Neutral Citation Number: [2020] EWHC 2477 (Admin)

Case Nos: CO/1035/2019 and CO/899/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/09/2020

Before:

MR JUSTICE LINDEN

- -

BETWEEN:

THE QUEEN
(on the application of PETER GOODLAND)

Claimant

and

CHIEF CONSTABLE OF STAFFORDSHIRE POLICE

Defendant

AND BETWEEN:

THE QUEEN (on the application of
(1) MARTIN WRIGHT
(2) RALPH BARLOW
(3) EDWARD WHITE
(4) JAYNE BAKER
(5) NICHOLAS TUCKER
(6) DOUGLAS BOULTON
(7) JAMES TAYLOR
(8) PETER BENNET
(9) MICHAEL THOMASON
(10) STEPHEN WILSON
(11) GARETH WILLIAMS
(12) COLIN ASTON
(13) DAVID UPTON
(14) FREDERICK BOWER

(15) GEOFFREY TWEATS
(16) KEVIN BRIDGWOOD
(17) SIMON BONNET)

Claimants

- and -
CHIEF CONSTABLE OF STAFFORDSHIRE POLICE

Defendant

- -
- -

Mr David Lock QC and Ms Julia Smyth (instructed by **Haven Solicitors Ltd** and **Taylor Law**) for the **Claimants**
Mr Jonathan Holl-Allen QC and Mr Aaron Rathmell (instructed by **Staffordshire and West Midlands Police Joint Legal Services**) for the **Defendant**

Hearing dates: 15 and 16 July 2020
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE LINDEN

The Honourable Mr Justice Linden:

INTRODUCTION.

1. The Claimants are former police officers who retired from the Staffordshire police force ("the Force") as a result of injuries which they sustained in the course of their duties. For many years they have been in receipt of injury awards pursuant to the Police (Injury Benefit) Regulations 2006 SI 2006/932 ("the 2006 Regulations"), having each been found to be permanently disabled as a result of their injuries and consequently to have suffered a reduction in their earning capacity.

2. The Defendant is the Police Pensions Authority ("the PPA") in relation to members and retired members of the Force for the purposes of the 2006 Regulations.

3. On 2 March 2008, the Defendant's statutory predecessor entered into an agreement with the Police Federation and the National Association of Retired Police Officers ("NARPO") as to how the 2006 Regulations would be applied in certain categories of case ("the NARPO Agreement"). Pursuant to the NARPO Agreement a number of award holders, including a number of the Claimants, were then given guarantees that their then current assessment of loss of earning capacity, and therefore pension, would remain at the same level for the rest of their lives. They were also told that there would be no review of their injury award unless they requested one following a significant change in their condition.

4. Following a series of announcements, and consultation with NARPO, by letters dated 18 April 2017 each of the Claimants was notified by the Defendant that their award would be reviewed as part of a reassessment programme which would apply to all award holders save for certain exempted categories. This step was said to be in accordance with Regulation 37 of the 2006 Regulations. Award holders were told that, in accordance with the Regulations, they would be assessed by a qualified medical practitioner. The selected medical practitioner ("the SMP") would determine whether their degree of disablement had substantially altered, for better or for worse, since they were last assessed. Their awards would then be adjusted accordingly if appropriate.

5. In response to accusations that what lay behind the reassessment programme was a cost cutting agenda, the Defendant sought to reassure retired officers that this was not the case, including in a letter to Mark Judson of NARPO dated 7 July 2017. This explained the decision to conduct the reviews as follows:

> *"I am very mindful of the expectation outlined in Regulations that injury pensions are reassessed. I have a duty to ensure that the use of public money is justified and necessary and this needs to be balanced with the recognition that these benefits were awarded following injury in the course of duty to the public. I am clear that Staffordshire Police will meet its legal commitments to honour injury benefit payments at a level to which each pensioner is entitled.*
>
> *The process is not a cost-saving exercise and will not be a factor in any force savings target required by the ongoing budgetary challenges. Neither does the Force have a predetermined aim to reduced bandings."*

6. In the event, between April 2017 and May 2020, the Defendant completed reviews in 70 cases, including all bar one of the Claimants. Of these reviews, in 49 cases the level of pension payments remained unchanged, in 2 cases it increased and in 19 cases it was reduced. At the time of the hearing before me there were another 10 reviews in progress. The Claimants therefore did not pursue any allegations of a hidden agenda before me. Nor did they question the independence of the SMPs who carried out their individual assessments. However, Mr Lock QC says that lack of trust on the part of the Claimants, whether or not it was justified, was a significant factor in their refusal to cooperate with the review process, described below.

7. In the case of Mr Goodland, he protested against the proposed review of his case on the basis that, by letter dated 12 March 2008 ("the 12 March letter"), the Defendant guaranteed his pension for life and promised that there would only be a review of it if he requested one. No review has taken place in his case, apparently because his case has not yet been reached in the overall process.

8. In the case of the other Claimants, they refused to answer questionnaires which were sent to them by the Defendant from May 2017 when their cases came up for review ("the Questionnaire"). The Questionnaire asked them for medical and employment related information which they accept was relevant to the assessment of their awards but which, they maintain, they were not obliged to provide. These Claimants also refused to give consent to the Defendant's occupational health professionals or to the SMPs to access their medical records, as a result of which the SMPs decided in each of their cases that they could not carry out an assessment for the purposes of the 2006 Regulations. The Defendant therefore decided, pursuant to Regulation 33, that he would nevertheless review their awards and he did so. The reviews resulted in reductions in each of these cases although these reductions have not been implemented pending the outcome of this litigation.

9. There are therefore two categories of Claim before me:

    i) In the first, CO/1035/2019, Mr Goodland contends that the 12 March letter gave rise, at common law, to a legitimate expectation that his pension would continue for life and would not be reviewed unless he requested such a review. It would be a breach of this expectation for such a review to take place. He says that such a review would also interfere with his right to the peaceful enjoyment of possessions under Article 1 of the First Protocol ("A1P1") to the European Convention on Human Rights ("ECHR").

    ii) In the second, CO/899/2019 ("the Wright cases"), Mr Wright and 16 other Claimants challenge the decisions by the Defendant in each of their cases to carry out a review and reduce their pensions pursuant to Regulation 33. They say that the Defendant took decisions which he had no power under the 2006 Regulations to take or alternatively, if he did have power to do so, he acted unlawfully in any event as his decisions were in breach of these Claimants' rights under Articles 6 and 8 ECHR and/or the Defendant's common law duty of fairness. Their claims are brought together on the basis that they raise common issues. As noted above, they do not challenge the independence of the SMPs who dealt with their case. They accept that each SMP sought access to their medical records but they say that this was done on a blanket basis rather than by reference to the circumstances in each case, which they say was

an unlawful approach. These Claimants also accept that access to relevant parts of their medical records could assist the SMPs in carrying out their task.

10. Amongst the Wright cases, the decision in the case of Mr Kevin Bridgwood has been withdrawn by the Defendant as it was based on incorrect information.

THE STRUCTURE OF THIS JUDGMENT

11. I consider the issues in these cases under the following headings:

    i) The 2006 Regulations: paragraphs 12-46.

    ii) The Goodland claim:

        a) The facts in more detail: paragraphs 47-61;

        b) The Defendant's objection on grounds of delay: paragraphs 62-71;

        c) Ground 1 - breach of legitimate expectation - paragraphs 72-88;

        d) Ground 2 - breach of Article 1, Protocol 1 ECHR - paragraphs 89-128.

    iii) The Wright claims:

        a) The facts in more detail: paragraphs 129-179.

        b) Ground 1 - error of law in taking into account failure to complete the Questionnaire when deciding that Regulation 33 was engaged - paragraphs 181-185.

        c) Ground 2 - error of law and/or breach of Article 8 ECHR in taking into account refusal to consent to disclosure of medical records when deciding that Regulation 33 was engaged - paragraphs 186-214:

            i) The construction of Regulation 33: paragraphs 187-204;

            ii) Article 8 ECHR: paragraphs 205-213.

        d) Ground 3 - breach of Article 6 ECHR in failing to refer the matter to an independent and impartial tribunal - paragraphs 215-232.

        e) Ground 4: breach of Article 6 ECHR and/or the common law duty to act fairly: paragraphs 233-237.

THE 2006 REGULATIONS.

12. Under Regulation 11(1) of the 2006 Regulations the category of persons who qualify for an injury award is defined as follows:

> *"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…"*

13. Regulation 7(1) defines *"permanently disabled"* as follows:

> *"(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."*

14. Under Regulation 11(2), the entitlement is to a gratuity and an injury pension calculated in accordance with Schedule 3 to the 2006 Regulations. This is in addition to the pension to which the award holder is entitled by virtue of their service, to which they have immediate access in almost all cases, and in addition to any state benefits to which they are entitled. The award is paid by the PPA of the force in which the officer was serving at the time of the injury (Regulation 41) and Regulation 43(3) provides that it is payable for life subject to Regulation 11(2), which is not relevant in the present case, and to Part 5 of the 2006 Regulations which I consider below.

15. Under Schedule 3, the injury pension is *"calculated by reference to the person's degree of disablement, his average pensionable pay and the period in years of his pensionable service"* (paragraph 3).

16. Regulation 7(4) defines *"disablement"* as follows:

> *"(4) Subject to paragraph (5), disablement means inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a member of the force…"*

17. As to determining the *"degree of disablement"* Regulation 7(5) provides as follows:

> *"Where it is necessary to determine the degree of a person's disablement it shall be determined by reference to the degree to which his earning capacity has been affected as a result of an injury received without his own default in the execution of his duty as a member of a police force…"*

18. In *R (South Wales Police Authority) v (1) Medical Referee and (2) Philip Crocker* [2003] EWHC 3115 (Admin) Ouseley J emphasised that the question of a person's earning capacity is not necessarily the same as the question what, in practice, he is likely to earn:

> *"42. The task, in my judgment, in assessing earning capacity is to assess what the interested party is capable of doing and thus capable of earning. It is not a labour market assessment, or an assessment of whether somebody would actually pay him to do what he is capable of doing, whether or not in competition with other workers."*

19. He said, and I respectfully agree, that Regulation 7(5) engages two questions:

> *"51 .. First, the degree of disablement has to be assessed. This is assessed by the degree of loss of earning capacity. Second, it is necessary to determine the degree to which that loss is the result "of an injury received without his own default in the execution of his duty as a member of a police force." It is necessary, therefore, to discount the effect of any non−qualifying injury and any other cause*

whether classified as an injury or not. This could either be a non−duty injury, or an injury received through his own default, or some other cause. ... what has to be disregarded is every factor which has affected the loss of earning capacity other than the duty injury"

20. He went on to say:

"52…. The policy behind this requirement for apportionment is simple: an injury award should not be paid other than for injury received and earning capacity lost in the execution of the officer's duty…"

21. He added that this task may give rise to *"acute problems of causation"* where, for example, there is more than one cause of a loss of earning capacity or the loss is attributable to the effect of a duty injury on an underlying condition (paragraphs 53-54).

22. As to who is to carry out the assessment, Part 4 of the 2006 Regulations contains provisions dealing with *"Appeals and Medical Questions"*. Regulation 30 provides:

*"**30-Reference of medical questions***

(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 <u>for decision</u> 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,

….and, if they are further 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

<u>(d) the degree of the person's disablement;</u>

<u>and, if they are considering whether to revise an injury pension, shall so refer question (d) above….</u> (emphasis added)

(5) The police pension authority may decide to refer a question in paragraph (2) or, as the case may be, (3) or (4) to a board of duly qualified medical practitioners instead of to a single duly qualified medical practitioner, and in such a case references in this regulation, regulations 31 and 32 and paragraphs 5(1)(a) and (2) of Schedule 6 to a medical practitioner shall be construed as if they were references to such a board.

> *(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, be final.* (emphasis added)
>
> *(7) A copy of any such report shall be supplied to the person who is the subject of that report."*

23. The SMP is appointed by, but otherwise independent of, the PPA. Obviously, they are subject to the statutory duties specified by the 2006 Regulations as well as the other professional and legal obligations which apply to them. I was told that in practice the SMP does an economic exercise in the light of their findings as to the level of disability caused by the duty injury. This compares what the officer is likely to be able to earn (e.g. the officer could work 30 hours a week as a teacher and would earn X) with what they would have earned had they remained in service. The SMP then fixes the percentage degree of disablement (e.g. 37% of full earning capacity).

24. The degree of disablement is then placed in one of Bands 1-4 in a Table in Schedule 3 to the 2006 Regulations i.e. in bands of 25% or less, 26-50%, 51-75% and 76-100%. For each Band, there are then four percentages of average pensionable pay in the last year of service which will be the officer's minimum income guarantee. The applicable percentage is determined by reference to their length of pensionable service. So, for example, a person whose degree of disablement is assessed as being in the range 0-25%, is therefore in Band 1. They will have a minimum income guarantee of 15% of average pensionable pay if they have less than 5 years' pensionable service, of 30% if they have up to 15 years' service, of 45% if they have up to 25 years' service and of 60% if they have more than 25 years' pensionable service. The percentages at each stage are also higher according to which Band the person is in i.e. the greater the degree of disablement, the higher the percentage of average pensionable pay will be for each of the different lengths of pensionable service.

25. Regulation 31 then provides that a person who "*is dissatisfied with the decision of the selected medical practitioner as set out in a report under Regulation 30(6)"* may appeal to a board of medical referees who are appointed in accordance with arrangements approved by the Secretary of State (the Police Medical Appeal Board, which I will refer to as "the Board"). The procedure for determining such an appeal is set out in Schedule 6 to the 2006 Regulations. The Board consists of not less than three members, one of whom is a specialist in the relevant medical condition. Paragraph 3(2) of Schedule 6 provides for the Board to arrange a hearing *"at which it may interview or examine the appellant"* and paragraph 5 provides that the hearing or examination may be attended by the SMP and any duly qualified medical practitioner appointed by the appellant, although they may only observe any examination which takes place. The Board then provides the PPA, the appellant and the Secretary of State with its decision, which is final, subject to Regulation 32.

26. Under Regulations 34 and 35 there are then rights of appeal available to the applicant or award holder. Any challenge to the decision of the SMP or the Board by the PPA may only be by way of judicial review and I am told that such challenges are not unusual. In the present context, Regulation 34 is relevant. This provides that where a person *"is aggrieved by the refusal of the [PPA] to admit a claim to receive as of right an award or a larger award than that granted"* they may appeal to the Crown Court.

27. Under Regulation 32 a final report of a SMP or the Board (both referred to in the 2006 Regulations as a "medical authority") which formed the basis of the PPA's decision may be referred back to the medical authority for reconsideration, and a fresh report, where the Crown Court considers that *"the evidence before the medical authority who has given the final decision was inaccurate or inadequate"* (Regulation 32(1), emphasis added). There may also be a referral back to the medical authority by agreement between the parties (Regulation 32(2)), and there is a power to refer the matter to a different medical authority where the first medical authority is unable or unwilling to act (Regulations 32(3)).

28. The scheme of these provisions is therefore that the PPA is required to delegate the determination of the medical issues specified in Regulation 30 and is bound by the findings of the medical authority on them. However, Regulation 33 provides for the PPA to consider and determine the matter himself and/or for an appeal to the Board to be dismissed in certain circumstances:

> "**33 Refusal to be medically examined**
>
> "*If a question is referred to a medical authority under regulation 30, 31 or 32 and the person concerned wilfully or negligently fails to submit himself to such medical examination or to attend such interviews as the medical authority may consider necessary in order to enable him to make his decision, then—*
>
> > *(a) if the question arises otherwise than on an appeal to a board of medical referees, the police pension authority may make their determination on such evidence and medical advice as they in their discretion think necessary;*
> >
> > *(b) if the question arises on an appeal to a board of medical referees, the appeal shall be deemed to be withdrawn."* (emphasis added)

29. Regulation 36(1) also provides that:

> *"(1) An appeal shall not lie under regulation 34 or 35 against anything done by a police pension authority in the exercise of a power conferred by these Regulations which is expressly declared thereby to be a power which they are to exercise in their discretion."*

30. There is therefore no appeal from a decision of the PPA under Regulation 33 given that, provided the trigger event has occurred, the PPA has a discretion to determine the entitlement of the applicant or award holder under the 2006 Regulations on such evidence as they think necessary.

31. The issues in the Wright cases centre around:

    i) the construction of the words of Regulation 33 highlighted above and, in particular, whether refusal by an applicant or award holder to permit the SMP to access their medical records, where the SMP considers that this is necessary in order to make a decision, may amount to a failure to submit to a medical examination or to attend such interview as the SMP considers necessary;

ii) if Regulation 33 was engaged, whether the Defendant's determinations in these cases were in breach of Article 6 ECHR and/or the common law duty to act fairly in that he was not an independent and impartial tribunal and, it is said, he did not give the Claimants the opportunity to make representations before he came to his decision in each of their cases.

32. Part 5 of the 2006 Regulations is entitled *"Revision and Withdrawal or Forfeiture of Awards"*. This Part includes Regulation 37, which provides so far as material:

> "***37-Reassessment of injury pension***
>
> *(1) Subject to the provisions of this Part, where an injury pension is payable under these Regulations, the police pension authority shall, at such intervals as may be suitable, consider whether the degree of the pensioner's disablement has altered; and if after such consideration the police pension authority find that the degree of the pensioner's disablement has substantially altered, the pension shall be revised accordingly…"* (emphasis added)

33. In *R (Turner) v Police Medical Appeal Board* [2009] EWHC 1867 at paragraph 21 Burton J observed that the rationale for this provision is that:

> *"It is important from the point of view of disputes such as pension entitlement that a decision once made should be final if at all possible, and that is what is provided by these Regulations. But causation questions having been put aside, it is clearly fair both for the police force and for the community that someone who starts out on a pension on the basis of a certain medical condition should not continue to draw a pension, or any kind of benefit, which is no longer justified by reason of some improvement in his condition, or, of course, the reverse."*

34. In the Goodland case, there is an issue between the parties as to the meaning of the words of Regulation 37 highlighted above and, in particular, as to the scope of any discretion which the PPA has to determine what a suitable interval is in any given case. However, when a suitable interval has passed since an award was made or was last reassessed, the PPA is obliged to consider whether the degree of the pensioner's disablement has altered and, if so, is obliged to revise their pension accordingly, whether up or down: see *R (Crudace) v Northumbria Police Authority* [2012] EWHC 112 (Admin) paragraph 21.

35. The *"degree of disablement"* is, of course, a defined concept under Regulation 7(5) as I have pointed out. It is also question (d) under Regulation 30(2). In the case of a review pursuant to Regulation 37 the PPA is therefore required to refer the Regulation 7(5) question (compare *R v Merseyside Police Authority ex parte Yates* [1999] Lexis Citation 2295), but only that question, to a SMP for determination. That question, as noted above, is to be "*determined by reference to the degree to which his earning capacity has been affected as a result of an injury received without his own default in the execution of his duty as a member of a police force…"*.

36. There may also be more than one review under Regulation 37(1), so that any adjustment to the pensioner's banding may be revisited after a suitable interval. However, there is no power under Regulation 37(1) to revisit the question whether the pensioner is permanently disabled as a result of an injury received in the execution of

duty i.e. questions (a)-(c) under Regulation 30(2): see the helpful analysis by Silber J in *R (Pollard) v Police Medical Appeal Board* [2009] EWHC 403 at paragraphs 35-40.

37. It follows from this that in effect the role of the SMP, where a question has been referred under Regulation 37(1), is to decide the Band which applies to the award holder under Schedule 3 to the 2006 Regulations. This may be adjusted upwards or downwards but the entitlement can never fall below Band 1, which covers 0-25% disablement, because the question whether the pensioner qualifies for an injury pension cannot be revisited. I therefore agree with Mr Holl-Allen QC that Regulation 37 is merely a mechanism for deciding the level of the injury pension and that the aim of the provision is, as far as possible, to ensure that this reflects the degree of loss of earning capacity which the award holder has suffered by reason of the duty injury.

38. The operation of Regulation 37 was considered by the Court of Appeal in *R (Laws) v Police Medical Appeal Board* [2011] ICR 242. As the Headnote to the law report accurately records, the Court held that:

> *"....it was not open to a selected medical practitioner or to the defendant appeal board, on a periodic review of an injury pension under regulation 37(1) of the Police (Injury Benefit) Regulations 2006, to reduce or increase a pension by virtue of a conclusion that the clinical basis of an earlier assessment of the pensioner's degree of disablement had been wrong; that, on such a review, neither the medical practitioner nor the board was entitled to redetermine the merits of any earlier decision and their only duty was to decide whether there had been an alteration in the degree of disablement since the previous review or decision;"*

39. The Court of Appeal also held, however, that a pensioner's degree of disablement might be affected by factors other than the duty injury. For example, the pensioner's earning capacity might be improved by the acquisition of new skills since the previous assessment. At paragraph 13, Laws LJ also appeared to approve a statement by Burton J in *R (Turner) v Police Medical Appeal Board* [2009] EWHC 1867, paragraph 23, accepting a concession that changes in the labour market, such as greater availability of jobs which the pensioner could do, could also alter the pensioner's earning capacity. But there had to be a change in the effect of the duty injury, or some other relevant alteration in the circumstances since the previous assessment, for Regulation 37 to "bite", whether the change improved or diminished the pensioner's earning capacity.

40. This conclusion was based on the statements in, for example, Regulation 30(6) that the decision of the SMP is *"final"* subject to any appeal etc. I do not disagree with the view that the task of the SMP and/or the Board is <u>not</u> to revisit earlier decisions, and that the issue under Regulation 37(1) is as to whether, since the earlier assessment, there has been any alteration in the pensioner's degree of disablement. This was also the conclusion in the *Pollard* and the *Turner* cases referred to above and of Cox J at first instance in the *Laws* case. However, I respectfully doubt the correctness of the view that it is for the SMP or the Board to determine this issue. The view of Laws LJ, with which Munby and Black LJJ agreed, was that:

> *"18 So much is surely confirmed by the terms of regulation 37(1), under which the police authority (via the SMP/board) are to consider whether the degree of the pensioner's disablement has altered. The premise is that the earlier decision as to the degree of disablement is taken as a given; and the duty - the only duty - is to decide whether, since then, there has been a change: substantially altered, in the words of the regulation."* (emphasis added)

41. But it seems to me to be highly arguable that as a matter of construction the only question which the SMP is required to consider is the question in Regulation 30(2)(d): "*the degree of the [pensioner's] disablement"*. As noted above, this is the question which Regulation 30(2) requires to be referred to the SMP for a decision, and no other question. Arguably, the provisions therefore contemplate that the SMP will address the position as at the time of their assessment, reach a view as to the degree of disablement and submit a report to the PPA. Under Regulation 37 their assessment will then be compared with the previous assessment by the PPA. If the comparison shows that "*the degree of the pensioner's disablement has substantially altered, the pension shall be revised accordingly…"*. This does not mean that the previous assessment was not *"final"* in the sense that the fact that the pensioner was entitled to a pension could not be revisited and the previous assessment determined the degree of disablement, and was binding on the PPA, until any reassessment under Regulation 37 after *"such interval…as may be suitable"*. Nor does it mean that the subsequent assessor will inevitably revisit the conclusions of the earlier assessor even on the issue of the degree of disablement, although I accept that it may be that this *appears* to be the case where there has been no material change of circumstances since the last assessment.

42. Obviously, however, there are arguments the other way and I am bound by the decision in *Laws*. Accordingly, it is for the SMP to compare the earlier degree of disablement with the present degree of disablement with a view to deciding whether it has altered substantially. This will entail identifying any relevant change in circumstances since the previous assessment, including any change in the effects of the duty injury or any other change which affects the pensioner's earning capacity. On the logic of *Laws*, if there have been no changes then the previous assessment stands. But if there have been, and there is a substantial alteration in the degree of disability, then the pension will be adjusted by reference to the Table in Schedule 3 to the 2006 Regulations.

43. I respectfully agree with Burton J in *Turner* that on this approach, issues of causation may be less central as it is a given that the pensioner is permanently disabled as a result of an injury received in the execution of duty. But it is possible to envisage cases where earning capacity has gone down since the previous assessment but this is as a result of a condition or circumstance which has arisen since the previous assessment, rather than as a result of the service injury. In such a case, the strict position would be that no adjustment should be made given the rationale for the relevant provisions as explained by Ouseley J in the *South Wales Police* case. In principle, in another case the effect of the service injury on earning capacity might diminish whilst the overall level of earning capacity stayed the same, or diminished, owing to subsequent unrelated health issues, in which case there ought to be a reduction in the award and so on. Similarly, the effect of the service injury might increase and yet the earning capacity remain the same or improve by reason of

technological changes, changes in the labour market or other changes in the circumstances of the pensioner.

44. I therefore agree with Mr Holl-Allen that complex issues of causation may arise in the course of a reassessment under Regulation 37. I also agree with him that, quite apart from this, the fact that the SMP is required to consider whether there have been material changes in the position since the previous assessment tends to support the argument that the SMP will therefore require reliable information about the pensioner, including historic information about their health, what work they were capable of doing and what they were capable of earning. The need is likely to be the greater where, as here, it is a long time since the previous assessment and/or the review is being conducted by a different medical practitioner.

45. On the basis of *R v Merseyside Police Authority ex parte Yates* (supra), Mr Lock submits in relation to the Wright cases that the PPA is not entitled to require the pensioner to provide information to the PPA, even with a view to deciding whether a suitable interval has elapsed. He submits that once the PPA has taken the decision that a suitable interval has elapsed they must refer the pensioner to the SMP immediately and without making any enquiry. I do not agree. The decision of Latham J (as he then was) was that there is an obligation to refer the Regulation 30(2) issues and the PPA:

> *"is not entitled to pre-empt the answers of the medical practitioner by coming to adverse conclusions as to fact, or law, in relation to the claim in order to avoid reference to the medical practitioner"*

46. I can see no objection to the PPA asking a pensioner for information which may inform the suitable interval question provided the purpose of doing so is not to avoid reference to a medical practitioner but, rather, to decide whether there has been a suitable interval in the circumstances of the particular case and provided this does not involve determining issues which are required to be determined by the qualified medical practitioner. Nor, indeed, can I see any objection to the PPA gathering information at the request of the SMP provided appropriate steps are taken in relation to issues of confidentiality and data protection. However, this is not a decisive issue in the present case for reasons which will become apparent.

THE GOODLAND CLAIM.

The facts in more detail.

47. Mr Goodland was born on 15 December 1952. He served as a police constable for 23 years and retired from the force in 1997 at the age of 45 following injuries which he sustained when a police horse fell on him. He was awarded a Band 2 pension based on 40% disablement pursuant to Reg A20 Police Pension Regulations 1987. The 1987 Regulations contained materially identical provisions to the 2006 Regulations and nothing therefore turns on the change of statutory regime in this case or that of any of the other Claimants.

48. The only review of Mr Goodland's injury award prior to 2008 took place in 1998 when he was initially assessed as having a 25% loss of earning capacity. He successfully appealed against this assessment and his original assessment of 40% was reinstated.

49. In 2004, the Home Office provided non- statutory guidance on various matters related to the then applicable pension provisions in the form of Circular 46/2004. Annex C to this Circular provided guidance in relation to reviews of injury awards. It provided, amongst other things, that when an injury pensioner reached state retirement age ("SRA") they should be placed in the lowest band of degree of disablement unless there were cogent reasons to do otherwise, given that an officer would ordinarily not be earning from the age of 65 years and therefore would not have reduced earning capacity. Annex C also provided for injury awards to be recalculated at police compulsory retirement age using national average earnings as the benchmark for assessing loss of earning capacity, rather than rates of police pay.

50. It was in this context that, as noted above, the NARPO Agreement was entered into on 2 March 2008. It was signed by Mr Graham Liddiard, Director of Resources of the local Police Authority which was then the PPA. The NARPO Agreement provided as follows:

> *"**Staffordshire Police Injury Awards - Implementation of Home Office Circular 46/2004**.*
>
> ***Agreement Between Staffordshire Police, NARPO and Police Federation**.*
>
> *1. Applies to all ex officers in receipt of injury awards prior to 0 1/01/08*
>
> *2. All ex officers beyond State Retirement Age (SRA) at 01/01/08 to be protected for life at their current injury award level with annual increases*
>
> *3. All ex officers are entitled to at least a Band 1 injury award for life. Staffordshire Police will guarantee a minimum award of £50 per month irrespective of any calculation (uprated annually by the appropriate inflation index)*
>
> *4. All ex officers will be "paper reviewed" now and then again at SRA unless a review is requested by the ex-officer*
>
> *5. All ex officers will retain their existing injury award band until SRA unless a review is requested by the ex-officer*
>
> *6. Staffordshire Police will not recalculate injury awards using National Average Earnings as the comparator but will continue to use police pay*
>
> *7. Staffordshire Police will accept as a cogent reason for not reducing to Band 1 at SRA the fact that an ex officer was not able to accrue the equivalent of a 30-year pension. In such circumstances any reduction at SRA would only be to the equivalent of a 30-year pension plus a Band 1 injury award for the rank held at retirement. This will be increased in line with the appropriate inflation index*
>
> *8. Ex officers in receipt of injury awards who completed sufficient service to receive the equivalent of a 30-year pension will be entitled to that pension plus a band l injury award at SRA. Increased annually by the appropriate inflation index*

> *9. Those ex officers in receipt of a pension and an injury award that when added together falls below that of a full 30-year pension plus a band 1 injury award will retain their combined pension and injury award without reduction. Increased annually by the appropriate inflation index*
>
> *10. Agreed protection arrangements will ensure that any reductions at SRA are phased to reflect the amount of such reductions and the time that the ex-officer has had to plan. There will be a minimum of 12 months' notice before any reduction is implemented*
>
> *11. Staffordshire Police will work with the Federation and NARPO to assist ex officers who might wish to put forward other cogent reasons for not reducing their injury awards on a case by case basis*
>
> *Within the bounds of statutory powers this agreement is a binding contract upon all signatories."*

51. The parties devoted significant space in their skeleton arguments to debating the legality of the NARPO Agreement. Clearly, at least some of its terms went beyond what was required or authorised by the 2006 Regulations but it is noteworthy that the reference to the Agreement being a binding contract *"Within the bounds of statutory powers…"* suggests that the Agreement only bound the signatories insofar as it was consistent with the applicable statutory regime. Ultimately it was common ground that, for reasons which I will explain, nothing turned on the question whether the NARPO Agreement was ultra vires.

52. On 12 March 2008 Mr Liddiard wrote to inform Mr Goodland of the consequences of the NARPO Agreement. His letter stated that:

> *"In May 2006 you will have received a letter from Superintendent Andy Franks who was, at that time, Head of HR. The letter was intended to give early notice of potential changes to the way in which your injury award would be calculated following the issuing of new guidance by the Home Office. I recognise that the content of that letter may have caused you some anxiety or distress - I apologise if this was the case.*
>
> *Staffordshire Police has been in close consultation with NARPO and the Police Federation to try and establish a fair and compassionate way of implementing the Home Office guidance (circular 46/2004)."*

53. Mr Liddiard then summarised the features of the Home Office Circular that I have highlighted above and continued:

> *"Staffordshire Police recognised that its management of injury awards had not previously been in line with this Home Office guidance and consequently ex officers in receipt of injury awards would also have had expectations that were at odds with the guidance.*
>
> *Following extensive discussions with NARPO and the Police Federation an agreement has been reached (attached at Appendix A) which seeks to address Staffordshire Police's duty to comply with the Home Office advice but which also*

> *recognises the impact that any reduction in injury awards might have on individual ex officers.*
>
> *In your particular circumstances and having reviewed your injury award I am pleased to inform you that under the agreement your current injury award banding and pension are guaranteed for life.*
>
> *Staffordshire Police do not propose to review your injury award again unless following any significant changes in your condition, you request a review.*
>
> *I hope that the content of this letter is clear and that I have been able to allay any concerns that you may have had following the correspondence in May 2006"* (emphasis added)

54. Although the letter said that it attached a copy of the NARPO Agreement Mr Goodland says that he does not remember seeing this. Again, I do not consider that this affects the analysis for reasons which will become apparent.

55. As it happens, the part of Annex C to the Home Office Circular which provided for an injury pensioner to be placed in the lowest band of degree of disablement when he reached SRA, unless there were cogent reasons to do otherwise, was declared to be unlawful in *R. (Simpson) v PMAB* [2012] EWHC 808 (Admin). Supperstone J held that it had no basis in Regulation 37 given that this Regulation was concerned with changes in earning capacity and did not differentiate according to age in terms of the statutory test to be applied. In 2014, the Secretary of State also conceded that the provision in Annex C for benchmarking against national average pay, rather than police pay, after an award holder reached compulsory retirement age for officers of his rank, was also unlawful. The Circular was then withdrawn in its entirety on 21 February 2014.

56. On 18 April 2017, Deputy Chief Constable Nicholas Baker wrote to injury award holders in the following terms:

> *"It was agreed at the Staffordshire Police Pension Board that I should write to you, in my capacity as Chair of the Pension Board. You receive an Injury Pension from Staffordshire Police and the Chief Constable has decided, in her capacity as Police Pension Authority, that injury pensions will be reviewed. This is in accordance with Regulation 37(1) of the Police (Injury Benefit) Regulations 2006."*

57. The letter went on to explain that *"It is intended that all injury pensioners will be reviewed on a phased basis with the following exceptions."* The exempted categories were (a) individuals aged 72 or over, or (b) who had been diagnosed with a terminal illness, or (c) who had been assessed or reassessed in the preceding three years (unless an earlier reassessment had been recommended by the SMP). The letter explained that the assessments would be carried out by the SMP who would decide whether the pensioner's degree of disablement had substantially altered, for better or worse. Award holders were told that as a result of the assessment their injury pension could stay the same, increase or be reduced, but that their pension could not be reduced below Band 1 or raised above Band 4. They were also told that if they were dissatisfied with the outcome of the SMP's assessment they had a right of appeal.

58. Importantly, given the Defendant's argument that Mr Goodland's Claim is time-barred, the letter concluded as follows:

> *"This letter is just to inform you of the reassessment programme. Whilst I acknowledge this may cause you some anxiety, I regret that at this point in time I am unable to enter into correspondence with you about your personal circumstances. You will be written to again directly in due course when your injury pension comes up for review. The process is expected to take at least eighteen months, so it may be some time before you are written to again about this."* (emphasis added)

59. As will be apparent, the proposed review would be the first time for 20 years or more that anyone had considered whether the level of Mr Goodland's injury pension was in accordance with the 2006 Regulations. In his witness statement dated 4 March 2019, Mr Goodland explains that he and his wife have a daughter, Jenny, who has Down's Syndrome. She lives in Lancashire. In 2015, in the light of changes to Jenny's independent living environment, Mr Goodland and his wife decided to relocate from Scotland, where they were living, to Leeds, where their son lives. He says that this would mean that they were near enough to Jenny, *"to be readily accessible"* but not so close as to undermine Jenny's independence. He does not suggest that the move to Leeds was influenced by the 12 March letter. On the contrary, he says that they needed to relocate to be nearer Jenny given the prohibitive cost of visiting her from Scotland.

60. Mr Goodland says that, in order to buy a house in Leeds, he and his wife *"required a mortgage in the region of £125,000"* although the application form dated 11 April 2016 suggests that the figure was £115,000. He says that he needed to demonstrate to the building society that his sources of income were *"permanent"* and that he established this *"through production of"* the 12 March letter, although this is not apparent from the supporting documents which he exhibits. These show that in November 2015 Mr Goodland submitted a letter, dated 6 May 2015, in which the Defendant's Pensions Manager set out his pension entitlements. These were then £19,747 per year in respect of basic pension and £8,819 in respect of injury pension. Whether the building society relied on the 12 March letter may not matter, however, because Mr Goodland's central point appears to be that in reliance on the 12 March letter he and his wife entered into a mortgage and bought a house which they could not afford if there were any reduction to his income.

61. Mr Goodland says that if his injury pension were reduced, he believes that he would not be able to afford the mortgage repayments and *"would almost certainly have to sell our present home and move to somewhere smaller."*. However, he does not provide any figures or other information which would enable me to judge whether that is the case bearing in mind, for example, that his pension could only be reduced from Band 2 to Band 1 and that the mortgage is a joint mortgage with his wife, whose pension in 2016 amounted to £16,132. There is no evidence as to their savings or outgoings. Even if he is right, it is arguable that he did not rely on the 12 March letter to his detriment – the purchase of a more expensive house was a benefit – and that his real point is that the review will potentially lead to adverse consequences for him if his true entitlement under the 2006 Regulations is lower than what he has been paid thus far.

The Defendant's objection on the grounds of delay.

62. In his Summary Grounds of Resistance, the Defendant took a point on delay. His argument was and is that the decision which is challenged by Mr Goodland was communicated to him on 18 April 2017. Since the Claim Form was not issued until 13 March 2019, the Claim is out of time. No complaint of prematurity is made and nor is any such complaint made in the Detailed Grounds of Resistance.

63. As is well known, CPR rule 54.5(1) requires that a claim for judicial review be filed (a) promptly and (b) in any event not later than 3 months after the grounds to make the claim first arose. In granting Mr Goodland's renewed oral application for permission on 13 December 2019 Griffiths J said, at paragraph 2 of his Order, that *"No decision is made herein concerning the issues concerning time raised by the Defendant in action CO/1035/2019, which shall be considered, if appropriate, by the trial Judge"*. There was no dispute before me that it was therefore open to me to dismiss Mr Goodland's claim on the grounds of delay or alternatively to refuse relief on this ground: see the discussion in *R (Lichfield Securities Ltd) v Lichfield DC* [2001] EWCA Civ 304 paragraphs 33-35.

64. In fact, the Claim Form states that the challenge is to *"The threat to breach the terms of a promise made to the Claimant by the Defendant's statutory predecessor to appoint a Selected Medical Practitioner to carry out a review of the Claimant's pension under Regulation 37(1)"*. The entry under ***"Date of decisions"*** states *"Defendant has not yet acted in breach of the Claimant's legal rights but has threatened to do so, on several occasions."* This refers to the correspondence which has taken place in Mr Goodland's case. The relief sought by Mr Goodland is an order to prevent the Defendant from appointing a SMP *"to carry out a Regulation 37 (1) review in his case"* or alternatively a quashing order in respect of any such appointment which has been made. A quashing order in respect of the 18 April 2017 decision is only sought "*So far as the Court considers it necessary*.".

65. Before me, Mr Lock's central point was that the decision communicated on 18 April 2017 was of no legal effect in Mr Goodland's case. In the language of Lord Steyn in *R (Burkett) v Hammersmith LBC* [2002] 1 WLR 1593 at paragraph 42, the notification was *"not a juristic act, giving rise to rights and obligations"*. It was *"a decision to do an unlawful act in the future"* (paragraph 39 *Burkett*) and, even if Mr Goodland was entitled to challenge it by way of a claim for judicial review, he was not obliged to do so. The true nature of his Claim is that he is seeking quia timet relief in relation to the Defendant's threatened appointment of a SMP to consider whether there had been any alteration in his degree of disability pursuant to Regulation 37 of the 2006 Regulations. Such an appointment would have legal consequences and he is entitled to take steps to prevent it or, alternatively, to await an appointment and then seek judicial review. He argues that his approach is consistent with the approach approved in *Burkett*, where the House of Lords held that time ran from the grant of planning permission, rather than the local planning authority's earlier resolution that outline permission for development should be granted subject to a satisfactory agreement under section 106 of the Town and Country Planning Act 1990. But he says that his position is *a fortiori* given that, here, the Defendant did no more than *"inform [him] of the reassessment programme"* and state that it might be some time before steps were taken in his particular case.

66. Mr Lock also says that the Claim relates to Mr Goodland's case alone. Although other Claimants received similar assurances pursuant to the NARPO Agreement and, indeed, have reserved their rights to rely on these assurances, he seeks relief in relation to his particular case and on the basis of the facts of his particular case, including his alleged reliance on 12 March letter for the purposes of his mortgage application. The Defendant's reliance on the fact that he has proceeded with the reassessment programme is therefore misplaced. Moreover, the Defendant proceeded in the knowledge of Mr Goodland's objections and has not provided a witness statement to explain how many injury pensioners may have similar arguments based on legitimate expectations or, more generally what the effect would be of a decision in Mr Goodland's case which was averse to the Defendant. Similarly, this is not a case like *R (Terry Adams Limited) v Avon County Council* [1994] Env LR 442, on which the Defendant relies, where there is a genuine issue as to a continuing administrative process following a decision which affects the legal rights of a group. Here, legal rights were only affected when a SMP was appointed to review a given case.

67. I agree with Mr Lock's argument that the issue here is not delay, essentially for the reasons which I have summarised, although there are respects in which his argument is weaker than in *Burkett* given that, in that case, it was not inevitable from the grant of outline and conditional permission in that case that full planning permission would be granted. This was a significant factor in the House of Lords' decision that the claimant was entitled to wait. Here, there was no conditionality to the decision communicated on 18 April 2017.

68. It is also arguable that the letter of 18 April 2017 communicated a decision that a *"suitable interval"* had passed for the purposes of Regulation 37, and therefore did have a relevant legal effect. But, ultimately, I am not persuaded that this was its true nature. Regulation 37 contemplates a decision that a suitable interval has passed in relation to an individual case, whereas this was essentially a notification to all award holders of an intention to review their cases on a phased basis. As noted above, Regulation 37 also contemplates that a SMP will be appointed when the decision to review is taken, whereas the letter merely informed the recipient that one would be appointed when the time came, and that this might not be for some time. It cannot realistically be said that the Defendant has, since the decision communicated on 18 April 2017, been considering whether Mr Goodland's degree of disablement has altered pursuant to Regulation 37 and therefore has been breaching his legitimate expectations: that stage will only be reached when the SMP is asked to look at his particular case. Adopting the phraseology of the 18 April 2017 letter, Mr Goodland's injury pension has not yet *"come up for review"*. I therefore accept that his Claim is, in effect, based on anticipatory breach.

69. It seems to me that the real issue may therefore be prematurity. On Mr Lock's own argument, no relevant decision has been taken in Mr Goodland's particular case, and therefore no grounds for judicial review have yet arisen. Moreover, although it seems inevitable that, subject to the outcome of his Claim, a SMP will be appointed to carry out an assessment, it is by no means inevitable that the assessment will result in a reduction to his injury pension. The court will entertain a claim to restrain the continuation of a process on which a public body has no power to embark: see eg *R v Horseferry Road Magistrates Court Ex parte Independent Broadcasting Authority*

[1987] QB 54, 73, to which Mr Lock refers in a footnote in his skeleton argument. It will also, in exceptional circumstances, intervene in interlocutory or procedural decisions of public bodies rather than await the final outcome: see, e.g. *R v Association of Future Brokers and Dealers Limited ex parte Mordens Ltd* (1991) 3 Admin LR 254, 263. But, on one view, the present case does not fall within either category. Arguably, what matters in the present case is whether Mr Goodland's current level of injury pension is reduced as a consequence of the proposed review of his case. Arguably, therefore, the appropriate point at which to issue a claim is if and when that is the outcome. That is what the Wright Claimants have in fact done.

70. Having said this, no objection on grounds of prematurity was made on behalf of the Defendant either in his statements of case or orally at the hearing before me, and so the point was not argued. Griffiths J has also given permission subject to the pleaded issue on delay and was not asked to consider prematurity. If the point had been raised, I anticipate that Mr Lock would have argued that the 12 March letter not only guaranteed that Mr Goodland's current assessment of his degree of disability was for life: it also promised that there would be no review of that assessment unless he requested one. On that basis, arguably there was a legitimate expectation that he would not be required to submit himself to a medical examination or attend interviews as required by the SMP or otherwise risk a decision under Regulation 33. Since there is a clear intention to make such an appointment, albeit in the future, arguably Mr Goodland's Claim is not premature.

71. Accordingly, I propose to consider Mr Goodland's Claim on the merits as presented, and on the facts as they currently stand. In other words, the challenge is to a threatened decision to appoint a SMP to carry out a review under the 2006 Regulations. That review may or may not result in a change in Mr Goodland's level of injury pension. If it does, that change may be beneficial or adverse to Mr Goodland. His evidence of action in reliance, which I have indicated I did not find particularly impressive in any event, will be given limited weight because it assumes that the decision of the SMP will be adverse to him and then expresses unsubstantiated opinions about the consequences in that event. Although there is a degree of artificiality in my approach, that is a necessary consequence of the way in which Mr Goodland's Claim has been brought. I also note that the Wright Claimants, whose injury pensions were actually reduced, are not running arguments based on breach of legitimate expectation as might have been expected, although they reserve their right to do so in future proceedings, as I have noted.

The grounds of challenge in the Goodland case.

Breach of legitimate expectation?

The issues.

72. The Defendant accepts that by virtue of regulation 9 of the Police Pensions (Amendment) Regulations 2011 anything done by a Police Authority prior to 22 November 2012 in pursuance of a function under the relevant regulations is now to be treated in law as having been done by him as PPA. The Defendant therefore also accepts that insofar as the letter of 12 March letter gave rise to any legal obligation he was bound by that obligation.

73. The overarching test where a promise is relied on as giving rise to a legitimate expectation at common law was confirmed by Flaux LJ at paragraph 30 of his judgment in *R (Alliance of Turkish Business People Ltd) v Secretary of State for the Home Department* [2020] 1 WLR 2436:

> *"30 It was common ground that, before a statement or representation can be relied upon as giving rise to a legitimate expectation, it must be "clear, unambiguous and devoid of relevant qualification": see* R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd *[1990] 1 WLR 1545, 1569g–h, per Bingham LJ;* R (Patel) v General Medical Council *[2013] 1 WLR 2801, para 40, per Lloyd Jones LJ. As Lloyd Jones LJ went on to say at para 44: "The question for consideration is how, on a fair reading of the statement, it would have been reasonably understood by those to whom it was made …"*

74. The Defendant accepts that the promise made in the 12 March letter was *"clear and unambiguous"* but denies that it was *"devoid of relevant qualification"*. The relevant qualification is said to be the reference to the NARPO Agreement in the letter to Mr Goodland. As noted above, the 12 March letter informed Mr Goodland of the effect of that Agreement in his case and a copy of it was said to be attached. The 12 March letter and the NARPO Agreement both purported to implement Home Office 46/2004 and it is said that therefore the letter did not give rise to any expectation which went beyond mitigating the unfairness of that Circular.

75. The Defendant submits that, even if this is wrong, the NARPO Agreement and the 12 March letter did not give rise to a *legitimate* expectation as the promise which was made was ultra vires and in breach of statutory duty. In the alternative, the Defendant says that it was fair to frustrate any legitimate expectation which Mr Goodland may have had. He also denies detrimental action in reliance.

Discussion and conclusions

76. As to the Defendant's argument that the 12 March letter contained a relevant qualification, I do not agree. As Flaux LJ pointed out, the question is what would reasonably have been understood on the basis of a fair reading of the letter by those to whom it was addressed. Such a person would have understood that their then current injury award banding and pension were guaranteed for life and would not be reviewed again unless requested by the award holder. The references to the NARPO Agreement and to the fact that the recipient's entitlement arose *"under the agreement"* would not have been understood as signifying that the pension was only guaranteed for as long as the NARPO Agreement was in force, or provided that it was enforceable (as the Defendant pleads at paragraph 39 of his Detailed Grounds of Resistance). Nor would the references to the Home Office Circular have been understood as qualifying the promise in the 12 March letter in this way or so that it only applied to the extent necessary to address the unfairness of that Circular, as Mr Holl-Allen argues at paragraph 53 of his skeleton argument. The express statement that the guarantee was *"for life"* and the disavowal of any intention to review the award again unless the award holder requested a review were to contrary effect.

77. As to the vires of the 12 March letter, Mr Lock advanced detailed arguments about the legality of the NARPO Agreement. However, he accepted, when I put it to him, that

the issue turns on the legality of the individual promise given to Mr Goodland. This was the basis of Mr Goodland's expectations. Mr Holl-Allen did not disagree.

78. Mr Lock argued that under Regulation 37 it was open to the Defendant to decide in advance that a suitable interval would, in effect, be *"never"* or *"whole life"* in the case of Mr Goodland and others who had the benefit of the relevant aspects of the NARPO Agreement. He said that that is what the Defendant had done in the 12 March letter, in the same way as he had indicated in his letter of 18 April 2017 that certain categories would be exempted from the review process which had been announced.

79. Mr Lock also argued that even if there was no power under Regulation 37 to make the relevant promise, it was for the Defendant to prove that there was no *other* power pursuant to which the promise could have been made. Applying the presumption of validity stated in *Smith v East Elloe Rural District Council* [1956] AC 736, 769-770, since this negative had not been proved it should be assumed that the Defendant's decision was intra vires. It was pointed out by Mr Holl-Allen that no such argument had been pleaded, or foreshadowed in Mr Lock's skeleton argument, whereupon Mr Lock indicated that he would not pursue this submission.

80. The first answer to Mr Lock's argument is that 12 March letter does not appear to have been a decision about suitable intervals pursuant to Regulation 37 at all. The review of Mr Goodland's award referred to in the 12 March letter appears to have been the *"paper review"* referred to at paragraph 4 of the NARPO agreement. No referral to a SMP was made. The *"paper review"* was with a view to deciding whether, and if so how, the NARPO Agreement applied to Mr Goodland, rather than a decision based on any of the considerations which would be relevant to deciding what a suitable interval might be in his case, such as when his last assessment had been, the nature of his disability or any recommendations as to his next review made by the SMP at the time of his previous assessment.

81. Second, and more importantly, even if the 12 March letter recorded a decision under Regulation 37, in my view the terms of the Regulation did not permit such a decision. As noted above, Regulation 37 requires the Defendant "*at such intervals as may be suitable, [to] consider whether the degree of the pensioner's disablement has altered"*. It is for the Defendant to decide whether a suitable interval has elapsed since the last assessment or reassessment and, if it has, he is obliged to consider whether the degree of the pensioner's disablement has altered. I agree with Mr Holl-Allen that there is therefore a continuing duty to monitor whether an award is being paid in accordance with the 2006 Regulations. The Regulation does not permit the Defendant to decide in advance that a suitable interval will never elapse and thereby abandon any duty to monitor a given case. Nor does it permit him to decide that an injury pension will be paid at a particular level, and on the assumption, there is a particular degree of disability, regardless of whether that is in fact the case and regardless of the injury pensioner's actual entitlement under the 2006 Regulations. It might well be that a suitable interval never elapses in the lifetime of an award holder because his injuries are permanent and so severe that there is never a point at which there is any purpose in asking a SMP to consider whether their degree of disablement has altered. But this type of case will be rare given the range of factors, including changes in the labour market or technological changes, which might affect an award holder's earning capacity and given that, as Ouseley J pointed out in the *South Wales Police* case, the

question is one of earning *capacity*, rather than what in practice an award holder would earn.

82. The fact that the Defendant said, in the 18 April 2017 letter, that the reassessment programme would not apply to the three specified exempted categories seems to me to be nothing to the point. That was effectively a statement of the Defendant's then present intentions in relation to the group of award holders as a whole. But even if it were intended to be a lifetime guarantee to those aged 72 or over, and those with terminal illness, that they were not subject to Regulation 37 the question would remain as to whether such a guarantee was permitted by Regulation 37 or binding. That is a question of statutory construction, in relation to which the views of the Defendant as to his obligations and powers are irrelevant.

83. It was common ground before me that, subject to the arguments under A1P1 ECHR, the Defendant could not be held to a promise which he did not have any power to make or which undertook to do something which conflicted with his statutory duty. This is clear from Lord Woolf MR's statement of principle at paragraph 57(c) of his judgment in *Reg. v. North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213 on which Mr Lock relied to found his case at common law:

> *"(c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."* (underlining added)

84. Mr Holl-Allen also relied on paragraph 35 of the judgment of Stanley Burnton LJ in *R (Albert Court Residents Association) v Westminster City Council* [2011] EWCA Civ 633 and it was also this point which led the Court of Appeal, in *Rowland v Environment Agency* [2005] Ch 1 to consider the position under A1P1 ECHR: see paragraphs 67, 81, 102, 136 and 152.

85. In my view, the 12 March letter offended against these principles in various ways: there was no power to decide never to carry out any reviews in Mr Goodland's case, and a promise to do so was contrary to the Defendant's duty under Regulation 37. Similarly, there was no power to give a guarantee to pay Mr Goodland regardless of his true entitlement under the 2006 Regulations having regard to his degree of disablement, and to do so was contrary to those Regulations, which provided for payment according to degree of disablement. Mr Goodland's only legitimate expectation was that he would be paid in accordance with his entitlement under the 2006 Regulations.

86. Mr Goodland's claim based on legitimate expectation at common law therefore fails.

87. For completeness, I note that Mr Lock referred me to numerous passages from *Coughlan* in addition to paragraph 57(c), cited above, which deal with the approach to deciding whether it is fair to depart from a promise which has given rise to a legitimate expectation. He also referred to *Re Finicane's Application for Judicial*

Review [2019] All ER 191 and *Paponette v Attorney General of Trinidad and Tobago* [2012] 1 AC 1. I accept that these authorities show that the burden of proof is on the Defendant, that if it fails to adduce evidence to justify its frustration of the expectation in question it runs the risk that there is a finding that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power, that the court should consider the proportionality of the Defendant's actions and that the question whether Mr Goodland relied on the 12 March letter to his detriment is relevant to the question of fairness but not decisive, albeit this last point is open to debate given that it was left open by Lord Kerr in *Finucane* (see paragraph 72). I also accept that the court will be more likely to intervene in a case were the promise is made to an individual or a defined group of individuals and does not raise wide ranging issues of general policy, as Laws LJ pointed out in *R v Secretary of State for Education and Employment ex parte Begbie* [2000] 1 WLR 1115, 1131.

88. However, all of that having been said, the present context is one in which the Defendant did not have the power to make the promise relied on and would be acting in breach of statutory duty if it were to comply with that promise. It is not one in which the promise was open to the Defendant but he has now had a change of heart. The true abuse of power in the present case would lie in the Defendant failing to act in accordance with the 2006 Regulations. There is, in fact, also undisputed evidence of the Defendant's reasons for resiling from the 12 March letter namely the Defendant's various statements of the public interest, as expressed in Regulation 37, in ensuring that the expenditure of public resources is justified and in accordance with the law. As yet, the infringement of Mr Goodland's expectations is limited to an intention to apply Regulation 37 which, in my view, is obviously a proportionate way to achieve these aims. Even if, contrary to my view, I am required to consider the proportionality/fairness issue on the assumption that the review results in a reduction of Mr Goodland's injury pension, I do not consider that this would amount to an abuse of power assuming that the reduction was in accordance with the 2006 Regulations and having regard to the less than cogent evidence which Mr Goodland has put forward thus far as to the detriment which he will suffer if there is such a reduction.

Breach of Article 1, Protocol 1 ECHR?

The issue

89. I therefore turn to the arguments under A1P1 ECHR. This provides that:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

90. Mr Lock's case is that the 12 March letter generated a legitimate expectation which should be regarded as a *'possession'* under A1P1, namely that his pension was

guaranteed for life and would not be reviewed other than at his request. The reassessment programme threatens to interfere with Mr Goodland's peaceful enjoyment of that possession, or deprive him of it, and is wholly unjustified.

Discussion

Introduction

91. The starting point is that, as the European Court of Human Rights ("the Court") said in *Beyeler v Italy* 33 EHRR 1224, 1256:

> *"the concept of 'possessions' in the first part of article 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision."*

92. In *Kopecky v Slovakia* (2005) 41 EHRR 43 the Court summarised its case law on the concept of *"possessions"* as follows at paragraph 35:

> *".... (b) Article 1 of Protocol No.1 does not guarantee the right to acquire property.*
>
> *(c) An applicant can allege a violation of Art.1 of Protocol No.1 only in so far as the impugned decisions related to his "possessions" within the meaning of this provision. "Possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a "possession" within the meaning of Art.1 of Protocol No.1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition"*

93. Thus, a claim or right to a non-contributory welfare benefit such as the injury award which is the subject of the present cases attracts the protection of A1P1: see *Stec v United Kingdom* (2005) 41 EHRR SE18 at paragraph 53 and *R (Haworth) v Northumbria Police Authority* [2012] EWHC 1225 (Admin) at paragraph 109. In *Stec*, the Court said:

> *"If.... a Contracting State has in force legislation providing for the payment as of right of a welfare benefit—whether conditional or not on the prior payment of contributions—that legislation must be regarded as generating a proprietary interest falling within the ambit of Art.1 of Protocol No.1 for persons satisfying its requirements…".*

94. I note that, subject to the arguments about legitimate expectations, the extent of the right is defined by the legislation which gives rise to it. Accordingly, in the *Haworth* case King J accepted Mr Lock's submission that in the context of the 2006 Regulations:

> *"the property right which fell to be protected under [A1P1] is the claimant's right to a full pension entitlement determined in accordance with the regulations rather than that awarded to her on a purported application of the regulations whether in accordance with the regulations or not"*. (paragraph 109)

Pine Valley

95. A key case in relation to the development of the concept of a legitimate expectation as a possession in the context of A1P1 is *Pine Valley Developments Ltd v Ireland* (1992) 14 EHRR 319. Here, the Court held that where property was purchased in reliance on the fact that outline planning permission for industrial development had been granted, the purchaser had a property right with which the State had interfered even though the planning permission had subsequently been held to be void ab initio by the Irish Supreme Court. At paragraph 51 the Court said this:

> *"…a first question that arises in this case is whether the applicants ever enjoyed a right to develop the land in question which could have been the subject of an interference.*
>
> *Like the Commission, the Court considers that this question must be answered in the affirmative. When Pine Valley purchased the site, it did so in reliance on the permission which had been duly recorded in a public register kept for the purpose and which it was perfectly entitled to assume was valid. That permission amounted to a favourable decision as to the principle of the proposed development, which could not be re-opened by the planning authority. In these circumstances it would be unduly formalistic to hold that the Supreme Court's decision did not constitute an interference. Until it was rendered, the applicants had at least a legitimate expectation of being able to carry out their proposed development and this has to be regarded, for the purposes of Article 1 of Protocol No. 1, as a component part of the property in question."* (emphasis added)

96. It is to be noted that the Court attached particular significance to the fact that a legal right had been created by the grant of planning permission, albeit that right had been invalidated by the subsequent decision of the Supreme Court. This was a feature which Mance LJ (as he then was) highlighted in *Rowland v Environment Agency* [2005] Ch 1, at paragraph 138 and in the passages which I consider in more detail below.

97. However, in *Pine Valley* there was no violation of A1P1 because the annulment of the outline planning permission was in order to ensure that the planning legislation was correctly applied and to fulfil the purposes of that legislation, including the protection of the green belt. This was a legitimate aim. The annulling of the planning permission was also proportionate given that it was a proper, if not the only, way to achieve the legitimate aim and having regard to the fact that the developer was engaged in a commercial venture and aware of the risk which it was taking given the opposition to its proposals.

98. In *Rowland v Environment Agency* (supra) at paragraph 85, Peter Gibson LJ approved the following summary of the principles to be derived from the decision of the Court and the Opinion of the Commission in *Pine Valley*:

> *"(1) A legitimate expectation relating to property may constitute a possession protected by article 1 at any rate if it can be regarded as a component of property protected by article 1….(2) A legitimate expectation for this purpose may arise notwithstanding the fact that it was beyond the powers of the public body which fostered the expectation to realise the expectation….(3) The legitimate expectation cannot entitle a party to realisation by the public body of the expectation which it is beyond the powers of the public body to realise, but may entitle him to other relief which it is within the powers of the public body to afford, e g the benevolent exercise of a discretion available to alleviate the injustice or payment of compensation. (4) But the fact that the expectation was founded on an ultra vires act or that the public body had no power to realise the expectation raised and the reason why in law it had no such power, e g the potential adverse effect on third parties, may be a reason, and indeed a strong reason, going to the justification for the interference and its proportionality."*

Stretch

99. In *Stretch v United Kingdom* (2004) 38 EHRR 12 the claimant was granted a 22-year lease of industrial land by a local authority in 1969. The lease required him to construct up to six buildings at his own expense for light industrial use and it included an option to renew for a further 21 years. In the course of negotiations to renew the lease, in 1990, he was told that the option to renew was unenforceable because the local authority did not have a power to agree to such options under section 164, Local Government Act 1933: it only had power to "let" land. This position was held to be correct by the Court of Appeal. The European Court of Human Rights held that there had been a violation of A1P1 and that the claimant was therefore required to be compensated.

100. As far as the concept of a *'possession'* is concerned, at paragraph 32 the Court said, referring to paragraph 51 of the judgment in the *Pine Valley* case (set out at paragraphs 95 above), and to *Pressos Compania Naviera SA v Belgium* (1996) 21 EHRR 301 which concerned <u>claims</u> as possessions:

> *"The Court recalls that, according to the established case law of the Convention organs, "possessions" can be "existing possessions" or assets, including claims, in respect of which the applicant can argue that he has at least a "legitimate expectation" of obtaining effective enjoyment of a property right"*

101. At paragraph 35 the Court said that:

> *"The Court considers, in the circumstances of this case, that the applicant must be regarded as having at least a legitimate expectation of exercising the option to renew and this may be regarded, for the purposes of Art.1 of Protocol No.1, <u>as attached to the property rights granted to him ….under the lease</u>."* (emphasis added)

102. This was essentially because the parties had entered into a contract for the lease of the land which included the option to renew and which was entirely valid subject, only, to the issue of capacity in relation to the option to renew. Neither party had been aware of this issue and the rest of the contract remained valid. The claimant had proceeded to pay ground rent, to build on the land and to enter into subleases with others who

operated their businesses on the land. The claimant clearly expected the lease to be renewed and to continue to profit from the subleases, and the issue in relation to the validity of the option had only arisen at a late stage: see paragraphs 33-34.

103. The Court held that there was an interference with the claimant's possessions:

> *"the Court is of the view that West Dorset's actions may be regarded as frustrating the applicant's legitimate expectations under the lease and depriving him in part of the consideration which he gave in entering into the agreement. Whether it is regarded as interference with the peaceful enjoyment of the applicant's possessions within the meaning of the first sentence of Art.1 or as a deprivation of possessions within the second sentence, the same principles apply…"* (emphasis added)

104. The Court went on to hold that the interference was not justified. At paragraphs 37-39 it said:

> *37. According to the Court's well-established case law, an interference must strike a "fair balance" between the demands of the general interests of the community and the requirements of the individual's fundamental rights…There must therefore be a reasonable relationship of proportionality between the means employed and the aims pursued…..*
>
> *38. The Government have emphasised in this case the doctrine of ultra vires which provides an important safeguard against abuse of power by local or statutory authorities acting beyond the competence given to them under domestic law. The Court does not dispute the purpose or usefulness of this doctrine which indeed reflects the notion of the rule of law underlying much of the Convention itself. It is not however persuaded that the application of the doctrine in the present case respects the principle of proportionality.*
>
> *39. The Court observes that local authorities inevitably enter into many agreements of a private law nature with ordinary citizens in the pursuance of their functions, not all of which however will concern matters of vital public concern. In the present case, the local authority entered into a lease and was unaware that its powers to do so did not include the possibility of agreeing to an option for renewal of the lease. It nonetheless obtained the agreed rent for the lease and, on exercise of the renewal of the option, had the possibility of negotiating an increase in ground rent. There is no issue that the local authority acted against the public interest in the way in which it disposed of the property under its control or that any third-party interests or the pursuit of any other statutory function would have been prejudiced by giving effect to the renewal option. … there was nothing per se objectionable or inappropriate in a local authority including such a term in lease agreements"*

105. It added at paragraph 40:

> *"….it is not suggested that in this case the applicant had any possibility to obtain some kind of compensation for the application of the rule in his case. The applicant not only had the expectation of deriving future return from his investment in the lease but, as was noted in the Court of Appeal, the option to*

> *renew had been an important part of the lease for a person undertaking building obligations and who otherwise would have had a limited period in which to recoup his expenditure."*

106. In other words, the fact that the local authority could not lawfully grant the option to renew was not in itself a justification when the other circumstances of the case were taken into account. In the view of the Court this was not a case where there was any particular public harm by reason of the grant of the option, or any particular public interest in it not being enforceable, whereas the harm to the claimant was considerable.

Rowland v Environment Agency

107. In *Rowland v Environment Agency* Peter Gibson LJ said that the *Pine Valley* and the *Stretch* cases stood for the proposition that *"an expectation may amount to a possession for the purposes of article 1 even though it arises from an act which is unlawful under domestic law"* (paragraph 90). He held that there was such a possession in a case where, in 1974, Mrs Rowland's husband had purchased an estate of land, Hedsor Wharf, through which a non-tidal stretch of the River Thames, Hedsor Water, flowed. He had done so in the belief, based on the behaviour of the navigation authority's representatives amongst other things, that the stretch of river was private. The navigation authority had built weirs at either end and had put up, or allowed to be put up, signs which said it was private, as a consequence of which the stretch was not used by the public. On her husband's death in 1998, Mrs Rowland succeeded to the estate but, in 2001, the Environment Agency concluded that historic public rights of navigation (PRN) on Hedsor Water continued to exist over the stretch of river and informed her that it would be removing all signs prohibiting public use of it. The Court of Appeal held that the Agency's view was correct and that it was therefore right to take down the signs which stated that Hedsor water was private.

108. Amongst the issues which fell to be considered by the Court of Appeal was whether the Agency's decision was incompatible with A1P1. Peter Gibson LJ held that Mrs Rowland's expectation that the stretch of water was private was such a possession:

> *"The fact that the expectation was held by Mrs Rowland as the owner of Hedsor Wharf and was associated with her property would lead to the conclusion that the expectation was a possession protected by article 1".*

109. However, he agreed with the Judge's view that:

> *"the interference was plainly lawful, being in accordance with English law, pursued the legitimate aim of safeguarding the legal rights of the public over Hedsor Water and was proportionate in that it achieved a fair balance between the interests of the public and the interests of Mrs Rowland."*

110. Peter Gibson LJ explained, at paragraph 96, that:

> "*It was inevitable that once the defendant was aware that it had made a mistake in allowing Hedsor Water to be treated as a private water, it, as the guardian of navigation in the Thames, should resile from its previous stance. Courts should be slow to fix a public authority permanently with the consequences of a*

> *mistake…, particularly when it would deprive the public of their rights. The defendant had no power to fulfil the expectation of Mrs Rowland, and it was bound to conclude that it should remove the misleading signs that Hedsor Water was private…"*

111. Mance LJ appears not to have accepted that Mrs Rowland's expectations amounted to a possession for the purposes of A1P1, although his approach meant that he did not need to determine this issue. At paragraph 152, he noted that in the light of the *Pine Valley* and the *Stretch* cases *"it can no longer be an automatic answer under English law to a case of legitimate expectation, that the agency had no power to extinguish the PRN over Hedsor Water or to treat it as private"* but he did not specifically state his view on whether there was a relevant possession and said that, on the facts, he did not consider that Mrs Rowland had a legitimate expectation that Hedsor water would remain private. Her legitimate expectation was a more limited one which, he appears to have considered, arose at common law. The Agency's conduct:

> *"conferred on Mrs Rowland a legitimate expectation to the effect, at least, that, should it transpire that Hedsor Water was not private, the agency would, in reacting to any such discovery, take into account the previous common assumption of the Rowlands and of the agency to the contrary and the fact that Hedsor Water has been effectively private (so far as can be judged without any serious public discontent) over many years; and would smooth the position (as far as possible consistently with its duties to preserve the PRN) for Mrs Rowland while she owns and resides at Hedsor Wharf*." (paragraph 153).

112. Mance LJ considered, for various reasons, that the case was very different to *Pine Valley* and *Stretch*. These reasons included that:

> *"Here there is before us no claim against the state, and indeed no claim for compensation against anyone. We are concerned simply and solely with a claim for declaratory relief regarding the conduct of the agency, which can only act in accordance with its statutory mandate. That mandate involves preserving the PRN, and it is not suggested (nor could it be in the light of the public interest) that the alchemy of section 3(1) of the Human Rights Act 1998 can affect that mandate"* (paragraph 152)

113. Importantly, nor did the purchase of the estate involve a transaction with the Agency:

> *"the agency was never asked to, and did not, issue any formal statement or enter into any direct commercial relationship with the Rowlands. Still less did it purport to convey to the Rowlands any right for which the Rowlands paid anything….What the agency in reality did was continue to treat Hedsor Water as private—something on the face of it to the benefit of the owners of Hedsor Wharf—in circumstances where this has now proved wrong. Neither the Pine Valley nor the Stretch case in my view therefore lends support to an argument that the legitimate expectation created by the agency in the present case should be regarded as having a scope beyond that identified in para 153 above"* (paragraph 162).

114. The contrast with the A1P1 ECHR cases was summarised by Mance LJ as follows:

> *"161 In this respect too, both the Pine Valley….and Stretch… cases were in my judgment very different cases to the present; and the distinction is not purely formalistic as Lord Lester suggests. In the Pine Valley case the minister's grant of outline planning permission was an official decision creating legal rights, formally recorded for public use; even in that situation, it was held that purchasers bore the risk that the right might be nullified. In the Stretch case the borough council was the other contracting party in an apparently straightforward commercial transaction, whereby the council granted an option for an additional term, a grant which must clearly and fundamentally have shaped the consideration obtained by the council from the other party. The council's inability in law to grant such an option pursuant to its own direct contractual undertaking led, not surprisingly, to the grant of relief to the other party to the contract."*

115. May LJ agreed with Peter Gibson LJ. He also broadly agreed with Mance LJ but said that he considered that Mrs Rowland's expectation was stronger on the facts than Mance LJ considered it to be. At paragraph 104 he said:

> *"I agree that Mrs Rowland's legitimate expectation should be seen as a possession within article 1 of the first Protocol. An intricate process of reasoning is required to reach this conclusion. But, as Peter Gibson LJ has explained, in para 96 above, this conclusion does not take Mrs Rowland very far. The Human Rights Convention does not enable Mrs Rowland to retain Hedsor Water as private, when to achieve this is beyond the statutory power of the respondents. They must not act so as to abuse their power, but I agree that they have not done so."*

116. The conclusion in the *Rowland* case was therefore that the Agency had acted both fairly and within its powers, and in a manner which was both proportionate and justified. Accordingly, the appeal was dismissed but the declarations granted to the Agency at first instance would be amended to provide that it must take into account, in exercising its statutory functions, the common assumption previously held by both parties that Hedsor Water was private. *Rowland* therefore gives only limited support to Mr Lock's argument.

Kopecky

117. In *Kopecky v Slovakia* (2005) 41 EHRR 43, which was handed down after the decision in *Rowland*, the Court again examined the concept of a legitimate expectation as a possession for the purposes of A1P1. At paragraph 45 it said:

> *"45. The notion of "legitimate expectation" within the context of Art.1 of Protocol No.1 was first developed by the Court in the case of Pine Valley…. In that case the Court found that a "legitimate expectation" arose when outline planning permission had been granted, in reliance on which the applicant companies had purchased land with a view to its development. The planning permission, which could not be revoked by the planning authority, was "a component part of the applicant companies' property"*. (emphasis added)

118. The Court then summarised *Stretch* as follows:

> *"46. In a more recent case, the applicant had leased land from a local authority for a period of 22 years on payment of an annual ground rent with an option to renew the lease for a further period at the expiry of the term and, in accordance with the terms of lease, had erected at his own expense a number of buildings for light industrial use which he had sub-let for rent. The Court found that the applicant had to be regarded as having at least a "legitimate expectation" of exercising the option to renew and this had to be regarded, for the purposes of Art.1 of Protocol No.1 , as "attached to the property rights granted to him … under the lease".*

119. The principle underlying both cases was stated as follows:

> *"47. In the above cases the persons concerned were entitled to rely on the fact that the legal act on the basis of which they had incurred financial obligations would not be retrospectively invalidated to their detriment. In this class of case the "legitimate expectation" is thus based on a reasonably justified reliance on a legal act which has a sound legal basis and which bears on property rights."* (emphasis added)

120. The Court also referred to cases where claims are regarded as an asset or possession as *"Another aspect of the notion of "legitimate expectation"* and gave the example of *Pressos Compania Naviera SA v Belgium* (1996) 21 EHRR 301, referred to above, which it summarised as follows:

> *"The case concerned claims for damages arising out of accidents to shipping allegedly caused by the negligence of Belgian pilots. Under the domestic rules of tort such claims came into existence as soon as the damage occurred. The Court classified the claims as "assets" attracting the protection of Art.1 of Protocol No.1. It then went on to note that, on the basis of a series of decisions of the Court of Cassation, the applicants could argue that they had a "legitimate expectation" that their claims deriving from the accidents in question would be determined in accordance with the general law of tort.*
>
> *48. The Court did not expressly state that the "legitimate expectation" was a component of, or attached to, a property right as it had done in Pine Valley …and was to do in Stretch…. It was however implicit that no such expectation could come into play in the absence of an "asset" falling within the ambit of Art.1 of Protocol No.1, in this instance the claim in tort. The "legitimate expectation" identified in Pressos Compania was not in itself constitutive of a proprietary interest; it related to the way in which the claim qualifying as an "asset" would be treated under domestic law and in particular to reliance on the fact that the established case law of the national courts would continue to be applied in respect of damage which had already occurred.*"

121. The Court then considered whether it was sufficient, for the purposes of A1P1, that a claim was genuine or arguable, as opposed to being clearly well founded. It held that this would not be sufficient:

> *"51….On the contrary, the Court takes the view that where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it*

> *has a sufficient basis in national law, for example where there is settled case law of the domestic courts confirming it."* (emphasis added)

122. In *Saghinadze v Georgia* [2010] EHCR 18768/05 the Court emphasised this point at paragraph 103, where it said:

> *"The concept of 'possessions' is not limited to 'existing possessions' but may also cover assets, including claims, in respect of which the applicant can argue that he or she has at least a reasonable and 'legitimate expectation' of obtaining effective enjoyment of a property right…An expectation' is 'legitimate' if it is based on either a legislative provision or a legal act bearing on the property interest in question (see* Kopecký v Slovakia*…. paras 45-52)."* (emphasis added)

Conclusions on A1P1

123. Under the case law of the ECHR, then, the basis for an asserted legitimate expectation, if it is to be protected under A1P1, must be an act which has consequences in law, on which the claimant relies to their detriment on the basis that it will not be retrospectively invalidated, or a claim which has a sufficient basis in national law. This also appears to have been at the heart of Mance LJ's analysis in the *Rowland* case. As noted above, although he did not express the point in precisely the same way, he emphasised that there was no transaction between the Agency and Mr Rowland which would ordinarily have had legal consequences were it not for the issue of vires. The relevant transaction had been between Mr Rowland and the vendor of the estate and he had not even sought assurances from the Agency as to the stretch of river being private. Peter Gibson LJ held that there was a legitimate expectation for the purposes of A1P1 although, on the facts, Mrs Rowland did not have any basis for her expectation in national law, and May LJ appears to have agreed with him on this point, but they did not explore the precise boundaries of the concept of a legitimate expectation under A1P1 because they did not need to, given their overall conclusion on the appeal i.e. that it failed in any event. Moreover, their decision was reached before the decision in *Kopecky* and the underlining of the need for a *"legislative provision or a legal act"* in *Saghinadze*.

124. Applying the case law of the ECHR, I am therefore not persuaded that Mr Goodland's expectations were protected under A1P1 in law or in fact. As a matter of law, the 12 March letter was not a contract and it did not give rise to a legitimate expectation at common law, as I have held. It was notification to Mr Goodland of what had been decided or agreed under the NARPO Agreement and of how the 2006 Regulations were to be interpreted and applied to his case. Rightly, in my view, Mr Lock did not argue that the letter was a contract although he referred to it as a *"representation"* or *"promise"*. There was no consideration for the promise provided by Mr Goodland and in my view there was no intention to contract with him. Although, in contrast, paragraph 66 of Mr Lock's skeleton argument did assert that the NARPO Agreement was a private law contract between the parties to that Agreement, on which Mr Goodland was entitled to rely pursuant to the Contracts (Rights of Third Parties) Act 1999, Mr Lock confirmed at the hearing before me that this argument was not pursued. This, then, was not a case in which Mr Goodland had an otherwise sound legal right or claim which was then invalidated by the vires/breach of statutory duty issue. As Mr Holl-Allen submitted, the extent of Mr Goodland's claim or legitimate expectation was defined by the 2006 Regulations and the 12 March letter did not

affect this position in law even if it was permitted by the 2006 Regulations, which it was not.

125. Even if the question whether there is a legitimate expectation amounting to a possession is a broader one, of fact, to which the existence or otherwise of a prima facie sound basis in law for the alleged expectation is merely relevant, I nevertheless consider that Mr Goodland's case under A1P1 fails on the facts. This is not a case in which he acquired property on the understanding that it had particular features and, as a result, invested more money than he might have. Here the property in respect of which he has expectations, i.e. the injury pension, was granted to him in 1997. His proprietary interest then was no more and no less than as defined by the relevant statutory provisions and subject to the qualifications set out in those provisions. Ten years later he was told that his existing assessment of degree of disablement would not be reviewed under those provisions unless he requested a review and nearly 10 years after that, he says, he relied on this commitment in entering into a mortgage and would have to sell his house if there were any reduction in his injury pension, although the evidence does not clearly establish that he would have to.

126. I therefore do not accept that the Defendant's promise not to review Mr Goodland's award without his consent was a *'possession'* for the purposes of A1P1 on the basis that it was a component of Mr Goodland's injury award or that it gave him a claim which amounted to a legitimate expectation. Insofar as it is said that the possession is the guarantee to maintain his assessment of degree of disablement and his pension at its current level, that does not take the matter any further than the proposition that the relevant possession is the injury pension which he is currently receiving. That possession has not been interfered with other than to the extent that the Defendant has said he intends to review whether it is in accordance with the 2006 Regulations, which brings the issue back to the undertaking not to review. In my view, then, there has been no material interference with any property or possession of Mr Goodland and nor will there be until such time, if this is the outcome, as his injury pension is reduced.

127. Even assuming that the undertaking not to review and/or to guarantee that Mr Goodland's injury pension will be paid on the basis of his current banding is a possession which will be interfered with by the fact of a review pursuant to Regulation 37, the aim of the proposed interference is to assess whether he is being paid in accordance with the 2006 Regulations. It is proportionate in that the assessment will be carried out in accordance with those Regulations and as required by them. In my view there is a clear public interest which underlies Regulation 37, as discussed above. The review may or may not result in a change in his assessment. It could result in an increase in his award. Even if it does result in a reduction, I have not been provided with clear evidence of the financial impact which this will have on Mr Goodland, nor of the consequences of that impact. As I have also pointed out, nor is this a case in which it is suggested that Mr Goodland did anything in exchange for the promise in the 12 March 2008 letter or relied on it at that point. I therefore consider that insofar as the proposed review amounts to an interference with Mr Goodland's possessions for the purposes of A1P1 it will be proportionate, "*in the public interest and subject to the conditions provided for by law"*.

128. Finally, as the Court of Appeal accepted in *Rowland*, even if the Defendant's proposed review is not compatible with A1P1 Mr Goodland is not entitled to an

injunction to prevent the Defendant from acting in accordance with Regulation 37 or an order which would oblige it to pay an injury award which is not authorised by the 2006 Regulations. No claim for damages is made by him and nor could any be made given that, as matters stand, Mr Goodland has suffered no loss and, of course, will suffer none if the SMP confirms his current degree of disablement as being Band 2.

THE WRIGHT CLAIMS

The facts in more detail.

129. There appear from the documents to be variations in the facts as between the various Claimants but it appeared to be common ground that these do not matter as ultimately the Wright Claimants raise points of principle which are common to all of the Claimants in this group. Mr Wright's case has been relied on by both parties as illustrating the process in relation to his group of Claimants and I will therefore set out the key facts in his case and mention one or two variations from the pattern in his case. Each of the Claimants produced a witness statement although these appeared to be somewhat partisan. The Defendant has not provided any witness statements, which has made it necessary to piece together what happened from the documents, albeit with helpful guides from Counsel, and has left areas of the case unexplained or unproved.

130. Mr Wright was medically retired in 1992 after 10 years' service. His case was reviewed in 1997 and it appears that it ought to have been reviewed again in 2002 but was not. According to his witness statement, he was informed by letter dated 26 May 2006 that his case would not be reviewed again until he reached the age of 65. He also received the letters of 12 March 2008 and 18 April 2017 to which I have referred in the context of Mr Goodland's claim.

131. On 24 May 2017, Mr Andrew Coley of the Defendant's human resources support team followed up on the 18 April 2017 letter by writing to inform Mr Wright that his *"Injury Award, currently Band 3 is now due for review."* The letter said:

> *"In order to enable· the review to be undertaken I enclose a Reassessment Questionnaire, Medical Consent Form and a prepaid envelope for your reply. A Frequently Asked Questions sheet and the Appendix "Factors which can affect the Selected Medical Practitioner's reassessment of the injury award" are also enclosed for your information.*
>
> *The details provided by you will be considered and only in cases where it is believed that there may be a substantial alteration in your circumstances will a formal assessment be arranged by the Selected Medical Practitioner. You will, of course, be notified of the outcome in due course."*

132. One of the purposes of the Questionnaire was therefore said to be to enable the Defendant to decide whether to refer the award holder to the SMP. The Questionnaire asked the award holder for information about their current situation and the impact of their disability on them, as well as about whether they considered that there had been a substantial alteration to their circumstances since they were last assessed. It asked whether they had undertaken training or gained qualifications. It asked whether they were employed or self-employed or doing any voluntary work and for details of

employer, work, pay, income, benefits and so on. It also asked them whether there was any other information which they considered relevant to the review, and to attach any supporting documentation which they wished the SMP to consider. At the end of the form there was a summary of sections 2 and 3 Fraud Act 2006 and they were asked to sign a declaration that their answers were truthful and that they had not knowingly withheld any relevant information. As I have noted, Mr Lock accepted that the information requested in the Questionnaire was relevant to the SMP's task and to the assessment which required to be carried out under Regulation 37. Clearly it was.

133. The medical consent form which the award holder was asked to sign appears to have been the Defendant's standard form for cases where the Force was seeking an officer's consent for access to their medical records in order to assess their fitness for duty. It sought consent for the Defendant's Occupational Health, Safety and Welfare Department ("OH") to approach their GP or other treating doctor. It reminded them of their rights under the Access to Medical Reports Act 1988 and provided a summary of these rights and their rights under the then Data Protection Act 1998. It also gave them the option of seeing any report or records before they were sent to OH. They were told that the information would be retained by OH on a confidential basis and that any advice given to management would be expressed only in terms of their fitness for employment with the Force and/or to carry out their duties *"now and in the future"*. It was clear from the form that the recipient could either consent or not consent.

134. The Frequently Asked Questions document which accompanied the letter of 24 May 2017 ("FAQs") told the award holder that:

> *"Over the coming months we will refer Injury Benefit pensioners to our Selected Medical Practitioner (SMP). We will write to you asking that you complete the necessary consent forms for access to your medical records."*

135. There was then the following question and answer:

> *"**How will my Injury Benefit pension be reassessed?***
>
> *Your medical records will be requested from your doctor. These will be handled by our Occupational Health staff only and they will be sent together with the Review Questionnaire completed by you to the SMP. The SMP will review your file and assess whether there is any substantial alteration to your police injury disablement. The SMP may decide to interview you in person. Examinations usually take place at the SMP's consulting rooms…."*

136. The plan was therefore apparently that the pensioner's medical records would be obtained and sent to the SMP together with the answers to the Questionnaire. I note that in his skeleton argument Mr Lock says that the evidence shows that the previous practice was for SMPs not to require access to medical records (see paragraphs 33(b), 94(c) and 140). He goes on to ask why the practice was changed and he complains that the Defendant has not put in evidence to explain this change. In fact, the evidence does not show a well-established past practice. Four of the Wright Claimants say that when they were last assessed, in the mid-1990s, they were not asked for consent. Insofar as their recollection is accurate, I note that their reviews were conducted shortly after the initial assessments and relatively close to the time when they were

serving police officers, at which point the assessor appears to have had records available in at least two of the four cases. In any event, I can well see why it would be helpful to see medical records in the present circumstances, where the Claimants have long since ceased to be serving officers and the bulk of them had not been assessed for in the order of 20 years.

137. In the FAQs, the injury pensioners were also told that they would get a copy of the SMP's report, which would be sent to them by OH, and that they had a right of appeal from the SMP's decision. There was then the following question and answer:

> *"**Will my medical records be kept confidential?***
>
> *Yes. Although correspondence with you will be from the HR Support Team…all your medical records will only be seen by our [OH] staff and the SMP. Non-medical staff will neither see nor have access to your medical records."*

138. Then there was this passage:

> *"**What if I refuse to take part in this process?***
>
> *When we write to you to request that you complete the Review Questionnaire plus the forms necessary for access to your medical records, you will be given 28 days to reply and return the forms. At the end of that 28 days your injury benefit pension may be suspended or reduced to Band 1 if we have had no satisfactory reply from you. You will be sent reminder letters at 21 days after our initial letter if we have not had your reply.*
>
> *If you fail to be medically examined, or to attend a medical interview, then the Police Pension Authority may make a final decision on the medical evidence and advice as is thought necessary."*

139. As Mr Lock points out, there does not appear to be any power under the 2006 Regulations to suspend injury awards in these circumstances and I understand that, in the event, this threat was not acted on despite the Claimants' refusals to complete the Questionnaire or give their consent. I also note that it was dropped from the October 2019 version of the FAQs.

140. Not long after this, on or about 17 June 2017, the Staffordshire Branch of NARPO published a summary of legal advice which had been provided to the Police Federation to the effect that the 2008 NARPO Agreement was unlawful and therefore was not legally binding. Award holders were told that the advice was to fill in the Questionnaires and that the legitimate expectation argument based on individual letters to award holders would fail.

141. It is clear from the documentary evidence that the Wright Claimants rejected the advice to cooperate with the process envisaged by the Defendant and that they did not cooperate with it. In the light of the way in which the issues have been framed, their motives for not doing so are not relevant, as they plainly acted *"wilfully"*, in the sense of deliberately, at all material times for the purposed of Regulation 33. But suffice it to say that they were not prepared to submit the Questionnaire (one or two did so but then withdrew it) or to give their consent to any access to their medical records (again,

one or two were initially willing but then withdrew their consent). On the contrary, in most if not all of the cases they instructed the Defendant to cease to process any of their personal data. It appears that they were advised that they could refuse to cooperate with impunity provided that they physically attended any interviews with the SMP, and submitted to any medical examination which the SMP required. This did not require them to answer questions put to them by the SMP or to allow the SMP to access their medical records. Indeed, in the majority of the cases the Claimants also withheld their consent to the release to the Defendant of the SMP's report of outcome of their appointment, purportedly on the grounds that the report was not factually accurate.

142. In the case of Mr Wright, there were various written exchanges between him and the Defendant. In summary, Mr Wright's approach was to state that he was willing to cooperate with any lawful review whilst challenging the lawfulness and motives of the proposed review, accusing the Defendant of pursuing a cost cutting agenda and asking numerous questions, some of which appeared obtuse and designed to obstruct the process.

143. Mr Wright's questions and arguments were fully answered by the Defendant which sought to reassure him about the process, and to explain in detail the reasons for it and why it was lawful. The reasons why the SMP required access to medical records – i.e. in order to make an accurate assessment – were also explained. It was reiterated that Mr Wright did not have to consent to access to his medical records. He was told that the completion of the Questionnaire was not an obligation but was a reasonable request for relevant information which would assist the SMP to make his decision. He was also warned that if he did not return the forms he would be called to an appointment with the SMP, and that if he refused to be examined the PPA *"may make a determination on such evidence and medical advice as thought necessary."*

144. On 11 July 2017, solicitors instructed by Mr Wright began to correspond with the Defendant. They confirmed that Mr Wright would agree to be examined by the SMP but challenged what they described as the *"non- statutory review process"* in the form of the Questionnaire. In a letter dated 25 July 2017 the Defendant reiterated that there was no obligation to fill in the Questionnaire or to give consent to the disclosure of medical records. It was also reiterated that "*His medical records and reports will be seen and accessed only by our Occupational Health staff who forward them, only with your client's written permission, to the SMP".*

145. On 24 August 2017 the SMP, then a Dr Vivian, wrote to Mr Wright postponing indefinitely an appointment which Mr Wright had been offered but had not yet confirmed. The purpose of this letter appears to have been to explain why he was doing this and what would be expected of Mr Wright, and why, if an appointment were to go ahead. Essentially the same letter appears to have been written to the Claimants whom he was scheduled to see.

146. Dr Vivian said that he understood that Mr Wright had not returned the Questionnaire and nor had he consented to access to his medical records. He gave guidance as to the statutory role of the SMP and stated that he had undertaken hundreds of assessments in this capacity. He said:

> *"In order to be able to reach a conclusion about an injury award, it is essential that I have full access to the GP and OH records where available. I have been involved in many instances where not having access to the evidence in these records would have led me to reach the incorrect decision."*

147. He went on to say:

> *"I cannot complete my statutory role unless certain conditions are fulfilled. As SMP, I am interpreting your attendance, precisely to involve the following:*
>
> - *You will provide me in advance of the meeting with a full set of your GP and occupational health records where available, with no reductions except where other people are identifiable. This is normally coordinated by the OH Department. Your records will be subject to normal medical rules of confidentiality.*
>
> - *You will agree to attend the meeting with me, and answer the questions that I put to you. This should largely be similar to a normal medical assessment, although there may need to be careful exploration of any variance between what you tell me, and what is in the medical records. I recognise that you may not be happy about this, but if you feel you are under duress, the assessment cannot proceed.*
>
> - *You will agree to the release of my report to the organisation. Your report may be subject to normal medical rules, and my approach is to proceed as though it does. However, the SMP process is not complete until the organisation has a copy of my findings, and thus a decision to withdraw consent undermines the purpose of the assessment.*
>
> *If we understand the SMP assessment as a normal medical consultation, then you have the right to decline any of these. However, by doing so, my view is that you have not "attended" the assessment in any meaningful way, because I will not be able to complete my assessment."*

148. Dr Vivian concluded:

> *"As a doctor who qualified nearly 30 years ago, I am aware that this type of assessment can feel very threatening to the individual. I wish to reassure you that I adopt a 'disinterested' approach. By this, I mean that it is not in any way to my benefit for me to find one way or the other. My role is simply to examine the evidence, and reach a decision based on this. My decision can be subject to scrutiny by an appeals process, and I am always willing to review my decision, if new evidence is submitted after the original assessment."*

149. The claim made in Mr Lock's skeleton argument (e.g. at paragraphs 115) that there is no evidence that any SMP made a request for disclosure of medical records is therefore incorrect. As will also be seen below, the evidence clearly shows that the SMPs considered that access to the Claimants' medical records was necessary to enable them to carry out their task.

150. On 29 August 2017, the Defendant then wrote to Mr Wright following up on Dr Vivian's letter and asking him to fill in a consent form, which was enclosed. The letter also relayed an offer from Dr Vivian for Mr Wright's GP records to be sent to him directly, rather than via OH. However, Mr Wright responded, on 27 September 2017, by instructing the Defendant immediately to cease processing *"my medical notes and all sensitive data held in my name"* and to return all such data to him.

151. By letter dated 18 October 2017, the Defendant informed Mr Wright that it could not cease to process sensitive data held in his name as this would mean that his pensions could no longer be paid. It also declined to return his files to him. However, it reassured him that there were no GP notes on his files as they had been destroyed after his last assessment. He was told that an appointment with Dr Vivian had been made to him on 27 November 2017 and that he could be accompanied by a relative or friend. He was also told this:

> *"Please note that if you do not attend the appointment, the SMP will conduct the review in your absence and will produce a report to the Police Pension Authority for consideration under Regulation 33…..In those circumstances, the Police Pension Authority may make his determination on such evidence and medical advice as he in his discretion thinks necessary.*
>
> *If you do attend but do not agree to the request made by the SMP, including the release of your GP records and the release of your report to the Police Pension Authority, Regulation 33 shall apply."*

152. It was also reiterated that Mr Wright would receive a copy of the SMP's report and he was reminded of his right of appeal.

153. Pausing there, the claim made in Mr Lock's skeleton argument (e.g at paragraphs 128 and 138(a)) that the Claimants were not warned of the consequences if they withheld consent to access to their medical records is therefore incorrect. This letter and the earlier communications which I have highlighted, as well as further correspondence highlighted below, show that they and their legal representatives were very well aware that if they refused to consent to access to their medical records Regulation 33 would be applied.

154. In a letter dated 24 October 2017, the application of Regulation 33 was disputed by Mr Wright's solicitors who maintained that:

> "*We do not consider that a former police officer brings themselves within Regulation 33 by attending an interview and then failing or refusing to answer all of the questions put by the SMP to the satisfaction of the SMP. Regulation 33 only comes into play if the former officer wilfully fails to attend the interview, not if the officer attends, and yet fails to provide answers at the interview to the reasonable satisfaction of the SMP."* (emphasis added)

155. It was reiterated that Mr Wright was willing to attend an appointment with the SMP and argued that therefore Regulation 33 did not apply. The letter also denied that refusal to permit access to historical medical records could be construed as amounting to a wilful refusal to be examined and it developed arguments based on medical confidentiality and Article 8 ECHR.

156. By letter dated 6 November 2017 the Defendant disagreed with both arguments but accepted that, as had already been made clear, it was a matter for Mr Wright as to whether he consented to the disclosure of his medical records. However:

> *"Regulations 37 and 33 clearly imply the cooperation expected of a person who is the subject of a review. If it were not so, Regulation 33 would be unnecessary"*.

157. The letter added:

> "*The PPA does not accept that its request for consent for the disclosure of Mr Wright's medical records is in breach of case law or Article 8 of the ECHR. Indeed, disclosed GP medical documents are securely kept, with access only given to Occupational Health professionals and the SMP. The Force does not retain such GP records on file. Once the appeal period has expired, and it is known that an appeal has not been lodged. The confidentiality of Mr Wright's health data is therefore preserved and respected."*

158. On 27 November 2017, Dr Vivian reported that Mr Wright and his wife had indeed attended the appointment that day. Mr Wright had brought a prepared document and they spent approximately 90 minutes discussing the process:

> *"We did not discuss his medical condition, and I do not have his permission to access his GP records. Therefore, I have not been able to conduct an assessment, and cannot produce a certificate."*

159. It is not the case that all Claimants had appointments with Dr Vivian. It appears that, apart from Mr Wright, he only saw Mr Barlow, Mr White, Ms Baker, Mr Wilson, Mr Williams and Mr Aston. In a letter dated 19 December 2017, the Defendant then indicated that he was prepared to arrange appointments with an alternative SMP.

160. Thereafter, Drs Yarnley and Nightingale were appointed to carry out assessments of the Claimants. In relation to medical records, on 18 January 2018 Ms Natalie Dent, Deputy Director of Staffordshire and West Midlands Police Joint Legal Services referred to the previous correspondence and said that:

> *"I am not suggesting that those pensioners being reviewed should have to disclose the entirety of their medical history, but in my view, to assist the SMP (and ultimately the PPA) in reaching their decisions…. a certain amount of relevant medical information has to be made available. Without being fully informed and having all the necessary information, the PPA could make a decision which is of detriment to your clients. The ultimate aim of the review is to ensure that the appropriate pensions are being received."*

161. It is said by the Defendant that whereas Dr Vivian required access to all medical records, Drs Yarnley and Nightingale only required access to more limited medical records. In answer to my request for references in the documentation which supported this claim, I was shown 2 letters from the Defendant to Mr Boulton in July 2018 which said that records since his previous assessment would be sufficient. Mr Boulton was examined by Dr Nightingale. I was also referred to an email dated 22 March 2018, written on behalf of the Defendant in relation to Mr Wilson and Mr Williams, which said that Dr Yarnley's position was that the records since their duty injuries

would be sufficient and a letter from the Defendant to Mr Tweats, dated 21 February 2018, which was to the same effect and which said that the records would be destroyed at the end of the reassessment process. I accept that these were the respective positions of Drs Yarnley and Nightingale, although I have not been shown any document in which the doctors themselves directly set out or explained their positions on this issue. It also appears that the proposal remained that consent would be given, the records would be obtained by OH and they would then be forwarded to the SMP.

162. On 6 February 2018, after some uncertainty as to whether he would attend and having stated that he would "*not be disclosing medical records."* Mr Wright attended an appointment with Dr Yarnley who, on 13 March 2018, reported as follows:

> *"…. Mr Wright attended the assessment but confirmed he was not willing to provide any medical information. This I confirmed effectively frustrated the review process.…..* (emphasis added)
>
> ***Opinion***
>
> *As Mr Wright does not consent to me obtaining information from his General Practitioner and or Specialists in order to allow me to make a determination as to whether there has been a substantial alteration in Mr Wright's index disablement I am unable to provide any meaningful comment and it is therefore for the Police Authority to make a determination based on such evidence and advice as they consider appropriate."*

163. Apart from with Mr Wright, Dr Yarnley held appointments with Mr Barlow, Mr White, Ms Baker, Mr Aston, Mr Upton and Mr Tweats. These appointments were apparently in February and March 2018. Some of these Claimants were apparently armed with GP notes which supported their position but I have not been shown these and gather that they have not all been disclosed. Dr Yarnley apparently considered them to be inadequate and that he needed to see the medical records in order to verify matters for himself. In the cases of all of the Claimants whom he saw, he therefore took the same position as in the case of Mr Wright: in the light of the refusal to allow him access to any medical records, the process had been frustrated and he could not give a meaningful view. In the case of Mr Upton, for example, he explained his position as follows:

> *"I expressed my concern that I could not compare his present situation to his historic situation as he was not giving consent for access to any medical information either held by Staffordshire Police or his GP or other medical practitioners. He confirmed he did not wish to do this, apart from providing a letter from his GP, effectively confirming his condition and a statement from himself to state this had not changed."*

164. In the case of Ms Baker, Dr Yarnley said this:

> *"Ms Baker confirmed she was willing to engage in the process but not to allow me to access any medical records, information or to provide consent for reports or copies of medical records and therefore I considered I could not undertake an assessment as instructed as I have no means of validating information. Ms Baker*

> *made it clear that she was not willing to engage in the process beyond attending and providing the limited, and in my opinion inadequate information, noted above. She specifically would not allow access to any medical records however focussed or limited in nature I am therefore unable to make a determination."*

165. The other 10 appointments were with Dr Nightingale, apparently in July and August 2018. Dr Nightingale did not provide written reports from her appointments because the relevant Claimants refused to consent to the release of her reports but no point was taken to the effect that this put them in a different category to the other Wright Claimants. The Defendant relies on passages in its internal reports for her cases which relate what she is said to have told persons unspecified in OH. The entries in these reports are along these lines:

> *"Mr Tucker was interviewed by Dr Nightingale, Selected Medical Practitioner on 14 August 2018. The SMP's report to Staffordshire Police has not been released, as the SMP's company IMASS has not received consent from Mr Tucker for its release.*
>
> *Dr Nightingale has verbally informed Occupational Health, however, that in her opinion, because Mr Tucker would not allow her access to any medical records, she is unable to make a decision as to whether there has been a substantial alteration in his disablement. It is therefore for the Police Pension Authority to make a determination based on such evidence and advice as he considers appropriate."* (emphasis added)

166. Mr Taylor says in his witness statement that he took a report from his doctor and a copy of his medical records to the appointment with Dr Nightingale as he was willing to discuss production of these documents with her. But he does not claim that he drew attention to them, still less handed them over. Others who attended appointments with Dr Nightingale say that they had GP notes and were willing to discuss their health with her but that she said she required access to their medical records in order to make her decision. They each objected to the contents of her report about them, purportedly on grounds of factual inaccuracy, and therefore withheld their consent to it being passed to the Defendant.

167. It is clear from the evidence that all three SMPs regarded it as necessary to have access to the Claimants' medical records in order to carry out their task under the 2006 Regulations. Indeed, it is common ground that the refusal of consent to this was the reason why they considered that they could not complete their task. As I have noted above, the Claimants also accept that *"having access to relevant medical records could assist the SMP to undertake his or her task."* (paragraphs 52 and 58 of the Statement of Facts and Grounds).

168. Mr Lock has placed some reliance on an argument that the SMPs required prior disclosure of medical records. On the basis of the documents, I accept that this was their preference but the fact that they saw each Claimant despite the lack of prior disclosure suggests that they were willing to see a pensioner and then obtain the medical records if consent was given. They may have been contemplating further appointments, if necessary, but I have no way of knowing as they have not provided witness statements. The problem, as far as Drs Yarnley and Nightingale were concerned, was that each of the Claimants flatly refused to permit them to access their

medical records at all and insisted on controlling the information available to the SMP.

169. Mr Lock also says that the medical examination or interview in each case never began or took place because of the impasse. I accept that the evidence suggests that the SMPs considered that they could not proceed solely on the basis of the information which the Claimants were prepared to make available to them. There was discussion of the process, why access to medical records was required and whether the award holder was willing to consent. When they reiterated that they were not willing to do so the SMPs apparently took the view that they could not proceed. The SMPs appear to have considered that there was no point in proceeding unless there was consent to the disclosure of the information which they required given that they could not make a reliable assessment without the ability to access the records.

170. Mr Lock says that the request for access was general, rather than focussed on a particular issue. I agree that the documentary evidence suggests that the SMPs wanted the ability to see all medical records, albeit the time span varied as between SMPs as I have noted. They may have been willing to discuss a more focussed approach but the evidence about this does not enable me to find that they were. I have no reason to think that they would do anything other than refer to those records where, and to the extent that, they considered this to be relevant. As I have said, the position of the Claimants was that the SMPs could not see <u>any</u> records, regardless of whether they were relevant or whether it would be helpful for them to do so.

171. By letter dated 10 July 2018, the Defendant wrote to Mr Wright personally, stating his understanding of what had happened at the appointment with Dr Yarnley and offering to meet him, along with other award holders who were in the same position:

> *"So that I can explain the next stages of the process in person and give you the opportunity to discuss it further. Of course, as the other injury pensioners will be present, I am not proposing to discuss individual cases."*

172. But he also offered to allow them a further two weeks after the meeting *"for you to consider your own position and to provide any further information before I make my determination"*. This meeting did not go ahead, however, apparently because the award holders were not prepared to attend in person, although they were content for their representatives to attend.

173. After further correspondence, on 26 November 2018 the Defendant issued the following decision to Mr Wright:

> *"Further to your appointment with the Selected Medical Practitioner… He has advised in a letter dated 13 March 2018 that he has been unable to make a decision as to whether there has been a substantial alteration in your injury disablement.*
>
> *I am writing to inform you that in my capacity as Police Pension Authority, I have determined, in accordance with Regulation 33….that you have failed to submit yourself to such medical examination as the medical authority (the SMP) considered necessary in order to enable him to make a decision.*

Having carefully considered the matter, I have determined, therefore, that your injury pension be reduced from Band 3 to Band 2 with effect from 13 March 2018."

174. This decision was apparently based on an internal report of 12 November 2018, which had been prepared by the Defendant's human resources team and which summarised the background in terms of what was known about Mr Wright's injury and assessments thus far, as well as the history in relation to the attempts to reassess his case. The internal report stated:

"As Mr Wright has refused to give his consent to the release of relevant medical records, the SMP has been unable to complete a meaningful review of his injury disablement. Legal advice given by Joint Legal Services about this is that as a result of Dr Yarnley's letter, Regulation 33 should now be applied by the Police Pension Authority."

175. The report then recommended a reduction from Band 3 to Band 2, which would have the effect of reducing Mr Wright's injury pension by one third.

176. Following further correspondence, on 30 January 2019 the Defendant provided more detailed reasons for his decision of 26 November 2018. This stated that *"in making my determination. I took account of the following matters:"*. It then gave a brief summary of the background, including (at paragraph 3) that "*You refused to complete a questionnaire and refused to give your consent to the release of your GP medical records"*. It noted, also at paragraph 3, that Dr Vivian had reported that as he did not have permission to access Mr Wright's GP records he had been unable to conduct an assessment. It also noted, at paragraph 4, that Dr Yarnley had said that, as Mr Wright was unwilling to provide any medical information:

"he was therefore unable to make any meaningful comment or determination.

5. I determined that you failed to submit yourself to such medical examination or interview as the SMP considered necessary in order to enable him to make a decision and that, accordingly, I was able to make a determination as to whether there had been a substantial alteration in your degree of disablement on such evidence and medical advice as I thought necessary."

177. At paragraph 6, the Defendant said. *"I considered that you were trying to prevent the true state of your disablement from being revealed."* He explained that "*For your injured earnings comparator. I used the mid-point salary of an Assistant Case Manager in the Performance and Standards Unit Grade F at Staffordshire Police… I have no reason to believe that you are not capable of working in such a role full-time."*.

178. In his concluding section the Defendant said:

"It is open to you to provide me in good faith with relevant and accurate information relating to your current condition and capacity for work, so that I can consider whether a reconsideration of this determination or a further review under Regulation 37 is justified.

You may request a further review if you believe that there has been a substantial alteration in your disablement."

179. Neither of these options was taken up by any of the Claimants.

The Grounds of challenge in the Wright cases.

180. Mr Lock advances four grounds of challenge. These are:

i) First, error of law in relying on the Claimants' failures to complete the Questionnaire as providing a basis for exercising his powers under Regulation 33;

ii) Second, error of law in relying on the Claimants' withholding of their consent to access to their medical records as providing a basis for exercising his powers under Regulation 33;

iii) Third, and in the alternative, breach of Article 6 ECHR in exercising his powers under Regulation 33 to reduce the pension payable to each Claimant when he should have arranged for such a decision to be taken by an independent and impartial tribunal;

iv) Fourth, and again in the alternative, breach of Article 6 ECHR and/or the duty to act fairly in exercising its powers under Regulation 33 to reduce the pension payable to each Claimant without ensuring that a fair procedure was followed.

Ground 1: error of law in relying on failure to complete the Questionnaire

181. This Ground can be disposed of shortly. I agree with Mr Lock that Regulation 33 is only triggered by a failure on the part of the applicant or award holder to comply with requirements which the *"medical authority"*, in this case the SMP, *"may consider necessary in order to enable him to make his decision"*. In this case there is no evidence that any of the SMPs considered that filling in the Questionnaire was necessary for this purpose. Nor does failure to complete the Questionnaire appear to have been the reason why the SMPs considered that they could not carry out their statutory functions. The evidence indicates that the Defendant considered that this information would assist the SMP, but that does not bring the matter within Regulation 33.

182. That being so, to the extent that the Defendant relied on failure to fill in the Questionnaire as a basis for concluding that Regulation 33 applied, and he could therefore make the Regulation 37 determination himself, he erred in law. However, on the evidence, it is clear that the Defendant's decision that he could make the Regulation 37 decision was based entirely on the fact that each of the Wright Claimants had refused to consent to the SMP accessing their medical records. I appreciate that the more detailed reasons for his decision, provided on 30 January 2019, say that he *"took account of the following matters"* and then provide a narrative which includes refusal to complete the Questionnaire. However, the Defendant's internal reports on each case, the original decision of 26 November 2018, and a fair reading of the 30 January 2019 letter, show that he relied on the decisions of the SMPs as triggering the application of Regulation 33. These decisions, as I have

explained, were based purely on the refusal of consent to the disclosure of medical records.

183. Furthermore, I accept that the Claimants' general lack of cooperation, including in relation to the Questionnaire, was relevant to the Defendant's discretion as to whether he should determine the Regulation 37 question assuming that Regulation 33 was engaged, and, if so, what his decision should be. He was therefore entitled to take it into account to this extent.

184. Even if this is wrong, I am confident that the Defendant would have reached the decision that Regulation 33 had been triggered, and would have made the same reductions, even if he had not relied on the failure to complete the Questionnaire: see *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [2017] PTSR 1041. As I have said, on a fair reading of the documentary evidence, he based his decision that Regulation 33 applied on each Claimant's failure to comply with the SMP's requirements.

185. There is therefore nothing in this Ground.

Ground 2: error of law in concluding that Regulation 33 was triggered by refusal of consent to access medical records and/or breach of Article 8 ECHR.

186. Mr Lock's case under this heading is that as a matter of construction, applying domestic law principles, refusal to permit the SMP to access a Claimant's medical records does not amount to failure to submit to a medical examination or to attend an interview. He also argues that *"requiring that former officers disclose all of their medical records, both to the Force and the SMP, or by applying a sanction for failure to do so, the PPA breached the Claimants ECHR rights"* (paragraph 113 of his skeleton argument).

The construction of Regulation 33

187. Mr Lock rightly points out that Regulation 33 does not leave a margin of appreciation to the PPA or, for that matter, the Board of medical referees. The facts of the case must fall within Regulation 33 if the PPA is to make the decision, or the appeal to the Board is to be deemed to be withdrawn. He submits that the PPA can only decide the question which was referred to the SMP if there is material to justify the PPA concluding that the award holder has wilfully or negligently failed to submit or attend, etc.

188. Mr Lock then argues for a highly literal interpretation of Regulation 33. He submits the provision is penal in nature, or amounts to a *"sanction"*, and should therefore be construed narrowly. He relies on the heading to the provision which, as noted above, is *"Refusal to be medically examined"*. He says that Regulation 33 can only be engaged as a result of actions of the applicant or award holder after a question has been referred to the SMP. He submits that if an applicant or award holder turns up to an interview with the SMP he therefore *"attends"* and *"the first test under Regulation 33 cannot be satisfied"*. A person cannot fail to submit to an examination unless the SMP *"has commenced or attempted to commence an examination and… The*

pensioner has either refused or otherwise by his conduct has failed to submit to the proposed examination" whereas, he says, the examinations did not begin in these cases because of the impasse about access to medical records. He relies on case law in the context of the Employment and Support Allowance Regulations 2008 in support of these arguments. His position is that even if, as a result of the award holder's refusal to give consent, the SMP is left with incomplete information, or is unable to verify the information provided, they should get on and make their decision, drawing adverse inferences if necessary.

189. Whilst I agree with Mr Lock that the facts must be capable of justifying the PPA or the Board's decision that Regulation 33 is engaged, I do not agree with his narrow construction of the scope of Regulation 33. It seems to me that the starting point is that Parliament should be assumed to have had in mind that, other than in an emergency, it would be highly unusual for a medical practitioner to conduct a medical assessment without any access to information about the patient's medical history. This is true of a patient's own treating doctor, but the position is *a fortiori* in the situation where the patient is claiming a benefit or payment, whether in the context of employment, social security, litigation or otherwise and the assessment is to be carried out by a doctor who has not dealt with them before. The very fact that the claimant's entitlement and/or the extent of their entitlement needs to be established, whether or not it is formally disputed, means that the assessor is entitled to see all of the materials which are relevant to the assessment. They may also require access to these materials in order to obtain information which the patient is unable to recall, or to verify information which they say or believe they can recall. Where they are assessing loss of earning capacity arising out of a particular event, and particularly where they are assessing whether there has been a change in the loss of earning capacity consequent upon that event, the need for a consideration of the medical history seems obvious, and all the more so where they are assessing whether there has been any such change since an assessment carried out 20 years earlier by a different practitioner.

190. Secondly, and following on from this point, the context in the present case is that the medical authority is being required to carry out an assessment for the purposes of establishing the applicant or award holder's entitlement to payments under a statutory scheme. As I have noted, Regulation 33 is not just concerned with situations in which the PPA is carrying out a review under Regulation 37. It applies to applicants for awards as well as award holders. It applies to all medical questions which arise under the 2006 Regulations including eligibility for the various types of award described in Part 2, reviews of existing awards pursuant to Regulation 37 and reductions in injury awards pursuant to Regulation 38 on the grounds that the former officer has substantially contributed to his disablement by his own default. It also applies to appeals to the Board pursuant to Regulation 31, and to Regulation 32 referrals to the SMP or the Board in the context of appeals to the Crown Court pursuant to Regulation 34, or to the appeal tribunal pursuant to Regulation 35. These provisions contemplate that the decision maker in relation to all medical questions which arise under the 2006 Regulation is to be the medical authority. It would therefore be surprising if, at the same time, they did not contemplate that the medical authority, even where they consider it necessary to carry out their statutory function, has the power to ask to see the applicant or award holder's medical records and that the medical authority is obliged to make a decision on the basis of such information as the applicant or award holder chooses to provide or is able to recollect, as Mr Lock

submits. Plainly, the 2006 Regulations contemplate, as a cornerstone of the scheme, that the medical authority will be enabled to make decisions which can be taken by the PPA, the Crown Court and the appeal tribunal to be reliable and based on "*accurate"* and "*adequate"* evidence (Regulation 32(1), cited at paragraph 27 above) whereas Mr Lock's reading of the 2006 Regulations would seem to be inimical to this purpose.

191. Third, in my view the language of Regulation 33 is deliberately broad so as to enable the medical authority to make an accurate assessment of the various different medical questions which may be referred. The key requirement is that the medical authority is provided with such information as he *"may consider necessary in order to enable him to make his decision"*. The logic of Mr Lock's argument is that even if this is the view of the medical authority, and even if this view is entirely correct, say because the applicant or award holder can remember barely anything, Regulation 33 is not engaged. But in this context, it cannot be sensible to limit what the medical authority may consider to be necessary to fulfil his statutory task in the way proposed by Mr Lock. Mr Lock accepted, when it was put to him by me, that the applicant or award holder could be expected to answer questions rather than merely physically to *"attend"* an interview, and that these questions could be about his medical history. I also put it to him that this would be particularly important where the issue was one of mental as opposed to physical health, but it would be true of both, and he appeared to agree. But his position was that the 2006 Regulations did not then require the applicant of award holder to permit the medical authority to fill in gaps in memory, or to verify what they had said, by reference to medical records.

192. In my view this is an artificial place in which to draw the line. Once it is accepted that the expectation reflected in Regulation 33 goes beyond merely being physically present at an interview or submitting to a physical examination, and that it extends to an expectation to provide at least some of the information necessary to enable a reliable decision to be made, there is no reason why the Regulation should not extend to other matters which may be considered implicit in any medical examination or interview, namely that the practitioner will have access to the medical history where and to the extent that they deem this to be necessary. The phrase *"such medical examination or…such interviews as the medical authority may consider necessary"* is sufficiently flexible to embrace interviews or examinations which are conducted on the basis that the interviewer or examiner has been authorised to familiarise himself with the relevant background. Refusal to agree to this is clearly capable of being a refusal to submit to, or attend, the examination or interview which the medical practitioner considers necessary to carry out their task i.e. one which is conducted on an informed basis and with access to such relevant information as is available.

193. Mr Holl-Allen put the matter more broadly in contending for a general duty to cooperate. I prefer to rely on interpretation of the words of the 2006 Regulations. They do not create a duty on the applicant or award holder to do anything: rather, they give them a choice to comply with the requirements of the medical authority or allow the decision to be taken by the PPA, or their appeal to be deemed to be withdrawn. Regulation 33 describes particular forms of non- cooperation which have consequences rather than giving rise to a general duty to cooperate. Failure to cooperate with the medical authority's requirements in relation to a medical examination or interview may lead to the conclusion that they have not attended or

submitted etc and that they were acting wilfully or negligently, but the question remains the question posed by the terms of the Regulation.

194. Fourth, Mr Lock attempts to make his position more attractive by arguing that in the event of a refusal of consent, the SMP should get on and make the decision, drawing adverse inferences where appropriate. However, if consideration of the medical records cannot be regarded as part of a medical examination or an interview, it is not clear from where the medical authority derives its power to ask to see them or on what legal basis an adverse inference could be drawn from a refusal of an unlawful request or a request with which there is no duty to comply. Conversely, if there is a power to ask, it is not clear why this could not be regarded as part of a medical examination or interview. Even assuming that there is such a power, the suggestion that adverse inferences could be drawn from a refusal to consent is also problematic: should general requests for access be made by SMPs and adverse inferences routinely drawn in the event of refusal and, if not, when and how will the SMP know whether a particular aspect of what they are being told is inaccurate or ought to be checked? It would be far better for the law to facilitate and encourage an informed and accurate decision by the medical authority, rather than one which makes assumptions about why consent is being withheld, and I consider that this is what Parliament intended. Moreover, the fact that, under Regulation 33(b) the result in the event that there is a failure to submit/attend etc is that the appeal is deemed to be withdrawn rather than that the medical authority, here the Board, must nevertheless make its decision, would seem inconsistent with Mr Lock's analysis.

195. Finally, I reject Mr Lock's submission that in this case there were no interviews or examinations because the stand-offs in relation to consent which were confirmed at each of the Claimants' appointments resulted in there being no discussion of their medical condition or physical examination. Again, the suggestion that in order to bring the case within Regulation 33 the SMP had to carry out what they regarded as a pointless exercise and then reach no conclusion because they were not able to view the medical history seems to me to be highly unattractive and artificial, and not consistent with what was intended under the 2006 Regulations. Plainly there could be a failure to submit to an examination, or to attend an interview, which was based on a prior indication by the applicant or award holder that they refused to do something which was necessary for the assessment to be of any value.

196. In coming to these conclusions, I have considered Mr Lock's argument that Regulation 33 is a penal or punitive provision or a *"sanction"*. This is the basis for his submission that it should be construed narrowly under the domestic law presumption against doubtful penalisation, and part of his argument that there was a breach of Article 8 ECHR in this case. It is important to be clear that although Regulation 33(b) may be regarded as a sanction because the former officer's appeal is deemed to be withdrawn, Regulation 33(a), with which this case is concerned, provides that the determination of the question referred to the SMP is to be made by the PPA. The provisions therefore give the officer a choice between assessment by a medical practitioner on the basis of the information which that practitioner considers necessary, or an assessment by the PPA *"on such evidence and medical advice as they in their discretion think necessary"*. Where Regulation 33 applies, the ex-officer therefore loses the right to assessment by a duly qualified medical practitioner on the medical practitioner's terms and his case is assessed by the PPA on the PPA's terms.

In each case, according to Mr Lock's argument, adverse inferences can be drawn from the refusal of consent. But he says that any adverse inferences should be drawn by a qualified medical practitioner rather than the PPA. Where the SMP makes the decision there is an avenue of appeal to the Board and beyond. Where the PPA makes the decision, the avenue of challenge is to apply for judicial review.

197. Although the modern view is that the concept of a penal measure should be given a broad meaning for these purposes, and applies to any detriment inflicted through the coercive power of the State (see Bennion 7th Edition page 716), I am therefore doubtful that Regulation 33(a) is a penal measure. What is complained of here is a change in the decision maker and the scope for challenging their decision, rather than the imposition of any liability on the pensioner, whether criminal or civil. Even if Regulation 33 is to be so regarded, the penal aspect is not powerful and the principle therefore does not carry a great deal of weight in the present context. In my view, the language of Regulation 33 is also sufficiently clear. Parliament intended that the medical authority would have access to such information as they considered necessary to make the relevant determination as to the applicant or award holder's statutory entitlement. It did not intend that relevant information could be withheld and that the medical authority would nevertheless be obliged to make a decision which may be unreliable as a result. Bearing in mind that the principle of doubtful penalisation is concerned with fairness, nor do I consider that there is any unfairness in my interpretation of Regulation 33 given that the Regulation contemplates that the applicant or award holder will be told of the SMP's requirements and is then able to decide whether to comply. Rather, it is the Claimants' interpretation which risks unfairness through the making of unreliable decisions by persons charged with statutory duties to reach reliable ones.

198. I have also taken account the competing arguments in relation to the application of Regulation 23(2) of the Employment and Support Allowance Regulations 2008. This provides, so far as material, that *"where a claimant fails without good cause to attend for, or to submit to [a medical] examination… the claimant is to be treated as not having limited capability for work."*

i) Mr Lock relied on the decision of the Upper Tribunal in *PH v Secretary of State for Work and Pensions* [2016] UKUT 0119 (AAC) for the proposition that *"examination"* should be given its technical and literal meaning, but this was an agreed position between the parties in that case, and in the context of very different facts. The Upper Tribunal held that the applicant had not failed to submit to the medical examination in question. The process of investigating the nature and extent of his relevant health conditions did not start because there was a concern about whether the applicant had validly agreed to the examination being recorded. He had said that he wished to re-schedule but had not agreed a date then and there, because he did not have his diary to hand. I also note that the Upper Tribunal held that failure to submit to a medical examination *"refers to a person who fails to cooperate with the examination process so as to thwart its purpose."* (paragraph 22).

ii) He also relied on *JW v Secretary of State for Work and Pensions (ESA)* [2016] UKUT 0208 (AAC) for the proposition that *"submit"* should also be given its ordinary meaning. Whether or not there is been a failure to submit will be a matter of fact and degree: the fact that an applicant is unfriendly would not be

> enough, but if he was obstructive or imposed unreasonable conditions on the examiner that might be a failure to submit. For example, in case *CIB/849/2001* Commissioner Turnbull held that consenting to an examination only on the condition that the resulting report would not be passed to any lay person, including the adjudication officer, was a failure to submit to the examination because it defeated the purpose of the examination and rendered the resulting report useless.

199. For his part, Mr Holl-Allen submitted that the context for these decisions was materially different, although he drew an analogy between the decision in *CIB/849/2001* and the present case which, he said, involved imposing a condition (that the interview/examination was conducted without sight of the medical history), which rendered, or risked rendering, the resulting report useless. He also drew attention to the fact that, contrary to the assertion at paragraph 102(d)(i) of Mr Lock's skeleton that there is no such requirement, an applicant for Employment and Support Allowance is required to fill out a detailed questionnaire (the ESA 50) which requires them to provide details of treating healthcare professionals, to supply copies of healthcare records in their possession and to authorise the DWP's assessor to contact their treating healthcare professionals. The DWP's Guide (ESA 214), at page 13, also encourages the assessor to contact the applicant's doctors if it is considered that further information is required.

200. I agree with Mr Holl-Allen that the case law in relation to these social security benefits is not particularly helpful in the present context, although the comparison with Employment and Support Allowance does tend to illustrate the point that, generally, a person's medical history and the evidence of their treating healthcare professionals will be taken into account in assessing their state of health for the purposes of determining their eligibility for a given benefit or payment. The statutory test with which the present case is concerned arises in a different context and is worded differently and more flexibly. As I have pointed out, Regulation 33 emphasises the views of the medical authority as to what is necessary to enable them to perform their statutory task.

201. I have also considered a consultation document, published by the Home Office in August 2008, which contained proposals for changes to the 2006 Regulations. Mr Lock relied on paragraphs 6.5 and 6.6 of this document which considered the position of an applicant for an injury award. Paragraph 6.6 stated in relation to Regulation 33 that:

> *"Although this requirement ensures that the applicant must provide the police authority with an opportunity to have him or her, examined and interviewed as necessary, it does not provide the authority with any express power to require the disclosure of relevant documents and medical records. Although it is not suggested that a police authority should be given such a power, it is clear that refusal to comply with such a request will oblige the police authority or the SMP, as the case may be, to consider the case on the available facts, and it is also reasonable for them to conclude in such circumstances that the claimant has something to hide, which would damage his or her case."* (emphasis added)

202. The consultation document did not recommend the introduction of an express provision requiring consent to disclosure of medical records. Rather, the proposal was

that an applicant who refused the request of a police authority or an SMP for relevant information should be formally warned to expect an adverse inference to be drawn from such a refusal and that they may have their claim rejected altogether.

203. Again, I did not derive a great deal of assistance from the passages relied on, which were not specifically concerned with reviews under Regulation 37. The consultation document represents the Secretary of State's view of the law, rather than being authoritative. It is right that Regulation 33 does not provide the PPA with any power other than to determine the relevant question(s) in the circumstances described. However, paragraph 6.6 did not address the powers of the SMP in any detail or the Board at all. Nor is the observation that a refusal to disclose *"will oblige the police authority or the SMP, as the case may be"* to consider the case on the available materials, particularly clear. Unless the refusal to disclose amounts to failure to submit to a medical examination or attend an interview, etc only the SMP would have power to decide. Nor does the passage deal with Regulation 33(b) which, as I have noted, deems an appeal to the Board to be withdrawn where Regulation 33 is satisfied.

204. Similarly, nor did I derive a great deal of assistance from the fact that there appears to have been a proposal in 2011 to replace the 2006 Regulations. In a Note which was submitted at lunchtime on the first day of the hearing before me, Mr Lock drew attention to the fact that draft regulations were apparently circulated. Regulation 32 of the draft regulations was the equivalent to the current Regulation 33 and it now expressly provided that wilful or negligent failure to *"consent to the disclosure of medical records."* would allow the PPA to decide to determine the issue and/or lead to an appeal to the Board being deemed to have been withdrawn. Mr Lock submitted that this indicated that the drafter did not consider that failure to consent to disclosure of medical records fell within Regulation 33. That may or may not be so - they may have considered that it should be stated for the avoidance of doubt - but Mr Lock was not able to assist further as to the circumstances of the draft regulations or why they were not enacted. Although the Note said that attempts were being made to find out, no further information has been forthcoming.

Article 8 ECHR

205. Turning to Mr Lock's arguments under Article 8 ECHR, this provides that:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

206. Mr Lock emphasises, and I accept, the rationale for and the importance of the principle that information imparted by a patient to a doctor acting in a professional capacity is inherently confidential, and the duties of medical practitioners in this regard: see *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033 at paragraph 63 (concerning medical notes or psychiatric patients) and more generally paragraph

145 of the Opinion of Lady Hale in *Campbell v MGN Ltd* [2004] 2 AC 457 as well as the well known statement of the duties of medical practitioners by Boreham J in *Hunter v Mann* [1974] QB 767. Mr Lock also points out, and I accept, that medical information of this sort is protected by Article 8: see e.g. *Z v Finland* (1998) 25 EHRR 371.

207. Mr Lock submits that:

i) There has been an interference with the Claimants' rights to respect for their private lives in this case by applying a sanction to them for failing to consent to disclosure of all of their medical records.

ii) That interference was not in accordance with the law. There is no clear, foreseeable and adequately accessible law which governs the rights, duties and powers of the parties in the present situation: see the ECHR Guide to Article 8. Nor did the Defendant follow a fair and transparent procedure as required by Article 8: *R (TB) v the Combined Court at Stafford* [2006] EWHC 1645 (Admin) at paragraph 23. The Claimants were told that they could decide not to disclose but were then subjected to sanctions for doing so. There was no system for ensuring that only relevant information was required to be disclosed and for ensuring that confidential information was kept confidential. There was no balancing of the importance of the information with the pensioner's right to privacy: the request was for general consent.

iii) Nor were the actions of the Defendant necessary in a democratic society in the interests of the economic well-being of the country or for the protection of the rights and freedoms of others. Nor were they proportionate. The Claimants were required to disclose, or permit access to, the whole of their medical records without having had the opportunity to see them themselves. Those records will likely contain information which is entirely irrelevant to the question which the SMP was asked to address and would potentially include information which was both irrelevant and highly sensitive. They would not have the opportunity to correct or comment on any information on which the SMP relied. Moreover, the records were to be disclosed to the Defendant as well as the SMP

208. As will be apparent, I do not entirely accept the characterisation of the facts on which these arguments are based. Nor do I consider that the actions of the Defendant breached Article 8 ECHR in this case, or that Article 8 leads to a different interpretation of Regulation 33 to that which I have reached.

209. Firstly, as to interference with the right to respect for private life, the cases relied on by Mr Lock are ones in which the issue was whether it was permissible to override the consent of the patient or to disclose without their consent. In the present case, the right of the award holder to decide whether or not to consent to disclosure of their medical records was respected and, indeed, expressly accepted by the Defendant on various occasions. A decision not to consent had consequences but not such consequences as to render the right to withhold consent nugatory. Each of the Claimants did withhold his consent and the consequence was that the decision was taken by the Defendant rather than the SMP. That decision was then subject to judicial review rather than there being a right of appeal.

210. Secondly, insofar as there was an interference with the right to respect for private life, that interference was in accordance with law in that, in my view it was consistent with the 2006 Regulations including Regulations 30, 33 and 37. As I have held, these provisions permit the medical authority to request sight of the award holder's medical records as part of a medical examination or interview where they consider this necessary. If the award holder is not prepared to consent to this, the decision may be taken by the Defendant. That is what happened in this case. Any consent to disclosure would also have been subject to the common law duty of confidentiality owed by those who saw the records and to the data protection legislation. As for the fairness of the procedure which was followed, as I have explained, there were lengthy exchanges about the question of consenting to disclosure and why consent was sought, and the consequences of not doing so were made very clear. It is true that the request was for general consent, but the Claimants had every opportunity to make representations as to their position and any more refined approach to which they were willing to agree. Their position was essentially to enter a blanket refusal, and that refusal was respected. This is not a case, like *R (TB) v the Combined Court at Stafford* (supra) where the patient was not given an opportunity to make representations.

211. Thirdly, the request for access to medical records was necessary in order to reach a reliable decision as to each Claimant's degree of disablement and therefore their true entitlement under the 2006 Regulations. In this regard, I have already noted the Claimants do not dispute that the SMPs held this view and nor have they sought judicial review of the SMPs' views on this issue save indirectly through their arguments under Article 8.

212. Fourth, the request was proportionate. It was solely for the purposes of the statutory task which the SMP was required to carry out. The materials would be destroyed once that task had been completed and the time for any appeal had expired. Although the request was for general authorisation, the access would be limited to medical professionals and subject to the professional obligations of the SMP and OH personnel including their duties of confidentiality and under the data protection legislation. The SMPs could be relied on to include only relevant information in their reports. In relation to the risk of them relying on inaccurate information, the Claimants would receive a copy of the report relating to their case and they also had a right of appeal under the 2006 Regulations.

213. The decision of the European Court of Human Rights in *MS v Sweden* (1999) 28 EHRR 313 tends to support this analysis in that it recognises the point that where a claim for a benefit is made the applicant may need to accept the need for their medical history to be considered in order to decide whether they qualify. In that case it was also relevant that the provider and the recipient of the sensitive information were subject to obligations and safeguards which were designed to prevent abuse. In *MS* it was held that there was no breach of Article 8 even though the medical information had been disclosed by one public body to the other without the knowledge or consent of the applicant.

Conclusion on Ground 2.

214. For all of these reasons, then, I do not accept that the Defendant erred in law in concluding that he could decide the Regulation 37 question himself in the

circumstances of each of the Claimants' cases, or that he breached Article 8 ECHR. I therefore reject Ground 2.

Ground 3: failure to refer the decisions to an independent and impartial tribunal contrary to Article 6 ECHR

215. Article 6 ECHR provides, so far as material, as follows:

> *"In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

216. Mr Lock's argument under this heading is that Article 6 ECHR applied to the PPA's decision under Regulations 33/37 and that he was not an independent and impartial tribunal. It follows that he breached Article 6 in reaching the decisions himself rather than delegating them to an independent and impartial tribunal.

217. Mr Holl-Allen accepts that the PPA is not an independent and impartial tribunal but he argues that Article 6 ECHR does not apply to decisions about the level of injury award to which an applicant or award holder is entitled. As I understood his argument, this is because of the evaluative nature of the decision making about the pensioner's degree of disability. He relied on the following passage from paragraph 49 of the judgment of Lord Hope in *Ali v Birmingham City Council* [2010] 2 AC 39:

> *"....I would be prepared now to hold that cases where the award of services or benefits in kind is not an individual right of which the applicant can consider himself the holder, but is dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and how the need for it ought to be met, do not engage article 6(1). In my opinion they do not give rise to 'civil rights' within the autonomous meaning that is given to that expression for the purposes of that article...."*

218. I agree with Mr Lock that Article 6 ECHR applies to a decision as to the level of an injury award under the 2006 Regulations and note that this was the conclusion of the ombudsman in *Flynn v Humberside Police Authority* (Determination 2001 L00007). As the passage above shows, *Ali* was concerned with decisions as to the allocation of services and benefits in kind: in that case, the provision of suitable accommodation according to whether the person was unintentionally homeless, and the degree of priority which the Housing Act 1996 required that they be given. The present case is concerned with the decisions about loss of earning capacity which determine a specific financial entitlement under the 2006 Regulations.

219. As noted above in relation to Mr Goodland's arguments under A1P1, a claim to such an award is itself a possession. Part of the reasoning in *Stec v United Kingdom* (supra) which led to this conclusion was that:

> *"48. It is in the interests of the coherence of the Convention as a whole that the autonomous concept of "possessions" in Art.1 of Protocol No.1 should be interpreted in a way which is consistent with the concept of pecuniary rights*

under Art.6(1). It is moreover important to adopt an interpretation of Art.1 of Protocol No.1 which avoids inequalities of treatment based on distinctions which, at the present day, appear illogical or unsustainable."

220. This was said having noted the Court's decision in *Schuler-Zgraggen v Switzerland* (1993) EHRR 405 on which Mr Lock relied. In *Schuler-Zgraggen* the Court held that Article 6 applied in a case where the issue was as to the claimant's entitlement to a state invalidity pension. Under the relevant legislation, the entitlement was graduated according to the degree of incapacity, with a full pension being granted where it was at least 66.6%, a half pension where it was less than 50% and only in cases of hardship where it was at 33.3%. A quarter pension would be awarded if incapacity was at least 40%. The amount of the pension is based on the insured's annual average income, which was calculated by dividing the total income, taken as a basis for assessing contributions, by the number of contribution years. Mrs Schuler-Zgraggen's complaint was that her full pension had been cancelled when she had a child, purportedly on the basis that she would not have been earning anyway, even if she had not had health problems. She argued that she was entitled to a full pension, but she also argued in the alternative that she should be awarded a proportion of full pension.

221. At paragraph 46, the Court noted that in the light of its case law including *Feldbrugge v Netherlands* (1986) 8 EHRR 448, *Deumeland v Germany* (1986) 8 EHRR 448 and *Salesi v Italy* (1993) 26 EHHR *187 "today the general rule is that Article 6(1) does apply in the field of social insurance, including even welfare assistance"*. It went on to say:

"the State intervention is not sufficient to establish that Article 6(1) is inapplicable; other considerations argue in favour of the applicability of Article 6(1) in the instant case. The most important of these lies in the fact that despite the public law features pointed out by the Government, the applicant was not only affected in her relations with the administrative authorities as such but also suffered an interference with her means of subsistence; she was claiming an individual economic right flowing from specific rules laid down in a federal statute.

In sum, the Court sees no convincing reason to distinguish between Mrs. Schuler-Zgraggen's right to an invalidity pension and the rights to social insurance benefits asserted by Mrs. Feldbrugge and Mr. Deumeland."

222. Thus, as Lord Collins said at paragraph 61 of his judgment in *Ali v Birmingham City Council* (supra), *Schuler-Zgraggen* showed that *"The mere fact that evaluative judgments are required will not take the case out of article 6(1)"*. He went on to say, at paragraph 62, that:

"The reference in that decision to 'an individual, economic right flowing from specific rules' in legislation reflects a thread running through the case law in this area. It is plain from the jurisprudence of the court that an important factor in the application of article 6(1) in disputes with public authorities in areas which in national law would normally be regarded as public law is the assertion by the applicant of what has been variously described as 'an economic right' or an 'individual, economic right' or a 'purely economic right'."

223. A key factor in the decision in *Ali* that the statutory duty of the housing authority under section 193(3) Housing Act 1996 did not give rise to correlative civil rights was also the lack of precision as to its content:

> *"73…. There is no right to any particular accommodation. The duty is to secure that accommodation is available. In my judgment, these factors together with the essentially public nature of the duty mean that the duty does not give rise to an individual economic right...,"*

224. In contrast, disputes in relation to housing and council tax benefit, which was a means tested financial benefit, did fall within Article 6: see *Tsfayo v United Kingdom* (2009) 48 EHRR 18. Although the ECHR subsequently held, in *Ali v United Kingdom* (2015) 63 EHRR 20 that Article 6 was engaged, in *Poshteh v Royal Borough of Kensington & Chelsea* [2017] AC 624 the Supreme Court confirmed its reasoning and decision in the *Ali* case.

225. The case law does not reveal a crystal-clear set of principles on which to distinguish which statutory schemes give rise to civil rights and which do not, but happily the present case is not near the boundary. Mr Holl-Allen's argument in relation to *Schuler-Zgraggen* is that the decision in issue did not involve an evaluative exercise as to the level of pension. Rather, the invalidity pension had been cancelled on the basis of an assumption that Mrs Schuler-Zgraggen would not have been working or earning in any event once she had given birth to a child. In my view, however, the key point about *Schuler-Zgraggen* is that the statutory scheme gave rise to an entitlement to specific financial payments subject to the applicant's level of disability and after taking into account other relevant considerations. The fact that there was a need to make evaluative judgments as to the degree of disablement, hardship etc, did not alter the fact that the statutory scheme created civil rights. Mr Holl-Allen's argument is about the nature of the dispute in relation to Mrs Schuler-Zgraggen's civil rights and therefore does not engage with the relevant issue. The rights which the statutory scheme created remained civil rights, whether her entitlement was reduced or cancelled, and whatever the reason for doing so: the determination of a dispute about her degree of disability for the purposes of deciding her entitlement under the statutory scheme would still be a determination of her civil rights under that scheme. Similarly, the 2006 Regulations gave rise to civil rights in the present case and the determination of the Claimants' entitlements under the 2006 Regulations therefore amounted to determinations of their civil rights.

226. Having said this, however, I do not accept that Article 6 was breached in this case. Although it is conceded by the Defendant that he is not an independent and impartial tribunal I accept that the proceedings under the 2006 Regulations in relation to entitlements to awards, including reviews of awards, should be *"taken as a whole"* to use Brooke LJ's phrase in *Adan v Newham London Borough Council* [2002] 1 WLR 2120 at paragraph 43. In *Ali v United Kingdom* (supra) the ECHR said:

> *"79. It is therefore necessary for the Court to examine the whole of the legislative scheme in question, including the safeguards offered to individual claimants, in order to determine whether the procedure provided for resolution of disputes over the "civil rights and obligations" thereby created is compliant with art 6(1); including, in particular, for the purposes of the present case, whether*

the adjudicatory process by which the applicant's "civil rights" were "determined", taken as a whole, provided a due enquiry into the facts."

227. Many of the cases where this has been the issue have focussed on the question whether the right to apply for judicial review of an administrative decision is sufficient to ensure that the applicant's civil rights have ultimately been determined by an independent and impartial tribunal, particularly where the determination of the civil right involves fact finding. But there is no reason why the opportunities to seek a determination by an independent and impartial tribunal before the specific administrative decision complained of should not be taken into account in assessing whether the relevant statutory scheme affords the applicant an Article 6 compliant determination of civil rights.

228. Looked at as a whole, the 2006 Regulations provide for decisions as to whether there is an entitlement to an injury award and/or as to the extent of the entitlement to be taken by the PPA. However, as I have explained in more detail above:

i) Under Regulation 30, the decision-making process requires all medical questions to be determined by an independent qualified medical practitioner after a process which is likely to involve medical examinations and/or interviews in which the applicant or pensioner participates, and in the course of which they present their evidence, and facts are found.

ii) Under Regulation 31, there is then a right of appeal to the Board, which is independent and which holds a hearing in which the appellant participates. Again, the Board has a fact-finding role. Mr Lock accepts that this decision - making process therefore complies with Article 6.

iii) There is then a further right of appeal to the Crown Court or the appeal tribunal under Regulations 34 or 35, as the case may be. Mr Lock accepts that the Crown Court considers the matter afresh and that the decision-making process complies with Article 6.

229. At each of these stages the applicant or award holder is able to dispute the factual basis of the decision in relation to him, and Mr Lock makes no complaint in this regard. Regulation 33 only comes into play after there has been a referral to a qualified medical practitioner and after the applicant or pensioner has had the opportunity to avail himself of these procedures but has wilfully or negligently failed to submit to the examinations and interviews which are necessary to make them effective and fair: in effect, where he has chosen not to avail himself of his Article 6 rights under the relevant provisions. Even then, the decision as to whether Regulation 33 has been triggered requires the specified precedent facts to be established although I accept that judicial review of the decision which the PPA then takes as to the applicant or pensioner's entitlement will only be available on conventional bases.

230. I therefore consider that the 2006 Regulations do afford applicants and pensioners an Article 6 compliant right to a determination of their rights under those Regulations before an independent and impartial tribunal. The position where Regulation 33 applies is that they have deliberately or negligently failed to avail themselves of this right. It would be surprising if Article 6 nevertheless required that an applicant or

pensioner could then insist on a further hearing before a different body, not provided for under the statutory scheme.

231. In any event, I do not consider that the Defendant had any power to refer the matter to another body for a determination. The only option available to him in the circumstances of this case, having regard to the terms of Regulation 33, was to determine the matter himself.

232. I therefore reject Ground 3.

Ground 4: failure by the Defendant to hold a fair hearing/follow a fair procedure

233. Mr Lock complains that "*the PPA failed to follow any procedure which permitted any of the Claimants to take part in the decision-making process which led to a final decision to review their pensions"* (paragraph 163 of his skeleton). He says that the Claimants were not invited to submit evidence to the PPA for the purposes of his decision or to comment on the factual accuracy or relevance of the evidence on which he proposed to rely. He says that in three cases (Messrs Bridgwood, Barlow and Bower) the Defendant made material factual errors in coming to his decision. He contends, based on *Karakasis v Greece* (2003) 36 EHRR 29 paragraph 26, that it cannot be compatible with Article 6(1) to determine civil rights without hearing the parties' submissions. He also complains of breach of the common law duty to act fairly and relies on *R (St Helens Borough Council) v Manchester Primary Care Trust* [2008] EWCA Civ 931 paragraph 13.

234. My answer to the Wright Claimants' complaint under Ground 4 is similar to my answer to Ground 3. The right to a hearing is not absolute: obviously, as a result of their behaviour a party to a dispute about their civil rights may forfeit the right to a hearing or have their participation in the process of determination limited in other ways. But, in any event, Mr Lock's arguments ignore both the opportunities which the Claimants had in principle under the 2006 Regulations to put their cases, and the opportunities which they had on the facts of the present case:

    i) I have outlined the features of the statutory scheme which amply allowed the Claimants to put forward such information and arguments as they thought fit but provided, in effect, that if they did not cooperate with the process of medical assessment the PPA *"could make their determination on such evidence and medical advice as they in their discretion think necessary"*. The 2006 Regulations therefore provided a fair procedure for the determination of their civil rights including hearings by the SMP, the Board and the Crown Court. However, the Claimants did not avail themselves of these procedures or, at least, were not prepared to do so in accordance with the rules which applied to them.

    ii) I have summarised the lengthy exchanges between the parties during which what was required of the Claimants was made very clear, as were the consequences of failing to cooperate. They had every opportunity to put forward relevant evidence and arguments during these exchanges. The very point of the Questionnaire was to enable them to put forward relevant information which would inform the decision in their case, yet they refused to provide that information. The Defendant's letters of 10 July 2018 specifically

offered an opportunity to meet and reflect even after they had declined to cooperate with the SMPs. This was not taken up by the individual Claimants. But in any event it was open to them, legally advised as they were, to submit further evidence or submissions in response to this letter. In his letters of 30 January 2019, the Defendant also offered the opportunity to put forward information or ask for a further review but, again, this was not taken up.

235. I see no unfairness in the fact that the 2006 Regulations provided that if the Claimants failed to cooperate with the available procedures it would be a matter for the discretion of the PPA as to how he went about making his decision. Nor do I consider that, on the evidence, the way in which the Defendant exercised that discretion in the present case was unfair having regard to the history I have summarised above. Indeed, it seems to me to be unrealistic for the Claimants to contend that, having withheld relevant information from the Defendant and the SMPs when it was requested, having taken particular exception to the Defendant requesting such information, and having failed to take up offers to meet and to submit evidence they now have a justified complaint that they were not given a fair opportunity to present such evidence and arguments as they wished to present.

236. Insofar as the Defendant made errors of fact in relation to three of the Claimants, which is not conceded by him other than in the case of Mr Bridgwood, this may mean that the decisions in those cases are capable of challenge on this basis if they are maintained by the Defendant. But I make no finding one way or the other. The Wright Claimants' pleaded case before me raises issues of principle which are common to all cases, rather than seeking individual consideration of any particular Claimant's case, and I have therefore limited my decision accordingly.

237. I therefore reject Ground 4.

CONCLUSION

238. I therefore dismiss the Claims in both the Goodland and the Wright cases.