IN THE CROWN COURT AT SNARESBROOK

Case No: A 2006 7706

BETWEEN

Leigh Harrington

Appellant

-and-

Metropolitan Police Authority

Respondent

BEFORE His Honour Judge Platt
Mrs P.Wright JP
D Blayney Esq JP (Justices)

8th January 2007

JUDGMENT

1. This is an appeal to the Crown Court under the provisions of Regulation H5 of the Police Pensions Regulations 1987 ("the Regulations") against the decision of the Respondent Authority that the Appellant should forfeit permanently 25% of the pension entitlement which had accrued to him during his service as a police officer. At the conclusion of the hearing we announced our unanimous decision to allow the appeal in full and we now set out our reason for that decision.

2. We understand that there have recently been a number of successful appeals to this court against decisions to forfeit police pensions. It would also appear from the facts of this case that the relevant sub-committee of the Authority to whom these decisions have been lawfully delegated, have fallen into errors of law in their determination of these difficult applications.

3. In fairness to the Authority some of these errors would appear to result from what can be described as a failure of the Home Office Guidance properly to address issues which arise in relation to these applications under Article 6(1) and Article 1 of the First Protocol to the European Human Rights Convention which are contained in the Human Rights Act 1998. Others arise from a misunderstanding of the complex provisions of the Regulations on which the sub-committee does not appear to have been correctly advised.

4. We have therefore endeavoured to identify clearly the errors which have occurred in the decision making process in this case and to give some indication of the factors which ought properly to inform the decision whether or not to forfeit any part of a police officer's pension and if so for how long. We hope the guidance offered in this judgment

will help to ensure that future applications are properly considered and thereby reduce the volume of appeals.

5. **Chronology**
The brief circumstances are that this appellant pleaded guilty at the Central Criminal Court on 1st October 2003 to one offence of Misconduct in a Public Office and on 21st November 2003 he was sentenced to 6 months imprisonment.

6. Following the conviction and sentence the Respondent Authority then applied to the Home Secretary on 3rd December 2003 under Regulation K5 of the Regulations for a certificate in order to determine whether or not to forfeit any part of the Appellant's pension. That application was granted and a certificate issued by the Home Secretary on 28th August 2004.

7. There followed a period of significant delay which we deal with later in this judgment but following a hearing at which the Appellant had the opportunity to make representations and did so, the Authority decided on 8th June 2006 permanently to forfeit 25% of the Appellant's pension entitlement. It is against that decision that he now appeals.

8. **The legal process**
In order to understand the process by which a police officer may be deprived of his pension entitlement it is necessary to look in more detail at the procedure laid down by the Regulations. The starting point is to be found at paragraph K5 of the Regulations the relevant parts of which read as follows:

> "(1) This regulation shall apply to a pension payable to in respect of a member of a police force under Part B or C or under Regulation E (1) .....
>
> (2) subject to paragraph (5), a police authority responsible for payment 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) a police authority responsible for payment to a member of a police force 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, the police authority in determining whether a forfeiture should be permanent or temporarily 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 he is imprisoned or otherwise detained in legal custody.

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

....."

9. It is clear from this paragraph that there are two possible routes by which the procedure may be initiated. The first of these is that the officer has either been guilty of treason or a breach of the Official Secrets Act for which he has been sentenced to not less than ten years in prison. Such an event would necessarily involve a crime of the utmost gravity. The second, which is the route which is normally encountered and set out in subparagraph (4), is that the officer has been convicted of an offence committed in connection with his service as a member of a police force **and** the Secretary of State is satisfied that the offence is **either**

(a) gravely injurious to the interests of the state; **or**

(b) liable to lead to a serious loss of confidence in the public service.

Once the Secretary of State has issued his certificate under subparagraph (4) the Authority is then, and only then, entitled to decide to forfeit the whole or part of the officer's pension entitlement either permanently or for a specified period, but this determination is itself further circumscribed and limited by the provisions of subparagraph (5).

10. For reasons which will become clear it is crucial to bear in mind that the ultimate decision is that of the Authority and not the Secretary of State.

11. From that decision there is then a right of appeal to the Crown Court under Regulation H5 the material part of which reads as follows:

> "Where a member of a home police force.....is aggrieved by....the forfeiture under regulation K5 by the police authority of any award granted to or in respect of such a member, he may....appeal to the Crown Court and that court, after inquiring into the case, may make such order in the matter as appears to it to be just."

It is common ground that this appeal is by way of rehearing at which each party is entitled to call evidence and make submissions.

12. Nature of the rights which are liable to forfeiture

Under Regulation B1 of the Regulations (as amended) in general terms every Police Officer with sufficient qualifying service is entitled to an ordinary pension on reaching the age of 60. The amount of that pension depends essentially upon two factors, the length of his service and his pensionable pay at the date of retirement. If an officer leaves the police force before reaching the age of 60 he is not normally entitled to an immediate pension but instead becomes entitled to a deferred pension under Regulation B5.

13. Pension benefits used commonly to be described as a reward conferred on a faithful employee by a grateful employer in return for long service. Such a description indeed appears in the judgment of His Honour Judge Norman Jones Q.C. , the Recorder of Leeds, in the case of **Paul Banfield –v- Cambridgeshire Police Authority** (4th June 2003) at paragraph 18 of the judgment. With the greatest respect to the learned judge we do not think that analysis can stand with the decision of the European Court of Justice in the seminal case of **Barber –v- Guardian Royal Exchange Assurance Group [1991] 1 QB 344.**

14. It is true that **Barber** was principally concerned with the issue of discrimination as between men and women in terms of their entitlement to equal pay for equal work which is prohibited by Article 119 of the Treaty of Rome. However the fundamental rationale of that decision is that a pension is simply deferred pay. The employee gives up his entitlement to immediate benefits in his weekly or monthly pay in return for payments of benefits either to him or his dependents at a future date. Benefits are indeed earned by years of faithful service but the argument that these benefits amount to any kind of gratuity on the part of the employer was decisively rejected in the **Barber** judgment.

15. The fund which will eventually provide those benefits may comprise contributions by both employer and employee or, in the case of a non-contributory scheme, simply by the employer. In the case of any state scheme the fund or that part of the fund which represents the employer's contributions may be purely notional in the sense that

contributions are not actually paid into any separate fund or account, nor indeed are the employee's contributions although they are actually deducted from salary, but the liability nonetheless remains as a liability of that body in the accounts of the government department or public authority concerned.

16. Once the length of service and the amount of pensionable pay have been determined it is possible by the application of actuarial rules to determine the size of the notional fund required to produce the pension to which the officer is entitled.

17. The elements of the fund.

In the case of a police pension the fund consists of three elements. The first is the element which represents the employer's notional contributions. The second is the element which represents the employee's actual contributions. The third is the secured element referred to in subparagraph (5) of regulation K5. This element exists because of the police pension scheme is a "contracted out" scheme for the purpose of the National Insurance Contributions Regulations. A scheme which is "contracted out" guarantees to pay its members a specific level of benefits on retirement in lieu of any entitlement to the second State Pension and in return **both employer and employee** pay reduced contributions into the national insurance fund out of which state pensions are payable.

18. This secured element is specifically defined at paragraph A5(4) of the Regulations as follows:

> "In these regulations any reference to the secured portion of a pension is a reference to the portion of the pension which equals the graduated retirement benefit which would be payable to a pensioner, on the assumption that he retired from regular employment on attaining state pensionable age, in return for a payment in lieu of contributions in respect of the whole of any period of non-participating employment by reason of which he is entitled to reckon pensionable service for the purpose of the pension, being a period of non-participating employment at the end of which no payment in lieu of contributions in fact fell to be made; and any reference to the unsecured portion of a pension shall be construed accordingly."

19. We do not think it necessary to delve much further into the detail of what is a highly technical and convoluted provision but it clearly refers to what was then called graduated retirement benefit and is now called the second state pension. What is relevant and absolutely clear is that it has nothing to do with the element represented by the employee's actual contributions.

20. We mention this third element principally because of an extraordinary error which appears in the letter of 5th July 2006 to be found at pages

157-159 of the trial bundle. This is the formal letter from the Respondent Authority notifying the Appellant of the decision to forfeit. At the bottom of page 158 the letter reads

> "... the Sub-Committee decided that the former Officer's pension should be permanently forfeit by 25%.
>
> The forfeiture does not apply to the secured portion of the pension, which amounts to 35% and reflects the officer's own contributions to the pension fund."

This is completely wrong. The contributions made by the officer simply do not fall within the definition at paragraph A5(4) of the Regulations.

21. We say no more about this issue in general terms because it does not arise for decision in this appeal. However it is an issue which may arise and need to be considered in more detail in future particularly in a case where effectively a total or very substantial forfeiture is under consideration. Any such decision will need to take careful account of the restrictions on forfeiture imposed by Regulation K5(5) and proper valuations of the secured element will need to be carried out.

22. This will be a matter of expert actuarial evidence but it is clear from the evidence referred to in the judgment of His Honour Judge Norman Jones Q.C. in the case of **Paul Banfield** that the total contributions both notional and actual are equivalent to approximately 33% of salary. On the figures for the current tax year contracted out schemes reduce the employer's overall National Insurance contributions by approximately 3.5% of salary and the employee's contributions by approximately 1.5% of salary so there would seem to be a fair argument for concluding by a rather rough and ready calculation that 5/33 or approximately 15% of the pension is actually covered by the definition of the secured pension in subparagraph (5). That may not appear a very large proportion but in this case it actually amounts to just over £63,000, in round figures £44,000 from the employer and £19,000 from the employee.

23. The entirely separate question of the proportions of the fund which should be attributed respectively to the employer's and employee's contributions received detailed consideration in June 2003 in the case of **Paul Banfield** to which we have already referred and both parties in this appeal were content to accept the formulation of His Honour Judge Norman Jones Q.C. in that case that the correct figures are 65% for the employer's contributions and 35% for the employee's contributions.

24. It has long been settled law that at least in subparagraph (4) cases, despite the apparently wide wording of Regulation K5, it could never be fair to forfeit that part of the pension which represents the officer's own contributions. In modern terms this would be a clear infringement of

the officer's rights guaranteed by Article 1 of the First Protocol to the Human Rights Convention which is forbidden by section 6(1) of the Act. It follows that subject to subparagraph (5) the maximum permissible forfeiture is effectively 65%.

25. The Secretary of State's certificate.

As we have seen there are specific preconditions to the forfeiture procedure under subparagraph (4) of Regulation K5. which require the authority to apply initially to the Secretary of State for a certificate. The Appellant made a number of complaints about the fairness and accuracy of the material submitted to the Secretary of State in support of the application for the certificate in this case. We accept the submission of Counsel for the Respondent Authority that the certificate is conclusive in these proceedings. Any challenge to the validity of the certificate could only be made by application to the Administrative Court for a quashing order. The investigation and resolution of one of these complaints is the principal reason for the delay in this case.

26. Our principal concern is with the effect of the certificate being granted. We have seen the notes for guidance issued by the Home Office under circular number 26/2006. We note that these were issued in September 2006 which was after the decision under appeal but it is clear from other documents in the bundle that apart from an adjustment in the figures to take account of the **Banfield** case there is no material difference between this document and the one which it replaced, Circular 56/1998.

27. We are particularly concerned to note the terms of paragraph 8 of Annex B to the Circular which reads as follows:

> "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. As certificates are likely to be issued only in serious cases it follows that substantial forfeiture (say 35-65%) would normally be imposed."

28. In our judgment this statement is not just seriously misleading but actually wrong as a matter of law for two reasons. The first is that the Regulations themselves place no lower limit on the amount of the forfeiture. It is simply wrong as a matter of law for the executive to seek to limit in any way the ambit of the discretion which Parliament has conferred on the decision making body. In clear terms the Regulations provide first for the circumstances in which a certificate may be granted. Once granted It is then for the authority to decide whether or not to forfeit at all, and if so to settle upon the terms of forfeiture both in amount and time.

29. The second reason is that any decision to forfeit clearly engages the provisions of Article 6(1) of the Convention as well as Article I of the First Protocol. If the Circular is right the Secretary of State's certificate amounts in effect to a decision by him that the appropriate starting point for the authority's determination is one to forfeit more than half of the forfeitable pension. This decision not only pre-empts stage one of the authority's decision making process, it is a decision made simply upon the basis of material submitted by the police authority without any consideration of any mitigating circumstances (see paragraph 5 of Annex B of the Circular,) or any opportunity for the officer to make any representations or any opportunity to resolve disputed issues of fact. In our judgment any such procedure simply could not comply with Article 6(1).

30. In our judgment the analogy which places the certificate of the Secretary of State in its proper context is to regard it as akin to, and of no greater weight than, a certificate by a Magistrates Court under section 6(1) of the Magistrates Court Act 1980 that upon the material presented there exists of a prima facie case against a defendant. It is then for the Authority to start their determination with effectively a clean sheet of paper.

31. The Case against the Appellant

Against this background we now consider the case against this Appellant. We have read the agreed bundle of documents put before us. We have heard submissions from Counsel for the Appellant and the Respondent and have been much assisted by their written skeleton arguments. We have also heard evidence from the Appellant and his wife. The Respondents did not choose to call any evidence relying simply on the agreed documents and submissions. We accept the Appellant as a truthful witness of fact.

32. The Appellant joined the police force on leaving University and by the time of his dismissal had just over 18 years of service as a police constable. The Appellant was clearly unhappy that he had not been allowed to resign following his plea of guilty and put forward a quantity of evidence to show that he had been unfairly treated in that other officers appear to have been allowed to resign in similar circumstances. Since the forfeiture proceedings may follow equally whether an officer resigns or is dismissed we do not consider that this issue is relevant to our decision. The question of whether the Appellant had been fairly or unfairly dismissed is a matter for an Employment Tribunal and not for this court. Its only relevance in this case is to demonstrate that immediately after his plea the Appellant accepted that his career in the police force was effectively over.

33. At the time of his arrest the Appellant was employed as a Sexual Offences Investigation Techniques ("SOIT") officer. As such his duties were not only to take statements from persons who alleged that they had been the victims of rape or other sexual offences but also to act as

a chaperone providing support and help to such persons throughout the investigation.

34. The Appellant accepted that he was effectively in an important position of trust towards those with whom he came into contact in the course of these duties. He also accepted that such persons were commonly vulnerable as a result of the traumatic experiences they had undergone.

35. As a SOIT officer the Appellant was instructed to look after Ellie Hazel who was alleging that she had been attacked and raped late at night by three men in Peckham. After taking her statement the Appellant continued to act as her SOIT officer and remained in regular contact with her. We accept his evidence that she obtained his mobile phone number and sent him a large number of text messages. It was very much part of the Appellant's duties to act as a chaperone to Miss Hazel and for that purpose it was necessary to gain her confidence and to provide moral support and sympathy when she needed it. This he did and there is absolutely nothing in the evidence to suggest that the Appellant was in any way grooming Miss Hazel or acting in any way unprofessionally towards her.

36. On the 19th March 2003 he attended her son's birthday party as an invited guest and left in the early evening. He was on call that night and at about 11.30 p.m. she called him in distress. He offered to go and see her immediately and she accepted. We do not accept the suggestion put to him in cross examination that he should have been accompanied by another officer. There is no evidence that he was ignoring any guidance or breaking any rules in going alone to her house at that time of night.

37. We accept his evidence that shortly before this incident while the Appellant was away on leave, there had been a breakdown in the support arrangements for Miss Hazell's and a call for help from her had not been responded to leading to a suicide attempt on her part. In agreeing to go to her house we accept that the Appellant made a proper judgment in the light of the circumstances known to him at the time. He was simply doing his job as a conscientious officer.

38. When he arrived they had a conversation and then engaged in some consensual sexual activity. He then left. The next day Miss Hazell alleged that he had indecently assaulted her. That charge was not proceeded with and the Appellant pleaded guilty to the common law offence of misconduct in a public office. By his plea the Appellant accepted that this consensual sexual activity risked harm to the public perception of and confidence in the role of chaperones and that by his conduct he was being reckless as to whether he was breaching his duty as a chaperone to Miss Hazell thereby harming the public interest.

39. The Appellant's actions were as the judge remarked "a gross breach of trust" involving "an extremely vulnerable individual". Such conduct was clearly so serious that only a custodial sentence could be justified.

40. It is important to deal now with an issue which has clearly caused some confusion in the minds of the members of the sub-committee of Respondent Authority. At page 45 of the bundle appears a draft of the count alleging misconduct in a public office. In the draft particulars of the statement of offence there is included an additional and much more serious element that his behaviour amounted to a breach of his duty not to undermine or have a detrimental effect on Miss Hazell's position as a witness in an ongoing rape investigation.

41. That element formed no part of the Appellant's basis of plea and does not appear in the actual particulars of the indictment which is found at page 151. There is no mention in these particulars of any risk of undermining Miss Hazell's position as a witness. There is a very good reason for this.

42. At page 73 of the bundle appears the minutes of the meeting of the subcommittee of the Respondent Authority at which the case of the Appellant is reported in these terms :

> "Mr Harrington was chaperone for the victim of a serious sexual assault and had a sexual relationship with her *after the case was discontinued.*"

43. The letter from the Respondent Authority to the Secretary of State dated 19th May 2004 repeats this account in these terms :

> "He became emotionally involved with the victim and maintained contact with her *after the criminal case was discontinued."*

44. There is only one logical explanation for this choice of phrase. In the material before us there is substantial evidence that in relation to the rape allegation the police had concluded that for very good reasons Miss Hazell could not be put forward as a witness of truth and that conclusion had been reached before 18th March 2003. It must follow from this that the prosecution were unable to substantiate any allegation that Mr Harrington's sexual activity with Miss Hazell risked undermining her credibility as a witness in the rape investigation or any trial .

45. We note also that Counsel for the Respondent Authority was very careful in his cross-examination of Mr Harrington to confine his questions to suggesting that in general terms such behaviour carried the risk of undermining a witness' credibility, a proposition which the witness accepted and with which we have no difficulty.

46. It is certainly unfortunate that in his sentencing remarks the learned judge referred specifically to "the risk of undermining her [Miss Hazell's] credibility as a witness in the Peckham rape case and the integrity of the prosecution case ...*which was then still pending.*"

47. It may be that these remarks served to confuse the members of the sub-committee who considered the Appellant's forfeiture case. The report of the deliberations of the sub-committee at page 117 of the bundle records "Members further considered that ex PC Harrington's actions had had the potential to undermine the victim's "*credibility as a witness"* and the *"integrity of the prosecution case"* in which she was involved."

48. These remarks are repeated on the second page of the letter of reasons sent to the Appellant's representative which appears at page 158 of the bundle.

49. As we have explained this conclusion simply cannot be true and serves further to undermine the basis for the decision under appeal in this case.

50. The correct approach

We accept that the maintenance of public confidence in the integrity of the police is a legitimate and important matter of public interest which for the general public good may justify overriding the rights of the individual under Article 1 of the First Protocol. However we also consider that there are other ways in which that confidence can be both maintained and restored when it comes into question. In our judgment we have long passed the days when any suggestion that any police officer might be guilty of any offence would be greeted with expressions of public shock and outrage.

51. Today's society rightly demands very high standards of its police but the expectation is simply more realistic. Police officers will sometimes fall from those very high standards of behaviour which are expected of them. When these events occur public confidence will substantially be restored by open admission of any organisational failure, the thorough, timely and competent investigation of any alleged offence and the conviction and proper punishment of the offender.

52. Length of service

We start with this factor in the light of the **Barber** judgment and the provisions of Article 1 of the First Protocol because it seems to us to have been one which has in the past been either overlooked or given too little weight.

53. Pension rights are deferred pay earned by service. Those rights may accrue both to the officer and his dependants who are very likely to be entirely innocent. At one end of the scale lie cases where officers have been engaged in corrupt activities over a significant period of time

where it would be an affront to justice and common sense to regard the pension rights relating to that period of corrupt service as having in any true sense been "earned". At the other end of the scale lie cases of where officers have many years of impeccable service whose careers have been brought to an end by a moment of madness or reckless behaviour where it would be wholly disproportionate to deprive the individual of his rights in addition to the punishment which he has already received.

54. It is cases at the lower end of this particular scale which may well be suitable for time limited forfeiture if any forfeiture is considered appropriate.

55. The seriousness of the offence.

This will always be an important factor. At one end of the scale will lie cases of large scale corruption for personal gain involving serious perversion of the course of justice. At the other end lie offences which involve activities which are not in themselves criminal but become so by reason of the officer's position as a police officer. We say no more about this because the concept of aggravating and mitigating features is very familiar and is clearly set out in the Home Office Circular.

56. Circumstances surrounding the investigation.

This is an important factor because police officers may well be in a position to hamper delay or obstruct the course of an investigation. As we pointed out at paragraph 47 the timely investigation of such allegations is an important element in restoring any damage to public confidence. Officers who have assisted an investigation by frank co-operation and appropriate pleas at the earliest opportunity may expect to be treated very differently to those who positively obstruct an investigation, who decline to co-operate or who maintain a plea of not guilty in the face of overwhelming evidence.

57. The extent of publicity and media coverage

We regard this as a particularly difficult area for a number of reasons. Almost any allegation of crime against a serving police officer is likely to excite the interest of the media. Such allegations are matters of legitimate public interest. Having said that, the extent of the publicity may have nothing to do with the seriousness of the offence or the gravity of any risk that public confidence in the police may be undermined. Sexual offences or offences with a sexual element are more likely to lead to sensational reporting than other offences. Standards of accuracy in reporting may vary widely.

58. It seems to us to be grossly unfair that the amount of forfeiture should be affected in any way either by inaccurate media reporting or by the accident of whether there happens to be on the day of sentence either a glut or a dearth of news and the degree of newsworthiness of the story in the judgment of the tabloid press.

59. What seems to us to be important is not the actual reporting of the conviction or sentence which is to be expected in all cases, but thereafter continued public news interest in the form of leading articles, comment, or correspondence from the public which indicate a serious degree of public concern. Inaccurate reporting should always be disregarded. Equally although the media coverage is likely to be adverse that is not necessarily the case, and coverage which presents either the police in a favourable light in terms of the investigation, or otherwise helps to restore any damage caused to public confidence is equally a factor to be taken into account.

60. The appellant in this case has complained about the fact that the Respondent Authority took a pro-active role in making press releases of his case. We do not consider that this criticism is in any way justified. As we have said there is bound to be legitimate media interest in any allegation against a police officer of criminal conduct. If the police authority refuses to respond to enquiries they run the risk of generating further media speculation, or of being accused of cover-up which only serves to make matters worse.

61. If the police respond with appropriate and factually accurate information such actions are in fact more likely to assist the officer by helping to restore public confidence in the police in their investigation of crime. The same applies to press releases and press statements made after the event. Accurate information is more likely to lead to accurate reporting and diminish the amount of speculation and innuendo which appears.

62. The other factors are clearly set out at paragraph 5 of Annex B of the Home Office Circular. They do not call for comment. The only one which is relevant to this case is the issue of the betrayal of an important position of trust for personal gain. It is clear that this Appellant betrayed an important position of trust but we are not satisfied that he did this for personal gain. We do not regard consensual sexual activity on a single occasion as falling within this category.

63. Personal Mitigation

We note from the minutes of the sub-committee at page 77 of the bundle at least one case in which sub-committee suggested that personal mitigation should be included in the material to be submitted to the Secretary of State at the stage when he is deciding to issue his certificate. In general we do not think this is appropriate.

64. At this stage the Secretary of State is carrying out an objective test to decide whether either of the conditions set out in subparagraph (4) is satisfied. Including information as to personal mitigation at this stage runs the risk of confusing the separate duties of the Secretary of State and the Police Authority. For the reasons set out at paragraphs 26 and 27 such confusion is to be avoided. We accept of course that there may be information submitted with the application which the

officer may wish to rely on in mitigation but in our judgment the proper place for personal mitigation is during the enquiry by the Authority once a certificate has been granted.

65. This Appellant has put forward very significant personal mitigation. He has eighteen years of excellent service as a police officer. He was highly regarded by his colleagues as a SOIT officer. His offence involved conduct which was not in itself a criminal offence and from the sentence passed falls very much at the lower end of the scale of gravity. It is properly described as a single incident of reckless behaviour. He was wholly co-operative in the investigation and pleaded guilty at the earliest opportunity. If it were not for his frank answers in interview he might never have been successfully prosecuted at all.

66. In terms of the media coverage we disregard the serious degree of misreporting which occurred in his case. We do not accept the submission of counsel for the Respondents that media coverage extended over six weeks. The evidence we have shows a single report of his plea followed after a gap of six weeks by the reporting of his sentence. There is no evidence that any of the reports of sentence provoked any further media comment of the kind we have referred to above.

67. We also attach significant weight to the fact that a lady whom he had previously chaperoned as a SOIT officer was prepared to give evidence in mitigation on his behalf and to procure the publication in Time Out, a magazine with a wide national circulation, of an article which was wholly favourable to the Appellant's performance of his duties as a SOIT officer. We also note that the statistics of reported rape allegations immediately after the sentence show no sign of any significant diminution which might indicate a drop in the level of public confidence in police investigations of rape.

68. We also note that not a single one of the other aggravating factors listed in paragraph 5 of Annex B of the Home Office Circular are present in this case.

69. Finally we attach significant weight to the conduct of the Appellant after his dismissal from the police force. He became aware that a member of the public was intending to import a firearm and live ammunition from the USA via an internet purchase. He persisted in the face of some official indifference in conveying this information to the police and assisting them to take appropriate action which resulted in a personal letter of thanks from the Area Commander of the Hertfordshire Constabulary.

70. The decision of the Respondent Authority was to forfeit permanently 25% of the total pension entitlement. Taking account of the secured element, that is a figure of over 40% of the forfeitable amount. We

have identified a number of errors in their approach and their considerations which mean that this figure cannot be supported.

71. Taking all the relevant factors into account which we have set out in this judgment we have reached the unanimous conclusion that it would be simply unfair to forfeit any part of this Appellant's pension and that such forfeiture would be a disproportionate interference with his rights under Article 1 of the First Protocol. This case appears to us to be in many important respects comparable to the decision of His Honour Judge Wiggs and Justices in the case of **Blench –v- Hampshire Police Authority (2nd November 2001)** where the same conclusion was reached. We accept of course that each case will turn on its own facts and that decisions of one Crown Court are not binding on another. Having said that a broad measure of consistency is certainly very desirable.

72. The appeal is therefore allowed.

His Honour Judge Platt