Neutral Citation Number: [2021] EWCA CIV 1699

Case No: C1/2020/0497

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISON
ADMINISTRATIVE COURT
MRS JUSTICE JEFFORD DBE
CO/3817/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 November 2021

Before:
LORD JUSTICE MOYLAN
LORD JUSTICE MALES
and
LORD JUSTICE PHILLIPS

- -

Between:

THE QUEEN
(On the application of the
Chief Constable of South Yorkshire Police) **Appellant**
- and -
(1) LLOYD KELLY
(2) THE CROWN COURT SITTING IN SHEFFIELD **Respondents**

- -
- -

Dijen Basu QC (instructed by **South Yorkshire Police**) for the **Chief Constable**
David Lock QC and **Julia Smyth** (instructed by **Slater and Gordon Lawyers**)
for the **First Respondent**
The **Second Respondent** did not appear and was not represented

Hearing date: 5 May 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Friday 19 November 2021 at 10:30am

Lord Justice Phillips:

1. On 5 June 2005 the first respondent ("Mr Kelly") was required to retire as a serving police officer due to permanent disablement. Although his disability arose from injuries suffered in the course of police service, it was not until 19 May 2016 that Mr Kelly claimed an injury award under regulation 11 of the Police (Injury Benefit) Regulations 2006 ("the PIBR"), comprising a gratuity and injury pension. On 25 July 2017 the appellant ("the Chief Constable") awarded the appropriate gratuity and correctly calculated the annual amount of injury pension, payable as from the date of the claim in May 2016, but refused to back-date the pension to Mr Kelly's retirement. Mr Kelly appealed that decision to the Crown Court under regulation 34 of the PIBR.

2. The Chief Constable resisted Mr Kelly's appeal, contending (i) that the Crown Court did not have jurisdiction to determine the dispute, an appeal under regulation 34 being limited to the issues of whether there was a right to an award and, if an award was made, the amount of the gratuity or annual pension, not the period in respect of the pension would be paid; and, in any event, (ii) that Mr Kelly's entitlement to an injury award only arose upon determination in 2017 and was payable from the date he made a claim, there being no obligation on the Chief Constable to make payments retrospectively to the date of Mr Kelly's retirement.

3. On 20 July 2018 His Honour Robert Moore (sitting as a Deputy Circuit Judge in the Crown Court in Sheffield) ("Judge Moore") rejected both of those contentions, declaring that Mr Kelly was entitled to an injury pension from the date of his retirement and awarding interest on all sums at 3% per annum from 27 July 2017.

4. The Chief Constable challenged the Crown Court's decision in the Administrative Court by way of judicial review[1], the Crown Court being the defendant to those proceedings and Mr Kelly being joined as an interested party. Following a reserved judgment dated 6 February 2020, Jefford J dismissed the challenges, save that she set aside the award of interest on the ground that the Crown Court had no power in that regard.

5. The Chief Constable appealed to this Court in relation to the questions of the substantive jurisdiction of the Crown Court (ground 1) and, if there was jurisdiction, the entitlement to a back-dated injury pension (ground 2). Mr Kelly cross-appealed against the finding that the Crown Court had no power to award interest. Each of the issues so raised effectively turns on the interpretation of the relevant regulatory provisions. Permission to appeal was granted in respect of each of them.

The background facts

6. The following summary of the facts, as to which there was little disagreement, is drawn largely from the accounts set out in the judgments below.

7. Mr Kelly served as a member of the South Yorkshire Police from 29 December 1976 until his retirement on 5 June 2005. In the performance of his duties he was engaged in

[1] The claim was brought by way of judicial review of Judge Moore's refusal to state a case, but Lane J granted permission to proceed with the challenge to the Crown Court's substantive decision in the Administrative Court, without the need for the matter to be referred back to the Crown Court to state a case, following the approach in *R(Skelton) v Winchester Crown Court* [2007] EWHC 3118.

surveillance of suspected criminals, during which he was discovered by them and subjected to serious mistreatment. This was the main cause of Mr Kelly suffering from post-traumatic stress disorder, a condition which led to him being referred to a selected medical practitioner ("SMP") for assessment. On 11 April 2005 the SMP determined that Mr Kelly was disabled and that the disability was likely to be permanent. As a result, Mr Kelly was required to retire on 5 June 2005 pursuant to regulation A20 of the Police Pensions Regulations 1987, whereupon he became entitled to an "ill health" pension under regulation B3 of those regulations ("the 1987 Regulations").

8. At the time of Mr Kelly's retirement, the police pension authority did not go on to consider whether his established permanent disability was the result of an injury received without his own default in the execution of his duty, entitling him to an injury award above and beyond the ill health pension, and so did not refer to the SMP the further question of how the injury was caused.

9. It was not until 19 May 2016 that Mr Kelly wrote to the Chief Constable, asking to be referred to the SMP for a medical assessment to determine whether he was entitled to an injury pension. He was duly referred to Dr Iqbal.

10. On 14 July 2017 Dr Iqbal reported that Mr Kelly's permanent disablement was the result of an injury received in the execution of his duty. As there was no suggestion that the injury was due to any default of Mr Kelly, he was therefore entitled to an injury award. Dr Iqbal subsequently determined that Mr Kelly had a 54.64% degree of disablement (Band 3), entitling him to a gratuity of 37.5% of his average pensionable pay at retirement and an injury pension guaranteeing a minimum income (taking into account other benefits) of 80% of that average.

11. By letter sent on behalf of the Chief Constable dated 25 July 2017, Mr Kelly was informed that he had been granted an injury award, which would be backdated to 19 May 2016, the date of his application. On 7 September 2017 the Pensions Administrator wrote to Mr Kelly informing him of the gratuity he would receive. On 13 November 2017 he wrote again, informing Mr Kelly of the amount of the first injury pension payment he would receive (in December 2017), which included "Arrears 19th May 2016 to 30th November 2017: £22,125.39". Mr Kelly's case is that such arrears should have been in the order of £157,000, dating back to his retirement.

12. As prefaced above, on 26 February 2018 Mr Kelly lodged an appeal to the Crown Court.

The relevant provisions

13. The governing statute is the Police Pensions Act 1976 ("the PPA"), as amended, section 1 of which provides for regulations to be made as to police pensions. References to the "police pension authority" in the PPA and in the regulations under it are (in relation to forces such as the South Yorkshire Constabulary) to the Chief Constable.

14. Section 6 of the PPA provides for a right of appeal as follows:

> "Subject to the following provisions of this section, regulations made under section 1 above shall make provision as to the court or other person by whom appeals are to be heard and determined in the case of any person who is aggrieved – (a) by the refusal of the police

> pension authority to admit a claim to receive as of right a pension, or a larger pension than that granted, under regulations made under that section…."

15. The PIBR are regulations made under section 1 of the PPA. Regulation 7 includes the following in relation to disablement:

> "(1)…a reference in these regulations to a person being permanently disabled is to be taken as a reference to that person being disabled at the time when the question arises for decision and to that disablement being at that time likely to be permanent.
>
> "(7) Where a person has retired before becoming disabled and the date on which he becomes disabled cannot be ascertained, it shall be taken to be the date on which the claim that he is disabled is first made known to the police pension authority."

16. Regulation 11 sets out the entitlement to a police officer's injury award:

> "(1) This regulation applies to a person who ceases or has ceased to be a member of a police force and is permanently disabled as a result of an injury received without his own default in the execution of his duty (in Schedule 3 referred to as the "relevant injury").
>
> (2) A person to whom this regulation applies shall be entitled to a gratuity and, in addition, to an injury pension, in both cases calculated in accordance with Schedule 3; but payment of an injury pension shall be subject to the provisions of paragraph 5 of that Schedule and, where the person concerned ceased to serve before becoming disabled, no payment shall be made on account of the pension in respect of any period before he became disabled."

17. Regulation 30[2] provides for the determination of entitlement to an award as follows:

> "(1) Subject to the provisions of this Part, the question whether a person is entitled to any, and if so what, awards under these Regulations shall be determined in the first instance by the police pension authority.
>
> (2) Subject to paragraph (3), where the police pension authority are considering whether a person is permanently disabled, they shall refer for decision to a duly qualified medical practitioner selected by them the following questions –
>
> (a) whether the person concerned is disabled;
>
> (b) whether the disablement is likely to be permanent,

[2] Regulation 30 of the PIBR was introduced in this form in 2012, replacing the materially identical provision in regulation H1 of the 1987 Regulations.

> …;
>
> and, if they are considering whether to grant an injury pension, shall so refer the following questions –
>
> (c) whether the disablement is the result of an injury received in the execution of duty, and
>
> (d) the degree of the person's disablement;
>
> and, if they are considering whether to revise an injury pension, shall so refer question (d) above. …
>
> (6) The decision of the selected medical practitioner on the question or questions referred to him under this regulation shall be expressed in the form of a report and shall, subject to regulations 31 and 32[3], be final.

18. Regulation 34 provides for the right of appeal mandated by section 6 of the PPA as follows:

> "Where a member of a home police force, or a person claiming an award in respect of such a member, is aggrieved by the refusal of the police pension authority to admit a claim to receive as of right an award or a larger award than that granted, ….he may, subject to regulation 36, appeal to the Crown Court and that court after enquiring into the case, may make such order in the matter as appears to it to be just."

19. Regulation 43 provides for the payment and duration of awards:

> "(1) Subject to the provisions of these Regulations, in particular of regulation 11(2) (limitation on payment of an injury pension to a person who ceased to serve before becoming disabled) and Part 5 (revision and withdrawal or forfeiture of awards), the pension of a member of the police force under these Regulations shall be payable in respect of each year as from the date of his retirement.

20. Schedule 3 to the PIBR sets out how the gratuity and injury pension elements of an injury award are to be calculated by reference to degree of disablement, average pensionable pay and period of pensionable service.

Jurisdiction of the Crown Court: ground 1 of the appeal

21. Mr Kelly's appeal was against the Chief Constable's refusal to recognise that he had a right to be paid an injury pension for the period from his retirement in June 2005 to May 2016, a period of some 11 years. That was reflected in his further contention that, when the Chief Constable made the first injury pension payment in December 2017,

[3] Regulation 31 provides for appeals from the report of an SMP to a board of medical referees and regulation 32 provides for reconsideration of a medical decision in certain circumstances, including where the Crown Court so directs on an appeal under regulation 34.

that payment was some £135,000 less than was due to him. On the face of matters therefore, the appeal (regardless of its substantive merits) would seem to fall clearly within one or other (or possibly both) limbs of the jurisdictional test in section 6 of the PPA and regulation 34 of the PIBR: Mr Kelly was "aggrieved by the refusal of [the Chief Constable] to admit a claim to receive as of right a pension/an award" in respect of 2005-2016 and/or was similarly aggrieved that he did not receive "a larger pension/ award than that granted".

22. Judge Moore dealt with the question of jurisdiction with commendable brevity, holding that from the point of view of the ordinary use of language, Mr Kelly was seeking "a larger award than that granted" within the terms of regulation 34. In other words, Judge Moore found that the appeal fell within limb 2 of the jurisdictional test. Jefford J rejected the challenge to that finding, holding that those words were sufficiently wide to encompass the total amount of the award (both the annual amount of injury pension and the period over which it was payable) and that it was highly unlikely that the regulations were intended to produce a bifurcated system of challenge, whereby issues as to the period of the award had to be litigated separately.

23. Mr Basu QC, on behalf of the Chief Constable, nevertheless maintained on appeal that the jurisdiction of the Crown Court was, properly understood, far more restricted. His overall submission was that the right of appeal was limited to (i) an outright refusal to grant any award at all (a simple question of entitlement as at the date of determination) and, if an award was made, (ii) the amount of any gratuity presently payable and the amount of annual injury pension going forward (in either case, effectively an exercise of examining the factors in Schedule 3 of the PIBR and the calculation based on their application). There was accordingly, Mr Basu argued, no right of appeal in relation to a claim that a correctly calculated annual injury pension should be back-dated many years. Such a claim would have to be made by way of a civil claim (the right of appeal to the Crown Court in no way excluding the right to bring proceedings) and would potentially be met, in part, with a limitation defence.

24. Mr Basu's first argument in support of that position was that the Crown Court, in exercising its powers under section 6 of the PPA and regulation 34 of the PIBR, is essentially engaged in a forward-looking exercise, examining the Chief Constable's decision as to the present amount of gratuity and pension, not any historical entitlement. In relation to section 6 of the PPA, which refers to the "right to a pension or a larger pension", he pointed to the fact that section 11(5) of the PPA provides that the term "pension rights" includes the right to "the present or future payment of a pension" (emphasis added). Further, he argued that, if it had been intended that the Crown Court would have jurisdiction to determine historical entitlement, it would have been empowered to award sums of money and interest, whereas its power was limited to declaring what was presently due.

25. For my part, I see no merit in that argument for the following reasons:

    i) Section 6 does not use the term "pension rights", but refers to a claim to receive as of right a pension or a larger pension. The term "pension" is defined in section 11(5) of the PPA as "a pension…of any kind whatsoever…and includes a lump sum or a gratuity…", giving no indication that it excludes parts of a pension attributable to a period in the past. The term "pension rights" is deployed in section 7 of the PPA, in the context of making provision for contributions to

pension rights, explaining why it is expressed as being in relation to the right to present or future payment of a pension: there would obviously be no question of contributing to accrued or past pension rights. I therefore see nothing in the wording of section 6 that supports Mr Basu's argument;

ii) In most cases there should be no need for the Crown Court to do any more than declare the rights it determines, fully expecting the Chief Constable to comply with such declaration whether they relate to rights to current payments or rights in relation to past periods. But in any event, I see no reason why the Crown Court could not, in order to do justice, order the payment of a money sum if the Chief Constable was not prepared to comply with a declaration. The question of interest is addressed separately below;

iii) I accept that in most cases the issue on appeal will be whether the Chief Constable has made the right decision as to the factors to be taken into account when determining whether there is a right to an injury award and, if so, its amount going forward. But I see nothing in the wording of the PPA or the PIBR, nor in the context of those provisions, which would restrict the Crown Court from also deciding whether the Chief Constable, in making his current decision, has correctly identified the date on which the entitlement arose, applying the provisions examined below in that regard.

26. Mr Basu's second argument was that the Crown Court's role is intended to be a summary method of dealing with detailed matters of entitlement and quantum of police pensions, not a substitute for litigation of claims for substantial arrears, where limitation would be an issue. In this regard Mr Basu referred to the fact that the current provisions had their origins in section 11 of the Police Act 1890, which provided that those aggrieved by the refusal of a claim to a pension might apply to the Court of Quarter Sessions, that court having the same power as now vested in the Crown Court to make such order as appears just, but expressed to be final. That section was considered by the House of Lords in *Kydd (Pauper) v Watch Committee of the City of Liverpool* [1908] AC 327, Lord Loreburn (with whom the majority of the House agreed) explaining at p.331 why the Court of Quarter Sessions was chosen for the work[4]:

> "It is largely concerned with detail and with matters of business on a small scale, as to which litigation would probably be deprecated by the Legislature. The preponderance of business elements in these functions, the comparative smallness of the matter to be settled, might well incline the Legislature to prefer a summary method of treatment."

27. I see no force in this argument either. It is difficult to see why a court which is considered competent and appropriate to consider any issue as regards current entitlement to a pension (including any technical or legal question which might arise) is not also considered able to deal with precisely the same issues as to entitlement in relation to previous years, often involving only one further relatively simple question (such as the date of disablement). The House of Lords in *Kydd* was explaining why the

[4] Mr Basu also referred to statements of the Home Secretary in the House of Commons in August 1890 about clause 11 of the Police Bill, recorded in Hansard, to the effect that the Court of Quarter Sessions, as the body conversant with police matters and also licensing appeals, was the competent court to deal with appeals on police pensions. In my judgment, even if those statements are admissible as to the interpretation of the current provisions, they are of very limited assistance.

Legislature must be taken to have fully intended to exclude any right of appeal from the decision of the Quarter Sessions, setting out the competence and appropriateness of a criminal court (now the Crown Court) to deal with entitlement to police pensions. That explanation lends no support to Mr Basu's argument that the jurisdiction of that court should be limited to current and future entitlement.

28. Mr Basu's third and main argument was that the first limb of section 6 of the PPA and regulation 34 of the PIBR was concerned with the binary question of whether a claim to an award was admitted or not (to any extent), whereas the second limb was concerned solely with the quantum of the two elements of an award – the gratuity and the annual pension. The argument is that the provisions simply do not encompass disputes about whether the annual pension element was payable in earlier years.

29. The immediate difficulty with that argument, at least in relation to limb 2, is that the provisions, in referring to a "larger pension" and "larger award", simply do not qualify those phrases with the word "annual". Indeed, it is instructive that, in illustrating in his Skeleton Argument (paragraph 26) his argument as to why Mr Kelly does not fall within either limb of the jurisdictional test, Mr Basu reproduced the words of the provisions with the word "annual" inserted in the text in square brackets, demonstrating that his contention involved effectively re-writing the provisions. As, Jefford J pointed out at [64], the word "annual" could easily have been included if that had been the intended effect.

30. A further serious objection to the argument is that, although pensions will no doubt usually be expressed as an annual entitlement, the PIBR recognises that that might not always be the case. Regulation 5(1) of the PIBR provides:

> "Where the rate at which a pension or allowance is payable or the amount thereof is expressed as an annual rate or amount, then, for the purposes of these Regulations, the weekly rate or amount of that pension or allowance shall be determined as if there were 52 weeks in each year."

31. It may be that there is more force in the contention that limb 1 of the jurisdiction test is only satisfied where a claim to an award has been refused in its entirety. However, if that contention is correct, in my judgment, it only serves to reinforce the conclusion that limb 2 relates to the total amount of an award and not simply the amount of the annual ongoing pension.

32. I would reject ground 1 of the appeal.

Retrospective entitlement: ground 2 of the appeal

33. Once the Chief Constable had determined, in July 2017, that Mr Kelly was entitled to an injury award, the question necessarily arose as to the date from which the injury pension should be payable given that Mr Kelly was permanently disabled at the date of his retirement some 12 years earlier, that disablement resulting from qualifying injuries and, further, that (as is now accepted by the Chief Constable) it was not necessary for Mr Kelly to apply for an injury award (but he had done so in May 2016).

34. The PIBR contain a number of provisions which, on their face, are designed to answer the question:

    i) Regulation 43 deals with "payment and duration of awards" and provides expressly that a pension shall be payable in respect of each year as from the date of retirement;

    ii) That basic provision is expressly subject in the case of an injury pension to regulation 11(2), which provides that, where a person does not become disabled until after ceasing to serve, no injury pension shall be payable in respect of any period before he became disabled;

    iii) Recognising that the date on which a person became disabled after retirement may be difficult to determine (particularly, no doubt, when a significant period has elapsed), regulation 7(7) provides that where that date cannot be ascertained it shall be taken to be the date on which the claim is first made known to the Chief Constable.

35. It appears relatively clear from those provisions that the Chief Constable was required to look back to ascertain when Mr Kelly became disabled to determine how far back the injury pension was payable, save that it could not be earlier than the date of retirement. If it was after retirement, that would have been the start date, unless that date could not be ascertained, in which case it would have been the date of the claim. As Mr Kelly was required to retire because of disablement, the answer would appear to have been straightforward and obvious: the injury pension was payable from 5 June 2005.

36. The Chief Constable, however, selected 19 May 2016, the date on which Mr Kelly made his claim, being the same date that would have been chosen had Mr Kelly not been disabled at retirement and the date of his disablement could not be ascertained.

37. On Mr Kelly's appeal, Judge Moore once again decided the point with commendable brevity and precision. He held that the Chief Constable was wrong to take the date which would have arisen had regulation 7(7) applied, and that the ordinary principles of regulation 43 were applicable. Jefford J rejected the challenge to that finding, holding that the natural reading of regulation 43 was that (subject to regulation 11(2)) it provides the date from which the pension is payable. The Chief Constable's arguments entailed reading into the regulations propositions which were not found there, and effectively places a burden on the officer to make a claim in order to acquire a right to an injury pension.

38. Mr Basu nevertheless maintained on appeal that the award of an injury pension in 2017 was properly back-dated only to 2016 rather than 2005. The main thrust of the case he advanced was that entitlement to an injury pension only arose after a referral to the SMP and subsequent determination by the Chief Constable, and that that referral and determination process was essentially a forward-looking exercise, concerned with the current condition of the disabled person with a view to assessing solely the present and ongoing entitlement to and quantum of an injury award, not any historical entitlement.

39. As for the nature of the exercise, Mr Basu pointed to the structure of regulation 30 of the PIBR (and its predecessor, H1 of the 1987 Regulations), under which the Chief

Constable's obligation to refer questions to the SMP only arises under regulation 30(2) when the police pension authority "are considering whether to grant an injury pension" (emphasis added). Mr Basu submitted that, whether rightly or wrongly, the Chief Constable did not consider the question of whether to grant Mr Kelly an injury pension until May 2016, so it was not until then that the obligation arose under regulation 30(2) of the PIBR to refer questions (c) and (d) to the SMP. Further, Mr Basu pointed out, on such reference the SMP's role was to determine whether the disability assessed at that time was the result of an injury received in the execution of that duty and the degree of disablement. There was no question of those questions being considered retrospectively, as at 2005 or any earlier point in time, when they might have been answered differently. It was only upon the SMP's report of the current position in 2017 that the Chief Constable became obliged to pay Mr Kelly an injury pension. The Chief Constable may have failed to refer the appropriate questions to the SMP in 2005 (which might have given rise to a civil claim), but he did not refuse to pay Mr Kelly a pension at that time, so no right to appeal to the Crown Court arose.

40. In relation to the period to which any determination of entitlement related, Mr Basu contended as follows:

i) Regulation 43 of the PIBR does not create a retrospective entitlement to payments, but in fact refers in 43(3) to payments being made "in advance". The exception provided for in that sub-regulation is where the determination is delayed, in which case payments will be made as from the date of claim, as in Mr Kelly's case;

ii) The reference in regulation 43(1) to "as from the date of his retirement" is needed because determinations by the SMP will sometimes be prior to retirement: the wording is designed to ensure that no pension is payable before an officer has left police service;

iii) The explanation for regulation 11(2) is that an officer may make a claim to an injury award prior to leaving the service, but may not become disabled until later, when his claim is determined in his favour. The provision preventing payment of pension in respect of a period before the person became disabled is needed to countermand the "back-dating" to the date of retirement which would otherwise take effect due to the combined effect of regulation 43(3) and 43(1).

41. In my judgment those submissions mischaracterise the nature, structure and effect of the PIBR and, to a significant extent, seek to turn those provisions on their head.

42. The starting point, in my judgment, is regulation 11 of the PIBR, which sets out in clear and unambiguous terms the statutory entitlement ("shall be entitled") to an injury award when certain conditions are met ("ceases or has ceased to be a member of a police force and is permanently disabled as the result of an injury received without his own default in the execution of his duty"). Mr Basu's contention ignores (or at least demotes) that primary provision, suggesting instead that the entitlement to an injury pension arises from regulation 30 and regulation 43. However, regulation 30 makes provisions as to how certain questions relevant to entitlement are to be determined in so far as medical opinion is relevant: it does not in any sense set out or provide for the entitlement itself. Regulation 43 addresses the period in relation to which the pension, once entitlement is established, is payable ("in respect of each year from the date of retirement", subject

to regulation 11(2)), and the manner in which it is to be paid ("in advance at such reasonable intervals as the police pensions authority may...determine"). Again, regulation 43 does not make any provision about entitlement.

43. It follows, in my judgment, that at any given time a former police officer is either entitled to an injury award under regulation 11 or he is not, regardless of whether he has made a claim. Further regulations which provide procedures for determining that entitlement, and paying any award due, cannot be interpreted as divesting the former officer of an entitlement he had accrued. I therefore see two fatal fallacies in Mr Basu's reasoning:

    i) The first is that it is wrong to equate the time when it is determined that there is an entitlement with that entitlement coming into existence: the Chief Constable is required to determine that there is and (in any case determined after retirement) has been entitlement, not to create that entitlement de novo. As Jefford J said at [44], Mr Basu's contention effectively requires an officer such as Mr Kelly to make a claim as a condition of having an entitlement, even though the regulations contain no such requirement;

    ii) The second is that there is a difference between the determination of the existence of entitlement and the nature of the entitlement, including the period in respect of which the award is payable.

44. I also do not accept Mr Basu's analysis of the provisions relating to the "backdating" of an award. The basic provision is again regulation 11 of the PIBR, which provides for an entitlement to an injury award for an officer who has ceased to be a member of a police force (e.g. from the date of retirement), save that, by virtue of regulation 11(2), it will not be payable in respect of a period before disablement (noticeably, not a period before determination of disablement). Regulation 43(1) repeats (in the context of payment and duration) that a pension is payable from the date of retirement (for life), but is, of course, expressly subject to the caveat in regulation 11(2). It follows that it is plainly not right that regulation 43(1) is designed to ensure that pensions were not payable for periods before retirement: that is obviously not an issue because the basic entitlement only arises on ceasing to be a member of the force (regulation 11(1)). The true purpose of regulation 43(1) is to provide, consistently with regulation 11(1), that once entitlement is established, the pension will prima facie be payable for life from the date of retirement, even if that involves paying substantial arrears. The exception to that basic position, where disability arises after retirement, is provided for in regulations 11(2) and 7(7). I did not understand Mr Basu to provide any or any convincing explanation as to the purpose or effect of such provisions if no backdating (beyond the date of the claim) was permissible at the time entitlement is determined.

45. There is no authority directly addressing the above points, but the cases to which we were referred do not, in my judgment, provide any support for the Chief Constable's stance.

46. In *R (McGinley) v Schilling* [2005] ICR 1282 the Court of Appeal held that an appeal to a medical referee from an SMP's decision as to degree of disablement under regulations H2 of the 1987 Regulations was a full reconsideration as at the time it was made, and not retrospectively to the date of the SMP's decision. The court so held despite the relevant police authorities submitting that, as the effect of regulations L3 of

the 1987 Regulations (the predecessor to regulation 43 of the PIBR) was that injury awards would be backdated to the date of retirement, an increased degree of disability would result in a windfall award for the earlier periods. May LJ proceeded on the basis that L3 did provide for the backdating of awards, but despite accepting that there was some force in the police authorities' argument, was not persuaded that his view of the issue under consideration was wrong. May LJ went on to explain at [48]:

> "In any case, there may be an element of swings and roundabouts here. The police authority suggest that backdating may result in over-compensation. But if the police authority's construction is correct, there could equally be undercompensation if the officer's condition deteriorated to an extent greater than had been anticipate by the [SMP]"

47. I accept Mr Basu's contention that May LJ did not decide that regulation L3 had the effect that awards would be payable retrospectively from the date of retirement, but it does not assist his case that, in considering the regulation, both the police authority and May LJ proceeded on that basis. Perhaps more significantly, May LJ's view that there may be an element of "swings and roundabouts" in the mechanism of the PIBR demonstrates that the fact that the SMP determines the medical issues on a contemporaneous basis is no reason to regard a determination of entitlement resulting from his report as only "forward-looking".

48. In *Tully v North Wales Police Authority* (Transcript 30 November 2006), a decision in the Cardiff Crown Court, the question was whether a retired officer had been disabled at retirement, or became so four years later. HH Judge Morris (sitting with Justices) stated:

> "14. …First, we are satisfied that Parliament intended that, generally speaking, pension entitlements under these regulations should be payable from the date of an officer's retirement unless or until that was limited or excluded by operation of an express provision to that effect elsewhere in the same regulations…"

49. That decision again provides no support for the Chief Constable's stance; to the contrary, it is part of a consistent approach (prior to this appeal) that accords with what I consider to be the clear and correct interpretation of the PIBR in this regard, as explained above.

50. I would accordingly reject ground 2 of the appeal.

Power to award interest: the cross-appeal

51. Section 6 of the PPA and regulation 34 of the PIBR are concerned solely with an appellant's claim to be entitled to monetary payments in the form of a gratuity and/or a pension. Those provisions could simply have stated that the Crown Court was to determine those rights and the amounts payable, arguably (but by no means certainly) thereby limiting the Court's jurisdiction to that determination. In contrast, however, the power of the Crown Court is described in regulation 34 in far wider terms: "enquiring into the case" and "making such order as appears to the Crown Court to be just". In my judgment that formulation, using language suggestive of wide discretion, cannot be

read as limiting the jurisdiction to merely affirming the amounts payable according to the formula in Schedule 3, but must be read as giving the Crown Court a power to make such other orders it sees fit to ensure that justice is done. The obvious and usual order a court makes to do justice when determining what money is due is the award of interest, thereby adjusting the value of the award to reflect the time value of money (and inflation) and so ensuring that the claimant has not been unjustly prejudiced by being kept from their money and the defendant does not benefit through doing so. Considerations of that nature led Judge Moore to award interest at 3% from the date of the determination in July 2017[5].

52. Jefford J reached the opposite conclusion, finding that the powers of the Crown Court must be circumscribed by the powers and obligations of the pension authority under the PIBR, pointing out that, for example, it would not be open to the Court to form the view that the percentages set out in Schedule 3 were unfair and then make an order for a larger award. As there was no power for the Chief Constable to award interest, she held, there was no jurisdiction for the Crown Court to do so.

53. I agree that regulation 34 could not be read as giving the Crown Court power to make an order inconsistent with the regulations from which the power was derived. But I see no difficulty in the Crown Court having jurisdiction to make a well-recognised ancillary order to give effect to the rights recognised by the regulations but denied by the Chief Constable.

54. A similar approach to a statutory power was adopted by this Court in SPP Health Limited v The NHS Litigation Authority [2020] EWCA Civ 1574. In that case a dispute under an NHS contract (which does not give rise to contractual liabilities) was determined by an Adjudicator under section 9(11) of the National Health Service Act 2006, which provides that the determination of a reference "may contain such directions (including directions as to payment)… as the [Adjudicator] considers appropriate to resolve the matter in dispute." The Adjudicator's refusal to award interest on sums found due was subject to judicial review. Stuart-Smith LJ, with whom Lewison and Rose LJJ agreed, held that the general powers of the Adjudicator under the statutory provision conferred a power to award interest. Referring to disputes between parties to NHS contracts, he stated at [25]:

> "Whatever the pre-existing practice, I can see no justification for a blanket policy or decision not to include an award of interest as a constituent part of the appropriate resolution of a dispute where a party has been kept out of sums of money to which it was rightfully entitled. Put another way, if a party to a dispute has been kept out of their money, it is prima facie appropriate that the resolution of that dispute should include provision to reflect and compensate the party for that fact…. I would hold that the general powers available to the Adjudicator...confer a power to award interest where it is appropriate to do so."

55. Mr Basu pointed out that there was ultimately no dispute in that case that the Adjudicator had power to award interest, the issue being whether the Adjudicator had

[5] Mr Kelly did not claim interest from any earlier date as his case is that the sums to which he is entitled, from 2005 onwards, will be calculated on an index-linked basis.

failed to appreciate that power. Whilst that appears to be correct, the court nevertheless made an express finding, in broad terms, that there was power to award interest, doing so in relation to a provision where the powers conferred are not expressed as broadly as in the present case.

56. Mr Basu further contended that, if regulation 34 did purport to empower the Crown Court to award interest, the regulation was *ultra vires* in that regard, section 6 of the PPA providing no such power. That would be a strange result indeed given that, as Mr Basu pointed out, the wording of regulation 34 was originally to be found in primary legislation, the Police Act 1890. In my judgment Mr Lock QC, for Mr Kelly, was right that the power to make such a regulation is clearly to be found in section 1 of the PPA, which provides for regulations to "contain such consequential or incidental provisions as appear to the Secretary of State to be necessary or expedient".

57. In my judgment Judge Moore did have power to award interest and it was plainly just to do so within regulation 34. As I am satisfied that the power to award interest is readily to be found in the governing statutory provisions, I see no need to consider Mr Kelly's further argument that a failure to award him interest would breach his Article 1 of Protocol 1 rights to property and possessions. Neither is it necessary to address the contention that the Crown Court has an equitable jurisdiction to award interest.

Conclusion

58. For the reasons set out above, I would dismiss the appeal but allow the cross appeal from the decision of Jefford J. The result would be to restore the order of Judge Moore, to the extent that it was set aside.

Lord Justice Males:

59. I agree.

Lord Justice Moylan:

60. I also agree.