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<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	Delivered: 08/04/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JR296
FOR JUDICIAL REVIEW

Stephen McQuitty KC (instructed by Phoenix Law) for the Applicant
Joseph Kennedy (instructed by the Crown Solicitors Office) for the First Respondent
Ian Skelt KC & Sophie Briggs (instructed by the Crown Solicitor's Office) for the Second Respondent

HUMPHREYS J

Introduction

[1] The applicant is a former police constable in the Police Service of Northern Ireland ('PSNI') who brings a challenge, by way of judicial review proceedings, against a decision of the Police Appeals Tribunal ('PAT') dated 13 March 2023.

[2] By this decision, the PAT dismissed the applicant's appeal from a determination of a misconduct panel which had found the applicant guilty of misconduct in the form of violence inflicted against a former partner and dismissed the applicant from the police service.

[3] The respondents to the application are the PAT and the Chief Constable of the PSNI. In accordance with the principle in *Re Darley's Application* [1997] NI 384, the PSNI took the lead role in responding to the applicant's case, although the court received both evidence and submissions from the PAT.

Background

[4] The applicant's former partner made the following allegations against him:

- (i) 13 October 2018 Assault by placing her in a headlock
- (ii) 11 March 2019 Assault by punching her to the mouth
- (iii) 2 November 2019 Assault by pushing her through a pane of glass
- (iv) 11 January 2020 Rape by forcing her to perform oral sex

[5] The PSNI investigated these matters and made a report to the Public Prosecution Service ('PPS') who returned a decision not to prosecute on 19 May 2021. The PSNI misconduct process continued, leading to a hearing on 17 and 18 October 2022. The applicant denied all of the charges against him. In relation to each of the first three charges, the applicant asserted that his former partner was the aggressor and he had acted using only reasonable self defence. In respect of the fourth allegation he claimed that the sexual contact was consensual. The panel heard evidence from the complainant and the applicant and five other witnesses.

[6] Prior to the misconduct hearing, on 26 September 2022, the solicitors then acting for the applicant requested copies of any Social Services reports relating to the complainant, as it was said these would detail complaints made by the applicant about her aggression towards him.

[7] This point was raised at the hearing before the panel on 17 and 18 October 2022. In cross examination of one of the investigating officers, DS Paul Mullan, the question was asked as to the whereabouts of these reports. The witness answered that he believed all documents had been requested from Social Services. It was evident that some documentation of this nature had been received since one report, of 6 November 2020, was referenced which indicated that the complainant had been aggressive. It was suggested by the applicant's solicitor that other documents, predating that one, "would have been in a similar vein."

[8] The panel, chaired by Assistant Chief Constable Todd, delivered its findings on 20 October 2022. The applicant was found guilty of gross misconduct and dismissed without notice. The panel determined that he had breached the PSNI Code of Ethics article 1.10, conduct likely to bring discredit on the police service, and 7.1, failing to act with integrity and in a manner which could reasonably be perceived as abuse, harassment or bullying.

[9] The applicant appealed to the PAT, furnishing written grounds on 25 October 2022. On 9 February 2023, the chair of the PAT, Laurene McAlpine, wrote to the parties indicating that she was minded to dismiss the appeal on the basis it had no reasonable prospect of success and there was no other compelling reason why it should proceed. In summary she stated:

- (i) The applicant's reliance on the PPS decision not to prosecute was misguided in light of the different systems and burdens of proof;

- (ii) The applicant's claim that he had been the victim of gender bias was without evidential foundation;
- (iii) The misconduct panel's assessment of the evidence and credibility of the witnesses was carefully set out;
- (iv) The circumstances in which an appellate body can interfere with the factual findings of a first instance decision maker are limited to irrationality;
- (v) The panel's findings, when measured against the transcript of the evidence, disclosed no error or fundamental flaw and were not such as would be liable to be interfered with by an appellate tribunal;
- (vi) In relation to the alleged missing Social Services documents, it was difficult to identify what they were or why they were not shared. In any event, such documents were unlikely to reveal anything significantly new about the unhappy relationship, the reference to "a similar vein" indicating that these would have offered more illustrations of what was already known;
- (vii) There was no procedural failing or unfairness identified which could have had a material impact on the findings or decision.

[10] Further submissions were furnished by the applicant in response to this correspondence. These included reference to text messages sent by the complainant to him on 11 January 2020, the day when the alleged oral rape occurred. In one of those messages she invites him to the bedroom to discuss their relationship, describing it as the place where they were 'intimate'. On the applicant's analysis this contradicted the complainant's account that the relationship was over by this stage and that she was being dishonest. It was stated that the text messages were recovered following a phone repair and that the applicant did not have those on his phone prior to the misconduct hearing.

[11] On 13 March 2023 Ms McAlpine made her final determination that the applicant's appeal had no realistic prospect of success and was therefore dismissed. She stated that the applicant's additional submissions failed to challenge the panel's reasoning or disturb the evidence to the extent that would be required to ground a realistic appeal. In arriving at this conclusion, the PAT chair adopted the reasoning in her correspondence of 9 February 2023 and made the following additional points:

- (i) She did not consider that the text messages could have materially affected the panel's findings since the applicant's own account at interview was that, by January 2020, the parties were no longer enjoying an intimate relationship. At the hearing, however, he gave evidence that they were in an ongoing sexual relationship. The reference to intimacy was not, in the chair's assessment,

sufficient to have altered the overall findings in light of their conclusions regarding the credibility of witnesses;

- (ii) There was no new evidence which could have led to a materially different finding nor had there been any procedural breach or unfairness which could have affected the outcome.

The Statutory Provisions

[12] Proceedings before the PAT are governed by the Police Appeals Tribunal Regulations (Northern Ireland) 2016 ('the Regulations'). Regulation 4 provides that a member against whom a finding of misconduct or gross misconduct has been made may appeal to the PAT on the grounds:

- (a) that the finding or disciplinary action imposed was unreasonable; or
- (b) that there is evidence that could not reasonably have been considered at the original hearing which could have materially affected the finding or decision on disciplinary action; or
- (c) that there was a breach of the procedures set out in the Conduct Regulations or other unfairness which could have materially affected the finding or decision on disciplinary action.

[13] By regulation 12(1), the chair of the PAT shall, on receipt of the relevant documents, determine whether the appeal should be dismissed under regulation 12(2) which says:

"An appeal shall be dismissed under this paragraph if the chair considers that—

- (a) the appeal has no real prospect of success; and
- (b) there is no other compelling reason why the appeal should proceed."

[14] Regulation 12(3) and (4) provide that if the chair considers that the appeal should be dismissed under regulation 12(2), she is obliged to give the parties notice in writing of this view, together with reasons, and afford them the opportunity to make written representations in response.

[15] If the appeal is not dismissed under regulation 12 then the chair moves to consider whether the appeal should be dealt with at a hearing and then, if so, directions are made in relation to the future conduct of the appeal proceedings.

“No Real Prospect of Success”

[16] The applicant placed significant reliance on caselaw emanating from immigration disputes to support an overall proposition that the “no real prospect of success” test creates only a modest threshold.

[17] In *ZT (Kosovo) v Secretary of State for the Home Department* [2009] UKHL 6 Lord Neuberger equated this test with another found in the statutory immigration scheme, “not clearly unfounded.”

[18] In another context, that of an application to set aside a default judgment, it is necessary to show “a real prospect of successfully defending the claim.” In *International Finance v Utexafrica* [2001] EWHC 508 (Comm), Moore-Bick J stated:

“The fact is that in ordinary language to say that a case has no realistic prospect of success is generally much the same as saying that it is hopeless; whereas to say that a case has a realistic prospect of success carries the suggestion that it is something better than merely arguable. That is clearly the sense in which the expression was used in *The Saudi Eagle* and in my view is also the sense in which it is used in rule 13.3(1)(a). There are good reasons for that. A person who holds a regular judgment, even a default judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice in favour of setting the judgment aside. In my view, therefore, Mr. Howe was right in saying that the expression “realistic prospect of success” in this context means a case which carries a degree of conviction.”
(para [8])

[19] In *R (Raza Ali) v PAT* [2022] EWHC 646 (Admin) considered the equivalent provision in the rules governing PAT procedures in England & Wales. Fordham J rejected an argument that there is a material difference between a positive “real prospect of success” test and a negative “no real prospect of success” test. In either case, the decision maker must assess whether there is a real, as opposed to fanciful, prospect of success.

[20] In *R (O’Connor) v PAT* [2018] EWHC 190 (Admin) HHJ Saffman commented:

“Finally, let me say that I have had regard to the threshold for the test under Rule 11 and the principles set out in *Swain v Hillman* and *Utexafrica* to which I have referred above. I

recognise that the threshold that the claimant has to meet to avoid dismissal under Rule 11 is not a high one but, for the reasons already set out, I am satisfied that the chair's conclusion that the threshold had not been crossed in this case was one which it was open to her to reach even taking account of the negative phraseology of the test." (para [182])

[21] The test under regulation 12(2) ought not to be the subject of over-analysis. These are straightforward words, familiar to most lawyers, and which are capable of application without resort to alternative phraseology. The Regulations intend to operate a filter which identifies at an early stage appeals which do not have a realistic prospect of success and mandates their dismissal. It is not intended to present a significantly high hurdle for appellants to surmount but it is designed to subject every appeal to early evaluative assessment in order to determine whether it ought to be permitted to proceed. Once the PAT determines that an appeal has no realistic prospect of success then it must be dismissed, unless there is some other compelling reason for it to proceed.

The Role of the Court

[22] A judicial review court, exercising its supervisory jurisdiction, is not a court of further appeal, nor does it substitute its view for that of the decision maker. An appropriate level of deference or latitude must be shown to tribunals which have been created by statute to carry out specialist functions. The role of the court is limited to ensuring that these functions have been exercised lawfully, rationally and in a procedurally fair manner.

[23] The statutory framework is important. It must be recognised that the PAT is a specialist appellate body, to which a limited statutory right of appeal exists. There is no automatic right of re-hearing before this tribunal. The permissible grounds of appeal are limited to unreasonableness, material new evidence and procedural unfairness. As Heather Williams J observed in *R (Commissioner of the Police for the Metropolis) v PAT* [2022] EWHC 2711 (Admin):

- “(i) The PAT must ask itself whether this finding was one that was within or outside of the range of reasonable findings that the Panel could have made;
- (ii) The PAT should keep in mind that the rule 4(4)(a) test is not met simply by showing a deficiency in the Panel's reasoning or a failure to consider a particular piece of evidence or similar error, if the finding of misconduct/ gross misconduct was nonetheless one that the Panel could reasonably have arrived at. The question is whether that finding is unreasonable;

- (iii) The PAT will be careful not to substitute its own view as to what should have been the outcome of the charges. Whether the PAT agrees or disagrees with the Panel and whether it thinks it would have found the allegations proven if it had been hearing the disciplinary proceedings is not in point, as this in itself does not indicate that the Panel's finding was "unreasonable." In many circumstances, different and opposing views can both be reasonable; and
- (iv) The PAT should consider all of the material that was before the Panel, whether or not the Panel made express reference to it in the decision." (para [57])

The Grounds for Judicial Review

[24] The applicant sought to rely on all the grounds set out in regulation 4 in his appeal from the misconduct panel to the PAT. He now no longer relies on "unreasonableness" but continues to contend that the "new evidence" and "unfairness" grounds have realistic prospects of success.

[25] As modified at the hearing of the application, the grounds relied upon to challenge the PAT decision were as follows:

- (i) The PAT misdirected itself as to the test applicable under regulation 12(2);
- (ii) The new evidence in the form of the text messages relied upon ought to have met the threshold of realistic prospect of success for the appeal;
- (iii) The failure to disclose Social Services reports gave rise to unfairness which was also a realistic ground for the appeal.

[26] Having read both the 'minded to' letter and the final determination by the PAT chair, there is no basis for the claim that she misdirected herself in law. It is quite evident from those documents that she considered the grounds of appeal advanced by the applicant, and his additional representations submitted under regulation 12(4) in detail and in the full context of the whole transcript of the evidence and the parties' respective submissions to the misconduct panel.

[27] In doing so, Ms. McAlpine was fully sighted on all the issues before the panel including, most significantly, the credibility of the essential witnesses. In considering whether the appeal bore realistic prospects of success, she was entitled to take into account the extensive caselaw on the issue of appellate intervention on findings of fact, as illustrated by Coulson LJ's judgment in *Kalma v African Mines* [2020] EWCA Civ 144. This is, of course, a different exercise from the one the chair was engaged

upon in assessing the merits of the appeal, but is entirely relevant to the question of whether it bears realistic prospects of success.

[28] The PAT chair correctly identified the statutory provisions contained in regulations 4 and 12. The applicant complains that she did not identify the regulation 12(2) test as being one of 'modest' proportions. As set out above, however, this is a straightforward test which does not require any further elucidation or explanation. The role of the chair under regulation 12 is to apply the test to the grounds advanced which is exactly what she did, reviewing all the evidence in light of her particular expertise. There is no basis whatsoever to contend that, in so doing, she committed an error of law.

[29] The remaining question is therefore whether the chair's assessment of the grounds advanced by the applicant can be impugned as being perverse or irrational. The assertion is made that the text messages could have materially affected the decision of the panel and therefore the PAT ought to have considered that this gave rise to a real prospect of success of the appeal. This was particularly so in a case hinging on factual disputes and the assessment of credibility by the panel. The applicant made the case in his regulation 12(4) representations that the content of the message:

“directly contradicts her account that our relationship was over and that we were simply co-habiting”

[30] On this basis, the new evidence is said to undermine the complainant's credibility. However, the matter is put quite differently for the purposes of this judicial review application. It is now argued by the applicant's legal representatives that the timing and content of the particular message serves to undermine the specific allegation of oral rape.

[31] In the PAT's ruling, the chair considered the text message on the basis put forward in his regulation 12(4) representations which is entirely understandable in light of the manner in which the evidence was presented as a ground for appeal. It is simply not open to the applicant to seek to challenge the decision maker's approach on a different basis in these proceedings.

[32] Even if this court formed a different view, it is not the function of the court on an application for judicial review to substitute its view for that of the decision maker. The only way in which such a decision can be interfered with is by way of a rationality challenge. It cannot be said that the decision on this issue was one which no reasonable decision maker could have arrived at.

[33] The chair is criticised for applying the wrong legal test by stating that she was not satisfied that the text messages “would have altered...the overall findings”, rather than the statutory language of “could have materially affected the findings.”

However, this must be read in the context of the following sentence, at paragraph 10 of the chair's determination:

"It is too weak a point to impact on the totality of the evidence and the panel's conclusions about witness credibility having had the benefit of hearing the witnesses directly."

[34] There can be no doubt that the focus of the chair's analysis was on the question of whether the new evidence could have made a difference. There is therefore no illegality or irrationality in her decision on the new evidence issue.

[35] Insofar as the Social Services reports are concerned, the transcript of the hearing reveals the purpose and complaint of the reference to these documents by the solicitor acting for the applicant. He stated to the witness being questioned:

"But you can see the issue, the concerns that {the applicant} would have, if there's not a full picture presented to the PPS?"

[36] It was not alleged at the hearing that there had been some material unfairness caused to the applicant by reason of the non-disclosure of these reports nor did the applicant seek any direction for disclosure from the panel. Indeed, to date, neither the applicant nor his advisors has articulated any basis for the claimed unfairness. If it was perceived that such existed, it is surprising, to say the least, that the applicant did not apply to adjourn the hearing and engage with a disclosure process.

[37] In this context, the PAT's decision cannot be challenged on a rationality basis. If the applicant did not see fit to require disclosure, did not articulate a clear reason why the documents were relevant and did not allege any unfairness had been occasioned to him, there was no basis for the PAT to find that this ground of appeal had any realistic prospect of success.

Conclusion

[38] For the reasons set out, none of the grounds of judicial review have been made out and the application is therefore dismissed.