OUTER HOUSE, COURT OF SESSION

[2021] CSOH 73

P793/20

OPINION OF LADY WISE

In the petition of

(FIRST)R, (SECOND) A AND

(THIRD) D

Petitioners

for

Judicial Review of the institution and maintenance of police misconduct proceedings against the petitioners

against

CHIEF CONSTABLE OF THE POLICE SERVICE OF SCOTLAND AND OTHERS

Respondents

Petitioners: Dean of Faculty QC, Campbell; MacRoberts LLP (for PBW Law)
Respondents: Maguire QC, Scullion; Clyde & Co (Scotland) LLP

16 July 2021

Introduction and background

[1] The petitioners are serving police officers who are subject to proceedings under the Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68) ("the 2014 Regulations") in which misconduct by each of them is alleged. The first respondent is the Chief Constable and the second respondent the Deputy Chief Constable, both of the Police Service of

Scotland. The second respondent was responsible for disciplinary matters at the material time and delegated to Assistant Chief Constable Speirs (ACC Speirs) who made the decision under challenge in this petition. The remaining respondents are Chief Superintendents authorised to conduct misconduct proceedings such as those brought against the petitioners.

[2] The subject matter of the allegations is the part each of the three petitioners (and one other officer who is no longer serving) is alleged to have played in a series of events that led to the murder of a Frederick McGettigan. On 30 July 2017 Mr McGettigan had handed a handbag belonging to Mrs Joanne Threshie into a police station, reporting that he had found it on a canal path. Mrs Threshie's husband was a serving police officer. Thereafter Mr and Mrs Threshie came to know the identity of Mr McGettigan and were suspicious that he had broken into their house and stolen the handbag. On 9 August 2017 Mr McGettigan was found dead. Kirk McIntyre, a cousin of Mrs Threshie, was subsequently charged and convicted after trial of his murder. Mrs Threshie was subsequently tried and acquitted of the same murder. Subsequent to the criminal proceedings an Investigating Officer ("IO") was appointed to investigate allegations against the petitioners. She produced a report in April 2020. Her conclusion was that each petitioner had a case to answer.

[3] After the IO produced her report, discussions took place between Superintendent Lynn Ratcliff of the Professional Standards Department ("PSD") of Police Scotland and Amanda Givan, Deputy to the General Secretary for Conduct of the Scottish Police Federation ("SPF") about the procedure that might follow the IO's decision. The discussion included the format of any misconduct hearings that might be held. The number of chairpersons to be appointed was considered. Ms Givan expressed concern about the prospect of a single Chairperson being appointed. She indicated that she considered this would be unfair, on the basis of a perceived risk that the evidence, findings or determination

relating to one of the petitioners might impact negatively on another or others. Superintendent Ratcliff accepted that these were valid concerns and she agreed in principle that separate chairpersons would be appointed.

[4] The ultimate decisions in relation to the procedure to be adopted were taken by ACC Speirs on behalf of the second respondent in July and August 2020. He made decisions on 27 July, 30 July and 19 August, all 2020, to refer each of the petitioners to misconduct hearings, with a separate chairperson for each. Those are the decisions challenged in these proceedings and will be referred to collectively hereinafter as "the decision".

The 2014 Regulations

[5] The 2014 Regulations govern the misconduct complaints giving rise to these proceedings. Part 2 thereof details the relevant procedure if alleged misconduct is reported to the deputy chief constable designated, in terms of Regulation 5 to exercise certain functions. Regulation 6 permits the appointment of someone to act as the officer's police representative and Regulation 7 makes clear that officers are entitled to be legally represented by a solicitor or advocate of their choosing at any misconduct hearing. In terms of Regulation 10, it is the Deputy Chief Constable who assesses whether, if proved, the alleged conduct would amount to misconduct or gross misconduct and who appoints an Investigating Officer where appropriate. The Investigator then serves a Notice of Investigation and conducts interviews – Regulations 11 and 12. Following investigation, the Investigator must submit a report to the Deputy Chief Constable, which report must include a statement of opinion as to whether the misconduct alleged should be referred to misconduct proceedings – Regulation 13. On receipt of the IO's report, it is for the Deputy Chief Constable, under Regulation 14, to determine whether the officer has a case to answer

and if so to refer the matter to be dealt with under formal procedures is, under Regulation 14.

[6] Part 3 sets out the procedure to be followed where there are to be formal misconduct proceedings. It includes the following provisions relevant to the determination of these proceedings;-

> "15.-(1) This regulation applies if the deputy chief constable has referred a case to misconduct proceedings.
>
> (2)The deputy chief constable must send a misconduct form to the constable.
>
> (3)A misconduct form sent in accordance with paragraph (2) must give notice of –
>
> (a) the conduct forming the subject matter of the misconduct allegation;
> (b) the date, time and location of the misconduct proceedings; ……
> …
> (e) the constable's right to seek advice from a staff association
> …
> (h) the name of the person appointed to conduct the misconduct proceedings.
>
> 16.-(1) If the deputy chief constable refers a misconduct allegation to misconduct proceedings, the deputy chief constable must appoint another constable to conduct those proceedings.
>
> …
>
> (3)… a constable appointed under paragraph (1) –
>
> (a) Must be of at least the rank of superintendent:
> (b)
> (c) Must be at least two ranks higher than the constable who is the subject of the misconduct allegation …
> (d)
>
> 18.–(1) Subject to the following paragraphs of this regulation and regulations 19 and 20, the person conducting the misconduct proceedings is to determine the procedure at those proceedings.
>
> (2) The person conducting the misconduct proceedings must permit –

(a) the constable or any person representing the constable to make representations;
(b) evidence to be heard from any witnesses in attendance; and
(c) … the constable or any person representing the constable to ask questions of the witness …

21.-(1) At the conclusion of the misconduct proceedings, the person conducting those proceedings must –

(a) determine whether the conduct which is the subject matter of the misconduct allegation is conduct of the constable ….

(c) in a case where the deputy chief constable has determined, in accordance with regulation 14(1)(b), that the constable has a case to answer in respect of gross misconduct, determine whether it is established that any conduct of the constable amounts to

(i) gross misconduct
(ii) misconduct; or
(iii) neither .

24.-(1) This regulation applies where –

(a) it has been determined at misconduct proceedings that any conduct of the constable amounts to misconduct or, as the case may be, gross misconduct……

(2) Where this regulation applies, the constable may appeal against –

(a) in a case mentioned in paragraph 1(a) –

(i) any determination made under regulation 21(1); and
(ii) any disciplinary action ordered.

(3) An appeal under this regulation may only be made on the grounds that –

(a) any determination under regulation 21(1) or any disciplinary action ordered is unreasonable; or

(b) there is evidence that could not reasonably have been considered at the misconduct proceedings which could have affected materially such a determination or the decision to order particular disciplinary action; or

(c) there was a breach of the procedures set out in these Regulations which could have affected materially such a determination or decision."

Submissions for the petitioners

[7] The Dean of Faculty presented his arguments challenging the respondents' decision making in four sections; procedural fairness, rationality, reason and alternative remedy. While normally alternative remedy would be the subject of a preliminary plea or argument taken by the respondents, in the present case the petitioners' focus was on whether the stated alternative remedy would be effective and so it would be dealt with last. On procedural fairness the question was whether the circumstances rendered what had happened unfair. Reference was made to *R* v *SSHD, ex parte Doody* [1994] 1 AC 531 and the six principles enunciated by Lord Mustill at p560. These include (1) there is a presumption that an administrative power will be exercised fairly, (2) the standards of fairness are not immutable and may change over time, (3) what fairness demands is dependent on the context of the decision, (4) the statute which creates the discretion and the shape of the system within which the decision is taken are essential features of the context, (5) fairness often requires that someone who may be adversely affected by a decision will have an opportunity to make representations before the decision is taken or to seek to procure its modification afterwards and (6) fairness will often require that the person affected be informed of the gist of the case he has to answer. In the present case the starting point was that the context included questions of the utmost gravity for the petitioners' careers as police officers.

[8] Where someone is charged on the same background of facts they should be tried together. This is well established in criminal matters – *Renton & Brown, Criminal Procedure,* paragraphs 9-54 and motions for the separation of trial were granted only rarely and where a trial of the accused together would lead to injustice. The general presumption was that it is in the public interest for analogous matters to be tried together (*Johnston* v *HM Advocate*

1997 JC 9 at 14). This avoids the repetition of evidence in different trials and avoids the risk of irreconcilable decisions on the same facts. The Guidance on the 2014 Regulations itself provides for joint hearings where more than one officer has to appear in relation to a matter stemming from the same incident. Paragraph 6.4 of the Guidance provides that it would normally be appropriate for the Subject Officers to attend the same proceedings so that the alleged misconduct can be considered in context. A Subject Officer may request separate proceedings if he/she can demonstrate that joint proceedings would lead to unfairness and it is for the person conducting the proceedings to decide whether to hold separate proceedings. Accordingly, the norm was that the officers would attend the same proceedings even if they were alleged to have played different parts in the circumstances alleged to have occurred, albeit that separate proceedings could be requested. It was noteworthy that only the officers themselves could make such a request and that the decision on such an application was for the officer presiding over the hearing. None of the officers had made a request in accordance with the Guidance.

[9] The Dean of Faculty contended that the papers in relation to the charges against each of the petitioners illustrated the similarity of the various charges. The first petitioner was accused of suggesting to Mr Threshie that Mr McGettigan was responsible for the housebreaking and of giving false evidence in the High Court trial (Misconduct Form, Core Bundle of Documents, at 65/2178). The second petitioner was also accused of giving information to Mr Threshie that identified Mr McGettigan as responsible for the housebreaking and for giving evidence at the second High Court trial in 2019 that showed he was responsible for that, although he was also accused of improperly accessing police data otherwise than in the proper course of duty (Misconduct Form, Core Bundle of Documents at 697/2178). Allegations against the third petitioner included failing to take any

action when he became aware that information had been passed to Mr Threshie linking Mr McGettigan to the housebreaking and providing evidence at the High Court trial in 2019 that led to him being accused of lying in court. (Misconduct Form, Core Bundle of documents at 1346/2178). All three petitioners are alleged to have discredited the police service by their behaviour.

[10] The undisputed chronology of events was said to support the petitioners' argument of procedural unfairness. In April 2020 the Investigating Officer (IO) had produced her reports and determined that each petitioner had a case to answer. The decision to refer each of the petitioners to misconduct hearings was not taken until late July/early August 2020. Sometime before that, discussions had taken place between Superintendent Lynn Ratcliff of the Professional Standards Department (PSD) of Police Scotland and Amanda Givan, Deputy to the General Secretary for Conduct of the Scottish Police Federation ("SPF") on the potential misconduct hearings. Ms Givan had expressed concern about the prospect of a single chairperson being appointed to conduct any misconduct hearings. Even leaving aside whether Ms Givan's concern was rational or justifiable, the point was that no decision had been taken that there would be a hearing or hearings. In terms of paragraph 6.3 of the Guidance, a person ought to have been appointed and then a hearing could have taken place in terms of paragraph 6.4 at which representations could have been made for separate hearings had the petitioners so wished. The Guidance was akin to a rule of court in that it gives rise to a legitimate expectation that it would be followed. A decision maker must follow his published policy unless there are good reasons for not doing so – *R (Lumba)* v *Secretary of State for the Home Department* [2012] 1 AC 245, at paragraph 26. The failure to do so in this case was a sufficient basis for the procedural unfairness challenge.

[11] The respondents' only argument against the procedure having been unfair was said to be that Ms Givan had reached agreement "in principle" with Lynn Ratcliff that there would be separate misconduct hearings. It was of the essence of an agreement in principle, however, that it was not binding. In any event, at the very least the decision maker later appointed would have to convene and see whether the tentative agreement held good; that had not happened. Equally fatal to the respondents' position on this was the absence of any suggestion that Ms Givan held actual authority to bind the petitioners. Under reference to *First Energy (UK) Ltd* v *Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 (per Steyn LJ at 201), the Dean of Faculty submitted that the law did not recognise the idea of a self-authorising agent and that applied *a fortiori* in the present case where all that is said to have been done is to reach an agreement "in principle". The analogy was given of Counsel being retained by certain newspapers, who speaks with an opponent in a case in which he expects to be instructed and agrees in principle that the case should go to a jury trial but is not later instructed of that particular case. Self-evidently, the agreement in principle would not be binding. The respondents did not explain how authority to bind the petitioners had been invested in Ms Givan. She had no actual or ostensible authority to bind the petitioners and that was an end of the matter.

[12] It was submitted that there was also substantive unfairness as the petitioners would suffer real and substantial prejudice in the event of there being separate hearings. If the allegations against the petitioners had been thought to require separate judgements on each of them, it would have been inappropriate, and probably a breach of Regulation 6 of the 2014 Regulations for the same IO to have been involved for all three, which is what occurred. Many of the witnesses and documents were common to all three proceedings and separate decision makers would involve enormous duplication of the relevant evidence,

with the risk that the same witnesses would give evidence three times with potentially different, inconsistent decisions being made. The underlying issue for each of the petitioners was the accessing and dissemination of information in late July and August 2017 to Mr and Mrs Threshie identifying Mr McGettigan and their subsequent actions in giving evidence about the events of that earlier time. There would have to be comprehensive evidence on the key issue of how and by what means information came into the possession of the Threshies and it was difficult see how the disputed allegations could be tried fairly in separate hearings. The decision maker had no wide discretion on the matter and it was not a "reasonable tribunal" test. It had to be decided in accordance with the principles of fair procedure; in this context the court was the ultimate arbiter of whether what had occurred was fair or not - *R* v *Panel on Takeovers and Mergers Ex parte Guinness Plc* [1990] QB 146 at 184. No unfairness or prejudice in relation to a single hearing had been identified.

[13] The rationality challenge focused on ACC Speirs having taken into account an irrelevant consideration, namely what he wrongly thought was the petitioners' stance on separate hearings. In consequence of that he had failed to take account of the actual position of the petitioners. It was clear from a letter dated 8 September 2020 and sent to the petitioners' agent (Core Bundle of Documents at 2063/2178) that the "agreement in principle" was a key factor in ACC Speirs' decision and that was an error. It could be argued that the error about there being agreement was the only factor in the decision being challenged, as the other factors narrated of the impact on all involved and the need to avoid delay appeared to be *ex post facto* justification. The submission on rationality was advanced as a standalone ground regardless of the fairness or otherwise of the situation.

[14] On the reasons challenge it was submitted that as the starting point was the published policy in which the norm was a joint misconduct hearing, the second respondent

was required to give adequate reasons for departing from that and she had failed to do so. The three reasons given in the letter dated 8 September were (i) the position of the SPF through Ms Givan, (ii) the impact on the family of the deceased and (iii) the need to progress to a conclusion without delay. The first reason was misconceived and irrelevant as a result of the lack of any authority on the part of Ms Givan. So much reliance had been placed on this that any other reasons stated seemed secondary. The reference to the impact on the family of the deceased was meaningless as a reason. It was impossible to see how separate misconduct hearings for the officers would have less impact than a joint one. So far as delay was concerned, a single hearing with 41 witnesses would obviously be quicker than three separate hearings each with 20-40 witnesses. The proceedings would proceed more quickly with one hearing before a single chairperson. Such reasons as were later given for the decision were wholly inadequate.

[15] It was submitted that as the decision taken on separate hearings had been unfair, irrational and unreasoned, the last point to consider (unusually) was whether there had been any failure on the part of the petitioners to exhaust a separate remedy. The respondents were likely to pray in aid Regulation 18(2)(a) of the 2014 Regulations which would require the decision maker to hear any representations to conjoin the hearings. This was unworkable, however, as in three separate hearings, each chair person would have to take a decision on such representations and there was nothing in the regulations to support a contention that the mode of hearing could be changed once determined. The hearings could not be re-aggregated if, for example, one of the three chairs granted such an application, one chair refused and a third agreed in principle but questioned whether they had power to do so given the earlier decision that there would be three hearings. An alternative remedy against a decision had to be effective before it could negate the ability to

seek judicial review – *McGeoch* v *Scottish Legal Aid Board* [2013] CSOH 6 a paragraph 76. Permitting each petitioner to go to their own chairperson was insufficient as an effective remedy. The appeal provisions in Regulation 24 were of no assistance as they apply only after a determination of misconduct/ gross misconduct has been made or has been admitted. There was no scope for challenging a procedural order during the proceedings other than by way of judicial review. It would be unfair to require the petitioners to wait until the end of an otherwise unfair procedure before it could be challenged. In *Pharmaceutical Society of Great Britain and Another* v *Dickson* [1970] AC 403, Lord Hodson had reiterated (at p429) that the court could determine the validity of a rule (or decision) whether or not consequential relief was available. This was confirmed and elaborated on in *R (on the application of Redgrave)* v *Metropolitan Police Commissioner* [2002] EWHC 2353, where Moses J expressed the view (at para 15) that protection by the court against manipulation of a process would be wholly inadequate if a claimant had to go through the laborious stages of appeal before the courts could vindicate his right not to have to undergo an unjust hearing at all. This court had taken jurisdiction in cases where the Regulations under discussion here did not provide an effective mechanism for determination of the situation that had arisen – *BC* v *Chief Constable of the Police Service of Scotland* 2018 SLT 1275.

Submissions for the respondents

[16] Ms Maguire QC submitted that the petitioners had failed to demonstrate that the decision made to hold three separate hearings was not one open to the second respondent. The second respondent (who delegated to ACC Speirs) made the relevant decisions under scrutiny. These included the decision to investigate conduct that may amount to misconduct or gross misconduct and to appoint a relevant IO (regulation 10). Having

received the IO's report, it was for the second respondent to determine whether there was a case to answer and having concluded that there was, she was required to refer the officers for a misconduct hearing (Regulation 14). That had been done and the procedure set out in part 3 of the Regulations, particularly regulations 15-17, had started to take place. It was the respondents' positon that the petitioners did not each have varying degrees of involvement in the investigation into the housebreaking at the Threshies. Only the first petitioner was directly involved in the investigation. The importance of this was that the petitioners' case was presented as if they were all alleged to be part of a common course of conduct, something that the respondents denied and which could be seen from analysing the different charges brought against each (pages 65, 697 and 1346 respectively of the Joint Bundle of Documents). There was no suggestion that the first petitioner had any involvement with the second and third petitioners. The allegations against the second and third petitioners were different, albeit arising out of their being members of the same WhatsApp group. While it was accepted that the petitioners were investigated as part of one investigation and not separately, it was never suggested that they had acted in concert. Two of the petitioners had accepted some of the allegations but the extent of any consequences of what they did remained contentious. One of the petitioners denied all allegations of wrongdoing.

[17] In the unusual circumstances outlined above, it had been appropriate for consideration to be given not only to whether it would be appropriate to convene one misconduct hearing for all three petitioners but also to consider other alternatives. Whatever was now said about the capacity in which Amanda Givan had expressed concerns about a single joint hearing, the critical point was that ACC Speirs had regard to the concerns expressed in making his decision. He took the view that there was significant

merit in the concerns expressed by Ms Givan which were shared by Superintendent Ratcliff. The affidavits of Chief Superintendent McDowall and Superintendent Ratcliff lodged in these proceedings confirm what the considerations were that led to the ultimate decision to have separate hearings and separate chairs for each officer. These included the risk that the chair could be influenced by an officer or officers who accepted some or all of the allegations to the detriment of an officer who denied them and the risk that one officer would try to apportion blame to one or both of the others. The view that a single hearing would be unfair to the officers was not just that of the decisions makers but was the position of Amanda Givan, whose affidavit for these proceedings indicated that she remained of the view that the hearings should be separate. She had argued strongly for separate hearings at a time when the PSD were minded to hold one hearing.

[18] The submissions made on behalf of the petitioners that there is a general interest in hearing analogous matters together and that to do otherwise in this case resulted in potential prejudice were supported only by vague and unspecific reasons. The situation was not analogous with a single complaint of negligence against more than one person or "separate offences which [were] committed at the same time and contribute[d] to the same result "(*Renton & Brown*, p27). The complaints were different and concerned alleged acts committed separately. The petitioners' approach invited precisely the danger that separate hearings are intended to guard against, namely treating all officers as having contributed together to the fatal outcome. Standing the very different charges against each, it was difficult to envisage how differing decisions could be said to be irreconcilable. Each chair would take an individual decision and not be influenced by others. The crux of the concern about a single hearing was that a single chair would be in a difficult position if, having

heard everything, he/she would still be required to make individual decisions about each officer.

[19] It was accepted that common law principle of fairness or abuse of process applied to police disciplinary proceedings – *R (Gray)* v *Police Appeals Tribunal* [2018] 1 WLR 1069, and that the court could interfere with decisions such as that made here. However the respondents disputed that there had been any abuse of process here, far less any significant prejudice to the petitioners. Even where the participants of the same alleged crime had been indicted in separate groups, it was held to be competent for the Crown to take the unusual course of indicting them separately – *Weir* v *HM Advocate* 2007 SLT 284. The situation here was that the misconduct was different for each complainer and the ability of the second respondent to fix separate hearings was not in doubt. In *Weir* Lord Osborne had commented (at paras 19-20) that where witnesses required to repeat their evidence in a second or subsequent trial, the evidence of what they said on a previous occasion could be critically examined. It was the witnesses who might therefore be disadvantaged, not the accused who would suffer prejudice. In any event, the petitioners have brought this peremptory challenge before getting to the stage envisaged by regulation 17 which provides that the petitioners and respondents should seek to agree a joint list of witnesses. If a responsible approach is taken to case management in each of the hearings it may be that there is scope for agreeing the evidence of many witnesses.

[20] It was the respondents' position that the petitioners' challenge was premature and that they should have proceeded through the various stages of the procedure as set out in the regulations and could make applications to the respective chairs under regulation 18 to conjoin the hearings. This could be done before any witnesses were cited. The chairs would be best placed to deal with any arguments about witness repetition against a background of

what was actually going to happen. Only after any relevant applications had been made to the panel chairs and refused would judicial reviews of their decisions be appropriate. The present petition should be dismissed and the petitioners could then pursue the other remedy available of challenging the procedure before the panel chairs who would have the relevant material. An examination of the witness lists contained in the packs revealed less of an overlap than the submissions for the petitioners suggested. In any event it was clear from the case of *Weir* v *HMA* that witness overlap did not necessarily result in prejudice, far less prejudice that would outweigh that of conjoining the hearings for officers charged with separate misconduct offences.

[21] Turning to the complaint that the procedure in this case had deviated from the Guidance, which the petitioners said they had a legitimate expectation would be followed, Ms Maguire submitted that the guidance (at para 6.4.1) stated only that it would "normally be appropriate for subject officers to attend the same proceedings in order that the alleged offending can be considered in context". The word "normally" qualified what may otherwise be appropriate and made clear that each case had to be considered on its own facts and circumstances. That was clear from the subsequent reference to the ability of subject officers to request separate proceedings if conjoined proceedings might be unfair. The second respondent's approach was consistent with the guidelines. Under reference to *R* v *Inland Revenue Commissioners ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 it was submitted that the doctrine of legitimate expectation was rooted in fairness, but fairness was not a one way street, it was something the respondents were entitled to as much as the petitioners. The respondents could not be bound by anything less than a clear, unambiguous and unqualified representation. Standing the qualified terms of the guidance, no such unqualified representation had been made. Looking at it another way, it was

reasonable to ask what would have occurred had the second respondent ignored the representations made by Ms Givan and the understanding reached between her and Lynn Ratcliff. It might have been anticipated that a different judicial review would have been raised.

[22] The respondents' position was that there would be no real prejudice to the petitioners if the hearings were separate and that a single hearing ran the real risk of "taint". The argument that there had been a single IO appointed failed to recognise the different functions and responsibilities exercised by the various individuals involved. Chief Superintendent McDowall addressed this is his Supplementary Affidavit (No 24 of process) where he confirmed that there was no necessary correlation between the number of IO's and the number of hearings. For example it would have been possible to have four IO's and subsequently one chair for misconduct proceedings relating to all four officers. It was noteworthy that in the present case Mr Kennedy of the SPF had at one time expressed an intention to challenge the appointment of a single IO. While that had not been pursued it was inconsistent with the petitioners' current position. The approach of the single IO who had been appointed was to produce three reports which then required to be redacted to protect the privacy of each individual officer. It was not clear whether the petitioners would be separately represented but there did seem to be a potential conflict that would justify that. The risk here was that each officer might seek to blame another of their number for the disclosure to the Threshies and it might be difficult to consider the gravity of each alleged action separately from the overall outcome. Assuming separate representation, each representative would have to question the witnesses and so there would be little time saved in having a single hearing.

[23] In contrast to the lack of prejudice to the petitioners in having separate hearings, the risk of taint were there to be a single hearing was clear. It would patently be in the interests of the two petitioners who were part of the WhatsApp group that a chair is appointed who is tasked only with their individual evidence and explanations and who has not heard the evidence, including possible admissions, of the other. The first petitioner was in a separate position from those two and appeared to propose legal challenges to the admissibility of some evidence on the basis of personal circumstance. It could not be in her interests to have to air those circumstances in the presence of the second and third petitioners. The procedural unfairness challenge was general and unspecific and should fail.

[24] The respondents accepted that the previous rigid test of irrationality was no longer required and that the court's role was to examine an administrative decision "to ensure that it is in no way flawed, according to the gravity of the issue which the decision determined" – *Kennedy* v *Charity Commission* 2015 AC 455. However, the courts should abstain from a merits review and continue to attach weight to the expertise of the specialist tribunal and to the administrative decision maker's exercise of discretion. The personnel involved in decision making about the petitioners were well used to considering fairness in disciplinary proceedings. They had paid careful attention to the interests of the subject officers, collaborated to a significant degree with their staff association and had given appropriate thought and reflection to reaching the fairest decision for each officer. Ms Maguire submitted that the petitioners had not demonstrated that the second respondent misdirected herself in law, entertained the wrong issue, proceeded upon a misapprehension or misconstruction of the evidence, took account of irrelevant factors or failed to take account of relevant ones. It was not enough to disagree with the manner in which a decision maker has weighed the evidence *SS* v *Home Secretary* [2010] CSIH 72. It was evident that there

could be different views on the issue of whether a single chair for all three misconduct hearings was appropriate and the second respondent was entitled to reach a different view from the petitioners. The second respondent had a legitimate concern that the fairness and efficiency of the proceedings would be compromised by the appointment of a single chair.

[25] It was not sufficient to review the decision that the petitioners are unhappy with it and it was noted that Ms Givan who represents the second petitioner appeared to remain of the view that there should be separate hearings. No errors in the decision making process had been identified and the petition should be dismissed.

Discussion

[26] In this particular case it is important at the outset to identify the decision under challenge. When these proceedings were first raised, the respondents' position was that the decision was taken as early as June 2020 at the culmination of the discussions between Amanda Givan and Lynn Ratcliff. It was then acknowledged that the decision to appoint separate hearings and chairs for the three petitioners could only have been taken by the second respondent, who delegated to ACC Speirs for that purpose. The importance of that acknowledgement is that it explains the context of the discussions between Lynn Ratcliff and Amanda Givan. Their conversations took place before the decision maker had directed that misconduct proceedings would take place. It was for ACC Speirs alone to make that decision and to decide on a single chair or three separate chairs and hearings. It is easy to understand why it is generally useful for there to be discussions in advance of a decision being made, to try to identify issues of concern and the positions of the officers, if known, on matters of procedure. No doubt all those involved in such discussions are keen to work together to facilitate to smooth and efficient running of what are likely to be sensitive cases,

particularly where, as in this case, it is said that the gravest of consequences flowed from the alleged misconduct. In all cases, it seems that the PSD and SPF work closely to discuss and if possible resolve issues at an early stage. Chief Superintendent McDowall confirms in his affidavit (at para 5) that having a legal representative in terms of Regulation 7 of the 2014 Regulations does not preclude an officer from also having a police representative from the SPF and it is common for officers to have a combination of both. It is agreed in this case that Amanda Givan was to be the SPF representative for the second petitioner but not for either the first or third petitioner. Against that background she had discussions with Lynn Ratcliff in April and June 2020 before any relevant decision had been taken.

[26] The decision under challenge was made by ACC Speirs in mid-August 2020. No formal notice or record of that decision is available in these proceedings but it appears that the issue of why the hearings were to be separate was raised on behalf of all officers (four at that time) by solicitors' letter of 28 August 2020 (Core Bundle at 2060/2178) in which reasons for the decision were sought. It is in ACC Speirs' response (Core Bundle at p2063/2178) that these reasons are given. His letter stated:

> " … following the determination that all four officers should progress to misconduct proceedings, there were several discussions with the Scottish Police Federation, specifically the Assistant to the General Secretary (Conduct) regarding the timescales and format for these proceedings. Police Scotland's initial proposal was that a single Chairperson would be appointed however, it was the position of the Scottish Police Federation that there should be four separate Chairpersons to ensure independence and that the findings or outcome in respect of any one officer would not be unduly influenced by the evidence heard in respect of another. Furthermore, the Scottish Police Federation intimated that they may formally object to or challenge the appointment of a single Chairperson to conduct proceedings in respect of all four officers.
>
> Taking cognisance of the position of the Scottish Police Federation, the impact that this matter has had to date on the family of the deceased and the four subject officers

> involved and the need, for all concerned, to progress this case to a conclusion without unnecessary delay, Police Scotland took the decision to appoint four separate Chairpersons to consider the evidence in respect of each of the officers."

For the purposes of the discussion in these proceedings, those are the stated reasons of the respondents for the decision made.

[27] Turning to the grounds of challenge, the central argument is one of procedural unfairness. On the issue of whether as a general rule parties alleged to have committed misconduct on the same background of facts should be tried together, this is well established in criminal proceedings although is not an inviolable rule. Just as it would be competent for the Crown to indict separately in respect of the same alleged crime (*Weir* v *HMA* 2007 SLT 284*)* the fixing of separate hearings in these misconduct proceedings was *prima facie* competent. However, in terms of the respondents' own Guidance the default position for situations such as that in which the petitioners find themselves is that there will be a single hearing. Paragraph 6.4.1 thereof (Core Bundle of Documents at 2167/2178) states:

> "There will be cases where more than one Subject Officer is required to appear at proceedings for a matter stemming from the same incident. In such cases, each police officer may have played a different part and any alleged misconduct may be different for each police officer involved. However, it will normally be appropriate for the Subject Officers to attend the same proceedings in order that the alleged misconduct can be considered in context …"

As the petitioners' situation seems to be precisely that referred to in the Guidance, there would have to be a clear and rational justification for any departure from the norm and adequate reasons for that given. While the bare fact of such a departure may be insufficient to give rise to a successful challenge to the decision, the respondents would certainly have to have good reasons for acting in a manner at odds with their published policy (*R (on the application of Lamba* v *SSHD* [2012] 1 AC 245 at paragraph 26, citing Lord Phillips in *R (Nadarajah)* v *SSHD* [2004] INLR 139. The features of the proposed proceedings against

these officers that support a position that the Guidance ought to have been followed include that the charges against each officer arise from the same factual background and have similarities with considerable evidential overlap and that a single IO had been appointed on that basis. I accept that there will be a general expectation of a single hearing in a case involving a single IO and a related set of circumstances. What requires scrutiny in this case is the procedure that led to a different a different approach than the default position of a single hearing being adopted and the reasons given subsequently for that departure. This illustrates how the complaint of procedural unfairness is inextricably linked with the reasons and rationality challenges.

[28] When Lynn Ratcliff and Amanda Givan spoke first in April 2020 there was an expectation that, in light of the IO's conclusion, matters would progress to a hearing or hearings. It is accepted that when Ms Givan was told that the subject officers were likely to be heading to a single hearing she explained that the SPF would have a problem with that and that she thought it would be unfair (paragraph 13 of Ms Givan's affidavit). There appear to have been two separate conversations (Lynn Ratcliff's affidavit paragraphs 17 and 18) in which Ms Givan made clear that she considered that a single chair would be inappropriate. There is a dispute about whether she went so far as to suggest that if there were misconduct proceedings and a single chair was appointed, that appointment would be judicially reviewed. Ms Givan states that she would not have threatened this as she is not a solicitor but Lynn Ratcliff states that she did. In her Supplementary affidavit Ms Givan accepts that she would have made clear that the SPA would consider legal avenues if agreement could not be reached but that she would not have threatened judicial review. I do not require to resolve that tension in order to decide this matter. The central issue is how to characterise the discussions. As indicated, the discussions took place before a decision

was taken by ACC Speirs that there would be misconduct hearings. Neither Lynn Ratcliff nor Amanda Givan had authority to enter into a binding agreement as to the procedure that would be followed in the event that the decision maker determined that there would be a hearing or hearings. They could discuss matters on the hypothesis that hearings would take place because that was considered likely, but the power to determine whether the officers would be the subjects of a single or separate hearings was for ACC Speirs. What occurred between Amanda Givan and Lynn Ratcliff was described by the respondents as an "agreement in principle" but however it is characterised, I am satisfied that it could not constitute a binding agreement.

[29] Amanda Givan states in terms (principal affidavit para 17) that she did not speak to any of the petitioners regarding the issue of separate hearings; although she was the SPA representative for the second petitioner and was in regular contact with him she did not discuss the matter with him and did not receive any instructions on the matter from him. Accordingly, in any representations she made to Lynn Ratcliff, Amanda Givan was expressing a personal view and was not acting with authority from any of the petitioners. As Steyn LJ noted in *First Energy (UK) Ltd* v *Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194, at 201,

> "… a plea of apparent authority can only be based on a holding out, or representation, as to authority of the agent by the principal sought to be held bound by the particular act. Our law does not recognize, in the context of apparent authority the idea of a self-authorising agent."

I conclude that the petitioners are correct in stating that Ms Givan had no actual or ostensible authority to bind them as to further procedure.

[31] What appears to have occurred thereafter is that ACC Speirs reached his decision largely on the basis of what he understood was a representation on behalf of the petitioners

that they did not wish to appear before a single chair at a combined hearing. Even leaving aside the error in the letter of 8 September 2020 where it states that the decision to refer each of the four officers to misconduct hearings had been made before Ms Givan's purported representations, it is clear from the section quoted at paragraph [26] above that ACC Speirs relied heavily on what he understood, wrongly, to have been representations made on behalf of the officers. Accordingly, I consider that the whole procedure was flawed, not because of the departure from the expected procedure of a single hearing *per se* but because the primary basis for so departing was erroneous, being based on a misunderstanding about what the petitioners' views were and who was able to represent them. While ACC Speirs did not require to follow the Guidance without assessing its application to the context, he ought to have followed it unless there was good reason, based on accurate information, to depart from it.

[32] The respondents' position is that ACC Speirs reached a decision he was entitled to reach and had his decision been objectively justifiable that may have been so. However, based as it was on incorrect information, his decision was flawed in an important respect such that departure from the respondents' own Guidance was not justified. In any event, there was no acknowledgement in the letter of 8 September 2020 that the decision was a departure from the norm as opposed to the answer to an open question about single or separate hearings. I am satisfied that the procedural unfairness that took place gives rise to a real risk of substantive unfairness. If there are separate hearings arising from the same broad factual matrix which were investigated together by a single IO, different decision makers may assess the same facts differently and reach mutually inconsistent decisions. It is indisputable that the potential consequences for the petitioners are of the most severe kind and the risk of inconsistent findings between separate chairs hearing at least some of the

same witnesses is a sufficient basis to be satisfied about the decision made causing prejudice to the petitioners.

[32] The absence of any sound reason for departing for the published Guidance as a procedural flaw feeds into the reasons challenge. The reasons given in the letter of 8 September 2020 are threefold. First there is the mischaracterisation of Ms Givan's view as if it comprised formal representations on behalf of the officers. Secondly there is the impact on the family of the deceased and the subject officers and thirdly is the issue of delay. I have dealt with the error in ACC Speirs relying on what could only have been tentative discussions based on a hypothesis about a future decision as if they were representations. The second and third reasons are not easy to understand. It seems inconceivable both that there being three hearings rather than one would impact less on the family of the deceased and that separate hearings would avoid further delay. In their pleadings and submissions the respondents rely heavily on the interests of the petitioners and I have no doubt that ACC Speirs will have been doing his best to consider all those involved. However, the petitioners must be taken to understand and form a view of what is in their own interests and they oppose the idea of three separate hearings. The expressed concern is one of "taint" if the same chair hears evidence in a single hearing that could prejudice one or more of the cases being presented by the officers. However, assuming the appointment of a suitably qualified and experienced chair, there would have to be something more than that, given the default position in the Guidance for single hearings. I conclude that the reasons given in the letter of 8 Septembers 2020 were both misconceived and inadequate.

[33] Similarly, the rationality challenge succeeds as a result of the same error in basing the decision largely on a mistaken understanding of the position of the subject officers. The question of a single or joint hearing was not one for open debate, but one which had to start

with the Guidance. ACC Speirs reached his decision on separate hearings after taking an irrelevant consideration into account. In the absence of strong justification for any departure from the Guidance his decision making does not withstand scrutiny. The initial view of the respondents that there should be a single hearing in this case was consistent both with the earlier appointment of a single IO and with the published Guidance. I acknowledge the respondents' contention was that it was appropriate for ACC Speirs to give consideration to alternatives to a single hearing but in my view he could only do so on the restricted basis outlined above. The identified flaws with his decision making are sufficient for interference with it as it goes beyond how the available material was weighed.

[34] Finally I require to consider whether the petitioners had or have an alternative remedy that they could pursue. It was accepted on behalf of the respondents that the 2014 Regulations (in particular Regulation 24) would not permit a decision on procedural issues such as the conjoining of separate hearings to be appealed until after the determination by the first instance decision maker. In the particular circumstances of this case that would present a real difficulty. All three petitioners would have to participate in the unfair procedure until its conclusion before being able to challenge the decision not to hold a single hearing. Neither does the possibility of requesting each chair at the outset of the hearing to adjourn and conjoin with the other two hearings (in terms of regulation 18(2)) represent an effective remedy, given the clear scope for different decisions by the three chairs on the issue, with one or more of the petitioners then having to argue post determination that the refusal to conjoin the three hearings was unfair. Such practical problems would not be in the interests of any party. I conclude that the petitioners have no other effective remedy for the situation in which they find themselves than this judicial review and that their challenge has not be made prematurely.

Decision

[35] For the reasons given I will accede to the petitioners' motion and grant the prayer of the petition to the extent of the order sought there for declarator and reduction, there being no need for the other orders within the prayer. I should add that I acknowledge and understand the respondents' concern that the outcome in this case could have implications for their well established procedures. However, the errors made in this particular case arose largely from an absence of clarity about when and by whom decisions as to procedure at misconduct hearings are actually taken and the distinction between an SPF official expressing a personal view and representing the view of a police officer or officers on their behalf. No doubt those involved in the procedures described in the various affidavits will take care to avoid such confusion arising in future. Meantime, I will reserve the expenses of these proceedings.