6. Calculating an injury award, Regulation 12 award, review, revision, and forfeiture of Police Pensions.

6.1. There are 2 components to a police injury pension, and both are free of income tax in the hands of the former officer. First, the Regulations provide for payment of a one off gratuity and secondly they provide for payment of a monthly injury pension. The amounts payable are defined by a combination of the degree of disablement, the former officer's average pensionable pay and the length of the officer's service in accordance with paragraphs 1 and 3 of Schedule 3 PIBR. These provide:

> "1. A gratuity under regulation 11 shall be calculated by reference to the person's degree of disablement and his average pensionable pay and shall be—
> (a) in the case of a police officer all of whose service by virtue of which his pensionable service is reckonable was full-time, the amount specified as appropriate to his degree of disablement in column (2) of the Table in paragraph 3;
> ...
> 3. An injury pension shall be calculated by reference to the person's degree of disablement, his average pensionable pay and the period in years of his pensionable service, and, subject to the following paragraphs, shall be—
>
> (a) in the case of a police officer all of whose service by virtue of which his pensionable service is reckonable was full-time, of the amount of his minimum income guarantee specified as appropriate to his degree of disablement in column (3), (4), (5) or (6) of the following Table

Degree of disablement	Gratuity expressed as % of average pensionable pay	Minimum income guarantee expressed as % of average pensionable pay	Minimum income guarantee expressed as % of average pensionable pay	Minimum income guarantee expressed as % of average pensionable pay	Minimum income guarantee expressed as % of average pensionable pay
		Less than 5 years' service	5 or more but less than 15 years' service	15 or more but less than 25 years' service.	25 or more years' service.
(1)	(2)	(3)	(4)	(5)	(6)

25% or less (slight disablement)	12.5%	15%	30%	45%	60%
More than 25% but not more than 50% (minor disablement)	25%	40%	50%	60%	70%
More than 50% but not more than 75% (major disablement)	37.5%	65%	70%	75%	80%
More than 75% (very severe disablement)	50%	85%	85%	85%	85%

6.2. There are also complex provisions concerning the calculation of the amount which involve:

a) Deducting 75% of the value of any other police pension payable to the former officer (see paragraph 6 of Schedule 3);

b) Deducting 100% of the value of certain welfare benefits such as industrial injuries benefit and (now) employment support allowance. Despite the confusing wording of the paragraphs, the amounts deduced will usually be the full amount of the welfare benefit paid to the officer in the week in question. For a detailed explanation of the way the deductions work see *Evans & Anor v South Wales Police* [2018] EWCA Civ 2107.

6.3. Once an injury pension is awarded, its annual uprating is governed by the Pensions (Increase) Act 1971: see Regulation 29 of the 2006 Regulations. This provides a percentage increase each year linked to inflation which applies to all public sector pensions including those paid to former police officers. Hence, generally the amount

of a police pension is fixed in accordance with the Regulations at the date that it is assessed and then falls to be increased each April in accordance with the percentage sum fixed under the Pensions (Increase) Act 1971.

6.4. Regardless as to when a decision is made that a former officer is eligible for an injury pension, the Regulations provide that an injury pension is payable in respect of each year from the date of retirement: see Regulation 43(1). Accordingly, an officer who is only awarded an injury pension some years after he has retired is entitled to "back pay" from the date of retirement: see *R (Chief Constable Of South Yorkshire Police) v The Crown Court At Sheffield & Anor* [2020] EWHC 210 (Admin)[1]. Injury pensions can only be awarded after an officer's service has finished and thus there will always be an element of backdating.

6.5. The only exception to payment from the date of retirement is where the officer retires from the Force before becoming disabled as a result of a duty injury (and thus by definition cannot have been required by the Chief Constable to retire on the grounds of disability or medical unfitness). A former officer who subsequently develops a duty-related disablement from the date when the officer became disabled. Regulation 11(2) PIBR provides:

> "… no payment shall be made on account of the pension in respect of any period before he became disabled"

6.6. Thus, in such a case, a decision has to be made about the date when the former officer became disabled because that is the date from which the injury pension is payable. There are 2 points about such a decision making process under PIBR:

a) First, despite this being a "medical" decision, it is not one that the SMP or PMAB are entitled to take because it is not a decision listed in Regulation 30(2). Thus

[1] The Chief Constable has applied for permission to appeal this decision to the Court of Appeal. At the date of writing, no decision has been made as to whether permission is to be granted.

the "date when the former officer became disabled" is a decision for the PPA (although no doubt based on medical advice); and

b) Secondly, Regulation 7(7) PIBR deals with the situation where the date of disablement cannot be ascertained. It provides:

> "Where a person has retired before becoming disabled and the date on which he becomes disabled cannot be ascertained, it shall be taken to be the date on which the claim that he is disabled is first made known to the police authority"

This sub-Regulation will probably only be engaged when the medical evidence is so scant that the PPA cannot properly make a decision on the date when the office became disabled. If a decision is possible, it will be a date based on the medical evidence and not based on the officer's notification of his claim. It is not the date when the SMP decides that the officer is certified as being permanently disabled;

6.7. If the officer is dissatisfied with the PPA decision over the date, the officer can appeal to the Crown Court and the Court will act as a *de novo* decision maker about the date the officer became disabled based on the medical and other evidence before the court: see *R v Tully*[2].

Regulation 12 awards.

6.8. There is a special provision in Regulation 12 PIBR for a substantial additional award to be made to an officer who becomes "*totally and permanently disabled*" as a result of a duty injury. This award is made in relatively few cases and is subject to stringent conditions. However where it is awarded, the officer receives a lump sum of either 5 years APP or 4 years total remuneration, which ever is the lowest. Thus an officer with an APP of £35,000 can be awarded a tax-free sum of £175,000.

[2] A decision of His Honour Judge Morris sitting in the Crown Court in Cardiff in 2006, referred to in *R (Chief Constable Of South Yorkshire Police) v The Crown Court At Sheffield & Anor* [2020] EWHC 210 (Admin) at §26 and followed.

6.9. Regulation 12 provides:

> **"12 Disablement gratuity**
>
> (1) This regulation applies to a person who—
>
> (a) receives or received an injury without his own default in the execution of his duty,
>
> (b) ceases or has ceased to be a member of a police force, and
>
> (c) within 12 months of so receiving that injury, becomes or became totally and permanently disabled as a result of that injury.
>
> (2) Subject to the provisions of regulations 22 and 23 (abatement), the police pension authority for the force in which a person to whom this regulation applies last served shall pay to him a gratuity of an amount equal to whichever is the lesser of the following amounts, namely—
>
> (a) five times the annual value of his pensionable pay on his last day of service as a member of a police force;
>
> (b) the sum of four times his total remuneration during the 12 months ending with his last day of service as a member of a police force and the amount of his aggregate pension contributions in respect of the relevant period of service.
>
> (3) For the purposes of paragraph (2)(b) the amount of aggregate pension contributions in respect of the relevant period of service shall be calculated—
>
> (a) in the case of a person by whom, immediately before his last day of service as a member of a police force, pension contributions were payable under regulation G2(1) of the 1987 Regulations or would have been so payable but for an election under regulation G4(1) of the 1987 Regulations, in the same way as if the award were one payable under those Regulations, calculated in accordance with regulation A10 of those Regulations;
>
> (b) in the case of a person by whom, immediately before his last day of service as a member of a police force, pension contributions were payable under regulation 7 of the 2006 Regulations or would have been so payable but for an election under regulation 9 of the 2006 Regulations, in the same way as if the

award were one payable under those Regulations, calculated in accordance with regulation 26 of those Regulations.

(4) For the purpose of paragraph (2)(b), the amount of aggregate pension contributions for a person with service under the 2015 scheme is—

(a) for a person with service only under the 2015 scheme, the sum of all member contributions and payments for added pension made by the person under the 2015 Regulations in relation to the person's period of service under the 2015 scheme;

(b) for a person who is or was a 1987 transition member with continuity of service, the sum of contributions—

(i) calculated as if sub-paragraph (a) applied, and
(ii) calculated as if paragraph (3)(a) applied; and

(c) for a person who is or was a 2006 transition member with continuity of service, the sum of contributions—

(i) calculated as if sub-paragraph (a) applied, and
(ii) calculated as if paragraph (3)(b) applied."

6.10. The origin of this award arose from discussions between staff and employer representatives in the Police Negotiating Board ("**PNB**"), who then forwarded recommendations on changes to the schemes to the Secretary of State. Final decisions on any changes to the schemes were made by the Secretary of State. Agreement was reached in the PNB in about 1987 that the police injury pension scheme should provide for an additional gratuity award for former police officers who were either killed in the course of their duties or who had become permanently and totally disabled as a result of their services as a police officer. That recommendation was forwarded to and accepted by the Secretary of State.

6.11. The details of the new award for former police officers who were either killed in the course of their duties or who had become permanently and totally disabled as a result of their services as a police officer were set out in Home Office Circular no 20 of 1987. That document explained as follows:

"EXPLANATORY NOTES ON THE POLICE (INJURY BENEFIT) REGULATIONS 1987 AS AMENDED BY THE POLICE (INJURY BENEFIT) (AMENDMENT) REGULATIONS 1987

Briefly, the purpose of these Regulations is to implement an agreement reached by Committee E of the Police Negotiating Board that improved lump sum compensation payments should be made to police officers or their dependants in the event of death or total incapacity resulting from an injury on duty.

2. There are 10 Regulations. Regulation 9, however, is omitted by the Amendment Regulations, but Regulation 10 remains so numbered.

1-3 - Citation, commencement and interpretation
4 - Benefit payable on disablement
5 - Benefit payable on death
6 - Gratuities paid in anticipation
7 - Abatement in respect of gratuities payable under the principal Regulations
8 - Abatement in respect of damages or compensation
9 - Admissibility of certificates in evidence
(removed by Regulation 3(5) of the Amendment Regulations)
10 - Application of principal Regulations

CITATION, COMMENCEMENT AND INTERPRETATION
Regulations 1-3

3. It should be noted that the Regulations have effect from 25 November 1982. They can apply:-

(a) to anyone injured or killed on duty on or after that date (provided that, in the case of an injury, total disablement occurred within 12 months of the date of injury); and

(b) to anyone injured on duty before 25 November 1962 who was still serving on that date (provided that death or total disablement occurred within 12 months of the date of injury).
(Regulation 2)

4. The Regulations apply to members of a police force who die or are totally disabled as a result of an injury on duty. Expressions used have the same meanings as they have under the Police Pensions Regulations 1973 (the principal Regulations) unless defined separately. Thus for instance an injury on duty includes an injury received on

the way to or from duty, or in the other circumstances set out in Regulation 12 of the principal Regulations"

6.12. The changes to the police injury system (then under the 1987 Regulations) were made by the Police (Injury Benefit) Regulations 1987, and backdated to 1982. Regulation 4 of those Regulations introduced wording which is now contained in Regulation 12 of the 2006 Regulations. The relevant parts of the 1987 Regulations concerning police injury pensions were then repealed from the 1987 Regulations and replaced by the 2006 Regulations in materially identical form[3].

6.13. In order to qualify for a gratuity under Regulation 12, a former officer must satisfy each of the limbs of Regulation 12. The first 2 conditions are:

a) The applicant must have been a police officer who received an injury without his own default in the execution of his duty; and

b) The applicant must have ceased to be a member of a police force.

6.14. These are the same qualifying criteria applying to other awards under PIBR. However, in order to qualify for a gratuity under Regulation 12, the former officer must satisfy the third condition which provides that the former police officer has to meet the following test:

"within 12 months of so receiving that injury, becomes or became totally and permanently disabled as a result of that injury"

6.15. There are 3 elements to this rule namely:

a) the former officer must be permanently disabled;

b) the former officer must be totally disabled; and

[3] There were immaterial changes made in the 2006 Regulations such as, for example, the change from a single appellate Medical Referee to a panel of doctors known as the Police Medical Appeal Board

c) the former officer's total and permanent disablement must have arisen within 12 months of receiving the relevant injury.

6.16. The meaning of the term "permanently disabled" is explained above. The concept of a person being "*totally disabled*" is a defined term within PIBR. Regulation 7(6) provides:

> "(6) Notwithstanding paragraph (5), "totally disabled" means incapable by reason of the disablement in question of earning any money in any employment and "total disablement" shall be construed accordingly"

6.17. It follows that the test for "total" disablement is different to the test for disablement because it involves an assessment that the individual is incapable of earning any money in any employment. It follows that, unlike the tests set out above, a person who suffered serious disabilities and was still a police officer could be "totally disabled" if, ignoring his earnings from his or her office as a constable, the individual was "*incapable by reason of the disablement in question of earning any money in any employment*".

6.18. This approach is confirmed in Regulation 7(2) which provides:

> "In the case of a person who is totally disabled, paragraph (1) shall have effect, for the purposes of regulations 12 and 21 of these Regulations, as if the reference to "that disablement being at that time likely to be permanent" were a reference to the total disablement of that person being likely to be permanent"

6.19. Accordingly, a combination of Regulation 7(1) and 7(2) requires the SMP to approach the question as to whether a person is totally disabled as follows:

> "a reference in these Regulations to a person being permanently and totally disabled is to be taken as a reference to that person being totally disabled at the time when the question arises for decision and to that total disablement being at that time likely to be permanent"

6.20. Thus a former police officer will only become "totally disabled" if that person is incapable by reason of the disablement in question of earning any money in any employment.

6.21. The final condition is the 12 month rule, namely that the former officer's total and permanent disablement must have arisen within 12 months of receiving the relevant injury. The Home Office Circular 20/1987 offers no explanation as to why the decision was made that some police officers who become totally and permanently disabled as a result of police service should be paid a gratuity which is about 10 times larger than other police officers who have also become totally and permanently disabled as a result of police service.

6.22. The meaning of these words is not without difficulties. An officer who is, for example, very seriously injured in a car accident on duty and will never work again in any employment plainly "receives" the injury on the date of the car accident. It would be irrational if the officer's entitlement to the Regulation 12 award depended on whether the ill-health retirement process took 9 months or 15 months from the date of the accident. Thus, police earnings from the office of constable (which is not an employment) following the onset of a duty injury cannot prevent an officer becoming totally and permanently disabled within the 12 month period. But the 12 month rule creates two groups of former police officers who have become totally and permanently disabled as a result of duty injuries namely:

a) A group of former police officers where the SMP assesses that the relevant duty injury led to the former officer's total and permanent disablement within 12 months of the date when the former police officer received the injury. This group of former police officers receive a Band 4 pension and a gratuity of five times their APP[4]; and

b) A second group of former police officers who have also been left totally and permanently disabled as a result of a duty injury, but where the effects of the

[4] Or 4 times their full remuneration in the previous year if this figure is lower.

duty injury took more than 12 months to lead to circumstances where the effect of the injury amounted to total and permanent disablement. Members of this group of former officers are entitled to a Band 4 pension and a standard gratuity of 50% of their APP but they do not get a Regulation 12 gratuity.

6.23. The second group of former police officers have the same catastrophic effects on their lives as the former group but receive only receive around 10% of the gratuity payable to first group (i.e. a payment of 50% of 1 year's APP as opposed to a gratuity of 5 years APP). In particular, this second group includes officers who have suffered Post-Traumatic Stress Disorder which can display delayed onset of symptoms. In *R (Brotton) v Secretary of State for the Home Department* the lawfulness of the 12 month rule was challenged on a number of grounds including disability discrimination against former officers with psychological conditions in comparison to those with physical conditions. When the challenge was originally proposed, the Secretary of State agreed to review the provision, but after 18 months produced a short decision devoid of any real detail which left the rule in place. That review decision was challenged on various grounds including that the review process had failed to comply with the Public Sector Equality Duty ("**PSED**") under the Equality Act 2010. Permission was granted on paper for the PSED challenge but refused on all other grounds by Andrews J. That refusal was upheld on renewal by Kerr J but Mr Brotton sought permission to appeal that decision to the Court of Appeal. Permission was granted by Lord Justice Lewison who also granted permission on all grounds. At that point the Secretary of State, acting through his lawyers, agreed to pay Mr Brotton a Regulation 12 award and to undertake a further review.

6.24. That review is underway at the time of writing and so the 12 month rule may well be changed in the future. However this is the rule at present, notwithstanding that there are serious questions about the lawfulness of the rule.

Reviews of Ill-health and Injury Pensions: Overview

6.25. There are 3 separate reasons why a police pensioners may get called for a medical review, namely:

a) A review to determine whether any disablement has ceased;

b) A review of a 2006 or 2015 upper-tier or lower tier ill-health pension to assess whether that should be amended depending on the ability of the former officer to work 30 hours per week;

c) A review of an injury pension under Regulation 37 PIBR to determine if there has been a substantial change in the officer's degree of disablement.

Reviews of Ill-health pensions on the grounds that the former officer's disability has ceased.

6.26. A former police officer's right to be paid an ordinary pension or a deferred pension paid on reaching retirement is not dependant on any medical conditions and thus cannot be removed as a result of a medical review. However, former officers who have an ill-health pension, an early awarded deferred pension or an injury pension can be called in for a review and pension rights may change depending on the outcome of the review.

6.27. Regulation K1(1) of the 1987 Regulations provides:

> "(1) As long as a person—
>
> (a) is in receipt of an ill-health pension;
>
> (b) would not, if he had continued to serve as a regular policeman instead of retiring with an ill-health pension, have been entitled to reckon 25 years' pensionable service, . . .
>
> (c) would not have attained his relevant voluntary retirement age if he had continued so to serve or, where he would not have a relevant voluntary retirement age, has not attained the age of 65, and
>
> (d) he was not, immediately before he retired with the ill-health pension, a specified NCA officer,

the police pension authority may, if they wish to exercise the powers conferred by this Regulation, consider, at such intervals as they in their discretion think proper, whether his disability has ceased"

6.28. There are no statutory limits in the 1987 Regulations on the number of times that a PPA can ask an SMP to review the former officer, but the discretion would have to be exercised reasonably, and that is unlikely to justify annual reviews (see *R (Turner) v Metropolitan Police Authority* [2009] EWHC 1867 (Admin)).

6.29. There are like provisions in Regulation 51 of the 2006 Regulations as follows:

"51.—(1) As long as a person—

(a) is in receipt of a standard ill-health pension and has not attained the age of 55 years, or

(b) is in receipt of an enhanced top-up ill-health pension or a deferred pension which, in accordance with regulation 32, came into payment early on the ground of permanent disablement for engaging in any regular employment, and in either case has not attained the age of 65 years,

the police authority by whom the pension is payable may, if they wish to exercise the powers conferred by this regulation, consider, at such times as are specified in paragraph (2), whether his disablement has ceased, significantly worsened (in the case of a person such as is mentioned in paragraph (1)(a)) or significantly improved (in the case of a person such as is mentioned in paragraph (1)(b)).

(2) The times mentioned in paragraph (1) are such times as the police pension authority may in their discretion determine—

(a) in the case of a person such as is mentioned in paragraph (1)(a), until the person concerned attains the age of 55 years; and

(b) in the case of a person such as is mentioned in paragraph (1)(b), at intervals of no less than five years until the person concerned attains the age of 65 years"

6.30. Hence under the 2006 Regulations the PPA has a general discretion to carry out a review when an officer has a standard ill health pension at such points as the police pension authority consider appropriate in their discretion up to the pensioner's age of 55. After that, reviews can only be carried out every 5 years. In more serious cases where the officer has an enhanced ill-health pension or has accessed his deferred pension early on the grounds that he cannot engage in an regular employment, the review can only be carried out every 5 years. The first such review therefore cannot be carried out for the first years after the award of such a pension.

6.31. There are similar provisions in the 2015 Regulations, save that there is no 5 year limit for the first review.

6.32. Just as the decision making process leading to a police retirement is a 2 stage process, so re-joining the police service is a 2 stage process. In both cases, the first stage is medical and the second stage is an administrative decision by the Chief Constable. Stage 1 involves the SMP completing the same assessment as for the retirement process, but with the reverse question, namely whether a former officer can now perform all of the duties of a police officer. The former officer's disability will only have ceased if the SMP concludes that the officer can perform all of the duties required of him in the event that he were to re-join the service: see *R v. Sussex Police Authority ex parte Stewart* [2000] EWCA Civ 101 [2000] ICR 1122.

6.33. However there are some significant differences between the retirement exercise and the re-joining exercise. First, the question of "permanence" is not formally part of the re-joining assessment. It is thus not necessary for the SMP to be satisfied that the officer will be able to continue to perform all of the duties until the date of his retirement. However, where an officer has a recurring mental or physical illness which means a former officer's disablement has ceased at that point but where it is likely that, if the former officer were to re-join the police service and be exposed to the physical and psychological stresses of policing, the officer would become ill again, the Chief Constable may be acting in breach of a variety of legal obligations if she were to

give the officer the option of re-joining (and thus losing his pension). This is highly unlikely to arise in practice but, if it does arise, legal advice should be sought because this may lead to some complex legal issues for both the Force and the officer.

6.34. A former officer who disagrees with a decision of the SMP that he is no longer disabled or is no longer medically unfit can appeal against the decision to the PMAB.

6.35. Under all 3 pension schemes, where the SMP determines that the former officer's disablement has ceased, the PPA has a discretion to give the former officer 3 months notice of the option of re-joining the Force as a constable "*in a rank not lower than that he held immediately before he retired*": see Regulation K1(3) of the 1987 Regulations and like provisions in the 2006 and 2015 Regulations[5]. There is no obligation on the former officer to re-join the police service but the payment of an ill-health pension or early payment of a deferred pension will cease at the end of the 3 month notice period regardless as to whether the officer decides to re-join or not.

Reviews of Upper or Lower Tier Ill-health pensions.

6.36. There is only a single ill-health pension under the 1987 Regulations but both the 2006 and 2015 schemes have 2 tiers of ill-health pension. The difference between the tiers depends on whether the former officer is "*permanently disabled both for the performance of the ordinary duties of a member of the police force and for engaging in any regular employment otherwise than as a regular police officer*": see Regulation 29(4) of the 2006 Regulations and Regulation 111(2) of the 2015 Regulations. That depends on whether the former officer is capable of working for more than 30 hours per week: see the definition of "regular employment" in Schedule 1 to the 2006 Regulations and Regulation 2 of the 2015 Regulations.

6.37. The SMP can be instructed to review whether the former officer is capable of "*engaging in any regular employment otherwise than as a regular police officer".* The

[5] See Regulation 51(4) of the 2006 Regulations and Regulation 111(2)(b) of the 2015 Regulations.

outcome of that assessment could lead the former officer to have an increased or reduced ill-health pension (or could leave it unchanged).

Reviews of Injury Pensions.

6.38. The Chief Constable is under a statutory duty to review injury pensions as a result of Regulation 37 of the 2006 Regulations, but has a discretion to decide the period of any review. Regulation 37 provides:

> "(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.
>
> (2) Where the person concerned is not also in receipt of an ordinary, ill-health or short-service pension under the 1987 Regulations or the 2006 Regulations or a retirement pension under the 2015 Regulations, if on any such reconsideration it is found that his disability has ceased, his injury pension shall be terminated.
>
> (3) Where payment of an ill-health pension is terminated in pursuance of regulation K1(4) of the 1987 Regulations, regulation 51(5) or (6) of the 2006 Regulations or regulation 111 or 115 of the 2015 Regulations, there shall also be terminated any injury pension under regulation 11 above payable to the person concerned.
>
> (4) Where early payment of a deferred pension ceases in pursuance of regulation K1(7) of the 1987 Regulations or regulation 51(8)(d) of the 2006 Regulations or a full retirement pension which came into payment early on grounds of permanent medical unfitness ceases to be paid under regulation 116 of the 2015 Regulations, then any injury pension under regulation 11 above payable to the person concerned shall also be terminated"

6.39. Regulation 30(2) provides for the occasions on which the PPA is required to appoint an SMP to undertake an assessment. The material parts provide:

> ".. where the police pension authority are considering whether a person is permanently disabled, they shall refer for decision to a duly qualified medical practitioner selected by them the following questions—

.. and, if they are considering whether to revise an injury pension, shall so refer question (d) above"

6.40. The linkage between Regulation 37(1) and Regulation 30(2) is the word "*consider*". Regulation 37(1) imposes a duty on the PPA to "consider whether the degree of the pensioner's disablement has altered" and Regulation 30(2) provides that, at the point that the PPA decides to "consider" that matter, the PPA is under a statutory duty ("*shall*") to appoint an SMP to act as a decision maker on that question on behalf of the PPA.

6.41. The PPA has a discretion to decide the interval between either the award of the pension or the last review and the start of the consideration process. The Regulation provides that reviews shall be carried out "*at such intervals as may be suitable*". There is little judicial observation about the meaning of these words save that the Judge in *R (Turner) v Metropolitan Police Authority* [2009] EWHC 1867 (Admin)) said that annual reviews were not (at least normally) contemplated. However, if an officer had a medical condition which was rapidly changing (either for the better or the worse) annual or even more frequent reviews may well be appropriate.

6.42. There is an open question as to whether it is lawful for the PPA to decide that the life of the officer is a "*suitable interval*" and thus to decide not to carry out a review for the rest of the officer's life, unless requested by the officer. As this issue may arise in *Wright and others v Chief Constable of Staffordshire,* it is probably best no to provide any further commentary on the point at present save to say that (a) a whole life interval is not explicitly ruled out by the wording of the Regulation, (b) in practice many officers that is the interval which *de facto* operates because they are never reviewed and (c) if the Chief Constable, as a public body, has promised not to review a former officer's pension, public bodies are expected to keep their promises and it would be a very strange exercise of discretion which was exercised in a way that breached such a promise.

6.43. Once the PPA starts a process of "*considering*" whether the degree of the pensioner's disablement has altered, the PPA comes under a statutory duty to refer the "*degree of disablement*" question to the SMP. Thus, the Regulations do not envisage a "stage 1" process under which the former officer's degree of disablement has altered and, if there is a case that the former officer's degree of disablement may have altered, the PPA then refers the matter to the SMP.

6.44. That construction of this wording (under identical wording in the 1987 Regulations) was confirmed by Mr Justice Latham in *R (Yates) v Merseyside Police Authority* [1999] Lexis Citation 2295. The Judge said:

> "There is no doubt that the scheme of part H of the Regulations, read literally, appears to abdicate to the medical practitioner responsibility for deciding issues in relation to which he is not necessarily appropriately qualified"

6.45. Subsequent to this decision, the 2006 Regulations were made by the Secretary of State affirming this role for the SMP. Accordingly, notwithstanding a degree of judicial reservation about whether this was an appropriate decision-making role for the SMP, these observations did not result in a policy change by the Secretary of State who made a new set of regulations in 2006 with the same division of decision-making responsibility between the PPA and the SMP, using the same wording. In *Yates,* having set out his reservations, the Judge explained the meaning and effect of the statutory system as follows:

> "… once a Police Authority applies its mind to a claim by someone such as the applicant that he is entitled to an injury pension, it is required pursuant to reg H1(2) to refer the relevant questions to a duly qualified medical practitioner. In any ordinary use of the word, the authority is "considering" the matter even if it decides to refuse the claim. …
>
> It follows that a Police Authority 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. That would not, however, prevent a Crown Court from declining to require the Police Authority to refer the matter to a medical practitioner in a case where the claim is obviously spurious or vexatious"

6.46. This construction is supported by the potentially punitive provisions in Regulation 33 which provides for decision making to be transferred to the Chief Constable where a police officer or a former police officer refuses to be medically examined (at a stage after the SMP is appointed). It is thus clear that PIBR envisages a single stage process, not a multiple stage process where the first assessment is undertaken by the PPA and then there is a decision whether to refer the matter to an SMP. The reason that there can only be a single stage process is that the PPA has no *vires* to decide whether there has been an alteration in a police pensioner's degree of disablement. That matter is exclusively within the decision-making realm of the SMP. It follows that, whilst the PPA has a discretion to decide what is a "*suitable interval*" before the PPA starts the process of considering whether to revise the pension, the moment that the PPA starts a process of consideration - or to use the words of the Judge "*applies his mind*" - in relation to a question of pension entitlement or a possible revision of a pension entitlement, the PPA comes under a statutory duty to refer the matter to an SMP for decision. The SMP then acts as a delegated decision maker on behalf of the PPA: see *R (Crudace) v Northumbria Police Authority* [2012] EWHC 112 (Admin).

6.47. The practical problem for Forces can be that a referral to an SMP results in the PPA incurring costs. It thus appears that a practice has grown up of "sifting" cases within occupational health teams within Police Forces in order to restrict the number of referrals to the SMP to those where there is something genuinely to investigate. Whilst that may be administratively convenient for the PPA and will save unnecessary referrals to the SMP, it is not consistent with the statutory framework because it means that the PPA is applying his mind to the question as to whether an officer is entitled to a pension award or whether an existing pension award should be revised without complying with the statutory obligation to refer the matter for decision to the SMP. The attempt to turn the simple one stage process into a two-stage process is thus likely to be unlawful.

6.48. The first question the SMP is required to address as part of any lawful review is whether there has been an alteration in the degree of the pensioner's disablement

since the police injury pension was initially awarded or was last reviewed, whichever is the later in time. It is thus a comparative exercise to assess the extent to which the loss of earning capacity of the former officer due to the duty injury has changed in the period since the award of the injury pension or the last review, whichever is later. The SMP is not entitled to conduct a fresh review of the cause of the officer's disablement or a fresh assessment of the former officer's degree of disablement and work back from that assessment to find that there has been an alteration in the former officer's degree of disablement. See *Metropolitan Police Authority v Laws & Anor* [2010] EWCA Civ 1099 where Laws LJ said at §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. The focus is not merely on the outturn figure, but on the *substance* of the degree of disablement"

6.49. It follows that, as part of any review, the SMP (and on appeal the PMAB) cannot lawfully revisit any of the issues around the entitlement of the former officer to a pension or any of the factual decisions about the basis upon which the original pension was awarded. That would offend against the finality of the decisions made by the SMP (or PMAB) on initial grant. See *R (ota Turner) v Police Medical Appeal Board* [2009] EWHC Admin 1867 as approved in *Laws.*

6.50. If the SMP reaches the view that there has been an <u>alteration</u> in either the uninjured earning capacity or the actual earning capacity since the last occasion on which the former officer was reviewed, he must next ask himself whether that alteration is <u>substantial</u>. No revision can be made to the pension for an insubstantial alteration. However it seems that the same approach should be taken to the meaning of the term "substantial" under Regulation 37 as in Regulation 8. Hence any change which is more than marginal could properly be considered by the SMP to be substantial.

6.51. If the SMP considers that there has been a substantial alteration in the former officer's degree of disablement, stage 3 of the process is for the SMP to assess the former officer's current degree of disablement as a percentage figure. If this stage is reached, the process to be followed is the same as the process the SMP has to follow when fixing the initial degree of disablement. However, on this occasion, the focus is on the former officer's degree of disablement at the date of the review assessment.

6.52. If the former officer is dissatisfied with the outcome of the review he can appeal to the PMAB who will conduct a rehearing of the issues that the SMP was required to examine, and if appropriate issue a fresh report with new findings on the review. The jurisdiction of the PMAB on a review appeal is no greater (and no less) than the SMP. The PMAB are required to apply the same tests under Regulation 37(1) as ought to have been applied by the SMP.

6.53. Subject to the provisions in Regulation 33, the Chief Constable only acquires a legal right to vary the pension payable to the former officer if a review process conducted by the has found that there has a substantial alteration in the former officer's degree of disablement since the initial grant or the last review (whichever is the latest). If there is no finding of fact that there has been a substantial alteration in the former officer's degree of disablement since the initial grant or the last review, the Chief Constable has no power to revise the pension payable to the former officer.

6.54. The question as to what alteration should be made when a former officer reaches either his Compulsory Retirement Age ("**CRA**") or later reaches pensionable age has been the subject of a series of High Court cases. The Home Office Guidance used to say:

> ""Once a former officer receiving an injury pension reaches the age of 65 they will have reached their State Pension Age irrespective of whether they are male or female. The force then has the discretion, in the absence of a cogent reason otherwise, to advise the SMP to place the former officer in the lowest band of Degree of Disablement. At such a point the former officer would normally no longer be expected to be earning a salary in the employment market.

A review at age 65 will normally be the last unless there are exceptional circumstances which require there to be a further review."

6.55. The lawfulness of this approach was challenged in *R (Simpson) v Police Medical Appeal Board & Ors* [2012] EWHC 808 (Admin) where Supperstone J quashed the guidance. The Judge found that the "*cogent reason*" approach was not part of the statutory scheme and thus introduced an unlawful form of decision making. He also accepted that the fact that a person had reached the age of 65 did not mean that a person had no earning capacity (a point that counsel for the Secretary of State found difficulty in advancing before a panel of Court of Appeal judges at the permission stage). Supperstone J said that on a Regulation 37 review:

"… the SMP and the PMAB cannot conduct a fresh review of the uninjured earning capacity and the actual earning capacity of the former officer and then, comparing the outcome of that assessment with the previously determined degree of disablement, conclude that there has been an alteration in the former officer's degree of disablement. That approach is contrary to the analysis approved in Turner and confirmed in Laws and reverses the approach required to be taken by Regulation 37(1). The statutory scheme requires an assessment as to whether there has been an alteration in the degree of disablement first. A further quantum decision on the present degree of disablement is only permissible if the police authority, acting by the SMP, have first decided that there is a substantial alteration in the former officer's degree of disablement"

The Judge also observed at §32:

"There is in my view no statutory basis in the Regulations to support a different approach to a regulation 37 review at different ages"

6.56. The Judge thus concluded as follows at §33:

"The advice contained in the Guidance that the SMP may place the former officer in the lowest band of degree of disablement in the absence of a cogent reason otherwise is not supported by the wording of regulation 37(1). The advice is based on the premise that, having reached the age of 65, a former officer would normally no longer be expected to be earning a salary in the employment market. The third of

Mr Spreadbury's[6] working assumptions is that the individual would no longer be in gainful employment "but for the duty injury and his or her earning capacity can therefore be assessed as nil". This is not in my view an approach permitted by regulation 37(1)"

6.57. Thus this part of the Guidance was quashed. The Secretary of State decided not to appeal but, at the same time, refused to withdraw the part of the guidance about how reviews should be conducted when the officer reached CRA and thus would have left the police in any event which also recommended a "cogent reason" approach. That part of the Guidance previously said:

"Review of Injury Pensions once Officers reach Compulsory Retirement Age

Once a former officer receiving an injury pension reaches what would have been his compulsory retirement age under the Police Pensions Regulations (55, 57, 60 or 65 depending on the person's force and rank at the point of leaving the police service) the force should consider a review of the award payable, since it is no longer appropriate to use the former officer's police pay scale as the basis for his or her pre-injury earning capacity.

In the absence of a cogent reason for a higher or lower outside earnings level, it is suggested that the new basis for the person's earning capacity, had there been no injury, should be the National Average Earnings (NAE)* at the time of the review. The NAE figure taken should be the average for the population overall. Separate figures for males and females, and regional fluctuations should not be considered. The loss of earning capacity for the purpose of establishing Degree of Disablement should therefore be assessed by reference to the % proportion the person's actual earning capacity bears to NAE.

This procedure should help to ensure that former officers are treated in a consistent way across forces. They will be placed on an equal financial footing with others in the employment market at a time when they could not have been assumed to be earning a police salary.

After a review at compulsory retirement age a force should determine the need and date for the next review. In some cases there may be particular circumstances which make it undesirable to conduct a further review.

[6] The Home Office official in charge of police injury pensions who provided evidence in the case.

6.58. That part of the Guidance was challenged in *R (Slater) v Secretary of State.* On this occasion, the Secretary of State decided not to contest the Guidance the case was resolved by way of a consent order and a letter dated 23rd February 2014. Following this decision, the whole of the Guidance 46/2004 was withdrawn by the Secretary of State. However the above Guidance still infects decisions because of the tendency of decision makers to use National Average Earnings from the Annual Survey of Hours and Earnings from the Office of National Statistics unless a cogent reason is used to adopt a different approach. That approach is of questionable legality following *Simpson* and *Slater.*

6.59. A pensioner who is dissatisfied with a decision of the SMP can appeal to the PMAB under Regulation 31 PIBR. The PMAB then reconsiders the issues and reaches a fresh decision. If the PMAB reaches a different decision to the SMP, the PMAB decision is substituted for the decision of the SMP. In practice it can be up to 12 months between the date of the SMP decision and the hearing before the PMAB. That period of delay raises questions about the status of the SMP decision. Those issues were addressed by Garnham J in *R (Fisher) v The Chief Constable of Northumbria & Anor* [2017] EWHC 455 (Admin) [2017] ICR 1106. In that case, Mr Fisher appealed against an SMP decision in February 2015 that had reduced his Band 4 pension to a Band 3 pension. The PMAB eventually convened in 2016 and overturned the decision of the SMP. The PMAB reduced Mr Fisher's pension to a Band 1 award. That decision was quashed on a judicial review application but, on receipt of the PMAB decision, the PPA had sought to backdate the effect of the PMAB decision to the date of the SMP decision. The PPA argued that the PMAB's decision took effect from the date of the SMP's decision and thus Mr Fisher had been overpaid for the 18 months between the date of the SMP decision and the date of the PMAB decision.

6.60. As Garnham J observed at §53, the key question was whether a decision of the PMAB to reduce a former officer's pension banding takes effect from the date of that decision or from the date of the SMP's decision, which in this case was 18 months earlier. The Judge decided that each decision took effect at its own date. Thus Mr

Fisher's was entitled to a Band 3 pension for the 18 months between the date of the SMP decision and the date of the PMAB decision. That entitlement was not affected by the later (and subsequently quashed) decision of the PMAB to substitute that decision with a decision that the pensioner was entitled to a Band 1 award. The Judge said at §56:

> "… if it is right that appeals are to be conducted on the basis of current evidence, and if it is right that current evidence can result in a change to the level of pension, it seems to me necessarily implicit in the scheme of the regulations that the date on which the changed pension is to take effect is the date of the appeal. It would be odd in the extreme if an appeal were to be decided on the basis of evidence of recent change in disability, yet the altered pension were to run from some earlier date. In my judgment it must be inherent in the scheme that the altered pension should take effect on the date when it is recognised that altered circumstances justify a change in pension"

6.61. That reasoning accords with the structure of sequential decision making under PIBR. However, it means that if a pensioner is successful in appeal against the reduction of a Band 3 award to a Band 1 award on an appeal to the PMAB, he will not be able to claim the Band 3 award for the period between the SMP decision and the PMAB decision. That could leave the officer with a substantially lower overall payment than would appear just. However, there may or may not be any real injustice in that situation. If the SMP has directed herself properly on the legal tests to be applied but has reached a legitimate medical decision that his award should be reduced because there has been a substantial alteration in his degree of disablement from the last review (say 5 years previously), that decision may well be a proper exercise of medical judgment based on the presenting medical condition and the SMP's medical assessment at the date of the review, as the Court of Appeal confirmed in *R (McGinley) v Schilling* [2005] ICR 1282. A PMAB hearing an appeal (maybe 12 months later) will have to ask itself whether there has been a substantial alteration in his degree of disablement from the last review (now 6 years previously). There may have been changes in the 12 month period or different doctors approaching the same medical symptoms may legitimately reach a different medical judgment to the SMP, perhaps based on evidence which was not available to the SMP. It follows that a

successful PMAB appeal does not necessarily mean that the SMP acted inappropriately or failed properly to address the questions before her. Each SMP decision is a final decision under Regulation 30(6) PIBR and thus takes effect in law at the date of the decision.

6.62. However if a case arises where an SMP has made a clear error of law in her decision, the pensioner could point out the errors and ask the PPA to agree to a reconsideration under Regulation 32(2). This is a breach of the SMP's public law duties and thus almost certainly will not give rise to a claim in damages for the reasons explained in *O'Rourke v. Mayor Etc of the London Borough of Camden* [1997] UKHL 24; [1998] AC 188. If the PPA agrees, any reconsidered decision will be backdated to the date of the original SMP decision and thus pensioner will not suffer a loss: see *McLoughlin v The Chief Constable of West Yorkshire* [2019] EW Misc 9 (CrownC). If the PPA refuses to agree to a reconsideration the pensioner has, in effect 2 choices to seek to avoid financial losses as a result of the SMP's error of law. The pensioner could seek a judicial review of the SMP's decision and a quashing of that decision. Any such application would inevitably be met by a complaint that judicial review is a remedy of last resort and that the pensioner has an alternative remedy, namely an appeal to the PMAB. However, the alternative remedy has to be "suitable". A remedy which leaves the pensioner without a remedy could be argued not to be a suitable remedy.

6.63. Alternatively, the pensioner could wait until the decision is overturned on appeal to the PMAB and then seek compensation from the PPA for maladministration on the basis that the SMP's decision was flawed and/or the PPA acted wrongly in not agreeing to a reconsideration. If that is rejected by the PPA, the pensioner could then make a complaint about that decision to the Pensions Ombudsman who, if he accepted that the SMP's decision was flawed, ought to make an award in favour of the pensioner to compensate for the financial losses suffered by the pensioner.

Reconsiderations under Regulation 32(2).

6.64. PIBR includes a specific right for the PPA and the officer jointly to agree to require a medical authority to reconsider a decision under these Regulations. Regulation 32(2) provides:

> "(2) The police pension authority and the claimant may, by agreement, refer any final decision of a medical authority who has given such a decision to him, or as the case may be it, for reconsideration, and he, or as the case may be it, shall accordingly reconsider his, or as the case may be its, decision and, if necessary, issue a fresh report, which, subject to any further reconsideration under this paragraph or paragraph (1) or an appeal, where the claimant requests that an appeal of which he has given notice (before referral of the decision under this paragraph) be notified to the Secretary of State, under regulation 31, shall be final"

6.65. There has been considerable litigation on the meaning of this provision. It was first examined in 2 cases, namely *R (Crudace) v Northumbria Police Authority* [2012] EWHC 112 (Admin)[7] and Haworth, R (on the application of) v Northumbria Police Authority [2012] EWHC 1225 (Admin)[8]. The power under Regulation 32(2) had the following purpose according to HHJ Behrens in *Crudace*:

> "… the general power under Regulation 32(2) exists as part of the system of checks and balances in the Regulations to ensure that the pension awarded (either by way of an initial award or on a review) to the former police officer by either the SMP or PMAB has been determined in accordance with the Regulations. The Claimant thus submits that the purpose of power is to provide is a mechanism to allow reconsideration of a pension payable to a former officer in the event a former officer is being paid the wrong sum. In practice this must mean that the former officer raises a reasonable case that the pension paid is incorrect. It is also a mechanism to give effect to A1P1 rights without the need for the intervention of the court"

6.66. There is no time limit for making applications under Regulation 32(2) and the Judge explained that the purpose of the provision was to enable cases to be reconsidered where there has been an error. HHJ Behrens said at 92:

[7] See http://www.bailii.org/ew/cases/EWHC/Admin/2012/112.html
[8] See http://www.bailii.org/ew/cases/EWHC/Admin/2012/1225.html

> "There is nothing in the wording of regulation 32(2) that limits the power to refer the matter back to the medical authority. The power is expressed in general terms. If it had been the intention to limit the power in the way suggested by Mr Holl-Allen[9] it would have been perfectly possible for it to be so expressed. Whilst it is true that the Regulations do contain references to finality, each of those references is expressly made subject to the power in regulation 32(2). It has to be borne in mind that the Regulations are concerned with the provision of pensions for former officers who were disabled in the course of duty through no fault of their own. In such a case it may well be thought that the need for accuracy is at least as important as the need for finality. Suppose case law establishes that an interpretation of the Regulations by either the SMP or the PMAB has been wrong I do not see why regulation 32(2) cannot be used to enable the SMP or (as the case may be) the PMAB to reconsider the decision in the light of the correct interpretation of the law"

6.67. A similar approach was taken by King J in *Haworth* as follows at §100:

> "This is not to say that the fact of delay since the decision sought be reconsidered was made, is entirely irrelevant to the exercise of the police authority's discretion whether to consent to a reconsideration under regulation 32(2). But in my judgment delay can be relevant only to the police authority's assessment of the underlying merits of the application. In an appropriate case the delay may be such that the authority can legitimately conclude that no fair reconsideration is possible, in other words no fair resolution of the issues sought to be raised on the reconsideration is possible – for example where material medical records are no longer available. And the longer the delay, I would see nothing improper in the police authority considering more anxiously than might otherwise be the case, whether the underlying merits have sufficient strength to justify re-opening an old case, although in principle I would agree that that in the absence of good reason to the contrary, consent should be given if the officer can demonstrate a reasonable case capable of being resolved on a reconsideration, that the pension he is being paid is significantly incorrect by virtue of a decision not in accordance with the regulations"

6.68. Hence, on the approaches taken in that case, it ought not to be open to a Chief Constable to say that a police officer has lived with a wrong payment over many years and that the principle of finality means that the calculation of the right pension should not be re-opened. However the approach taken these cases needs to be reconsidered in the light of the decision of the Court of Appeal *in R (Boskovic) v Chief Constable of*

[9] Counsel for the Chief Constable.

Staffordshire Police [2019] EWCA Civ 676. The difficulties with the approach taken in this judgment have already been explored above in relation to the seemingly contradictory observations made by the Judge concerning the status of a medical diagnosis in an SMP report[10]. In that case, counsel for the Chief Constable made the same submission that was rejected in *Crudace* and *Haworth,* namely that "*that the clear purpose of regulation 32(2) was not to provide a mechanism for appeal but rather to provide a simple method of reconsideration where the parties agreed to a reference in cases where an appeal is made or where there are judicial review proceedings*". The Judge accepted that argument, saying at §58:

> "… regulation 32(2) should be construed as a consensual and facilitative provision allowing reconsideration of questions affecting pension entitlement by agreement so as to avoid the expense and delay of an appeal or application for judicial review. Such a construction is particularly pertinent in the context of a statutory scheme which emphasises the importance of finality in decision-making"

6.69. If that is the proper approach[11], in exercising her discretion to decide whether to permit a referral back for a further decision, the Chief Constable has to take a rational approach but is entitled to decide the weight of each factor. In particular, the Judges said:

> "Amongst the other factors which a police authority is entitled to take into account when deciding whether or not to agree to a reference under regulation 32(2) is any delay in pursuing the claim, together with the costs of any reference"

6.70. There will always be an element of delay in such cases and thus, if this is a permissible consideration and the Chief Constable's approach is subject only to a rationality challenge, Chief Constables will be entitled to refuse to agree to a reconsideration even if it is clear that the previous SMP made an error and that the officer has been underpaid his pension for a number of (and possibly) many years. The problem for the Chief Constable is that, on the one hand, the Chief Constable will want to ensure that

[10] See paragraph 7.22 above.

[11] And it is an observation made by the Court of Appeal and arguably binding and thus should be treated as the right approach unless contradicted by a later Court of Appeal case.

former officers are paid the pensions to which they are entitled, on the other hand Chief Constables have to fund injury pensions. The limitation of this approach to the Court's supervision of the exercise of decision making under Regulation 32(2) is that it does not take account of the conflict of interest that the Chief Constable faces as the decision maker and as the person who will have to pay any award.

6.71. That conflict of interest was seen in stark terms in *McLoughlin v The Chief Constable Of West Yorkshire* [2019] EW Misc 9 (CrownC), a decision of HHJ Belcher. In that case the Chief Constable, based on the *Crudace* line of cases, had accepted that an SMP decision should be reconsidered even though it had been taken 20 years before. The SMP agreed to the reconsideration and decided that the 1984 award of a Band 1 pension was inappropriate and Ms McLoughlin should be awarded a Band 4 pension. That meant, so Ms McLoughlin's lawyers argued, she was owed the difference between a Band 4 and a Band 1 pension for the period between 1984 and when her pension was finally upgraded to a Band 4 on a review in 2007, a sum of several hundred thousand pounds. That one off payment had to come out of the Chief Constable's budget and he unsuccessfully argued that no payment was due for a variety of reasons, all of which were rejected by the Judge. Thus the exercise of the discretionary decision making by the Chief Constable had led to a substantial call on his own budget. The legitimate complaint that can be made against the decision in *Boskovic* is that the Court of Appeal did not acknowledge or factor in that conflict of interest (regardless as to whether it is a full legal bar to the Chief Constable taking the decision under the *Tsfayo* doctrine[12]).

6.72. This is another area where the decision making processes set up by the PIBR give rise to legal difficulties and may lead to a future examination of the role to be played by the Chief Constable. However, for present, the limited purpose and effect of reconsiderations under Regulation 32(2) as explained in *Boskovic* must be accepted as representing the law.

[12] See paragraph 3.22 above.

Refusals to be medically examined.

6.73. The following is a provisional view of the law but this may need revision when the Judge hands down judgment in *Wright and others v Chief Constable of Staffordshire* which is anticipated within the next few months[13]. Hence the following observations should be treated with some caution.

6.74. The system of medical assessments works on the basis of that the officer or former officer agrees to submit himself to a medical examination which is carried out by a doctor on behalf of the Chief Constable. There is not (and probably cannot be) any form of statutory duty on the officer or former officer to "co-operate" in that process but there can be consequences for the officer if the officer refuses to be examined.

6.75. The consequences of an officer refusing to be examined are set out in Regulation H4 of the 1987 Regulations as follows:

> "**Refusal to be medically examined**
>
> If a question is referred to a medical authority under Regulation H1, H2 or H3 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"

6.76. There is a like power to Regulation H4 in Regulation 75 of the 2006 Regulations, Regulation 118 of the 2015 Regulations and in Regulation 33 PIBR. The proper construction of the decision making process provided by Regulation H4 is as follows:

[13] The hearing occurred in mid-July 2020.

a) **Stage 1** is whether the former officer has failed to submit himself to such medical examination or to attend such interviews as the medical authority may consider necessary ("**the failure question**");

b) **Stage 2** is whether any such failure is wilful or negligent ("**the wilful or negligence question**"); and

c) **Stage 3** only arises where the tests under stages 1 and 2 are satisfied. In such a case the Chief Constable, as the PPA, has power to make a decision in substitution for the decision of the SMP, namely to decide the matter which the SMP could have decided ("**the medical question**").

6.77. Regulation H4 and the equivalent Regulations in the other sets of Regulations are potentially punitive provisions. They are thus required to be construed strictly so as not to expand the areas of behaviour for which the former officer can be penalised outside those specified in the Regulation.

6.78. Regulation H4 only relates to a time period after a question has been referred to the SMP. It is, by definition, not engaged at all before there has been an SMP referral. Hence, until there has been a referral to the SMP and the officer has engaged in conduct which brings him within the Regulation, medical decision making under the police pension system stays with the medical authority and cannot transfer to the Chief Constable.

The meaning of "attend" and "submit to a medical examination" in Regulation 33.

6.79. The use of words "attend" and "submit to an examination" follows similar use of the same words on many occasions in the statutory schemes relating to social security medical assessments. Regulation 23 of the Employment and Support Allowance Regulations 2008 refers to a claimant who "*fails without good cause to attend for or to submit to an examination*". That formulation of words to describe the way in which

medical examination for state entitled benefits should be approached has been used in social security legislation over a number of years prior to 2008[14].

6.80. In *PH v Secretary of State for Work and Pensions* [2016] UKUT 0119 the meaning of these provisions was explained by the Upper Tribunal. Jude Mitchell said:

> "21. … Regulation 23(2) of the ESA Regulations deems a person not to have limited capability for work if, without good cause, the person does either of the following: (a) fails to "attend for" a medical examination; (b) fails to "submit to" a medical examination.
>
> 22. To put it in more everyday turns [*this may be a mistake for "words"*], (a) refers to a person who fails to turn up for an examination of which s/he has been duly notified and (b) refers to a person who fails to co-operate with the examination process so as to thwart its purpose"

6.81. Submitting to an examination is, as the Judge noted, not the same as "*participating*" in a medical examination. He said:

> "The concept of "participating" in an examination does not feature in regulation 23 of the ESA Regulations 2008 (it is though found in various regulations imposing conditions on Jobseeker's Allowance claimants). While the concepts of participating in a medical examination and submitting to an examination are related, they are not necessarily synonymous. The First-tier Tribunal should have asked itself whether Mr H had submitted to a medical examination (it is clear he did attend for an examination)"

6.82. The term "examination" was explained by Judge Mitchell as being:

> "the process of investigating the nature and extent of Mr H's relevant health conditions"

Thus if, for any reason, the pensioner "attends" the place of the proposed examination the cannot fail to have attended. He will only usually fail to satisfy the second condition if the doctor commences the process of examination and then halts

[14] As confirmed by the Upper Tribunal in *PH v Secretary of State for Work and Pensions* [2016] UKUT 0119 at paragraph 28: see https://assets.publishing.service.gov.uk/media/5785050bed915d622c00011b/CE_2611_2015-00.pdf

it without completing it due to failure of the pensioner to engage with that process. It follows that it may be difficult to show that the pensioner has not "submitted" to the examination if the process to which the pensioner was required to submit has not commenced. Thus a key factual question is whether the point in the process was never reached at which the pensioner is required to submit to the doctor's examination.

6.83. In *R(IB) 1/01* Social Security Commissioner (now Upper Tribunal Judge) Rowlands observed it was arguable that a person who says he will definitely not attend an examination fails to "submit" to it, and also arguable that a person who attends but refuses to be examined has not submitted to an examination. However that point has not been decided either way. It seems probable that, whatever he states his intention to be, a social security claimant should be given the chance to attend an examination before he is penalised for failing to submit to an examination.

6.84. However once the claimant arrives for the examination, it is clear that a failure to submit can happen before the actual examination begins. In *PH* Judge Mitchell said:

> "30. I do not think that conduct within the examination room, and only in that room, is all that can be taken into account in deciding whether a person has failed to submit to a medical examination. Indeed, the authorities referred to above support this proposition. If, for example, an individual's disruptive conduct in the waiting area was designed to prevent an examination from going ahead, a decision-maker might properly conclude that the individual had in fact failed to submit to a medical examination. However, once a decision has been taken not to proceed with or to abandon an examination, I do not see how a claimant's subsequent actions can amount to him/her failing to submit to a medical examination. There is nothing left to submit to.
>
> 31. The remaining question in such cases is whether the decision not to proceed with or to abandon the examination can be attributed to the claimant such that s/he can properly be said to have failed to submit to the examination. This opens a door to questions of reasonableness, a concept that is closely allied to "good cause" which of course becomes relevant once it has been determined that a person failed to submit to an examination. I do not think that is objectionable, it is simply a consequence of the nature of a failure to "submit"."

6.85. The question as to whether the conduct of the claimant was sufficiently egregious or disruptive that it amounted a failure to submit to an examination was examined by the Upper Tribunal *in JW v Secretary of State for Work and Pensions (ESA) (Employment and support allowance : attending medical examination)* [2016] UKUT 207 (AAC). In that case, Judge Hemmingway said at §13 and §14:

> "13. Clearly the appellant did attend for the medical examination. He arrived at the examination centre and responded when called to go to the room where the examination was to have taken place. A key issue, therefore, for the tribunal was whether or not he then did submit to an examination. One of the points he has made in pursuing his appeal to the Upper Tribunal is that he did not actually refuse to be examined. However, matters are not quite as simple as that. It seems to me, as a matter of logic, that if a claimant seeks to impose an unreasonable condition and, absent that unreasonable conditions fulfilment, withholds consent to the examination taking place, then he does not submit to the examination. I note that in *CIB/849/2001* Commissioner Turnbull (now Upper Tribunal Judge Turnbull) decided that a person fails to submit to an examination not only if he absolutely refuses to be examined but also if he seeks to impose as a condition of being examined a term which would render the examination useless for the purpose for which it is required. In that case the claimant had consented to be examined but had said that he would not give his permission for anyone other than a medically qualified person to read any subsequently produced report. This, of course, would have had the effect of the decision maker not being able to see it. So, the circumstances there were different to what they are here but that appeal did illustrate the point that the imposition of conditions by a claimant might lead to a proper conclusion that such a claimant had failed to submit. In *BH v Secretary of State for Work and Pensions (ESA)* [2016] UKUT 0119 (AAC) Upper Tribunal Judge Mitchell observed that, where a decision is taken by those acting on behalf of the respondent not to proceed with or to abandon the examination, a question will arise as to whether such decision can be attributed to the claimant such that he/she can be properly be said to have failed to submit. As he observed:
>
> "This opens a door to questions of reasonableness …"
>
> 14. I would entirely agree with the above reasoning. I would add that reasonableness is not only potentially relevant to the imposition of conditions but also to general behaviour such that behaviour of, for example, a threatening or intimidating nature, on proper findings, might well amount to a failure to submit so long as the behaviour is the or a reason for the examination not proceeding. So, the tribunal had to ask

itself, having made appropriate findings on the evidence, whether the claimant had behaved in an unreasonable manner or had sought to impose unreasonable conditions. As to those sorts of matters, where behaviour is concerned, it seems to me that a claimant is not required to, for example, exude cheerfulness or be eager to please. He/she may, without in context being unreasonable, be, for example, sullen, unhappy or (save where communication is needed for the purpose of the examination) largely uncommunicative. However, if such behaviour strays into the realm of being obstructive or if it is such as to intimidate the person tasked with conducting the examination or even possibly other support staff (excluding significant over-sensitivity on the part of such examiners or staff) then that is much more likely to found a justifiable decision concerning failure to submit. As to conditions, again it seems to me that reasonableness is the key. I do not think, absent unusual circumstances, there can normally be any sensible objection to a non-aggressively put request for the name of the healthcare professional who is to conduct the examination (unless of course there are security concerns), a verbal assurance from the health care professional that he/she has been properly appointed as a healthcare professional such that they are authorised to carry out the examination and an indication as to which category within the definition of "healthcare professional" as contained within regulation 2 of the Employment and Support Allowance Regulations 2008, they fall within. The alternatives therein are a registered medical practitioner, a registered nurse or an occupational therapist or physiotherapist registered with a regulatory body established by an ordering council under section 60 of the Health Act 1999. It seems to me, though, that any demand for additional information, absent most unusual circumstances, is likely to go beyond what is reasonable. So, looking at matters in the context of the claims which have been made in this appeal, it seems to me it could not be said that any demand for the examiner's qualifications (over and above whether that person is a registered practitioner, a registered nurse or an occupational therapist or physiotherapist) or a demand for the examiner's registration number or their full NHS medical history would come within the bounds of reasonableness such that ordinarily an imposition of a condition that such information be supplied before the examination may commence or continue would constitute a failure to submit"

6.86. It seems sensible that the meaning of Regulation H4 and the like provisions should follow the line in these cases. The duty to "submit" to an examination revolves primarily around what happens within the examination room although it can extend beyond it.

Providing information to the PPA in advance of an SMP referral.

6.87. Assuming the above cases properly define what is meant by submitting to an examination, it appears clear that there is no duty on pensioner to provide information to the PPA in advance of a referral to the SMP in order to assist the SMP decide whether to make a referral. Any refusal to provide background information cannot be a failure to "submit" to an SMP examination.

Providing the SMP with access to medical notes made by other doctors.

6.88. There is a vexed issue which is due to be explored in the *Wright* case about whether pensioners are required to provide medical notes of previous consultations with doctors as part of the review process. The following is a provisional view but may need amending in the light of the judgment.

6.89. It is entirely lawful for the PPA or the SMP to ask for voluntary disclosure of medical notes and their provision may well assist the SMP. Pensioners often provide voluntary disclosure or submit reports from other medical experts to explain the extent of their disablement, all of which can be hugely valuable to the SMP. But there is nothing in PIBR to govern this disclosure.

6.90. The lawfulness of a requirement imposed by the Chief Constable or the SMP to require pensioners to provide medical notes will be tested in *R (Wright) v Chief Constable of Staffordshire* but the statutory scheme contains no such requirement. The provision of medical notes made by other doctors is not part of the social security statutory scheme, on which Regulation 33 is based, and so it is hard to see how a failure to provide medical notes made by other doctors can be relied upon to transfer decision making from the SMP to the Chief Constable under Regulation 33.

6.91. Medical records attract a high level of legal confidentiality at common law, and the confidentiality is the property of the patient, not the doctor: see *Ashworth Security Hospital v MGN Ltd* [2002] 1 WLR 2033 at §63. This is a legal duty which is recognised and is enforceable at common law. In *Hunter v Mann* [1974] QB 767 Boreham J said:

> " … the doctor is under a duty not to disclose, without the consent of his patient, information which he, the doctor, has gained in his professional capacity, save, says Mr. Bingham, in very exceptional circumstances"

6.92. Respecting the right of patients to maintain confidentiality in their medical records is also part of the duties owed by state bodies to an individual under article 8 ECHR. In In *Z v Finland* (1998) 25 E.H.R.R. 371 the ECtHR said at §95:

> "In this connection, the Court will take into account that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general.
>
> Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community"

UK domestic law is thus required to provide appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention. The fact that disclosure is made to a doctor who is subject to confidentiality obligations does not remove that requirement to protect the confidentiality of medical data. Confidentiality obligations are engaged in the proposed transfer of medical data from one doctor to another just as they are engaged in all other proposed transfers.

6.93. Further the right to assert confidentiality in medical notes is probably a "possession" of an individual for the purposes of article 1 of protocol 1 of the ECHR ("**A1P1**") and thus cannot be overridden save by a clear legal framework.

6.94. The combination of the patient's rights to confidentiality at common law, the duty owed to the patient under article 8 and the duty not to deprive a patient of their

possessions under A1P1 means that any claimed obligation on a patient to waive confidentiality and/or to make a disclosure of their medical records to any third party including an SMP and/or any penalty imposed on a patient for failing to do so must, at a minimum, have the following features:

a) Any claimed legal requirement on a patient to waive the patient's legal right to confidentiality must be "*in accordance with the law*" (article 8) and/or "*subject to the conditions provided by law*" (A1P1) or defined in a statutory provision so as to override common law rights at common law (see *Hunter v Mann*);

b) It must "*necessary*" in that the claimed duty must correspond to a pressing social need, and, in particular, must remain proportionate to the legitimate aim pursued; and

c) The waiver must be the result of a procedure which is "*fair and affords due respect to the interests protected by Article 8*": see *R (TB) v The Combined Court At Stafford* [2006] EWHC 1645 (Admin).

6.95. Any right of the PPA to impose sanctions on a pensioner for failing to waive legal confidentiality in their medical records to allow disclosure to an SMP for the purposes of a review of an injury pensions under Regulation 37 PIBR would not appear to satisfy any of these three criteria. The European Court of Human Rights has summarised the nature of the requirement that any interference with a person's article 8 rights should be in accordance with the law as follows[15]:

> "The national law must be clear, foreseeable, and adequately accessible (Silver and Others v the United Kingdom, §87). This includes sufficient foreseeability that individuals are able to act in accordance with the law, as well as a clear demarcation of the scope of discretion for public authorities"

6.96. There is no "clear" and "accessible" basis for imposing sanctions for non-disclosure.

[15] See https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf

6.97. The question as to whether a duty of disclosure of medical notes should be introduced to the PIBR review process was considered by the government as part of the Consultation Review of Police Injury Benefits ("**the 2008 Consultation**"). The 2008 Consultation said as follows:

> **"Supply of information**
>
> 6.5. Under Regulation 33 of the Police (Injury Benefit) Regulations 2006 there is some provision for requiring the officer making an application for an injury award to co-operate with a police authority in its consideration of it:
>
> 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 medical referee, the police authority may make their determination on such evidence and medical advice as they in their discretion think necessary; …
>
> 6.6. 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*)

6.98. The Home Office received representations from Forces that PIBR should be amended in order to include a duty on former officers to waive confidentiality in their medical records. These representations were not accepted by the Secretary of State when the Home Office published their response to the consultation in 2009[16]. This issue of

[16] See https://webarchive.nationalarchives.gov.uk/20100408144625/http://www.homeoffice.gov.uk/documents/cons-2008-police-injury-award/injury-awards-response2835.pdf?view=Binary

disclosure of medical records was "*Issue 40*" at page 18 in the response and said as follows:

> "40. It is proposed that a claimant who refuses a police authority or SMP's request for relevant information should be given formal notice that he or she can expect to have an adverse inference drawn from such refusal, and may have his or her claim rejected altogether. (Paragraph 6.7, P32)"

6.99. Thus the position of the Home Office, on behalf of the Secretary of State, was that the existing legislative scheme did not impose any obligation on a former police officer to waive the legal confidentiality held by the former officer in their medical records. Secondly, despite pressure from police forces, the Secretary of State appears to have decided against introducing such a duty but, instead, suggested that a warning should be given to pensioners that an adverse inference may be drawn against any former officer who elected not to disclose their medical records.

6.100. If the pensioner is asked to give disclosure, a difficult issue about relevance can arise. Whilst having access to relevant medical records could assist the SMP undertake his or her task, a pensioner's medical records may include:

a) material which is inaccurate (whether later corrected or not);
b) material which is confidential relating to third parties; or
c) material which has no relevance whatsoever to the review process, such as details of a medical condition from which the pensioner has made a complete recovery.

6.101. All of the material in medical records is information about the pensioner which was provided to the doctor and was never intended to be disclosed outside a patient/treating doctor relationship. Hence, references in medical records to pregnancy, an abortion or sexually transmitted diseases would be wholly irrelevant to the review process and thus the pensioner must have a right to protect disclosure of that information. As set out above, the fact that the information is being provided to another doctor is, of course, no answer to the confidentiality issue.

6.102. Judicial guidance on this issue is likely to arise in the *Wright and others* case. However, at least one other Chief Constable has conceded a judicial review when a challenge was made to a pensioner's right to maintain the confidentiality in his medical records.

Forfeiture of police pensions.

6.103. In common with other public sector pension schemes, the police pension system defines a limited number of areas where a pension can forfeited due to the conduct of the pensioner after leaving police service. Withdrawal of an ill-health pension or the early payment of a deferred pension due to the pensioner ceasing to be disabled from police duty (or no longer medically unfit for police duty) is set out above. However, all police pensions are subject to conditions which allow them to be forfeited due to particularly egregious conduct by the former officer.

6.104. Regulation K5 of the 1987 Regulations provides:

> "**Forfeiture of pension**
>
> (1) This Regulation shall apply to a pension payable to or in respect of a member of a police force under Part B or C . . . or to a pension payable to a pension credit member under regulation M1 (pension credit members' entitlement to pension).
>
> (2) Subject to paragraph (5), the pension supervising authority in respect of a pension to which this Regulation applies may determine that the pension be forfeited, in whole or in part and permanently or temporarily as they may specify, if the pensioner has been convicted of an offence mentioned in paragraph (3) and, in the case of a widow's pension, that offence was committed after the death of the pensioner's husband.
>
> (3) The offences referred to in paragraph (2) are—
>
> (a) an offence of treason;
>
> (b) one or more offences under the Official Secrets Acts 1911 to 1939 for which the grantee has been sentenced on the same occasion to a term of imprisonment

of, or to two or more consecutive terms amounting in the aggregate to, at least 10 years.

(4) Subject to paragraph (5), the pension supervising authority in respect of a pension to which this Regulation applies may determine that the pension be forfeited, in whole or in part and permanently or temporarily as they may specify, if the grantee has been convicted of an offence committed in connection with his service as a member of a police force which is certified by the Secretary of State either to have been gravely injurious to the interests of the State or to be liable to lead to serious loss of confidence in the public service.

(5) In the case of a pension to which this Regulation applies, other than an injury pension, pension supervising authority in determining whether a forfeiture should be permanent or temporary and affect a pension in whole or in part, may make different determinations in respect of the secured and unsecured portions of the pension; but the secured portion of such a pension shall not be forfeited permanently and may be only forfeited temporarily for a period expiring before the grantee attains state pensionable age or for which is imprisoned or otherwise detained in legal custody.

(6) To the extent to which a pension is forfeited under this Regulation, the police pension authority shall be discharged from all actual or contingent liability in respect thereof.

(7) The provisions of section 4(1) and (2) of the Police Pensions Act 1948, as they have effect by virtue of section 12(2) of the Police Pensions Act 1976 (forfeiture of pensions), shall not apply in relation to an award under these Regulations.

(8) This Regulation has effect subject to Regulation J1(6)(c).

(9) The police authority may, to such extent as they at any time in their discretion think fit—

(a) apply for the benefit of any dependant of the pensioner; or

(b) restore to the pensioner,

any amount or amounts of any pension that have been forfeited under this regulation"

6.105. It follows that, under the 1987 Regulations, there are 3 criminal offences where a subsequent criminal conviction entitles the PPA to forfeit a police pension, namely:

a) an offence of treason (Regulation K5(3)(a));

b) one or more offences under the Official Secrets Acts 1911 to 1939 for which the grantee has been sentenced on the same occasion to a term of imprisonment of, or to two or more consecutive terms amounting in the aggregate to, at least 10 years (Regulation K5(3)(b)); or

c) an offence where the following 2 conditions are met, namely:

i) it was committed in connection with his service as a member of a police force; and

ii) it is certified by the Secretary of State either to have been gravely injurious to the interests of the State or to be liable to lead to serious loss of confidence in the public service (Regulation K5(4)).

6.106. If these conditions are met, the PPA has a wide discretion to forfeit all or part of the pension. The same conditions apply to an offence committed by a widow or widower of a pension who is in receipt of a police pension. There are complex provisions relating to forfeiture and the guaranteed minimum pension for a former police officer of state pensionable years (see Regulation J1).

6.107. The forfeiture provisions in Regulation 55 of the 2006 Regulations are in substantially identical form.

6.108. The procedure to be followed for forfeiture applications under either the 1987 or 2006 Regulations is set out in a Home Office Circular[17] which is reproduced below:

"**ANNEX B**

THE PROCEDURES

[17] See https://www.gov.uk/government/publications/forfeiture-of-police-pensions

There are three stages to forfeiture.

2. **The first stage is for the police authority to identify a case where a pensioner, (whether he or she is eligible for an immediate or a deferred pension) has committed an offence in connection with his/her service as a member of a police force**. The Courts have ruled that the pensioner need not have been a serving officer at the time of the offence in order to meet the requirement that it must be connected with his/her service. For instance, the offence may have been committed after the pensioner retired but he or she may have used police knowledge or police systems or police contacts in the commission of the offence. However, pension rights, once earned, should not be forfeited except in serious circumstances. Forfeiture will therefore not be appropriate in every case where a pensioner has committed a criminal offence, but it should always be considered where the offence was serious and there is or might be public concern about the pensioner's abuse of his/her position of trust.

3. Where a case has been identified, (and without prejudice to the final decision by the police authority on whether to forfeit a pension), the police authority should apply to the Home Secretary for the issue of a certificate. The authority should provide the basis for the application, including the reasons for the police authority's view that the pensioner's offence was committed in connection with his/her police service and, in their opinion, was either gravely injurious to the interests of the State or, more likely, was liable to lead to a serious loss of confidence in the public service. Applications should include as much detail as possible (see Annex C) and should be addressed to the Policing Powers and Protection Unit, 4th floor, Peel Building, 2 Marsham Street, London SW1P 4DF. The Unit welcomes telephone inquiries from forces and police authorities for advice as to whether a particular case is one on which a certificate might be issued. The authority should also notify the pensioner of the application. Applications are liable to disclosure and care should be taken to provide only relevant information.

4. **The second stage is for the Home Secretary to consider whether the pensioner's offence was either gravely injurious to the interests of the State or liable to lead to serious loss of confidence in the public service**.

5. A person's rights to a police pension are part of the remuneration to which his/her service has entitled him/her and it is not axiomatic that a certificate will be issued. Forfeiture is an additional penalty which should not be added automatically to whatever sentence the Court has imposed. In deciding whether to issue a certificate therefore, the Home Secretary attaches a greater weight to the words "serious loss of confidence in the public service" than the harm inevitably caused by any police officer or former police officer who commits a crime. The Home Secretary will take into account:

- The seriousness with which the Court viewed the offence (as demonstrated by the punishment imposed and the sentencing remarks);
- the circumstances surrounding the offence and investigation;
- the seniority of the officer or former officer (the more senior, the greater the loss of credibility and confidence);
- the extent of publicity and media coverage; and
- whether the offence involved:
  - an organised conspiracy amongst a number of officers,
    - active support for criminals,
    - the perversion of the course of public justice,
    - the betrayal of an important position of trust for personal gain, and/or
    - the corruption or attempted corruption of junior officers.

6. The police authority and the pensioner will be notified of the Home Secretary's decision and the reasons for it. A copy of the certificate, if issued, will also be forwarded.

7. **The third stage follows the issue of a certificate. This is the decision by the police authority whether or not the pension should be forfeited and the determination of the extent of forfeiture**, both in terms of the proportion of the pension to be forfeited and the period over which that forfeiture is to take place. If the pension is a deferred one, the police authority may decide (once a certificate has been issued) to keep the question of forfeiture under review. However, delay in making a determination following the issue of a certificate could be challenged in the courts. Whether or not to delay the decision will depend on the individual circumstances of each case.

8. On the question of the amount which can be forfeited, paragraph 4 of the Regulations provides that forfeiture may be applied permanently or temporarily. The courts have ruled that the pension may be forfeited by no more than 65%, the remainder reflecting a pensioner's own contributions which cannot be forfeited. Certificates are likely to be issued only in serious cases.

9. For the purposes of these Regulations, pension does not include an allowance, a gratuity, a lump sum, or an award by way of repayment of aggregate pension contributions. It means a personal pension (including an ordinary, short service, ill health, injury or deferred pension), a widow's pension, or a dependent relative's special pension. A commuted lump sum may not be forfeited but if a pension is forfeited before it becomes payable (eg an ordinary pension before the age of 50 or a deferred pension before the age of 60), there will be little or no pension left to commute for a lump sum. The secured portion of a pension can only be forfeited temporarily, that is, until a pensioner reaches state pensionable age. After that, it may only be forfeited if the pensioner is in legal custody.

10. A pensioner who is dismissed after completing 25 years' service will not be entitled to an ordinary pension if he/she was dismissed for a cause for which the pension could be forfeited. In these circumstances, the pensioner will only become entitled to a deferred pension at the age of 60 and it will be for the police authority to determine whether the deferred pension should be forfeited and to what extent.

11. Other factors which might influence the extent of forfeiture are:
those listed above (paragraph 5) which reflect the gravity of the officer's conduct;

- mitigating circumstances;
- disability in the family;
- illness at the time of the offence; and
- assistance or information given to the police during the investigation or following conviction.

12. If several officers were involved in the commission of the offence, the police authority might decide to reflect different levels of culpability in the extent of forfeiture for each. For example, officers of a senior rank may be more culpable than junior ones.

13. The police authority should inform the Home Office of the final outcome of the case, whether the pension has been forfeited and the extent of forfeiture.

Right of appeal

14. Regulation H5 gives a pensioner the right of appeal to the Crown Court (the Sheriff Court in Scotland) against the police authority's role in the decision to forfeit the pension. An officer may appeal against the police authority's decision that there was a connection between the offence and the pensioner's membership of a police force and against the extent of the forfeiture. The right of appeal lies after the forfeiture has occurred, even if the cause for aggrievement is that the offence was committed in connection with his/her service. A decision to delay the determination as to forfeiture following the issue of a certificate might, in some circumstances, be prejudicial to a successful appeal and liable to challenge. Under the rules of the Crown Court a notice of appeal should be submitted to the Court and any other party to the appeal within 21 days of the day the decision was notified. The Court has discretion, however, to accept an appeal out of time.

15. Regulation H6 provides a right of appeal to a tribunal appointed by the Secretary of State as police authority against the first and third stages of forfeiture where the pensioner was a central police officer.

Identification of cases

16. You should ensure, in cooperation with your police force, that systems are in place to identify cases to which the forfeiture provisions apply so that appropriate action may be taken to meet the provisions of this circular"

6.109. There are more complex forfeiture provisions under Regulations 210 to 215 of the 2015 Regulations but the criminal offences that lead to potential forfeiture are identical.