate response.*** *Not whether he agreed with the complaint's conclusions or whether the complaint was resolved to your clients satisfaction, or his arrest was lawful. The evidence provided and the rationale from PSD in your clients outcome letter and the accompanying report were very clear. The conclusions from both the*

> *Investigating Officer and the PSD Appropriate Authority were deemed logical and entirely reasonable and proportionate.*
>
> ***The panel are fully satisfied that your client's complaint did receive a reasonable and proportionate response*** *and for the reasons stated above the complaint is Not Upheld.*
>
> [my emphasis]

42. The focus of this decision (certainly as it is expressed) appears to be on the handling of the complaint, and what is reasonable and proportionate, rather than being a fresh consideration of whether the complaint should have been upheld or not. At best, the approach is confused.

43. Mr Ley-Morgan accepts that the decision letter could have been fuller, but he submits that it is sufficient. There is support for his submission in the expressions of agreement with the original findings and the Appropriate Authority's determination of the elements of the complaint. However, even if I were to read the decision letter benevolently, and was persuaded that this issue was a consequence of unfortunate expression rather than substance, the central problem is the decision letter fails to engage at all with the representations made on the appeal as to the decision to arrest.

44. There is agreement with the original findings, and with the rationale of the first decision, and I have considered whether the appeal panel's general agreement with the first decision can be read as encompassing a fresh consideration of that issue in the light of the representations received on appeal. The appeal panel may be saying that the issue of whether there were grounds for an arrest had been considered in such detail during the determination of the complaint, that it was simply unnecessary to say any more.

45. However I have concluded that I cannot justify taking that approach.

    (1) The decision to arrest is the first and major issue raised in the complaint, and forms a significant part of the representations made on the appeal by the Claimant's solicitor.

    (2) The issue is not simply whether or not there are lawful grounds for an arrest, but whether or not the "strategy" (to borrow HHJ Tindal's word) of arrest and detention was appropriate when dealing with a man with mental health issues. If there was any issue which required dealing with in the appeal decision letter, it was this one. There are general words of agreement with the original findings, but nothing more, and no reference at all to the points raised by the Claimant's solicitor when making the appeal.

    (3) The lack of reference to the decision to arrest is in contrast to the treatment of some of the other issues, for example the fact that the Claimant is left writhing on the floor in the corridor, even though that was a matter which had led to a recommendation that the officers be spoken to.

    (4) The Claimant needs to be able to understand why the appeal panel considered that the decision not to uphold this element of the complaint was unsuccessful on appeal. There is an absence of adequate reasons which go to that aspect of the appeal, and for that reason alone the claim should succeed on this ground.

46. Standing back, and having read and re-read the appeal decision, the confused approach and the inadequate reasons leave me in serious doubt as to whether the issue of the

Claimant's arrest was considered afresh by the panel in accordance with the Statutory Guidance. In those circumstances, the claim succeeds on ground 1.

47. In the course of my consideration of this matter I have focussed on the way the matter was put to the appeal panel. In her submissions before me, Ms Hirst emphasised the references in Inspector Brennan's rationale to the strategy he had adopted reducing "demand" (which in context is the demand for welfare checks) and "holding the Claimant to account". These, she submitted, were improper purposes. The decision was irrational. She characterised the arrest as a "corrective" or a "deterrent". It may be that those matters will be explored further in the civil claim. But the argument is not really put that way in the appeal in the complaint. My decision on ground 1 is founded on the failure to deal with the matters which were put, and the lack of reference to the underlying point made in the complaint and in the representations on appeal. It is that which needed to be dealt with.

48. Ms Hirst also pointed up an internal consistency in the decision to arrest. On the one hand it was said that there were reasonable grounds for believing that the email had been sent by the Claimant in circumstances where he had no intention of carrying out his threat. On the other, it was said that it was necessary to arrest him to safeguard him (and others) because there was a risk that he would kill himself. Mr Ley-Morgan accepted that there was this inconsistency, but submitted (in effect) that it was possible to hold both views: a reasonable suspicion that the offence had been committed, and a concern that there was a risk that the Claimant might attempt suicide, which justified the need to arrest. On reflection, I can see that Mr Ley-Morgan may be right. These are two different questions, and it is at least open to the Defendant to say that that was the position taken. In any event, that point was never raised with the appeal panel.

49. I should say that nothing in this judgment is intended to determine the lawfulness or otherwise of this arrest. The Police found themselves in a very difficult decision. It is not suggested that Inspector Brennan or the officers at the scene acted other than in good faith. The decision in this claim goes only to the appeal decision in relation to the complaint. It will be for another appeal panel to consider how to deal with the appeal on the material before it, and to decide whether the first decision should be upheld or not.

50. The other major aspect of the complaint which falls into ground one, is the allegation of degrading treatment by the officers. As I note above, the appeal decision letter does make reference to this aspect of the matter. Whilst brief, a reading of the letter indicates that there was an engagement with the issues on this part of the complaint which is sufficient to show that the appeal panel considered the issue. Ms Hirst points to the unsatisfactory reference to the BWV footage. The letter seems to suggest that this shows that the Claimant's complaints in this respect were shown to be wrong. The problem with that is that the BWV ends after 34 minutes at the Claimant's home and does not cover any of the Claimant's time in the police station, which is where the degrading conduct is said to have occurred. There would have been CCTV footage of the custody desk and in the cell area, and Mr Ley-Morgan submitted that it may be this footage which is being referred to.

51. The appeal letter is not without difficulty on this issue, but I am not persuaded that there is a failure to follow the statutory guidance in relation to this aspect of the complaint, or that the decision is irrational. The panel had the material including the evidence of the officers which denied these matters, and the first decision is a rational one. There appears to have been a consideration of the issues involved by the appeal

panel, and the decision letter makes reference to the fact that there was an outcome which involved some remedial action. To uphold the first decision in this respect was a rational and reasonable decision.

Ground 2

52. Ground 2 is a different ground to ground 1, but related to it. The applicable legal principles are not really in issue; Ms Hirst sets them out at paragraphs 23 to 28 of her skeleton argument. The Defendant is a public authority for the purposes of section 6 of the Human Rights Act 1998. Article 3 ECHR imposes an absolute prohibition on torture or inhuman or degrading treatment or punishment. Whilst this ill-treatment must reach a minimum threshold of severity to fall within the scope of Article 3, the minimum threshold differs from case to case, and depends on all the circumstances including the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some cases, the state of health of the victim: see *Kudla v Poland* (2002) 35 EHRR 11.

53. Article 3 imposes an investigative duty on state authorities to investigate allegations of Article 3 ill-treatment: *Commissioner of Police of the Metropolis v DSD and Anor* [2018] UKSC 11. The Claimant's argument is that this investigative duty was engaged. Whether or not such a duty is imposed turns not on the findings of fact made in the course of the complaint, but upon the nature of the allegations themselves. Ill-treatment in police custody will reach the Article 3 threshold where the conduct of officers goes beyond their powers and arouses feelings of fear, anguish and inferiority, capable of humiliating the detainee or causing him serious injury or suffering.

54. Ms Hirst accepted that the labelling of the alleged conduct as degrading in the complaint was not determinative. The issue is whether or not the conduct alleged was of such a quality as to cross the threshold. The submission is that if it was arguable that this conduct crossed the threshold, or there were substantial grounds for believing that the operational duty under Article 3 had been breached, then the duty arises. Ms Hirst further submits that this duty was breached because:

    (i) the investigating officer did not contact the Claimant or his mother in relation to the complaint;

    (ii) it is unclear from the investigation report what steps were taken to investigate the conduct of the officers concerned;

    (iii) the CCTV and body worn camera footage referred to in the investigation report was not disclosed to the Claimant; and

    (iv) there was little investigation of whether the Claimant's arrest had been unlawful and/or for an abusive purpose.

55. Mr Ley-Morgan submits that the conduct alleged does not come close to that necessary for an Article 3 duty to arise. There is no allegation of ill treatment as such, nor does the complaint refer to the officers laughing at the Claimant or mocking him. There are allegations of bad language and (what might be described as) a bad attitude, and an allegation that the Claimant was left on the floor writhing in pain whilst suffering an anxiety attack. However, none of that is of any great seriousness. Having considered those arguments, and recognising that the Claimant's mental health issues would play a role here, on balance I conclude that the duty did not arise. The allegations are not of sufficient seriousness.

56. However, whether or not an investigative duty did arise, I agree with Mr Ley-Morgan that this ground fails because the Defendant substantially complied with such a duty in any event. The circumstances of and rationale for the arrest were investigated, as the investigation report shows. Inspector Pinchin viewed the body worn footage and the CCTV in the police station. Having done so he was able to conclude that the allegations made in the complaint (the swearing etc) were not correct. The failure to disclose the BWV to the Claimant does not take away from that. The refusal to use the toilet with the door shut was investigated and not denied. It was consistent with recognised practice when dealing with someone who had threatened suicide. Similarly the allegation that the Claimant was left writhing on the floor was seen on CCTV and investigated. There is a dispute as to whether or not the Inspector spoke at length with the Claimant's mother, but I am in no position to determine that matter. The Defendant's case is that he did speak to her, and the dispute (as I understand it) is that whilst they spoke, it was not about the matters she wished to convey. What those would be (given that she was not present at the material time) I do not know.

Ground 3

57. This alleges a breach of the Public Sector Equality Duty. HHJ Tindal directed that:

> *... the Claimant must file and serve ... a psychiatric report on the question of the Claimant's mental capacity and whether he is (and was in September 2019) a disabled person for the purposes of the Equality Act 2010.*

His reasons for making that direction are clearly set out in the Observations he made in the written order. The Claimant's case assumed that at the material time, he was disabled for the purposes of section 6 of the Equality Act 2010. He relied upon diagnoses of Bipolar Disorder and Anxiety/Depressive Disorder, which had fuelled his alcoholism. Alcoholism is an excluded condition for the purposes of the Equality Act and so cannot amount to a disability under section 6. However, his Bipolar Disorder and Anxiety/Depressive Disorder were mental impairments which could potentially amount to disabilities even if alcohol played a contributory role in his behaviour. HHJ Tindal made it plain that those mental impairments had to be proved and not merely asserted, and that a psychiatric report was required.

58. The Claimant relies upon the written report of Professor Fox. His report is dated 10 May 2023, and was written following a video interview with the Claimant and an examination of his medical records. An updated report was provided on 6 September 2023. The Claimant is also bringing a civil claim for damages for the personal injury and loss he says he suffered as a consequence of the incident in September 2019, and another incident in April 2020, and much of the report deals with whether, and to what extent, those incidents have caused him injury. Professor Fox's evidence touches on the issues which arise in this claim, but do not provide a direct answer to the questions identified by HHJ Tindal. The Defendant relies upon that lack of evidence. Given that this aspect of the case effectively deals with ground 3, it is convenient to deal with it at this stage.

59. The relevant sections of Professor Fox's report are these:

> *4.8 prior to September 2019 did [the Claimant] have a history of psychiatric illness, if so please identify and describe the illness*
>
> *4.9 Yes, alcohol dependence and bipolar*

4.23 For the purposes of judicial review, please comment on whether [the Claimant's] Injuries and condition amounts to a disability under Section 6 Equality Act

4.24 I confirm that his PTSD and bipolar II would fulfil the criteria for disability.

60. Mr Ley-Morgan submits that this evidence does not provide the Court with the required proof of disability at the material time. The PTSD referred to is said to be related to the incidents on 5 September 2019 and 23 April 2020; in other words caused by it rather than being present at the time. The only reference to Bipolar in the Claimant's medical records prior to September 2019 was in May 2013. The current position is that his condition is in remission and that it is "quiescent". Mr Ley-Morgan submits that this may have been the position in September 2019.

61. I have to reach a conclusion on the evidence before me. There is no reference in Professor Fox's reports to the Claimant suffering from Bipolar in or around September 2019. The records closest to the incident on 5-6 September 2019 are notes from the Claimant's addiction service [304-5]. On 27 August 2019 he is reported to be suicidal, and on 11 September 2019 he is said to be a vulnerable adult who is neglecting himself. There was no evidence of a lack of capacity but an acknowledged problem with alcohol. On 12 September 2019 he is reported as drinking 12-30 cans of Strongbow daily.

62. The evidence given by Professor Fox does not deal with the issue of whether the Claimant was disabled for the purposes of section 6 in September 2019, despite the fact that the issue was identified by HHJ Tindal. His evidence that the Claimant's *bipolar II would fulfil the criteria for disability* is not sufficient. It makes no reference to whether it did, or to whether it did in September 2019. In the absence of some positive evidence to that effect, I am unable to conclude (on the balance of probabilities) that the Claimant was disabled for the purposes of the Equality Act 2010 at the material time. The evidence I have is to the effect that it is the Claimant's alcoholism which appears to be the root problem at the material time. By regulation 3(1) of the Equality Act 2010 (Disability) Regulations 2010, that is not an impairment for the purposes of the Equality Act. In those circumstances, the Claimants case on the grounds of direct discrimination must fail.

63. The public sector equality duty in section 149 of the Equality Act 2010 requires a public authority, in the exercise of its functions, to have due regard to the statutory factors in section 149(1), namely to eliminate prohibited discrimination, advance equality of opportunity and foster good relations between those who share a protected characteristic and those who do not. The duty applies both to the formulation of policy and to individual decisions, and is to be complied with "in substance and with rigour". It is not a "box ticking exercise" and requires the decision-maker to evidence steps taken to comply with it: see *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 per McCombe LJ at [26].

64. As I understand Ms Hirst's position, the claim is argued on the basis of section 149, and not (now) on the basis of direct discrimination. Having heard the parties' submissions, I was left wondering whether that added anything to the claim. The Statutory Guidance makes reference to discrimination at paragraphs 3.29 and 9.22:

> *Discrimination is not always overt, and it can be necessary to look at all the circumstances of a particular case in order to see if discrimination can rightly be inferred from the surrounding facts…."*

Consequently it appears that insofar as the formulation of policy is concerned, the duty has been complied with.

65. As to the investigation itself, I follow that the complaint has the potential to give rise to an investigation which involves a consideration of whether there has been discrimination. But given that my finding on ground 1 is to the effect that there needs to be a further consideration of the matter, including the representations as to the "strategy" which led to the Claimant' arrest and detention, the issues of substance which lie behind this aspect of the Claimant's case on ground 3 will be covered in any event. Ground three is academic.

Decision

66. The claim succeeds on ground 1. The decision of the 22 March 2022 is quashed and the matter remitted to an Independent Appeals Panel for the appeal to be redetermined. I make an order in the terms of the draft minute of order agreed by the parties.