7. Challenges to decisions made within the police pensions systems.

7.1. The system for challenging decisions made within the police pension system is far from straightforward. Many other administrative decisions made by public bodies have been adapted in recent years so that a challenge comes before a tribunal sitting under the Courts and Tribunals Act 2007. However, as the High Court recently confirmed *in R (The Commissioner of Police of the Metropolis) v Police Medical Appeal Board* [2020] EWHC 345 (Admin), the PMAB is a tribunal within the meaning of section 31 Senior Courts Act 1971.

Appeals to the Police Medical Appeal Board

7.2. Challenges to any decisions made by the SMP can be made by the officer or former officer to the Police Medical Appeal Board, known as the "PMAB". The PMAB was created in England and Wales by the Police Pensions (Amendment) Regulations 2004 as a substitution for the "Medical Referee". It is a statutory body which is given its authority separately by each set of Regulations (namely the 1987 Regulations, the 2006 Regulations, the 2015 Regulations and PIBR).

7.3. The power for the officer to appeal is set out in Regulation H2 of the 1987 Regulations as follows:

> "Appeal to a Board of medical referees
>
> (1) Where a person is dissatisfied with the decision of the selected medical practitioner as set out in a report under regulation H1(6) [regulation H1(5)], he may, within 28 days after he has received a copy of that report or such longer period as the police pension authority may allow, and subject to and in accordance with the provisions of Schedule H, give notice to the police pension authority that he appeals against that decision.
>
> (2) In any case where within a further 28 days of that notice being received (or such longer period as the police pension authority may allow) that person has supplied to the police pension authority a statement of the grounds of his appeal, the police pension authority shall notify the Secretary of State accordingly, and the Secretary of State shall appoint a medical referee to decide the appeal and the police pension

authority shall refer the appeal to a board of medical referees, appointed in accordance with arrangements approved by the Secretary of State, to decide.

(3) The decision of the board of medical referees shall, if it disagrees with any part of the report of the selected medical practitioner, be expressed in the form of a report of its decision on any of the questions referred to the selected medical practitioner on which it disagrees with the latter's decision, and the decision of the board of medical referees shall, subject to the provisions of Regulation H3, be final"

7.4. There are materially identical provisions allowing the officer or pensioner to appeal against any decision of the SMP under Regulation 72 of the 2006 Regulations, Schedule 1 of the 2015 Regulations and Regulation 31 PIBR.

7.5. The procedural rules under which it is required to operate are set out in the various Regulations and follow an almost identical form. It is thus only necessary to reproduce the rules in Schedule H to the 1987 Regulations which are as follows:

"**1.** Every notice of appeal under regulation H2(1) and statement of grounds under regulation H2(2) shall be in writing.

2. On receiving a notice of appeal against a report issued under regulation H1 and the appellant's statement of grounds for appeal, the police pension authority, unless regulation H3(2) applies, shall forward to the Secretary of State and a board of medical referees copies of those documents and all other documents determined as necessary by the Secretary of State.

3. (1) The board of medical referees shall consist of not less than three medical practitioners appointed by, and in accordance with, arrangements approved by the Secretary of State, provided that—

(a) at least one member of the board of medical referees shall be a specialist in a medical condition relevant to the appeal;
(b) one member of the board of medical referees will be appointed chairman; and
(c) where there is an equality of voting among members of the board of medical referees, the chairman shall have a second or casting vote.

(2) The board of medical referees shall appoint a time and place for hearing the appeal, at which it may interview or examine the appellant, and for any such further hearings as it may consider necessary and shall give not less than 2 months notice, or

such shorter period as the [police pension authority] and appellant may agree, thereof to the appellant and [police pension authority].

(3) The police pension authority and the appellant shall, not less than 35 days (including weekends and public holidays) before the date appointed for the hearing, inform the board of medical referees whether they intend to be represented at the hearing.

4 (1) Where either party to the appeal intends to submit written evidence or a written statement at a hearing arranged under paragraph 3 above that party shall, subject to paragraph (2) submit it to the board of medical referees and the other party not less than 35 days before the date appointed for the hearing.

(2) Where any written evidence or statement has been submitted under paragraph (1), any written evidence or statement in response may be submitted by the other party to the board of medical referees and the party submitting the first-mentioned evidence or statement at any time not less than 7 days before the date appointed for the hearing.

(3) The board of medical referees may postpone or adjourn the date appointed for the hearing where any written evidence or statement is submitted in contravention of paragraphs (1) or (2) or it appears necessary to do so for the proper determination of the appeal.

(4) References in paragraphs (1) and (2) to periods of days shall include weekends and public holidays.

5 (1) Any hearing (including any examination) may be attended by—

(a) the selected medical practitioner; and

(b) a duly qualified medical practitioner appointed for the purpose by the appellant,

although they may only observe any examination.

(2) If the selected medical practitioner does not attend any examination then a duly qualified medical practitioner appointed for that purpose by the police pension authority may attend the examination as an observer.

(3) If any hearing includes an examination then only medical practitioners may be present for that part of the hearing.

6 The board of medical referees shall supply the police pension authority, the appellant and the Secretary of State with a written statement of its decision. Where the board of medical referees disagrees with any part of the selected medical practitioner's report, the board of medical referees shall supply a revised report.

7 (1) There shall be paid to the board of medical referees—

(a) such fees as are determined in accordance with arrangements made by the Secretary of State; or

(b) where no such arrangements have been made, such fees and allowances as the Secretary of State may from time to time determine.

(2) Any fees and allowances payable to the board of medical referees under paragraph (1) shall, subject to [paragraph 8(5)], be paid by the police pension authority and shall be treated as part of the expenses of the police pension authority for the purposes of this Schedule.

8 (1) Save as hereinafter provided, the expenses of each party to the appeal shall be borne by that party.

(2) Where a hearing has been cancelled, adjourned or postponed at the request of, or due to the actions or omissions of the police pension authority, less than 22 days (including weekends and public holidays) before the date appointed for the hearing the board of medical referees shall require the police pension authority to pay to the appellant any expenses actually and reasonably incurred by him in respect of attending or arranging to attend the cancelled, adjourned or postponed hearing as the case may be.

(3) Where the board of medical referees determines that a hearing has been cancelled, adjourned or postponed at the request of, or due to the actions or omissions of the appellant, less than 22 days (including weekends and public holidays) before the date appointed for the hearing the police pension authority may, subject to paragraph (4), require the appellant to pay towards the cost of the cancellation, adjournment or postponement as the case may be, such sum not exceeding the total costs of the cancellation, adjournment or postponement as the case may be as the authority thinks fit.

(4) If the board of medical referees, after taking account of any representations from either party, decides that the cancellation, adjournment or postponement as the case may be was not due to any fault on the part of the appellant and the appellant should not pay towards the cost of the cancellation, adjournment or postponement as

the case may be, it shall state that this is the case and the police pension authority shall not require the payment of any such costs.

(5) Where the board of medical referees decides in favour of the police pension authority and reports that in its opinion the appeal was frivolous or vexatious, the authority may, subject to paragraph (6), require the appellant to pay towards the cost of the appeal such sum not exceeding the board of medical referees' total fees and allowances as the authority thinks fit.

(6) If the board of medical referees, after taking account of any representations from either party, decides there are exceptional reasons why the appellant should not pay towards the cost of the appeal, it shall state that this is the case and the police pension authority shall not require the payment of any such costs.

(7) Where the board of medical referees decides in favour of the appellant, the police pension authority shall refund to the appellant any expenses actually and reasonably incurred by the appellant in respect of attending any such hearing as is mentioned in paragraph 3"

7.6. There is no right for the PPA to appeal against the decision of his own SMP. Accordingly, if the SMP considers that the SMP has made an error of law in awarding a pension to a pensioner or in the amount of such pension, the PPA has to issue judicial review proceedings to challenge the decision of the SMP: see *R (Merseyside Police Authority) v Police Medical Appeal Board & Ors* [2009] EWHC 88 (Admin) by way of an example.

7.7. The PMAB is carrying out a quasi-judicial function and thus, in order to answer the questions under the Regulations, the PMAB must make findings of fact on ant areas of disputed facts based on the information before it: see *R (Williams) v Merseyside Police Authority* [2011] EWHC 1119 (Admin).

Crown Court Appeals.

7.8. One of the peculiarities of the police pension system is the existence of a statutory right of appeal by an officer or former officer to the Crown Court. This is a "peculiarity" because, whilst most police officers are familiar with the Crown Court, these courts almost exclusively deal with criminal matters. The right of the officer to

appeal to the Crown Court is set out in Regulation H5(1) of the 1987 Regulations which provides:

> "H5.—(1) Where a member of a home police force, or a person claiming an award in respect of such a member, is aggrieved by the refusal of the police authority to admit a claim to receive as of right an award or a larger award than that granted, or by the forfeiture under Regulation K5 by the police authority of any award granted to or in respect of such a member, he may, subject to Regulation H7, appeal to the Crown Court and that court, after enquiring into the case, may make such order in the matter as appears to it to be just"

7.9. There is a separate system for appeals to the Secretary of State under Regulation H6, for:

a) an overseas policeman[1];
b) an inspector or assistant inspector of constabulary, or
c) a central police officer[2].

7.10. In such a case, the Secretary of State is then required to appoint" a barrister or solicitor of not less than 7 years' standing and a retired member of a police force who, before he retired, held a rank not lower than that of superintendent" to hold a tribunal hearing into the case. However, the Crown Court procedure applies to such a case.

[1] Schedule A provides that "overseas policeman" means "(a) a member of an overseas corps, or (b) an officer to whom section 10 of the Overseas Development and Co-operation Act 1980 or the Overseas Service Act 1958 applies or applied and whose service as such an officer is or was for the time being service in respect of which section 11 of the said Act of 1980 or section 5 of the said Act of 1958 has or had effect and that "overseas service" means service as an overseas policeman".

[2] Schedule A provides that a "central police officer" means a member of a home police force engaged on central service who enjoys a right of reversion under section 43(1) of the Police Act 1964 or section 15(5) of the 2012 Act] as the case may be" and "central service" means relevant service within the meaning of section 97(1)(b) to (cc) and (cf) of the Police Act 1996 or any of the following kinds of temporary service in pursuance of section 15 of the 2012 Act—(a) service in accordance with section 72(1)(b) or 73(1)(b) of the 2012 Act as an assistant inspector of constabulary or, as the case may be, as a staff officer of the inspectors of constabulary; (b) service under the Crown in connection with research or other services connected with the police provided by the Scottish Ministers; or (c) service as a member of staff of SOCA"

7.11. Regulation H7 then provides:

> "**H7 Limitations on appeals**
>
> (1) An appeal shall not lie under Regulation H5 of H6 against anything done by a police pension authority in the exercise of a power conferred by these Regulations which is expressly declared thereby to be a power which they are to exercise in their discretion.
>
> (2) Subject to Regulation H3(1), in any proceedings under Regulation H5 or H6 the court or tribunal shall be bound by any final decision of a medical authority within the meaning of Regulation H3"

7.12. A Crown Court appeal is not the only possible way that an officer is entitled to make a legal challenge against a decision of the PPA. As Coulson LJ observed in *R (Carter & Anor) v Chelmsford Crown Court* [2019] EWHC 1484 (Admin) at §23:

> "Regulation H5(1), which states that a person with a claim "may" appeal to the Crown Court. The option, even if it were available, is not therefore mandatory"

7.13. There are like provisions in Regulations 66 to 68 of the 2006 Regulations. The wording of the relevant provisions in Regulations 207 to 209 of the 2015 Regulations is similar but uses slightly different words. Regulation 207 provides:

> "207.—(1) This regulation applies in relation to payment of benefits under this scheme to or in respect of a member of a home police force.
>
> (2) The member or person claiming payment of a benefit in respect of the member (P) may, subject to regulation 209 (limitation on appeals against decision of scheme manager), appeal to the Crown Court against any of the following decisions—
>
> (a) a decision by the scheme manager to refuse to accept P's claim for payment of a benefit;
>
> (b) a decision by the scheme manager to refuse to pay P a benefit the entitlement to which arises on the fulfilment of conditions which do not include a claim for payment;

(c) a decision by the scheme manager to refuse to accept P's claim for payment of a benefit larger than the benefit granted to P;

(d) a decision by the police pension authority acting in exercise of its functions as scheme manager under regulation 75 (permanent medical unfitness) as to whether a refusal to accept medical treatment is reasonable;

(e) a decision by the scheme manager under regulation 115 (cancellation of ill-health pension: failure to receive appropriate medical treatment) as to whether a refusal to accept medical treatment is reasonable;

(f) a decision by the scheme manager under regulation 107 (reduction of pension in case of default) to reduce the amount of pension payable to the member.

(3) The Crown Court, after enquiring into the case, may make such order in the matter as appears to it to be just"

7.14. Whilst the right of appeal to the Crown Court is not the only method by which an officer or former officer can challenge unlawful actions by the PPA, the Court in *Carter* observed at §25 that the officer's right to appeal to the Crown Court was restricted to those specific matters set out in the Regulation. It said:

> "The wording of Regulation H5(1) is restrictive. It does not allow an aggrieved party to appeal to the Crown Court in relation to any decision by the Police Pension Authority. If that were the case, it would simply say so. On the contrary, it carefully restricts the circumstances in which such an appeal can be made to a) a refusal to admit a claim as of right; b) a refusal to admit a claim to a larger award than that granted; c) a decision as to whether a refusal to accept medical treatment is reasonable and d) forfeiture of any award"

7.15. This would suggest that older cases such as *R v Merseyside Police Authority, ex parte Yates* [1999] Lexis Citation 2295 suggested that an officer could appeal to the Crown Court for the refusal of the Chief Constable to refer a case to the SMP, that may not be correct. The decision to refer a case to the SMP is not a decision "*to admit a claim as of right*" to a police pension because it is only a preliminary step which may or may not lead to the officer establishing the right to a pension (depending on the findings of

the SMP). Hence, following *Carter,* it may be more appropriate to bring such challenges by way of judicial review.

7.16. The question as to what was meant by a "claim to a larger award than that granted" was considered by Mrs Justice Jefford in *R (Chief Constable Of South Yorkshire Police) v The Crown Court At Sheffield & Anor* [2020] EWHC 210 (Admin). The facts of that case were that Sgt Kelly served as a police officer with the South Yorkshire police service. He suffered serious Post Traumatic Stress Disorder ("**PTSD**") directly as a result of his public service. On 5 June 2005 the South Yorkshire Police Authority required Mr Kelly to resign as a result of his disabilities. The report prepared by the Selected Medical Practitioner ("**SMP**") determined that Mr Kelly's PTSD arose directly as a result of his duties as a police officer but no one advised Mr Kelly of his right to an injury pension. Mr Kelly was "*in very poor mental health at that time"* and was unaware that, following his enforced retirement, he may have been entitled to an injury pension. Mr Kelly learned that he may have a right to a police injury pension in 2016 and made the appropriate application. He was awarded a Band 3 pension and then claimed payment of the pension back to the date of his retirement and, when this was refused by the Chief Constable, appealed to the Crown Court. The Chief Constable opposed the claim on substantive and procedural grounds but lost. The Chief Constable sought a judicial review of the Crown Court's refusal to state a case for the High Court.

7.17. As noted above, the Chief Constable's substantive challenge failed because the court held police injury pensions were payable from retirement under Regulation 43 PIBR. However the Chief Constable also asserted that Mr Kelly had used the wrong procedure and should have brought a claim under Part 7 of the Civil Procedure Rules in the High Court. The Chief Constable's argument was that the words "*larger award than that granted*" in Regulation 34 referred to the amount of the injury pension calculated in accordance with Schedule 3, but did not apply to the amount of the pension paid over aa period of time.

7.18. Jefford J rejected that claim too because she held that the officer has the right to appeal to the Crown Court in relation to "the calculated amount in accordance with Schedule 3 and the period over which that amount is payable": see §63 and §69. Permission is being sought to appeal that case to the Court of Appeal and, at the date of writing, it is unclear if permission will be granted.

7.19. Section 74 of the Senior Courts Act 1981 provides:

> "(1) On any hearing by the Crown Court—
>
> (a) of any appeal; . . .
>
> the Crown Court shall consist of a judge of the High Court or a Circuit judge or a Recorder or a qualifying judge advocate who, subject to the following provisions of this section, shall sit with not less than two nor more than four justices of the peace"

7.20. Thus the normal composition of the Court for an appeal under the police pension system should be a Judge and between 2 and 4 magistrates. However section 74(3) provides that procedural rules entitle the Court to continue without magistrates. The procedural rules governing any appeal to the Crown Court are set out in the Crown Court Rules 1982 ("**the 1982 Rules**") and they permit the Court to sit with a Judge alone.

7.21. The relevant parts of Rule 7 of the 1982 Rules provide:

> "7 Notice of appeal
>
> (1) An appeal shall be commenced by the appellant's giving notice of appeal in accordance with the following provisions of this Rule.
>
> (2) The notice required by the preceding paragraph shall be in writing and shall be given—
>
> (c) … to the appropriate officer of the Crown Court; … and
>
> (e) … to any other party to the appeal.

(3) Notice of appeal shall be given not later than 21 days after the day on which the decision appealed against is given ….

…

(5) The time for giving notice of appeal (whether prescribed under paragraph (3), or under an enactment listed in Part I of Schedule 3) may be extended, either before or after it expires, by the Crown Court, on an application made in accordance with paragraph (6).

(6) An application for an extension of time shall be made in writing, specifying the grounds of the application and sent to the appropriate officer of the Crown Court.

(7) Where the Crown Court extends the time for giving notice of appeal, the appropriate officer of the Crown Court shall give notice of the extension to—
(a) the appellant;
…."

7.22. Rule 7(4) of the 1982 Rules requires some appeals to state the grounds of appeal in the Notice of Appeal. However, that provision does not apply to police pensions appeals. It is nonetheless good practice for the Notice of Appeal voluntarily to state the grounds upon which the appellant relies so that the Court and the Respondent Chief Constable can know what grounds are relied upon by the officer or former officer. However, the grounds eventually relied upon by the officer must be those emerging on the evidence and cannot be limited to any grounds set out in Notice because the requirement to state grounds is not part of the 1982 Rules for this type of appeal.

7.23. The Crown Court has powers to hear evidence and to resolve any factual disputes needed to address the issues in the appeal. It then has wide powers to "*make such order in the matter as appears to it to be just*". However, for reasons which do not appear to be properly explained, Jefford J decided in the *Sheffield Crown Court* case that the powers of the Crown Court did not extend to awarding interest on sums found to be owing.

The Pensions Ombudsman.

7.24. In addition to the right to have a complaint adjudicated in the courts, any pension beneficiary who disagrees with a decision made by the PPA has the right to make a complaint to the Pensions Ombudsman[3]. The Pensions Ombudsman exercises wide powers given by the Pension Schemes Act 1993 ("**the PSA 1993**") to make decisions about complaints by pensioners.

7.25. The Pensions Ombudsman has jurisdiction to consider and make a determination on a wide variety of different types of complaint including complaints that a PPA has been guilty of any form of maladministration or to "*any dispute of fact or law . . . in relation to an occupational or personal pension scheme*"[4]. Complaints must be made in writing within 3 years of the date of the relevant "act or omission" unless the person was unaware of the act or omission in which case the complaint must be made within 3 years of the "*earliest date on which that person knew or ought reasonably to have known of its occurrence*". The Ombudsman has power to extend that period if he considers that it is reasonable to do so[5].

7.26. Complaints to the Pensions Ombudsman unless the complainant has made an internal complaint to the PPA and failed to have the matter satisfactorily resolved. The procedures followed by the Pensions Ombudsman are set out in the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995[6].

7.27. The Pensions Ombudsman has the right to make a determination and to direct the PPA to "*take, or refrain from taking, such steps as he may specify*"[7]. The Pensions Ombudsman thus has decision making powers that can require the PPA to make or change a decision. If court proceedings are taken whilst a complaint is made to the

[3] See https://www.pensions-ombudsman.org.uk/making-complaint
[4] See s146 of the Pension Schemes Act 1993.
[5] See Regulation 5 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996.
[6] SI 1995/1053. This statutory instrument has been amended since it was first made. An up to date version should be able to be accessed from https://www.legislation.gov.uk/uksi/1995/1053/contents
[7] See section 151(2) of the Pension Schemes Act 1993.

Pensions Ombudsman, those proceedings can be stayed until the Pensions Ombudsman has made his decision[8].

Judicial Review.

7.28. If there is no other suitable alternative remedy, decisions of the PPA (whether directly taken by the PPA or by the SMP or PMAB on behalf of the PPA) can be challenged by way of judicial review. Any review has to be commenced promptly and, in any event, within 3 months of the date of the relevant decision. There is limited scope for the court to extend that time limit, depending on the particular facts of the case.

7.29. The proper defendant on such application can either be the SMP or PMAB or the Chief Constable since the SMP or PMAB takes decisions as a delegated decision maker on behalf of the Chief Constable. The usual practice is to issue proceedings against the Chief Constable and to make the SMP or PMAB an Interested Party but it is entirely proper to issue proceedings against the SMP or PMAB and to make the Chief Constable an Interested Party. If proceedings are commenced by the Chief Constable against the SMP or PMAB, the pensioner should be made an Interested Party.

7.30. Any claim for judicial review needs to secure permission before it can proceed to a full review. Any refusal of permission on paper can be renewed orally before the Judge and, if that is refused, can be the subject of an appeal to the Court of Appeal: see for example *Simpson v Police Medical Appeal Board* [2011] EWCA Civ 1797.

7.31. If permission is granted, the judicial review court will review the lawfulness of the decision but is not an appeal on the merits. Further, the High Court will treat the medical findings of the PMAB with considerable respect on the basis that the PMAB is a specialist medical tribunal which is charged to make clinical findings. Mostyn J explained the positon in *R (Sidwell) v Police Medical Board* [2015] EWHC 122 (Admin) as follows at §5:

[8] See s148 of Pension Schemes Act 1993.

> "It is trite law that this court will pay considerable respect to the decision of an expert and informed tribunal, and will only interfere where the grounds of challenge are clearly made out: see *Law Society v Salsbury* [2008] EWCA Civ 1285 [2009] 1 WLR 1286 per Jackson LJ at para 30"

7.32. Part of the obligation on the PMAB is to prepare a report which sets out its reasons. The duty to explain reasons is set out above but any challenge based on lack of proper reasons has to bear in mind the cautionary approach identified by Mostyn in *Sidwell.* The Judge said at §6 and §7:

> "6. Inasmuch as the challenge is made to the alleged inadequacy of the reasons I remind myself of the words of Munby LJ (as he then was) in *Re A and L (Children)* [2011] EWCA Civ 1611 at paras 34 and 35:
>
> > 'There are two principles in play here. The first is that explained by Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372. So far as concerns a judge's approach to a case and his reasoning his "reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account." An appellate court, Lord Hoffmann continued, "should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."
> >
> > The other principle, relating to the adequacy of a judge's expressed reasons, is that explained by Lord Phillips of Matravers MR in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409, paras [17]-[21]. For present purposes it suffices to refer to how Thorpe LJ put it in *Re B (Appeal: Lack of Reasons)* [2003] EWCA Civ 881, [2003] 2 FLR 1035, para [11]:
> >
> > > "the essential test is: does the judgment sufficiently explain what the judge has found and what he has concluded as well as the process of reasoning by which he has arrived at his findings, and then his conclusions?"
> >
> > Thorpe LJ had previously observed that one should not ignore the "seniority and experience" of the particular judge, the "huge virtue in brevity of judgment", and that the "more experienced the judge the more likely it is that he may display the virtue of brevity." I should add that

there is no obligation for a judge to go on and give, as it were, reasons for his reasons.'

7. Where the decision is written by members who are not legally qualified and who do not have the benefit of assistance from a legal adviser I should be especially careful not to subject their reasoning to intense narrow textual scrutiny. I should not expect their reasoning to resemble a judgment written by Lord Birkenhead"

7.33. However there are repeated cases where, despite the limitations set out above, the High Court has found that a PMAB decision should be quashed for lack of proper reasons, particularly if the limited reasons given hint that the PMAB may have approached the matter on an incorrect legal basis.