Neutral Citation Number: [2020] EWHC 385 (Admin) No. CO/374/2020

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice

Friday, 7 February 2020

Before:

MR JUSTICE SAINI

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
APS SHORT & Ors. Claimants

- and -

(1) POLICE MISCONDUCT TRIBUNAL
(2) CHIEF CONSTABLE OF
BEDFORDSHIRE POLICE Defendants

- and -

THE INDEPENDENT OFFICE
FOR POLICE CONDUCT Interested Party

Hearing date: 6 February 2020

MS SUSANNAH STEVENS (instructed by Slater and Gordon) appeared on behalf of the Claimants.

THE FIRST DEFENDANT did not appear and was not represented.

MR JOHN BEGGS QC AND MS ELIZABETH FOX (instructed by the Bedfordshire Police) appeared on behalf of the Second Defendant.

MS FIONA BARTON QC (instructed by the Independent Office for Police Conduct) appeared on behalf of the Interested Party

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A P P R O V E D J U D G M E N T

MR JUSTICE SAINI:

This judgment is in 9 parts as follows:

I. Overview - paras [1-20]

II. The Facts and Procedural Chronology - paras [21-38]

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VIII. Conclusion - paras [108-113]

IX. Postscript - paras [114-118].

I. Overview

1 On 4 November 2013, police officers from the Bedfordshire Police Service detained Mr Leon Briggs under section 136 of the Mental Health Act 1983. Mr Briggs was first physically restrained on the street and was then taken in a police van to Luton Station where he was further restrained in a cell.

2 During the course of restraint in the cell, he became unresponsive. Mr Briggs was pronounced dead at 4:14 pm on 4 November 2013 at Luton and Dunstable Hospital. The circumstances surrounding Mr Briggs' death have attracted substantial media attention. Mr Briggs, a black male, was aged 39 at the time of his death.

3 The Claimants are six police officers who face serious allegations of gross misconduct which arise out of Mr. Briggs' detention and restraint. The hearing of these allegations was due to commence before the First Defendant, the Police Misconduct Tribunal ("the

Tribunal") on Monday this week, 3 February 2020. That hearing has a time estimate of some four weeks and had been fixed for the convenience of the Claimants' Counsel as long ago as March 2019.

4 In broad summary, the Claimants argue that, because of prejudice arising from the contents of certain documents which were read (at least in part) by the legally qualified chair of the Tribunal, either the Chair, or the entire Tribunal should have recused themselves from hearing the proceedings.

5 The Claimants complain that the Chair or the Tribunal have effectively become tainted by the contents of the controversial documents such that the fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the Tribunal or Chair was biased. The Chair is a non-practising solicitor and retired judge, the other two members are an experienced magistrate and senior police officer respectively.

6 That is the main issue before me, although there are a number of other decisions of the Tribunal challenged on procedural fairness grounds.

7 The decision to dismiss the recusal application was made by all three members although, as I have said, it appears that the magistrate and police officer members did not consider the controversial documents in coming to the decision.

8 On Friday 31 January 2020, that is the last working day before the hearing was due to begin, the Claimants issued a claim for judicial review in the Administrative Court seeking to quash the decision of the Tribunal made on 20 January 2020 not to recuse itself from hearing the proceedings.

9 The relief sought in the Claim Form is important and I need to set it out in full. At section 7 of the Claim Form, the following two orders were sought:

> "1. An order quashing the recusal decision and remitting the case to a fresh Tribunal to hear the case.
> 2. An order staying the Bedfordshire Police misconduct proceedings due to commence on 3 February 2020 until this application is determined."

10 At the same time as issuing the claim, the Claimant made an application for urgent injunctive relief staying the proceedings which were due to start after the weekend.

11 The injunction application came before me as the urgent applications judge on the evening of Friday 31 January 2020. The materials put before me were substantial. Aside from pleadings, they consisted of four bundles of evidential materials and two bundles of authorities.

12 Having done my best to absorb these materials, I granted a stay. I was, however, very concerned as to whether the pre-action protocol had been complied with and, specifically, I had no knowledge as to the position of the Defendants and Interested Party.

13 In making the interim order on the evening of Friday 31 January 2020, I made the following observations:

> "I am concerned about the delay in making the application given that the decision in issue was made on 20 January 2020 with reasons given on 23 January 2020. The pre-action letter was also only sent today with an unrealistic timescale for response. That said, I recognise there is a basis for a stay, and indeed that stay may be short if the Claimants cannot persuade the Judge at the return day on Thursday 6 February 2020 that it should continue. That seems to me the course likely to cause least

> prejudice pending an *inter partes* hearing. I have directed that the matter be heard by me (if possible) next week given that I am sitting in the Administrative Court and have spent some time reading the papers".

14 Although it was not put before me by the Claimants in the application for urgent consideration on the evening of Friday 31 January 2020, I am now aware that a detailed pre-action response had in fact been sent to the Claimants' solicitors by the Independent Office for Police Conduct ("IOPC"), the Interested Party, on Thursday 30 January 2020 (the day before the injunction application).

15 It is to be regretted that the Claimants did not draw this letter to my attention. It was highly relevant to the issue of interim relief. I will return to this matter in due course and it is addressed in more detail in the Postscript to this judgment where I make reference to certain important provisions of the Administrative Court Guide 2019 concerning urgent applications.

16 Having granted interim relief in these circumstances, the Tribunal proceedings were stayed and I invited submissions from the parties as to how to deal with the return day. Given how long it had taken to convene the Tribunal proceedings and the near 6 years of delay since Mr Briggs' death, I am sure that the stay caused not only serious inconvenience to all (including the Tribunal) but also concern as to how much further delay would be involved. That would be a real concern to both the officers and the family of Mr Briggs.

17 Following the parties' submissions as to procedure in the week commencing Monday 3 February 2020, I made a case management order on Tuesday 4 February 2020. I directed that there be a "rolled-up" permission and substantive hearing before me on Thursday 6 February 2020. I also asked that the parties focus on certain specific matters which seemed to me (based on the pleadings and correspondence) to be the central issues. The Defendants

and Interested Party did not serve summary or detailed grounds of resistance but did, like the Claimants, serve skeleton arguments. This is not a case where there is any material dispute of fact and there was no need for evidence.

18 The permission and substantive hearing took place yesterday and, given the urgency of the matter, I am delivering this oral judgment this morning, Friday 7 February 2020.

19 I understand from Counsel for the parties that, subject to the outcome of these proceedings, the Tribunal will start the hearing this coming Monday 10 February 2020.

20 I record at the outset that I found the oral and written submissions of all parties of substantial assistance and I am grateful to all Counsel and their Solicitors for the efforts they made to enable the Court to deal with the issues within a week of commencement of the claim.

II. The Facts and Procedural Chronology

21 The parties are agreed that the broad nature of the allegations of misconduct faced by the Claimants can be taken from the Regulation 21 Notice served on the First Claimant, Loren Short, on 8 August 2019. The reference to Regulation 21 is to the Police (Conduct) Regulations 2012, which are the provisions which apply to these proceedings, although new regulations govern the position in respect of post 31 January 2020 complaints. All references in this judgment are to the 2012 Regulations.

22 In very broad summary, the allegations in the misconduct proceedings against each of the Claimant officers relate to:

i.) use of excessive force on the street (focusing on detention in the prone position);

ii.) a failure to take Mr Briggs to a mental health establishment to be assessed, rather than a police station;

iii.) a failure to transport him to the mental health assessment location in an ambulance;

iv.) use of excessive force at the police station; and, finally

v.) a failure to monitor and/or care for Mr Briggs' welfare on the street and at the police station.

23 Given the focus of the argument before me by Counsel for the Claimants, I should at this point identify what is not alleged against the Claimants.

24 There are no allegations relating to Acute Behavioural Disorder ("ABD") or excited delirium, nor any suggestion of a failure to take Mr Briggs immediately to hospital, as opposed to a mental health assessment centre. There are also no allegations that the officers caused and/or contributed to the death of Leon Briggs or allegations relating to treatment of Mr Briggs in a different manner due to his ethnicity or race.

25 It is in relation to these areas - where no allegations are made against the Claimants - that greatest objection is taken to the documents which were put before the Chair.

26 The second Defendant is the Appropriate Authority (or "AA") for the purposes of the Regulations. The misconduct hearing arises from an independent investigation by the IOPC and the misconduct proceedings were directed by the IOPC pursuant to para.27(4) of sch.3 of the Police Reform Act 2002. The IOPC is accordingly an Interested Party.

27 The Regulation 21 Notice appended, in accordance with my reading of Regulation 21, and in particular Regulation 21(1)(c) a large number of documents; and each relevant Claimant officer signed for his or her receipt of these documents.

28 Quoting from the Notice, the following documents were appended to it (I have underlined the principal documents which are controversial (either in their entirety or unless redacted)):

- IOPC Report dated 10/02/2016
- Bundle Statements Pages 1-340
- Bundle Statements Pages 341-651
- Bundle Documents 1 Pages 1-173
- Bundle Documents 2 Pages 1-316
- Bundle Documents 2 Pages 317-609
- Bundle Documents 2 Pages 610-926
- Bundle Documents 2 Pages 927-1247
- Bundle Documents 2 Pages 1248-1461
- Bundle Documents 3 Pages 348-760
- Bundle Documents 4 Pages 1-329
- Bundle Documents 4 Pages 330-694
- Bundle reports Pages 1-16
- Bundle of Medical Evidence Pages 1-202
- Copy Disc DO Scullion Interview
- Chief Inspector Michael Brown Report dated 10th May 2018

29 The IOPC Report, the Bundle of Medical Evidence, the witness statements and the Report of Chief Inspector Michael Brown are particularly important because they contain what the Claimants contend is highly prejudicial material which should not have been put before the Chair (either at all or at least in an unredacted form). It is said that these documents trespass into the prohibited areas where, as I have sought to explain earlier, no allegations of misconduct are made against the Claimants. I will need to return to the contents of these documents in more detail in due course.

30 Returning to the chronology, it is clear from the Statement of Facts and Grounds, and further material before me, that the Claimants became aware in August 2019 (and certainly no later than 3 October 2019) that the Chair had been provided with material which they believed to be irrelevant and inadmissible.

31 I refer here to the email correspondence in the bundles before me. On 3 October 2019, Mr Downes of Slater and Gordon, representing the Claimants, wrote to DS Elizabeth Slaughter, acting on behalf of the AA, an email in which he said as follows:

> "Good morning Liz
>
> Why were the papers sent to Chair before we have had a chance to request redactions? Can you ask the Chair if he has read some or all of them? If not, can you request that he does not read them or stops reading them if he has not finished?
>
> This investigation took nearly 6 years yet as soon as the papers are served on us we are expected to comply with deadlines in within a matter of weeks. It is unfair. I will get the requested redactions to you as soon as I can."

32 In due course, on 1 November 2019, the Claimants' representatives contacted the Chair directly in an effort to ascertain what had been read by him. Through their Solicitors the Claimants raised the issue of a possible recusal application in two telephone hearings during November 2019 – the latter on 19 November 2019.

33 Directions were given by the Chair that the Claimants serve a skeleton argument supporting any application for recusal of the Chair by 9 December 2019. The skeleton was served on 10 December 2019. My understanding is that it proved impossible to fix a date when the Tribunal and Counsel were available for an oral hearing of the recusal application in December 2019 or January 2020.

34 Having initially suggested that the Chair should consider the issue of recusal himself, the Claimants then declined to consent to that course and the issue of recusal therefore had to be determined by the whole Tribunal.

35 The recusal issue was listed for an oral hearing on 13 January 2020. But the Claimants informed the Tribunal that it was to be attended on behalf of the officers by Counsel who was instructed only to apply for an adjournment of the recusal application, and not to address the Tribunal on the merits. It was said on behalf of the Claimants to the Tribunal that it had not been possible to instruct alternative Counsel with relevant experience.

36 In these circumstances, the Tribunal determined that the recusal application would be determined on the papers and gave the Claimants the opportunity to provide a written response to the skeleton arguments filed by the AA and IOPC.

37 As I have already indicated, the application for recusal was in due course refused on 20 January, with written reasons for refusal handed down on 23 January 2020.

38 It was not until the last working day before the misconduct hearing was listed that the Claimants chose to issue the application before this Court, as I have outlined earlier.

III. The Decisions Challenged

39 The Claimants seek permission to apply for judicial review of the following decisions of the Tribunal:

a) the Chair's decision not to recuse himself;

b) the decision that the recusal application should be determined on the basis of written submissions alone, with no right of attendance on the part of the defence to make oral submissions on the date that the Tribunal convened to decide the application;

c) the decision that the recusal application would be determined by the whole Tribunal but that two members of the Tribunal would not be provided and would not read the documents in issue;

d) the failure to provide any disclosure to the defence as to what the Chair had told other members of the Tribunal about the content of the documentation he had read; and, finally

e) the refusal to recuse.

40 As I identified earlier in this judgment the sole form of final relief sought was recusal. In my judgment, in order to obtain that relief, the Claimants must show that the Tribunal or the Chair should have recused themselves. Challenging the other procedural decisions – such as, for example, the decision not to have an oral hearing – is not relevant to that relief. Success in those other challenges does not lead to recusal. They are of academic relevance only.

41 Accordingly, the Claimants must succeed on the core issue of recusal. That is why I will focus on that issue in this judgment and asked the parties to focus their submissions on that point. I will, however, also give my brief observations on the other challenges when I conclude this judgment.

42 Turning then to the heart of the claim: was the Tribunal right not to recuse itself?

43 Before addressing that matter, I need to address a preliminary point - which is the issue of alternative remedy. I raised this issue with the parties in my own observations following the grant of the stay, and it is also a point forcefully argued both by the IOPC and AA.

IV. Alternative Remedy

44 The relevant legal principles governing alternative remedies are concisely summarised in the July 2019 edition of the Administrative Court Judicial Review Guide.

45 Para.5.3.3.1 of the Guide provides:

> "Judicial review is often said to be a remedy of last resort (see *R (Archer) v Commissioners for Her Majesty's Revenue and Customs* [2019] EWCA Civ 1021 at [87] – [95]).31 If there is another method of challenge available to the claimant, which provides an adequate remedy, the alternative remedy should generally be exhausted before applying for judicial review.
>
> 5.3.3.2. The alternative remedy may come in various guises. Examples include an internal complaints procedure or a statutory appeal.
>
> 5.3.3.3. If the Court finds that the claimant has an adequate alternative remedy, it will generally refuse permission to apply for judicial review."

46 I also drew the attention of the parties to the recent judgment of Sales LJ in *R (on the application of Glencore Energy UK Limited) v Revenue and Customs Commissioners* [2017] EWCA Civ 1716; [2017] 4 WLR 213; [2018] STC 51. I make particular reference to paras.51- 58 of Sales LJ's judgment.

47 In addition, I referred the parties to *R (on the application of Archer) v Revenue and Customs Commissioners* [2019] EWCA Civ 1021; [2019] 1 WLR 6355; [2020] 1 All ER 716 [2019] STC 1353. I refer in particular to paras.90 and following of the judgment of Henderson LJ.

48 Those two cases are the most recent higher court pronouncements in relation to the scope and nature of the principles which dictate that judicial review is a remedy of last resort. These cases have underlined how important it is that the courts firmly police the use of judicial review when other remedies are available. Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives which are highly relevant in the context of this case. First, it ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what

procedures are appropriate for particular contexts. Second, it minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. Third, it promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it is available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention is really required.

49 These cases emphasise that close attention needs to be given to the system of remedies set out by Parliament when considering whether judicial review can be invoked before those remedies have been sought. As I describe below, in my judgment, in this case there is a bespoke and detailed statutory regime of remedies. The entire police misconduct process is a creature of statute and there are protections for the Claimants at every stage of that process.

50 So, the statutory regime includes a designated avenue of appeal to the Police Appeals Tribunal, which is wholly independent of the Tribunal. The process is governed by The Police Appeals Tribunals Rules 2012 ("the PAT rules"). There is a right of appeal in respect of both finding and outcome. The first instance stage of these misconduct proceedings has not even reached the stage of oral hearings, and it must be noted that the allegations may not be proved against the Claimants.

51 Bearing in mind the principles explained recently in *Glencore* and *Archer*, in my judgment, the availability of a statutory process which includes an appeal process is, on the facts of this particular case, fatal to this claim. I will return to my reasons for that conclusion after referring to some additional case law and the detail of the PAT rules.

52 In *R v Birmingham City Council ex parte Ferrero Ltd* [1993] 1 All ER 530, the Court of Appeal reversed the exercise of the judge's discretion at first instance to grant judicial review. Taylor LJ referred to a number of earlier authorities and concluded, at p.537 [italicised emphasis added]:

> "These are very strong dicta, both in this court and in the House of Lords as cited, emphasising that where there is an alternative remedy and *especially where Parliament has provided a statutory appeal procedure* it is only exceptionally that judicial review should be granted. It is therefore necessary, where the exception is invoked, to look carefully at the suitability of the statutory appeal in the context of the particular case."

53 Pursuant to r.4(4) of the PAT rules, if the allegations are found proved, an officer may appeal to the PAT on grounds which include:

i.) that the finding or disciplinary action imposed was unreasonable; or

ii.) 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

iii.) that there was a breach of the procedures set out in the Conduct Regulations, the Police (Complaints and Misconduct) Regulations 2012 or sch.3 to the 2002 Act, or other unfairness which could have materially affected the finding or decision on disciplinary action.

54 Having regard, in particular, to this third potential basis for an appeal, in my view it is clear that the statutory misconduct process is sufficiently robust to address all of the issues raised by the Claimants.

55 Specifically, a complaint about apparent bias, and the other kinds of procedural failings in respect of which complaint is made, would fall squarely within the third limb I have identified above (namely, other unfairness which could have materially affected the finding or a decision on disciplinary action).

56 Rule 5A of the PAT rules provides for materially the same appeal rights as r.4, but in respect of former officers. In the event that the Claimants are dismissed, the same remedies are available via either appeal route.

57 In my judgment, if the Claimants' case concerning the recusal (or the procedures) which led to the refusal of the application are meritorious, those arguments are no less likely to succeed in the PAT than in the Administrative Court (if indeed the allegations are found proved and an appeal is necessary).

58 If the appeal is allowed only to the extent of remitting the allegations to a new panel then the PAT's ruling would have the effect of reinstating the officers, pending a decision by a fresh panel. Consequently, in that regard at least, there would be no damage to the officers.

59 It is clear in my judgment that the statutory framework is capable of giving rise to the same remedies as judicial review. The statutory route available is an adequate alternative remedy as a matter of substance: it is practically available, and there can be no suggestion, to my mind, that the procedure by which it is obtained is inadequate.

60 However, the case law also provides that, where so-called "exceptional circumstances" arise, judicial review may be appropriate notwithstanding the existence of alternative remedies. That issue accordingly became the focus of the oral arguments before me.

61 Having considered the written and oral arguments forcefully made by Counsel for the Claimants, in my judgment, the facts of this case do not give rise to exceptional circumstances.

62 There is nothing exceptional about the fact that a preliminary legal argument has been determined against a party. It is a common occurrence in all forms of litigation. It is regularly the case that in courts and tribunals decisions concerning admissibility of evidence, in particular evidence which may be contended to be prejudicial, are made contrary to the arguments of a particular party. It would be surprising if that fact alone gave rise to exceptional circumstances.

63 Further, I have had specific regard to each of the matters relied upon by Counsel for the Claimants in her written Grounds in coming to my conclusion that those matters do not amount to exceptional circumstances. Of those points in her oral arguments she focused in particular on the overall injustice of the situation faced by the Claimants, including the fact there would be serious stress suffered by them, as well as costs and inconvenience if they had to run through the entire process and wait to appeal to the PAT to complain about apparent bias. It was also pressed upon me that the particular complaint made in this case is one which raises an issue of law, not one requiring specialist knowledge. That, to my mind, is a factor of limited relevance when balanced against the need to ensure that the Parliamentary allocation of competence to the PAT should generally be respected.

64 I have also considered the cases which Counsel for the Claimants focussed on in her submissions. These are the well-known trio of cases: *R v Chief Constable of Merseyside Police ex parte Calveley* & *Ors* [1986] QB 424; [1986] 2 WLR 144; [1986] All ER 257; *R v Chief Constable of Merseyside Police ex parte Merrill* [1989] 1 WLR 1077 and *R v*

(Wilkinson and others) v Chief Constable of West Yorkshire [2002] EWHC 2353 (Admin); [2002] All ER (D) 310 (Oct).

65 These cases do not advance the Claimants' position. Each of these cases arose out of a refusal to stay misconduct proceedings for abuse of process. In my judgment that is highly significant because it meant that the relevant judicial reviews, if successful, would bring an end to the misconduct proceedings and thus avoid contested hearings on the facts lasting weeks and followed by appeal processes. It is not difficult to identify why such facts might be said to give rise to exceptional circumstances.

66 That is far from the case here. The present application simply brings delay not finality.

67 Insofar as there is reliance by the Claimants upon savings in hearing length and cost, I agree with the AA and IOPC that this fact, in itself, would not amount to 'exceptional circumstances'. The period of time it takes for proceedings to run their usual course is simply a necessary consequence of the process. It is not 'exceptional'. Further, the submissions on prejudice arising from dismissal of the officers are necessarily predicated upon the assumption that a hearing will result in dismissal. The outcome will only be determined at a hearing.

68 Finally, in coming to my conclusion, there is nothing exceptional about this case and I have not overlooked the substantial reliance placed by Counsel for the Claimants on the case of *R (on the application of Squier) v General Medical Council* [2015] EWHC 299 (Admin); [2015] All ER (D) 268 (Feb). It seems to me that was a case on specific facts, as identified in the judgment of Ouseley J at para.22.

69 Reliance was placed by the AA and the IOPC on the decision of Jay J in the case of *R (on the application of Beale) v Special Case Panel* [2018] EWHC 759 (Admin), but that is also

a case based upon specific facts where Jay J decided there were no exceptional circumstances. Like *Squier*, that case does little to assist me.

70 It is ultimately for me to decide whether or not there are exceptional circumstances on the facts before me, and I am not satisfied that test is met.

71 I could end this judgment at this stage because I am going to refuse permission on the basis of the existence of an alternative remedy. However, given that I heard detailed submissions from Counsel for the Claimants on the merits I will consider the recusal issue substantively. I have not only heard argument on that issue, but I have also had time during this week and overnight to consider and reflect on the documents in respect of which complaint is made.

72 I turn, therefore to consider, the argument concerning apparent bias and recusal on its merits.

V. Apparent Bias

73 As I have already indicated, the Tribunal as a whole decided to consider the recusal application although, in fact, only the Chair had read certain of the documents. The written reasons the Tribunal gave for refusing that application (handed down on 23 January 2020) are not relevant to my task in this judicial review because when deciding whether the Tribunal was right not to recuse itself, it is not for me to assess the Tribunal's reasons on some form of *Wednesbury* or rationality basis.

74 Rather, it is appropriate for me to decide for myself (as the hypothetical fair minded and informed observer) and on the basis of the same materials as were before the Tribunal/Chair, whether they/he should have recused themselves. In taking this approach, I have regard to a number of Court of Appeal authorities but, in particular, I refer to what was said by

Mummery LJ in the case *AWG Group Limited v Morrison* [2006] EWCA Civ 6; [2006] 1 WLR 1163; [2006] 1 All ER 967:

> "19. What is the position of this court on an appeal from the judge's decision not to recuse himself? If the judge had a discretion whether to recuse himself and had to weigh in the balance all the relevant factors, this court would be reluctant to interfere with his discretion, unless there had been an error of principle or unless his decision was plainly wrong.
>
> 20. As already indicated, however, I do not think that disqualification of a judge for apparent bias is a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him. On the issue of disqualification an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias."

75 In approaching that question, I will proceed on the basis which is most favourable to the Claimants and I will assume (contrary to the facts) that both the Chair and both of the other Tribunal members have read all of the documents which were attached to the Regulation 21 Notice. I am going to make that assumption, even though it is clear on the material before me that only the Chair had read the materials (and not even, in fact, all of the materials in respect of which complaint is made).

76 Starting with the relevant legal principles, there was no real dispute between the parties. A misconduct hearing of the type in issue in this judicial review must be determined in accordance with the principles of natural justice and fairness. In my view, the common law standards and Article 6 ECHR standards, in this regard, are not different and I do not need to decide the interesting question as to whether or not Article 6 (in its civil or criminal form) applies to the present proceedings.

77 In considering the issue of recusal, the test is one of apparent bias and the test for that has been well-established by a number of cases.

78 The test in respect of apparent bias was set out by the House of Lords in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357; [2002] 2 WLR 37; [2002] 1 All ER 465;; [2002] LGR 51, per Lord Hope at para.103**:**

> " ... The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

79 The House of Lords considered what would be expected of the "fair-minded and informed observer" in *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2; [2006] 1 WLR 781**.** The case arose from a disability appeal tribunal hearing where the medical member of the panel, which consisted of a legally qualified chairman and two other members including the medical member, was a doctor who had for a number of years provided reports on behalf of the Benefits Agency as an independent examining medical practitioner.

80 In dismissing the Claimant's appeal and finding that there was no reasonable apprehension of bias, Lord Hope explained at para.17:

> "The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or

> tribunal member who is under scrutiny. It is to be assumed, as Kirby J put it in *Johnson v Johnson* [2000] 201 CLR 488, 509, para.53, that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant."

81 The recent Court of Appeal judgment in *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468 is also relevant. This appeal followed a trial judge speaking with one party's counsel in private and alone. The judge told counsel that he thought the counterclaim seemed weak and the claimant's case had several evidential gaps and asked counsel to pass that information to his opponent. A note of the conversation was sent. Although the Court of Appeal recognised that what the trial judge did was a mistake, it concluded that the threshold of "apparent bias" was not reached.

82 The Court of Appeal summarised the key applicable principles at para.17 – para.19:

> "17. The legal test for apparent bias is very well-established. Mr Faure reminded us of the famous statements of Lord Hewart CJ *in R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at 259 that 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done;' and that 'nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.' These principles remain as salutary and important as ever, but the way in which they are to be applied has been made more precise by the modern authorities. These establish that the test for apparent bias involves a two stage process. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then

ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased: see *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, para. 102 – para.103. Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case: see *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117, para 28; *Secretary of State for the Home Department v AF (No2)* [2008] EWCA Civ 117; [2008] 1 WLR 2528, para 53.

18. Further points distilled from the case law by Sir Terence Etherton in *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515; [2014] 1 WLR 1943, at para 35, are the following:

> (1) The fair-minded and informed observer is not unduly sensitive or suspicious, but neither is he or she complacent: *Lawal v Northern Spirit Ltd* [2003] UKHL 35; [2003] ICR 856, para 14 (Lord Steyn).
>
> (2) The facts and context are critical, with each case turning on 'an intense focus on the essential facts of the case': *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416, para 2 (Lord Hope).
>
> (3) If the test of apparent bias is satisfied, the judge is automatically disqualified from hearing the case and considerations of inconvenience, cost and delay are irrelevant: *Man O' War Station Ltd v Auckland City Council (formerly Waiheke County Council)* [2002] UKPC 28, para 11 (Lord Steyn).

19. In *Helow v Secretary of State for the Home Department* Lord Hope observed that the fair-minded and informed observer is not to be confused with the person raising the complaint of apparent bias and that the test ensures that there is this measure of detachment: [2008] UKHL 62; [2008] 1 WLR 2416, para 2; and see also *Almazeedi v Penner* [2018] UKPC 3, para 20. In the *Resolution Chemicals* case Sir Terence Etherton

> also pointed out that, if the legal test is not satisfied, then the objection to the judge must fail, even if that leaves the applicant dissatisfied and bearing a sense that justice will not or may not be done: [2013] EWCA Civ 1515; [2014] 1 WLR 1943, para 40."

83 I turn to the materials in respect of which complaint is made. To give a few examples of the material within these documents which is said to be prejudicial to the Claimants and which was the focus of Counsel's submissions: (i) in the IPCC Report, the opinion is expressed that the CCTV footage indicates that one of the officers "used more than minimal force on Mr. Briggs' torso whilst he was in the prone position"; (ii) the author of the IPCC Report also concluded that a reasonable tribunal could conclude "…the officers did know or should have known that Mr Briggs was displaying symptoms of ABD and therefore treated him as a medical emergency"; (iii) the author of the IPCC Report said that the officers might have perceived Mr Briggs was going to be aggressive because of a perception that persons from BME groups with mental health issues are likely to be more dangerous: (iv) Chief Inspector Brown drew certain conclusions to the effect that Mr Briggs should have rapidly been transferred to an Emergency Department but also said that there were incomplete, confused and contradictory processes in Bedfordshire as to how these situations should be managed; (v) the autopsy report identified that certain indicators concerning levels of blood in the brain would frequently be seen in patients suffering from asphyxia (but also suggested that there were high levels of amphetamines found); (vi) further medical evidence suggested that there was evidence of stimulant induced behaviour on the part of Mr Briggs but that given his behaviour he should have been taken to a section 136 suite at a hospital and not a police station.

84 It is clearly the case that opinions were expressed by a number of people (with varying degrees of emphasis) in the material to which objection is taken; and these opinions do on occasion go into the areas where there are no allegations of misconduct against the Claimant

officers. By the time of the hearing before me, the core hearing bundle for the Tribunal did not include any of the material (save for a redacted version of the IPCC Report).

85 Although this is a summary, I have considered all of the material that was put before the Chair. Having considered those materials during the course of Counsel's submissions, and also having reviewed them overnight, it seems to me that the observation made by Counsel on behalf of the AA, in respect of these materials, to the effect that the materials effectively go "both ways" is a fair one. By that I mean there is material in these documents which could be said to be arguably detrimental towards the Claimant officers but, equally, there is much material in them which is potentially supportive of them – both in the medical evidence and in the views of Chief Inspector Michael Brown. It is far from clear to me that this material is prejudicial in the sense required by the cases.

86 In this regard, I have noted what the Tribunal had to say at para.37 of its decision on recusal (and I am assuming that these comments reflect, principally, the observations of the Chair):

> "By way of illustration counsel has referred to race: if race is not an issue in the misconduct proceedings then the panel are capable of ensuring that such irrelevant material or opinion is simply to be ignored for the purposes of their task. The panel are fully aware, and no doubt will be reminded, that comment and opinion on irrelevant matters are to be ignored. The panel are also fully aware that there is within the public domain concern about race issues affecting the police service but that has nothing to do with this specific regulation 21 notice which they will address and determine upon the evidence at the forthcoming hearing. By way of example when deciding whether there was, or was not, a failure by the officers to take Mr Briggs to an assessment centre as opposed to a Police custody suite. The panel are also aware and believe they are able

> to distinguish between documents, policies and guidance which applied at the time (2013) and those which are prepared subsequently. Their mere production does not create the perception of prejudice or a real possibility of it."

87 I respectfully agree with these observations. It does not seem to me that the material, in itself, bearing in mind the fact that it goes both ways, was capable of giving rise to prejudice.

88 That having been said, and out of an abundance of caution, I am willing to assume in favour of the Claimants, for the purposes of this application, that the material was capable of giving rise to prejudice. In those circumstances, the approach to the recusal application would depend, in my judgment, on the nature and experience of the Tribunal concerned and, in that regard, I make particular reference to the case of *R (Mahfouz) v The Professional Conduct Committee of the GMC* [2004] EWCA Civ 233; [2004] All ER (D) 114 (Mar) at para.22 – para.25.

89 In that case, it was made clear that even when it was obvious that the Tribunal had seen prejudicial material, there is no absolute rule that such material is fatal to the fairness of the proceedings. The nature of the Tribunal is relevant. Where the panel (as in *Mahfouz* at para. 24) included:

> "… retired judges, justices of the peace, barristers, solicitors and academics. They can be assumed to understand the proper approach to issues of law and to be aware of the need to disregard irrelevant material."

In the present case, the Chair of the Tribunal and one member of the Tribunal fall squarely within these categories. I note also that the remaining member is an experienced police officer who I consider to be in an analogous position.

90 In *Subramanian v General Medical Council* [2003] UKPC 64; [2003] Lloyd's Rep Med 69, the features of the GMC panel were considered in the context of a member having been made aware of a previous finding of serious professional misconduct. The Privy Council held that a fair-minded observer would be assumed to have knowledge of the GMC's long and well-established system with statutory backing, operated by those selected and elected to the task, and supported by a comprehensive appeal system. The Privy Council concluded at para.21 that:

> "… there was no danger here of any prejudice to the doctor: this was a well-established quasi-professional Tribunal which has been directed in plain terms to pay no attention to the previous conviction because it would give them no assistance, a direction reinforced by the fact that it dealt with events more than 20 years before."

91 In my judgment, the position of the Tribunal in this case is directly analogous to that of the panels in *Mahfouz* and *Subramanian***.** As I have already observed, the Chair is a legally qualified non-practising solicitor who, for many years, sat as a judge; one member of the Tribunal is an experienced magistrate, the other an experienced senior police officer; and every one of them is well-placed to identify and ignore irrelevant and inadmissible material. The possible prejudice in *Mahfouz* and *Subramaniam* was clear and obvious and arguably serious (unlike the facts before me) but, notwithstanding that fact, the test for apparent bias was not met given the nature of the tribunals concerned.

92 My conclusion is accordingly that, even if the officers were in a position to prove prejudice arising out of the contents of the documents (contrary to my own views) the test for apparent

bias justifying recusal was not met. I would go so far as to say that the submission that the test for justifying recusal was met was not even, in my view, arguable on the basis of the factual material and the authorities.

93 Before I conclude this aspect of my judgment, I should say that it is likely to be a common occurrence in tribunals, including within the Police Misconduct Tribunal, that members will read documents or hear oral evidence which might be inadmissible, irrelevant or prejudicial. I am confident that, in approaching their task professionally, they will be able to put such material out of their minds.

94 Of course, there may be a case where the material that has been put before them is so extreme in its prejudice that, even making one's best attempt, one cannot put that material out of one's mind – but that is not this case, and that will be a rare case.

95 In my judgment, a Tribunal of the type in issue in this claim, is quite able to separate the evidence it hears from the opinions which others may have expressed in the past. It is also well-able to distinguish between what the officers have and have not been charged with.

96 That concludes my judgment in respect of the apparent bias aspect.

VI. Process Complaints

97 As I indicated at the start of this judgment, there are a number of complaints made separately from the complaint in relation to the recusal application. I will briefly address these matters.

98 The first complaint made is in respect of the fact that the recusal application was determined on the papers. I will give my views on this complaint but as I hope is already clear, it does not seem to me that it is relevant to the particular relief being sought in this case.

99 I start by observing that there is no right to make oral submissions at misconduct hearings. Regulation 33(1) of the Police (Conduct) Regulations 2012 provides that: "the person conducting or chairing the misconduct proceedings shall determine the procedure at those proceedings." This is a wide discretion constrained only by common law principles of natural justice and fairness. I also, as I have already observed, do not consider Article 6 to materially add to those principles.

100 In this case, having determined that the recusal application would be considered on the papers, the Claimants were expressly afforded the opportunity to file a response to the skeleton arguments of the AA and the IOPC. In my view, the process was conspicuously fair in circumstances where the substantive hearing was pressing and Counsel had not been instructed to deal orally with the recusal application on the date fixed for that hearing.

101 Further, it is important that I recognise the fact that the public interest in this case did not only concern the interests of the Claimants. There were wider interests at play, all of which are considered and balanced by the statutory framework under which the police are properly held to account on behalf of the family and the general public. There is the wider public interest in having this matter heard in the window in which it has been fixed for some time and which, regrettably, is already over six years after the events to which the proceedings relate. The decision to decide the recusal application on paper was entirely consistent with the competing interests and struck the appropriate balance.

102 In addition to this complaint concerning the lack of an oral hearing, there are two further procedural complaints made. One is that the recusal application would be determined by the whole Tribunal, but the two members of the Tribunal would not be provided with and would not read the documents in issue; and, secondly, that there was a failure to provide disclosure

to the defence as to what the Chair had told other members of the Tribunal about the content of the documentation he had read.

103 Addressing these complaints briefly, in my own view, it would have been preferable for the Chair to simply decide the issue of recusal himself to avoid the risk that the other members of the panel, who had not read the documents, might somehow become aware of matters which might in due course lead to their own recusal. I make no criticism, however, of the panel or the Chair in this regard – they were clearly dealing with what was, on any view, a late application against a pressing timetable.

104 As to the second complaint, sustained submissions on behalf of Counsel for the Claimants were made to the effect that there had been a failure by the AA to comply with the then applicable Home Office Guidance concerning the preparation of materials to go before the relevant panel. It was argued that the AA should have gone through what is said to be the normal process of seeking to agree redactions of inappropriate, irrelevant or prejudicial material with the Claimants' representatives *before* putting a bundle before the Chair. It does not seem to me that I need to resolve that dispute.

105 In particular, as I indicated in oral argument to the parties, it may be that my reading of what the regulations require is fundamentally different to what happens in practice in such misconduct proceedings. In my reading of the relevant regulations, the AA is obliged to send to the entire Tribunal <u>all</u> of the materials provided to the officer with the Regulation 21 notice. It may be that that does not happen in practice, and it may be that there has developed some form of interim process where, rather than all of those documents going to the Tribunal, there is a dialogue between the officers' representatives and the AA where the body of Regulation 21 documents are in fact redacted or removed from materials sent to the Tribunal.

106 It is not appropriate for me in this judgment to make general comments as to what is appropriate but I do recognise that, in this particular case, it may be that the process adopted by the AA did not strictly comply with what was in the Home Office Guidance. It did seem to me however to be in accordance with my reading of the Regulations.

107 Even if there is a valid complaint to be made, it was argued on behalf of the AA that what they were seeking to do was to expedite the process and there was, in fact, no harm in equipping the Chair alone with all of the material so that he could consider that material as part of an overall effective case management function. As to whether or not that is appropriate or correct, it is not necessary for me to make any decision, but I mention those points just to assure the parties that I have not lost sight of them.

VII. Delay

108 Both the AA and the IOPC have also argued the point of delay, and they have submitted before me that, as early as October 2019, the potential grounds for making this judicial review application had arisen and the Claimants did not act promptly.

109 Given that I am refusing permission, both on grounds of alternative remedy and on substantive grounds, I do not propose to deal any further with the delay arguments. I should observe however that had the issue of delay been a matter which I had to decide, I have considerable sympathy with the submissions made on behalf of the AA and IOPC. It does seem to me that, on any view, the Claimants could have acted earlier.

VIII. Conclusion

110 For the reasons I have given, I refuse permission and the stay on the Tribunal proceedings is removed forthwith.

111 Before leaving the matter, I shall come back to the issue which I mentioned at the outset of this judgment, which was the application for an injunction which I considered on the papers last week on Friday evening.

112 As I have indicated, there was in fact a detailed pre-action response dated 30 January 2020 sent by the IOPC to the Claimant solicitors. That was a response to the letter before action which had been sent that very same day by Slater and Gordon on behalf of the Claimants. For reasons which are not clear to me, that letter was not put before me when I considered the application for a stay on Friday evening. I was left to do the best I could, with a substantial volume of material, to try and work out what, if anything, would be the response of the Interested Party and the Defendants to application for a stay.

113 In my view, it was wholly unacceptable for the Claimants' Solicitors not to put that letter before the Court. When one seeks an urgent injunction, on paper or orally, and particularly when one invokes the urgent application process in the Administrative Court, as a basic and well-established rule, it is incumbent upon the applicant to put all material before the judge, including any material which has been supplied by the potential respondent to the application.

114 Had the letter of 30 January 2020 from the IOPC in fact been put before me on the evening of 31 January 2020, I am highly likely to have refused a stay because, when I looked at the substance of the points made on behalf of the IOPC in that letter, namely in relation to the question of alternative remedy, and the question of the underlying merits of the recusal application, the points that were being deployed by the IOPC reflect, in substance, my own reasons for having dismissed this application for judicial review.

115 In those circumstances it is highly unlikely that I would have granted a stay and that the proceedings before the Tribunal, which were meant to start earlier this week on Monday, would have gone ahead.

IX. Postscript

114 On oral delivery of this judgment on the morning of Friday 7 February 2020, I made costs orders in favour of the AA and the IOPC, such costs to be assessed on the standard basis. The IOPC however also made an application for indemnity costs based on the Claimants' conduct in relation to the failure to draw the pre-action response of the IOPC to my attention when the application for an injunction was made on 31 January 2020. I have referred to that matter in more detail above.

115 Regrettably, Counsel for the Claimants was without instructions in relation to the reasons for that failure (her relevant instructing solicitor was not, as I understood it, present at court). In light of that fact, and in fairness to the Claimants and their Solicitors, I agreed to deal with that application in writing.

116 I should emphasise that I make no criticism of Counsel for the Claimants. She was, it seemed to me, seeking to deal with a situation which was not of her own making.

117 If the application for indemnity costs is pursued by the IPOC and/or the AA, the Claimants' solicitors will need to provide a full explanation to the Court as to how this situation arose and how the failure was consistent with well-established rules governing without notice applications.

118 In this regard, I draw to their attention the following parts of the Administrative Court Judicial Review Guide 2019 in Section 14 (Specific Practice Points, Duty of Candour) and Section 16 (Urgent Cases):

> "14.1.3 The Court will take seriously any failure or suspected failure to comply with the duty of candour. The parties or their representatives may be required to explain why information or evidence was not disclosed to the Court, and any failure may result in sanctions".

> "16.3.5. The fact that a judge is being asked to make an order out of hours, usually without a hearing, and often without any representations from the defendant's representatives and in a short time frame, means that the duty of candour (to disclose all material facts to the judge, even if they are not of assistance to the claimant's case) is particularly important, see paragraph 14.1 of the Guide".

> "16.4.6 Wherever possible the Court will want representations from the defendant before determining any application made in advance of issuing the claim form. Unless, by not granting that order, irreversible prejudice would be caused to the claimant, the Court will generally make an order allowing the defendant a short period to file written representations or the Court will direct that the application should be dealt with at a hearing listed with notice being provided to the defendant".

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