



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 35

P371/18 & P864/18

OPINION OF LORD WOOLMAN

in the Petitions of

PC NICOLE SHORT

First Petitioner

and

PC ALAN PATON

Second Petitioner

against

decisions of the Scottish Police Authority refusing to allow them to retire on medical grounds

Respondent

**Petitioners: Sandison QC, Campbell; Kennedys Scotland
Respondent: Duncan QC, Irvine; DLA Piper Scotland LLP**

5 April 2019

Introduction

[1] Mr Sheku Bayoh died in Kirkcaldy on 3 May 2015. Controversy has surrounded his death. Questions have arisen about the conduct of the police officers who were present at the time. The Police Investigations and Review Commissioner (“PIRC”) carried out inquiries. Subsequently, the PIRC sent a report to the Crown Office. Counsel at the hearing informed me that on 3 October 2018, the Lord Advocate’s decision not to bring any

prosecutions in respect of the death was made public. That was not the end of matters.

Counsel understood that Mr Bayoh's family wished to review that decision. There might also be a Fatal Accident Inquiry and a public enquiry. At a subsequent hearing to discuss a draft opinion that I had provided, counsel for the Lord Advocate told me (a) that the Crown notified the initial marking decision to members of Mr Bayoh's family, but did not make it public, (b) on 1 February 2019 the family sought a review under the Victims Rights Directive and the Victims and Witnesses (Scotland) Act 2014, and (c) that the target date for the completion of the review is 30 April 2019.

[2] PC Nicole Short and PC Alan Paton ("the officers") have respectively 9 and 17 years police service. They were formerly based at Kirkcaldy police station. They were on duty on 3 May 2015. In the early morning members of the public telephoned the station to express alarm about a man brandishing a knife. That man turned out to be Mr Bayoh. The officers were instructed to respond to the incident. When they and other officers arrived at the scene, they had to deal with a difficult situation.

[3] The officers have both been on sick leave since the incident. They wish to retire on medical grounds. Their employer, the Scottish Police Authority ("SPA"), refused their applications as being against the public interest. It wished to defer matters to find out whether either of them would face criminal proceedings arising out of the incident.

[4] The officers challenge the decision of the SPA. They advance three arguments. First, the decision is irrational, having regard to: (a) the strong supportive medical evidence, (b) the lengthy period that has elapsed since the incident, and (c) the absence of any intimation to them that they will face either prosecution or internal disciplinary proceedings in respect of Mr Bayoh's death. Secondly, that the SPA took into account an irrelevant matter – that the officers were involved in a high profile incident. Thirdly, that the SPA

failed to take into account relevant factors – the deleterious effect on their health, the absence of intimation of any proceedings, and the public interest in allowing them to retire, rather than continuing to receive full pay.

[5] I heard both petitions together. Counsel agreed that there was a substantial measure of overlap. They each focussed on the case of PC Short, before identifying particular features that applied to PC Paton. I shall adopt the same approach.

PC Short's Account

[6] In late 2018 PC Short swore an affidavit regarding the events of 3 May 2015.

Although untested by cross-examination, it provides colour and texture to the circumstances as seen from her viewpoint. In the circumstances of the case, I have decided to set out her version at length:

“On Sunday, 3 May 2015 a Grade 1 call [response with lights and sirens] came in very early in the morning. I was working day shift ... with Constable Ashley Tomlinson. The call came through ... at 07:20 hours and related to a black male armed with a knife on Hayfield Road in Kirkcaldy. The report had been made by a member of the public.

I left the station alongside Constable Tomlinson. We were travelling in a vehicle immediately behind Constables Alan Paton and Craig Walker. It took only minutes for us to travel to the locus and during that time there were continuous messages received through our police radios from the call handler in relation to the same black male. The messages were of more reports being received from members of the public in relation to a black male suspect armed with a knife and chasing people with a knife. There was also a message from an Inspector advising that he was considering firearms deployment but that the situation would require to be assessed by us upon arrival. I remember hearing that the police dog was in Edinburgh and could not be there soon enough, and the firearms team were unavailable for some reason. I remember thinking, ‘it’s just us then’. My initial assessment was that a murder was about to take place and our instructions were simply to get to the scene.

Upon arrival, I took off my seat belt and looked out of the windscreen. I could see Constables Paton and Walker. They had already alighted from their marked police van and Mr Sheku Bayoh was walking towards them Their van was parked at the bus stop immediately outside the Industrial Estate. Mr Bayoh’s muscles were bulging

and he looked aggressive. He was not listening to their commands and looked very intimidating. He was totally silent at this point and had no expression on his face. Both constables had their sprays out, I think Constable Walker had PAVA spray and Constable Paton had CS spray. I heard them both shouting at Mr Bayoh, 'stay where you are, get back, get back or I'll spray you', and one of them had just sprayed Mr Bayoh. I did not see which one had used their spray and did not see ..., but I knew straightaway that one of them had. I could taste it in the air. It was a windy day, so I think the wind carried the spray. The spray is attracted to moisture and so it immediately is attracted to the mouth and eyes. Mr Bayoh reacted to the spray by laughing and wiping it away from his eyes like it was just water. It had no physical effect on him and did not deter him whatsoever. The spray was, however, affecting both Constables Paton and Walker as both had their hands over their faces, specifically their eyes, and both were bent over. I could not see a knife but still believed that Mr Bayoh had one on his person somewhere.

Constable Tomlinson alighted from our vehicle first and we met outside at the front of the vehicle. Mr Bayoh was now walking along the grass near the pathway outside the industrial estate He was walking in the opposite direction from Constables Walker and Paton. Mr Bayoh appeared to be on a mission from the manner in which he was walking. He appeared out of control and dangerous and given the reports of him chasing people with a knife as well as his demeanour and the way he didn't react to the sprays, I felt that he could not be permitted to leave. I was terrified that he was going to kill a member of the public if he was allowed to leave the street, which is what he was trying to do. I still fully believed that he had a knife in his possession. I issued Mr Bayoh with verbal instructions and commands to stop by shouting, 'stop ... stay where you are, put your hands behind your back, get down on your knees'. He ignored me. Constable Tomlinson shouted commands simultaneously, including a threat to use his spray if Mr Bayoh did not stop. Mr Bayoh did not stop, and he did not turn back. Constable Tomlinson was facing Mr Bayoh and I was behind them. Constable Tomlinson used his spray on Mr Bayoh and I had my spray out of its holster in preparation to use it. I could see the path of the spray and it hit Mr Bayoh in the face I could see it running down his face but he kept laughing and just wiped it as if it was water, and kept walking in the same direction. I could see that despite being sprayed on at least two occasions which I was aware of, the spray was having no effect upon Mr Bayoh. We had issued verbal commands, we had drawn our sprays, we had threatened to use our sprays, sprays were then used, but nothing was working and we were not in control of the situation at all.

In response to the escalating situation, I removed my baton from its holster and shouted a command to Mr Bayoh which was 'I have a police baton, put your hands behind your back, get on your knees'. Mr Bayoh responded at the point when I said, 'get on your knees' by turning his head halfway to the side and stating, 'what the fuck *It was like he scoffed. When he turned to his left, to face us, I could tell that he was under the influence of drugs. He was completely unresponsive. His face was expressionless, completely blank. He was not listening. His reaction to being sprayed was consistent with being under the influence of drugs and his eyes were totally black. I have never seen anything like it before, he was like a zombie. Mr Bayoh then

looked at Constable Tomlinson, then at Constable Walker. He shouted, 'fucking come on then' and then moved towards me. The manner in which he moved was like he was skipping in the way I have previously seen boxers skip. At this time my thoughts were mostly in relation to the knife as I still ... did not know where it was. I believed it to be in his possession somewhere. I tried to step back and tried to keep distance between us. I still thought in my head that he would stop eventually. In all my years of service I have never needed to use my baton or spray at all and usually, because I am so short and petite, this serves to de-escalate situations with men. Part of me still believed that is what would happen, but he just kept coming towards me. I swiped my baton at him whilst he was skipping towards me to try to show him that I was serious and that he needed to stop. I swiped towards the middle of his body and I completely missed him. Mr Bayoh was now so close to me that he was right in my face and I decided to turn around and run. I was screaming at this point and desperate to get away from him. I screamed 'NOOOOO'. I knew that he was chasing me, and I knew that he was right behind me. I could hear him behind me and I knew from what he had said and the way he had moved towards me that he was going to hammer me. I felt an enormous blow to the back of my head over to the lower right side. ... I went flying. My feet actually left the ground and I landed on the ground almost at the other side of the road. ... At the time, I remember thinking that I would not let my head be kicked about like the videos they showed us in Officer Safety Training and so I grabbed my hair which was in a bun and wrapped my arms around my head. I curled my body into a ball to protect myself. I did not feel him hitting me again and I'm not sure that I was conscious, but I was later told that he stamped on me at least three times.

I could not get up. I tried two or three times and I just kept falling back down on to my knees. I rolled onto all fours and tried to stand twice and could not. I felt someone helping me up. It felt like my legs were not working. I was desperate to get up. Constable Paton lifted me up by my vest and I recall that his complexion was grey. His eyes were bloodshot, he was really struggling to keep them open. Constable Paton pulled me to my feet and shouted in my face to 'run to the police van'. I staggered to my police van, then to the bigger van which had been driven by Constables Paton and Walker. The incident with Mr Bayoh continued, with other officers involved. I wanted to be further away. Whilst I was moving between vans, I tried to press my red emergency button, but my finger kept slipping off the button. I was like jelly. I do not know if I successfully activated the button or not. ... At this time, I was crying and hysterical. The wind had been knocked out of me and I couldn't breathe. Several of the officers asked me if there was blood and specifically stated that they thought I had been stabbed. I said that I had not and told them that I had been punched. I was unable to speak beyond that. I remember looking at myself and my new boots were scuffed, my police radio was upside down, my trousers were soaked and I could feel pain in my head, down my right side, in my knees and in my hands."

PIRC Investigation

[7] PC Short attended hospital immediately after the incident. After being discharged, she returned to Kirkcaldy police station later that day “numb, tearful and in shock”. In June 2015, PIRC investigators interviewed her for seven hours at a residential centre where she was receiving treatment. A second interview lasted five hours. They also interviewed PC Paton for several hours in the same month.

[8] The investigators told the officers that they were not suspects. Accordingly, they were questioned as witnesses. Since then, no one from the PIRC or the Crown Office has approached the officers. They have never been informed that they are suspected of having committed a criminal offence. They have not received any intimation that they face misconduct proceedings in connection with the incident.

PC Short’s Application

[9] PC Short applied for retirement on the grounds of ill-health in 2017. In terms of the procedure prescribed by the Police Pension Scheme (Scotland) Regulations 2015, a selected medical practitioner (“SMP”) was appointed. He reported that PC Short was suffering from post-traumatic stress disorder, which rendered her permanently disabled from undertaking the ordinary duties of a police officer. The following month a panel concluded that as there were no suitable posts in which to re-deploy her, she should be considered for ill-health retirement.

[10] Regulation 72 provides that where an officer is permanently medically unfit for performing the ordinary duties of a member of the police force, the SPA:

“(2) ... after considering all the relevant circumstances and all the advice and information available to it (including input from the member) —

(a) may require the member to retire on the date the employer considers the member ought to retire on the ground that the member is permanently medically unfit for performing the ordinary duties of a member of the police force; or

(b) may require the member to continue to serve as a member of the police force.”

[11] On 9 October 2017 the SPA stated that it would not be in the public interest for PC Short to be granted a medical discharge, because the PIRC investigations into the “high profile” death of Mr Bayoh were still ongoing.

[12] PC Short’s agents requested a review of that decision. They emphasised that she was a witness and victim, not a suspect, in relation to Mr Bayoh’s death. They enclosed a supplementary psychiatric report dated 19 December 2017. It stated that the refusal to allow her to retire was adversely affecting her health. It was contributing to her ongoing symptoms and presented a significant impediment to her recovery.

[13] On 2 February 2018 the SPA adhered to its original decision. It stated:

“Whilst it may well be the case that your client is only a witness at this stage, the PIRC investigation is of course still ongoing and until it is completed all individuals involved in the investigation must be treated as live participants in that process. ...there is clearly a balance to be struck in this case between the private interests of [PC Short] and the public interest. Whatever the final outcome of the ongoing investigation into the death of Mr Bayoh ... the fact remains that your client was involved in an incident which resulted in a man’s death. I would submit that those wholly exceptional circumstances justify the decision ... to decline to grant ... a medical discharge at this juncture.”

PC Paton’s Application

[14] The decision letter for PC Paton dated 10 August 2018 gives similar reasons for refusing his application. In his affidavit he gives details of his position. He has received extensive psychological counselling and long term medication for anxiety and depression

stemming from the events of 5 May 2015. Dr Wylie's psychiatric report dated 16 April 2018 supports PC Paton's retirement on medical grounds.

[15] PC Paton believes that two newspaper articles have contributed to his problems.

One was published in February 2018, the other in October 2018. They suggested that, as he was not performing his duties, it was wrong for taxpayers to pay his salary. PC Paton feels this assertion to be unfair, given that it is the SPA that has prevented his medical retirement.

Later Events

Undertaking

[16] On 17 October 2018 the SPA stated that it "is prepared to undertake for any new decision to be taken within 30 days of the relevant Crown Office and Procurator Fiscal Service ... decision".

Possible Review of the Crown Office Decision

[17] Mr Duncan informed me that, from enquiries he has made, he understood that Mr Bayoh's family were likely in the near future to request a review of the Lord Advocate's decision. There is no prescribed time limit for such applications, which are made under the Victims and Witnesses (Scotland) Act 2014. I have narrated the updated position in paragraph 1 of this opinion.

PIRC

[18] On 22 November 2018 the SPA wrote to ask the PIRC whether it had found potential grounds of misconduct on the part of the officers. The PIRC gave this enquiry short shrift. It replied that it was not part of its role to report on questions of misconduct.

Misconduct Procedure

[19] The SPA based its decisions on the question of criminal charges. Should any issue of misconduct be relevant, the Police Service of Scotland (Conduct) Regulations 2014 apply. They promote a culture of transparency. They require the deputy chief constable (“DCC”) to assess the seriousness of any allegation made against an officer. If he considers that there may have been a criminal offence, he must (i) refer the matter to the procurator fiscal, and (ii) inform the officer if he suspends or postpones any internal disciplinary proceedings: reg 9.

[20] If the DCC considers that there may have been misconduct or gross misconduct, he has a range of options. He can appoint an investigator, take “improvement action”, or take no further action: reg 10.

[21] Here, the DCC has not told the officers that they face any proceedings, or that any such proceedings have been suspended or postponed.

Are the Petitions Academic?

[22] I reject the SPA’s preliminary argument that the undertaking renders the petitions academic. The officers are not asking the court to rule on a hypothetical question. The issue is of great practical moment to them: *Wightman v Secretary of State for Exiting the European Union* 2018 SLT 959. Their current situation is taking a toll on their health. Neither can move on with their lives until they know whether they can retire. They cannot be confident of an early resolution. It may be months or years before all proceedings have come to an end and the SPA then makes a decision. Further, the SPA does not accept the grounds of challenge. It appears to deny that the decision-making process was flawed.

The SPA's Position

[23] In inviting me to dismiss the petition, Mr Duncan submitted that the position must be scrutinised as at the date of the decision letters. There should be no “rolling review” that takes into account later events. He then argued as follows: (1) The SPA has an unfettered discretion to consider whatever circumstances and advice it chooses, as long as they are relevant; (2) Investigations are the province of the PIRC, Crown Office and Police Scotland. It would be ultra vires, practically impossible, and potentially prejudicial for the SPA to carry out its own investigations and take a different view; (3) The decision letters demonstrate that the SPA did balance the prospect of proceedings against the officers' health problems; (4) The decisions were not “plainly wrong”, because the SPA was entitled to wait until all investigations had been concluded.

Irrationality

[24] Counsel agreed that I should apply the test formulated by Lord Keith in *R v Secretary of State for Trade and Industry Ex. p. Lonrho* [1989] 1 WLR 525, at 539-540. Are the reasons sufficient, if the circumstances point overwhelmingly in favour of a different decision? Counsel also agreed with Sedley J's pithy statement that the reasons must add up, and that a decision should be set aside if “There is an error of reasoning which robs the decision of logic”: *R v Parliamentary Commissioner for Administration, Ex p Balchin* [1998] 1PLR 1, at page 10. Counsel acknowledged that in future questions of irrationality may be tested by broader notions of unreasonableness: *Kennedy v Charity Commission (Secretary of State for Justice & Ors intervening)* [2015] AC 455, per Lord Mance at paragraphs [51] – [55].

[25] Here, the officers' personal circumstances appear compelling. Both seek retirement to restore their health. They do not wish to be left in limbo. Despite the lapse of years, neither has been informed that they will face criminal or disciplinary proceedings.

[26] The SPA accepts that these are relevant circumstances, which they did take into account in carrying out the balancing exercise. It says, however, that they are outweighed by the public interest. Clearly that may be determinative in some applications for medical retirement, for example where an applicant faces live disciplinary proceedings: *R v Chief Constable, Ex. p. Hay* [1996] 2 All ER 711.

[27] That is not the case here. No one has suggested that the officers are culpable to any degree in respect of the incident. The SPA itself relies on an unspecified involvement. One may ask two questions. How could they now be charged, given that they have been questioned at length without being cautioned? How could the DCC institute misconduct proceedings, given the lapse of time and absence of any intimation?

[28] The SPA seeks to avoid criticism of its handling of the applications. That is what I infer from its reference to "high-profile" and "wholly exceptional circumstances". It is a mistake, however, to conflate the public interest with matters in which the public has an interest. Decision-makers must ignore public clamour in undertaking their task: *R v Secretary of State for the Home Department, Ex p. Venables* [1998] AC 407 per Lord Goff at 490 – 491.

[29] The public interest in this case has a number of strands. One is that administrative procedures are fair and fairly applied. Public confidence falters where the necessary balancing exercise is not carried out, or cogent reasons are not given for a decision.

[30] I conclude that the SPA's reasons do not add up. There is an unbridged gap between the alleged involvement of the officers in a high profile incident and the conclusion that it

was in the public interest that they should be prevented from retiring. The decision was therefore irrational.

[31] In light of that conclusion, I shall only briefly address the other grounds of challenge. I hold that the SPA took irrelevant factors into account. It should not have attached any weight to the “high-profile” nature of the incident, because (generally) adverse media comment should not impinge on reg 72 decisions, and (specifically) there was no foundation for inferring that either officer might be criticised for their conduct that day. To say that they were “involved” in the incident is not enough. Something more is required. I also hold that, as the counterpart, the SPA failed to take into account the relevant consideration that the officers have never been told that they may face proceedings.

Order

[32] I shall grant orders reducing the decision letters, and require the SPA to reconsider the petitioners’ applications for retirement on the grounds of ill-health within 30 days of the date of the order.