Neutral Citation Number: [2021] EWHC 550 (Admin)

Case No: CO/1639/2020

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

Leeds Combined Court Centre
1 Oxford Row, Leeds, LS1 3BG

Date: 16/03/2021

Before :

THE HONOURABLE MR JUSTICE JULIAN KNOWLES

- -

Between :

THE QUEEN ON THE APPLICATION OF RICHARD WILBY-NEWTON	**Claimant**
- and -	
POLICE APPEALS TRIBUNAL	**Defendant**
-and-	
CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE	**Interested Party**

- -
- -

JASON PITTER QC AND BENJAMIN CAMPBELL (instructed by **RadcliffesLeBrasseur**) for the **Claimant**
OLIVIA CHECA-DOVER (instructed by **Force Solicitor**) for the **Interested Party**
The Defendant did not appear and was not represented

Hearing date: **26 January 2021**

- -

Approved Judgment

Mr Justice Julian Knowles:

Introduction

1. The Claimant, Richard Wilby-Newton, is a former police officer with South Yorkshire Police. He seeks judicial review of the 7 February 2020 decision of the Chairman of the Police Appeals Tribunal (PAT/the Chair), Mukhtar Hussain QC, to dismiss his appeal against the decision of a Police Misconduct Panel (the Panel) dated 15 October 2019 that he was guilty of gross misconduct. Gross misconduct means a breach of the Standards of Professional Behaviour contained in Sch 2 to the Police (Conduct) Regulations 2012 (SI 2012/2632) (the Conduct Regulations) that is so serious that dismissal would be justified: see reg 3(1). The Claimant was dismissed from the force without notice.

2. The Panel consisted of a Legally Qualified Chair (LQC); a lay member; and a Superintendent from South Yorkshire Police.

3. The Claimant faced two allegations, both of which he denied but both of which the Panel found proved:

    a. Excessive use of force. It was alleged that on 13 November 2017 in the course of, or following, the arrest of Ian Hague, who was handcuffed, the Claimant applied force by kicking him which was not necessary, proportionate or reasonable in the circumstances.

    b. Lack of honesty and integrity. It was alleged that when the Claimant was first interviewed about the incident on 15 January 2019 by South Yorkshire Police Professional Standards Department following a complaint by Mr Hague, the account he gave was inaccurate, or he was reckless or careless as to whether it was inaccurate. In particular (i) he denied kicking Mr Hague; (ii) he denied being one of the officers visible on the CCTV shown to the officer during the interview; and (iii) he asserted that he was elsewhere at the material time.

4. The Chair dismissed the appeal under Rule 11 of the Police Appeals Tribunal Rules 2012 (SI 2012/2630) (the Appeal Rules) which provided:

> "*Review of appeal*
>
> 11. (1) Upon receipt of the documents mentioned in rule 9(4) and (8), the chair shall determine whether the appeal should be dismissed under paragraph (2).
>
> (2) An appeal shall be dismissed under this paragraph if the chair considers that -
>
> (a) the appeal has no real prospect of success; and
>
> (b) there is no other compelling reason why the appeal should proceed.

> (3) If the chair considers that the appeal should be dismissed under paragraph (2), before making his determination, he shall give the appellant and the respondent notice in writing of his view together with the reasons for that view.
>
> (4) The appellant and the respondent may make written representations in response to the chair before the end of 10 working days beginning with the first working day after the day of receipt of such notification; and the chair shall consider any such representations before making his determination.
>
> (5) The chair shall give the appellant, the respondent and the relevant local policing body notice in writing of his determination.
>
> (6) Where the chair determines that the appeal should be dismissed under paragraph (2) -
>
> (a) the notification under paragraph (5) shall include the reasons for the determination; and
>
> (b) the appeal shall be dismissed."

5. The 2012 Rules have since been replaced by the Police Appeals Tribunal Rules 2020 (SI 2020/1).

6. The Chair gave a preliminary or 'minded to' determination under Rule 11 on 14 January 2020. Further representations were then made on behalf of the Claimant under Rule 11(4) on 28 January 2020. On 7 February 2020 the Chair gave his final determination dismissing the appeal.

7. On 1 June 2020 His Honour Judge Saffman, sitting as a judge of the High Court, granted permission on two grounds:

   a. It is arguable that the Panel reversed the burden of proof in its determination on the use of force, and arguable that the Chair fell into public law error in concluding there had been no reversal of the burden of proof and that an appeal had no prospects of success and that there was no other compelling reason why the appeal should proceed.

   b. The Panel's LQC refused to admit an expert report which the Claimant wished to rely on in relation to the use of force. The judge said it was arguable that in his decision the Chair did not properly explain why the LQC's decision was a proper exercise of his discretion, and so fell into public law error in concluding the appeal had no reasonable prospects of success on this ground.

8. The judge refused permission on a third ground relating to the honesty and integrity charge. He said there had been a clear analysis by the Chair and it was not arguable with any realistic prospect of success that the Chair's finding, that the Panel's decision was not out of the range of decisions open to it, was not one that was open to him. Mr Pitter QC on behalf of the Claimant renews the application for permission on that ground.

9. An Acknowledgement of Service has been filed by the Police and Crime Commissioner for South Yorkshire on behalf of the Police Appeals Tribunal indicating that the Tribunal takes a neutral stance to the Claimant's application. The Chief Constable of South Yorkshire resists it.

10. I held a remote hearing by Microsoft Teams on 26 January 2021. The Claimant was represented by Mr Pitter and Mr Campbell. The Chief Constable was represented by Ms Checa-Dover. I am grateful to all of them for their written and oral submissions.

The factual background

11. The following summary is primarily taken from the Panel's decision. I have also viewed three DVDs of CCTV and dash-cam footage.

12. The Claimant stood accused of breaching the following Standards of Professional Behaviour in Sch 2 to the Conduct Regulations:

    a. "*Use of Force*

    Police officers may only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances."

    b. "*Honesty and Integrity*

    Police officers are honest, act with integrity and do not compromise or abuse their position."

13. In relation to the use of force, the College of Policing's Code of Ethics (*A Code of Practice for the Principles and Standards of Professional Behaviour for the Policing Profession of England and Wales*) essentially reproduces the Standard of Professional Behaviour on the use of force in Sch 2 and adds four sub-paragraphs. It provides as follows (see *R (W80) v Director General of the Independent Office for Police Conduct and others* [2021] 1 WLR 418, [4]):

> "4. *Use of force*
>
> I will only use force as part of my role and responsibilities, and only to the extent that it is necessary, proportionate and reasonable in all the circumstances.
>
> 4.1 This standard is primarily intended for police officers who, on occasion, may need to use force in carrying out their duties.
>
> 4.2 Police staff, volunteers and contractors in particular operational roles (for example custody-related) may also be required to use force in the course of their duties.
>
> 4.3 According to this standard you must use only the minimum amount of force necessary to achieve the required result.

> 4.4 You will have to account for any use of force, in other words justify it based upon your honestly held belief at the time that you used the force".

14. In *W80*, supra, Vos C explained the purpose of the Code at [15]-[16]:

> "15. … The Preamble to the Code … sets out an expectation that other police officers and police civilian staff, whether engaged on a permanent, temporary, full-time, part-time, casual, consultancy, contracted or voluntary basis, and also all forces not funded by the Home Office and any other policing organisations outside the remit of the Code will use the Code to guide their behaviour at all times …
>
> 16. The College's Briefing Note on the Code described it as 'the foundation document for promoting, reinforcing, and supporting the highest personal standards from everyone working in the policing profession. It is expected to underpin and strengthen all existing integrity and accountability arrangements.'"

15. In January 2019 the Claimant had been a police officer for 29 years. He had been a dog handler since 2004. The Panel said he was of good character and a valued officer who was respected by colleagues. It said he had previously acted with honesty and integrity in the course of his work. One officer described him as 'honest beyond reproach'. Another said that during an incident he had remained calm and professional in the face of extreme provocation.

16. On 13 November 2017 the Claimant was on duty in Sheffield with his police dog, Lex, in a police vehicle. Mr Hague was driving a van. A message came through that the van might be stolen or cloned. The Claimant followed the van for a distance before it turned into a side road and parked up. The Claimant went to speak to Mr Hague. The dash-cam footage from the Claimant's vehicle shows that soon after being spoken to by the Claimant, Mr Hague became uncooperative and there was a struggle. The Claimant called for assistance. In his first interview the Claimant said Mr Hague was shouting and swearing. Lex was deployed and bit Mr Hague on his face when Mr Hague twice lunged and screamed at him, causing an injury. The Claimant arrested Mr Hague, and there was then a stand-off between the Claimant and Mr Hague. Shortly afterwards, other officers attended. There were further scuffles between Mr Hague and officers, during which PAVA spray was used and a taser was drawn (but not used). Officers described Mr Hague as aggressive and confrontational throughout.

17. Eventually Mr Hague was handcuffed behind his back and sat down on the ground. The situation appeared stable. The Claimant put Lex back in the police van. An officer was about to treat Mr Hague's injury when a further incident occurred. Mr Hague stood up and was restrained by two officers, PC Hunter and PC Walker. After a struggle they managed to place Mr Hague on the ground. The Panel then described what happened next ([14]):

> "As he was on the ground an officer could be seen on the CCTV footage moving his leg in the direction of Mr Hague. PC Fields described Mr Hague as kicking out at this time and he placed Mr Hague in a leg lock. Leg restraints were obtained and Mr Hague was put in them."

18. The 'movement of the leg' (which the Panel later found to have been a deliberate kick by the Claimant) occurs at 11:35:25 on the CCTV footage. This was shortly after the Claimant entered the screen (at about 11:35:21) and shortly before he then left (at 11:35:47). At the point of the kick Mr Hague was handcuffed and on the ground.

19. Mr Hague later pleaded guilty to motoring offences. On 23 November 2017 he made a complaint about having been kicked by a police officer during the arrest.

20. In its decision the Panel described what the Claimant said when he was interviewed under caution by South Yorkshire Police's Professional Standards Department on 15 January 2019 following the complaint.

21. He was shown the CCTV. When he was asked about the end of the incident, he explained that Mr Hague had calmed down so he had put the dog away. He thought the threat had gone. He had been speaking to others in the yard where the altercation took place. He knew one of the men had picked up the registration plates but the man denied it. (Mr Hague had earlier taken the plates off the van and thrown them into the yard). The Claimant said he then walked away as he was still a bit stressed and did not want to say something he would regret. He had been told there were no cameras. He then became aware of a scuffle involving Mr Hague. He said PC Hunter forced Mr Hague back to the floor. At [16]-[18] the Panel said:

> "16. When shown the CCTV the officer said he was not behind the other officers at the time of the final incident. He identified others as present. When asked if the officer who walked in was him he said 'No'. He said the officer walked like him but he didn't have any involvement in the incident.
>
> 17. The officer suggested that it looked like the person had scooped something off the floor or probably scooped his legs, to straighten his legs up and then get hold of him so that he is not putting his head and face in a position where they are going to be kicked. Later on he stated that to him the man is moving the bloke.
>
> 18. In the interview the allegations made by the [Appropriate Authority, ie, the Chief Constable] are [not] accepted by the officer in that he denied kicking Mr Hague; he denied being one of the officers visible on the CCTV shown to the officer during the interview; and asserted that he was elsewhere at the material time."

22. The exact exchange in the first interview was as follows (Bundle, p162 of 345). The Claimant is shown the footage at the point Mr Hague goes to stand up:

> "Q. Ok. Were you there, at that point ?
>
> A. I am stood over here somewhere.
>
> Q. So are you way off screen, you are not on screen at that point ?
>
> A. No.
>
> Q. Who was that officer ?
>
> A. I have no idea. I can see, I will be honest with you, I can see why you think that might be me.
>
> Q. Yeah. And why do you think that ?
>
> A. Because the legs he walks like me to a degree. That, and when I first saw it I were like, no I don't think that's me, and I am adam (*sic*), I am certain, I didn't have any involvement in that."

23. Later, he said (p164 of 345):

> "Like I say, to me it looks as if you know like you pass a football with the side of your foot, the inside of your foot, he's almost got in, and scooped something out, either something off the floor or I think looking at that, probably scooped his legs, to straighten his legs up and then get hold of him so he is not putting his head and his face in a position where they are going to be kicked."

24. At [19] the Panel said that the CCTV images had been enhanced and a process of elimination had been carried out, which had led to the Claimant being identified as the officer using his leg in the footage.

25. In his second interview on 6 February 2019 the Claimant accepted that the officer who used his leg was him, but he could not recall being there. He said he must have blanked it from his mind and must have been confused at that point. The Panel summarised his account ([20]) (sic):

> "He stated that saying kicking him was a bit excessive and it was more of a sweep quite possibly at something on the floor, to move something on the floor out of the way. He later said he couldn't justify the action because be couldn't remember doing it."

The Claimant's reg 22 response

26. Following service of the notice on the Claimant under reg 21 of the Conduct Regulations containing the allegations set out above, the Claimant served a response under reg 22. Regulation 22(2) provides that:

> "(2) The officer concerned shall provide to the appropriate authority -
>
> (a) written notice of whether or not he accepts that his conduct amounts to misconduct or gross misconduct as the case may be;
>
> …
>
> (c) where he does not accept that his conduct amounts to misconduct or gross misconduct as the case may be, or he disputes part of the case against him, written notice of -
>
> (i) the allegations he disputes and his account of the relevant events; and
>
> (ii) any arguments on points of law he wishes to be considered by the person or persons conducting the misconduct proceedings"

27. The pertinent parts of the Claimant's reg 22 response were as follows:

> "2.3 The Accused Officer accepts that he is correctly identified on the CCTV footage as walking onto screen from the right hand side at 11:35:21. A movement of his right leg is then visible on the footage at 11:35:25. The Accused Officer understands this movement to be interpreted by the Presenting Side as a gratuitous kick towards Mr Hague.
>
> 2.4 As explained in his interview of 6 February 2019, the Accused Officer has no recollection of this specific act depicted on the footage.
>
> 2.5 It follows that the movement he made must have been an unremarkable one. It was a movement made in an effort to assist other officers in gaining control of Mr Hague, and was necessary, proportionate and reasonable. Whilst the officer has no specific recollection of it, the movement may have been designed to move away an obstacle, debris or potential hazard, or to/move sweep Mr Hague's leg/legs so that they could not kick out themselves.
>
> …
>
> 3.1 In interview of 15 January 2019 the Accused Officer understood he was to be interviewed in respect of an allegation of punching and kicking arising from events of 13 November 2017.
>
> 3.2 Between those two dates PC Wilby-Newton had carried out many arrests.

> 3.3 On watching the footage that was available at that time the Accused Officer did not think that he was the individual that walks onto screen from the right at 11:35:21. He was emboldened in that view as he noted that individual to act in a manner inconsistent with the memory he had of his own actions. It was apparent that it was being said that the visible officer had kicked Ian Hague in a gratuitous manner, and the Accused Officer knew he had not done so.
>
> 3.4 Given that he did not at that time recognise himself amongst the visible Officers on the footage, he believed he was off-screen.
>
> …
>
> 3.7 On 6 February 2019, as soon as it was made clear to the Accused Officer that he had to have been the individual walking onto screen at 11:35:21, he accepted that his recollection of events had failed and he apologised for that fact.
>
> 3.8 It follows that whilst it is accepted that the account he gave in interview of 15 January 2019 was inaccurate, he did not know it to be inaccurate at that time, nor was he reckless or careless as to whether it was inaccurate."

The Panel's decision

28. The Panel began by setting out the allegations against the Claimant and the legal principles it would apply. I will return to some of these later. At [11]-[20] it set out the factual background.

29. The Panel's findings are set out from [21] et seq. It said the first issue was whether there had been force used by the Claimant. It said that the Claimant now accepted that force had been used. It said his actions had been described as a 'kick' or 'sweep' and that it was necessary to assess whether or not this had been an innocent action.

30. The Panel said at [22]-[24]:

> "22. The context of the leg movement is important. Mr Hague was in the process of being restrained by the officers. He had become volatile again. He was taken to the floor. At that stage this officer used his leg. This was part and parcel of the action to control Mr Hague. The suggestion that the officer at this time, in the process of officers trying to control Hague again, swept away something from the ground is unrealistic. The only credible interpretation of the action in the context of events at the time is that this was a deliberate kick.
>
> 23. The panel has viewed the CCTV evidence on a number of occasions. It accepts that the CCTV footage is not particularly

> clear but it is clear enough to assess what happened. In the panel's view it is a kick by the officer. It is not a sweeping action. 24. The panel noted that this view has been shared by others who have viewed the CCTV footage. PC Hunter on viewing the footage stated that it looked like someone kicked Hague while he was on the floor. PC Walker also stated that 'it does look like he kicked out with his leg'"

31. At [25] the panel concluded that the Claimant had been riled by events. At [26] it concluded on the balance of probabilities that there had been contact between the Claimant and Mr Hague.

32. At [27] the Panel concluded:

> "Although it is not clear from the CCTV that there was actual contact between the officer and Mr Hague, on a balance of probability there was contact. The proximity of the officer to Mr Hague means contact was inevitable."

33. Importantly for the purposes of this judicial review claim, at [28]-[33] the Panel said this:

> "28. The second issue is whether the officer has provided justification for his actions based on his honestly held belief at the time.
>
> 29. The panel has found that there has been a deliberate kick by the officer. The officer has not provided any justification for kicking Mr Hague.
>
> 30. The Officer has suggested that he cannot remember events and therefore cannot provide any justification for his action. It has been suggested that given his lack of memory he cannot be expected to provide any justification for his action.
>
> 31. An absence of memory could potentially be a justification for not explaining his actions. However, the officer has had every opportunity to view the CCTV footage. Even if he cannot remember events, he could observe them on the footage. He did not suggest that he had to make contract with Hague in order to distract him which might justify a kick.
>
> 32. PC Hunter was in a similar position to the officer in that he could not remember events. He could not remember striking Mr Hague but when shown the CCTV footage he accepted that he had done it and explained that it was a distraction strike. Having seen the CCTV footage, this officer has not provided any justification for his action other than to suggest that it was an innocent sweep which the panel do not accept.

> 33. Furthermore, in his interview, the officer attempted to dilute the seriousness of the action by stating that it was not a kick but more of a sweep. He never really acknowledged that it was a kick. He stated in his interview that the words 'kick him' was a bit excessive and that the action was more of a sweep. The officer's attempted dilution of the seriousness of the act re-enforces the panel's view that the officer knew that there was an absence of justification for it."

34. At [34]-[35] the Panel said:

> "34. It is not for this panel to find justification for the officer's action, when none is advanced by the officer. It is for the officer to provide evidence that his use of force was justified based on his honestly held belief at the time. He has provided no evidence to justify a kick.
>
> 35. The panel therefore concludes there was no justification for the actions of the officer in his use of force on this occasion. The [Appropriate Authority] has proved the first allegation."

35. At [36] et seq the Panel considered the second allegation against the Claimant, that of a lack of honesty and integrity. It said he now accepted that his account in his first interview had not been accurate in that he wrongly denied kicking Mr Hague and wrongly denied being present at the scene. The Chief Constable alleged that he knew his account was inaccurate or he was reckless or careless whether it was inaccurate. Having set out the Claimant's account, the Panel concluded he had deliberately given a false account knowing full well he was shown on the CCTV and that he had kicked Mr Hague. It concluded at [42]-[44]:

> "42. In his interview, the officer was attempting to take advantage of the poor quality of the CCTV footage in the hope of evading responsibility for his actions It was only when the officer was faced with incontrovertible evidence of his involvement that he accepted he was the officer who used his legs on Mr Hague.
>
> 43. The panel does not consider that the officer was open and honest in this interview. He deliberately tried to evade his responsibility for his actions and knowing provided inaccurate replies.
>
> 44. The AA has proved the second allegation. The officer is therefore acted (sic) in breach of the professional standards of behaviour namely use of force and honesty and integrity."

36. The Panel went on to find that the Claimant's actions amounted to gross misconduct and that the only appropriate outcome was dismissal without notice.

The Claimant's grounds of appeal to the PAT

37. Rule 4(4) of the Appeal Rules provided:

> "(4) The grounds of appeal under this rule are -
>
> (a) that the finding or disciplinary action imposed was unreasonable; or
>
> (b) that there is evidence that could not reasonably have been considered at the original hearing which could have materially affected the finding or decision on disciplinary action; or
>
> (c) that there was a breach of the procedures set out in the Conduct Regulations, the Police (Complaints and Misconduct) Regulations 2012 or Schedule 3 to the [Police Reform Act] 2002 Act, or other unfairness which could have materially affected the finding or decision on disciplinary action."

38. The Claimant appealed to the PAT on the following grounds:

    a. The decision reached on the first allegation was unreasonable in that the Panel applied the wrong legal test and in doing so reversed the burden of proof (Grounds of Appeal, [22]).

    b. In relation to honesty and integrity, the Panel wrongly left out of account various matters in its assessment of the veracity of the Claimant's alleged lack of memory, and thus its decision was unreasonable (Ibid, [40]).

    c. The LQC wrongly refused to admit the report of the expert, Joanne Caffrey, on whom the Claimant wished to rely in relation to the use of force ([48]).

39. Ms Checa-Dover emphasised that before the PAT the Claimant did not dispute or seek to appeal the Panel's finding that there had been a kick. Paragraph [5] of his Further Representations dated 28 January 2020 stated:

> "5. The Panel at first instance determined that the use of force was a kick. It is accepted that they were entitled to reach that conclusion as [a] matter for their assessment of the facts from the footage (it being within the range of reasonable findings). That finding is not the subject of appeal."

The Chair's decision of 7 February 2020 dismissing the appeal under Rule 11

40. The Chair's reasons for dismissing the appeal under Rule 11 as having no prospects of success can be summarised as follows.

41. He said at [2] that the Claimant now accepted the Panel's finding that he did use force in the form of a kick, and that he did not challenge that finding.

42. At [3] the Chair set out the background facts in similar terms to that which I set out earlier. The Claimant's responses in his first interview were then summarised, including his denial that he was shown on the CCTV; his denial of kicking Mr Hague; and his assertion that he was elsewhere at the material time.

43. The Chair then summarised the Claimant's responses in his second interview following enhancement of the CCTV footage. He now accepted that the officer who used his leg was him but he did not recall being there. He said he must have blanked it out or been confused. He said to describe the movement as kicking was 'excessive' and that it was more of a sweep at something on the floor to move it out of the way. He maintained that he could not remember doing it.

44. The Chair noted that the Claimant had appealed under Rule 4(4)(a)(c) of the Appeal Rules.

45. At [6] the Chair directed himself that the test as to 'unreasonableness' in Rule 4(4)(a) of the Appeal Rules is not *Wednesbury* unreasonableness, but something less: *R (Chief Constable of Durham) v Police Appeals Tribunal* [2012] EWHC 2733. He said that the PAT is not entitled to substitute its own views or its own approach for that of the Panel unless it has reached a view that the finding was unreasonable. In other words, an appeal will not succeed simply because the PAT concludes it would have reached a different decision to that reached by the Panel, provided the decision reached by the Panel was within the range of reasonable decisions which the Panel could have reached.

46. At [7] the Chair referred to the judgment of Wyn Williams J in *R (Chief Constable of Wiltshire Police) v Police Appeals Tribunal* [2012] EWHC 3288 (Admin), [32]-[34]:

> "32. There have been a number of recent decisions in which this court has grappled with what is meant by the word 'unreasonable' in Rule 4(4)(a) of the Appeal Rules 2008. I refer to *R (Montgomery) v Police Appeals Tribunal* [2012] EWHC 936 (Admin) (Collins J); *R (Chief Constable of Hampshire) v Police Appeals Tribunal* [2012] EWHC 746 (Admin) (Mitting J); *R (Chief Constable of the Derbyshire Constabulary) v Police Appeals Tribunal* [2012] EWHC 2280 (Admin) (Beatson J) and *R (The Chief Constable of Durham) v Police Appeals Tribunal* [2012] EWHC 2733 (Admin) (a Divisional Court consisting of Moses LJ and Hickinbottom J). In his decision in the *Derbyshire* case Beatson J expressed the view that the issue of whether a finding or sanction was unreasonable should be determined by asking the question whether the panel in question had made a finding or imposed a sanction which was within the range of reasonable findings or sanctions upon the material before it. The learned judge clearly considered that his view was consistent with the views expressed in the earlier decisions in the *Montgomery* and *Hampshire* cases.
>
> 33. The approach of Beatson J is echoed in the approach adopted in the *Durham* case by Moses LJ (with whom Hickinbottom J agreed). During the course of his judgment Moses LJ considered whether or not the use of the word "unreasonable" within Rule 4(4)(a) mandated the tribunal to apply what is familiarly known as the *Wednesbury* test when determining whether or not a finding or

sanction is to be categorised as unreasonable. His conclusion was as follows:-

> '7. It follows therefore, to my mind, that the test imposed by the rules is not the *Wednesbury* test but is something less. That does not mean that the Appeal Tribunal is entitled to substitute its own view for that of the misconduct hearing panel, unless and until it has already reached the view, for example, that the finding was unreasonable. Nor, should I emphasise, is the Police Appeals Tribunal entitled, unless it has already found that the previous decision was unreasonable, to substitute its own approach. It is commonplace to observe that different and opposing conclusions can each be reasonable. The different views as to approach and as to the weight to be given to facts may all of them be reasonable, and different views may be taken as to the relevance of different sets of facts, all of which may be reasonable. The Police Appeals Tribunal is only allowed and permitted to substitute its own views once it has concluded either that the approach was unreasonable, or that the conclusions of fact were unreasonable. None of what I say is revolutionary or new.'

> 34. I propose to follow the same approach to the word 'unreasonable' as that which was adopted by Beatson J in the *Derbyshire* case and Moses LJ and Hickinbottom J in the *Durham* case."

47. At [8] the Chair turned to the question of 'unfairness' in Rule 4(4)(c). He said that in this context, it meant unfairness to the individual police officer resulting from something which has been done (or not done) by the Panel in question, or by the Chief Constable, or by those representing him, who bring the charges against the officer: *R (Chief Constable of British Transport Police) v Police Appeals Tribunal* [2013] EWHC 539 (Admin), [19].

48. As to findings relating to credibility, at [9] the Chair referred to *Langsam v Beachcroft LLP* [2012] EWCA Civ 1230, [72]:

> "Both parties made submissions on the test to be applied on an appeal from a judge's findings of fact. It is well established that, where a finding turns on the judge's assessment of the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence, which is not available to the appellate court. It is, therefore, rare for an appellate court to overturn a judge's finding as to a person's credibility. Likewise, where any finding involves an evaluation of facts, an appellate court must take into account that the judge has reached a multi-factorial judgment,

> which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach."

49. At [11] et seq the Chair summarised the Panel's decision. He said that it had considered all the papers; correctly identified the issues; applied the correct principles of law; and set out its reasons in detail. He summarised its findings as follows.

50. At [12] he said the Panel had considered the evidence and the CCTV and concluded:

    a. The only credible interpretation of the Claimant's actions seen in context was that there had been deliberate kick. Having viewed the footage several times it rejected his account that it had been a sweep. The Chair said, having viewed the footage, that he agreed.

    b. Contact with Mr Hague was inevitable, although it was not clear from the footage.

    c. The Claimant had not provided any justification for kicking Mr Hague and he knew he had no justification.

    d. In relation to the second allegation, although the unenhanced footage (shown to the Claimant at his first interview) was not as clear as the enhanced footage (shown at the second interview), 'the officer must have been sufficiently reminded of events at the time to know what his involvement was'. Instead, he had deliberately continued to deny it was him and continued with an inaccurate account.

    e. The Claimant had 'prevaricated in his responsibility' until faced with incontrovertible evidence as to his identity.

    f. The Panel found that the Claimant had not been open and honest in his interview and had tried to evade responsibility for his actions and knowingly provided inaccurate replies.

    g. The Panel found his conduct amount to gross misconduct.

51. At [13] the Chair said that the grounds of appeal against the Panel's decision, and the Chief Constable's response to them, were set out in his preliminary determination. At [13] of that preliminary determination the Chair summarised the Claimant's grounds of appeal as follows:

    a. The decision of the Panel on the 'use of force' was

unreasonable because:

(i) The Panel applied the wrong legal test;

(ii) It reversed the burden of proof.

b. The conclusion reached by the Panel on the lack of 'honesty and integrity' allegation was unreasonable in all the circumstances of the case.

c. The decision of the legally qualified Chair not to admit expert evidence served on the 10 October 2019 was unreasonable and offended the principles of natural justice and fairness. In the alternative the Appellant wished to adduce the expert evidence before the Police Appeals Tribunal under Rule 4(4)(b).

d. The Appellant also sought permission to give evidence before the PAT.

52. In response, the Chief Constable submitted (summarised by the Chair at [14]):

a. The Appellant had failed to mention a kick in his account when completing the Use of Force forms completed on the same day; in his interview he had denied being there at the relevant time. In light of the CCTV footage which the Panel watched, the decision of the Panel was reasonable. The Panel applied the correct burden of proof.

b. The decision of the Panel that the Claimant had not been honest in his first interview was within the range of reasonable findings which was open to the Panel.

c. The Chair's decision to refuse to admit the expert report was within the range of reasonable decisions open to him.

d. The admission of the expert report or further evidence from the Appellant does not fall within Rule 4(4)(b).

53. Returning to the Chair's final determination, he said at [14] that he had considered the Claimant's further representations following his preliminary decision.

54. At [16] et seq the Chair set out his decision. He said at [18]-[20]:

> "18. The question for my consideration is whether this appeal has no real prospect of success and there is no other compelling reason for the appeal to proceed ? In order to answer that question, I have to, and I have, considered the Panel's decision in the light of the submission made by both sides. I have looked at the evidence before the Panel and the reasons for the decision. I have asked myself, was the Panel's finding of gross misconduct unreasonable in all the circumstances of this case ? I am satisfied it was not. I have also considered the issue of

> refusal to allow expert evidence. Having considered the reasons for such refusal, I am satisfied that it was reasonable and within proper exercise of the LQC's discretion. I am further satisfied that there was no reversal of the burden of proof.
>
> 19. I have also carefully considered the other matters raised by the Appellant in his grounds of appeal. I am satisfied that the decision reached by the Panel on finding was not out of range of decision that a Panel could reach on the evidence before it. Furthermore, I am satisfied that there was no unfairness under Rule 4(4)(c). Accordingly, I have come to the conclusion that this appeal has no real prospect of success and there is no other compelling reason for it to have an oral hearing before the Police Appeals Tribunal.
>
> 20. In coming to that conclusion I have reminded myself that a real prospect of a successful appeal is one that is better than merely arguable, and it not merely fanciful or imaginary, but that the prospect of success need not be as high as 50%. The appeal is therefore dismissed under Rule 11(2) of the Rules."

Submissions on this application

The Claimant's submissions in summary

55. On behalf of the Claimant, Mr Pitter made the following submissions.

56. First, he argued that the Panel reversed the burden of proof relating to the use of force. At [19] of his Skeleton Argument Mr Pitter referred to [34] and [35] of the Panel's decision (set out above) where it said it was not for it to find justification for the Claimant's actions, when none had been advanced by him; that it was for the Claimant to provide evidence that his use of force was justified based on his honestly held belief at the time; that he had provided no evidence to justify a kick; and that it therefore concluded that there was no justification for the Claimant's use of force and that the allegation was proved.

57. At [20.1] Mr Pitter said that the case was presented by the Chief Constable on the basis that the 'circumstances were such that the panel cannot fill the void (left by the Officer's lack of explanation)' (Chief Constable's Written Opening, [6(c]). After referring to [4.4] of the Code of Ethics (see above), Mr Pitter submitted at [20.3] (original emphasis):

> "The unfortunate consequence was to contribute to a shift in emphasis of the burden and standard of proof in relation to the use of force, which remains, as in the application of the principles of self-defence on the AA throughout. This is made clear by the Code of Ethics itself which states [at 3.1.2} *'However, in misconduct proceedings against police officers, the formal wording of the Police (Conduct) Regulations 2012 will be used.'* What the Code of Ethics does is give helpful guidance especially to a police officer, to help understand the

> principles and standards expected in day to day activity and serves as a guide to that effect. It does not affect the legal test and approach as set out in *W80* ie the breach which must be proved is whether the use of force (viewed objectively) was not necessary, reasonable and proportionate. It does not require the Officer to prove anything or give a reason (although they may be relevant considerations). Otherwise, any officer who does not recollect events for whatever reasons when force is used would be in breach."

58. Mr Pitter went on to submit (at [22]-[23]) that (original emphasis):

> "22. It is apparent that the Panel misapplied the test as it effectively viewed it as a requirement that the Claimant *must* give a positive account to justify his actions. The effect of that was to reverse the burden of proof …
>
> 23. Therefore, it follows that the Panel's decision and finding was wrong and unreasonable, in a public law sense, on the basis of its misapplication of the proper test and its findings was in breach of PAT rules 4(4)(a) and (c)."

59. So, Mr Pitter said that for these reasons the Panel's decision was wrong and unreasonable, and that the Chair in his decision had not engaged with this issue sufficiently or at all, simply stating that 'there was no reversal of the burden of proof', and so adopted the Panel's defective reasoning.

60. Additionally, on unreasonableness more generally, Mr Pitter said it was unreasonable for the Panel to have declined the Claimant offer of 'several options as to what could have happened … I am happy to go through them, if you think it would help' (Skeleton Argument, [24]).

61. At [26] Mr Pitter referred to the Officer's evidence that, having viewed the footage, he was 'moving [Mr Hague's legs]' because he was about to put his hands and face down and he 'I didn't want to get kicked … So I have moved his legs in a position where he can't necessarily kick out at me.'

62. Accordingly, Mr Pitter submitted that it was wrong and unreasonable in a public law sense for the Chair to conclude that an appeal had no prospects of success.

63. I turn to the Claimant's second ground of challenge, relating to expert evidence.

64. Mr Pitter submitted that the LQC was wrong to refuse to admit the expert evidence from Joanne Caffrey on which the Claimant wished to rely; that it went directly to the reasons the Claimant might have had for acting as he did, which was of importance because of the Panel's view that it was for the Claimant to justify his actions (Skeleton Argument, [29]). He also submitted that the Chair's reasoning on this issue was 'light' and that he had not justified his reasoning.

65. Third (the renewed ground for seeking permission), at [33] Mr Pitter made a number of criticisms of the Panel's reasoning on the honesty and integrity allegation, in

particular, its conclusion at [39] that having viewed the footage the Claimant 'must have been sufficiently reminded of events at the time to know what his involvement was'. He said it was not clear how that conclusion was reached. He also said that the Panel had not had sufficient regard to the fact that the CCTV footage needed to be enhanced to enable identification to be made with sufficient clarity.

66. Accordingly, the Claimant invited me at [38] of his Skeleton Argument either to (a) quash the Chair's decision and order reconsideration under Rule 12 of the Appeal Rules (determination of an appeal not dismissed under Rule 11); or (b) alternatively, remit the matter to the PAT for reconsideration and provision of proper reasons.

The Chief Constable's submissions in summary

67. In reply, Ms Checa-Dover submitted as follows.

68. As I have said, she began by pointing out that the Panel's finding that the Claimant had deliberately kicked Mr Hague had not been the subject of any appeal to the PAT (Skeleton Argument, [9]). At [10] she said:

> "Thus, notwithstanding how the event is now framed in the Claimant's Skeleton Argument as 'a motion' or 'use of a leg', this case involves the Claimant deliberately kicking a handcuffed detainee, who was on the ground being restrained by other officers, whilst riled by the preceding events."

69. At [11]-13] she also pointed out that the Claimant had completed a Use of Force Form on the same day and had not mentioned any contact or use of force, whether by way of a kick or 'sweep' or otherwise. She said any such contact should obviously have been included. Her inferential submission was that the Claimant had intentionally not mentioned what he had done because he knew it was wrong. She also said that the Claimant had failed to mention a kick in his accounts thereafter. In particular, although he had given a long account in his first interview on 15 January 2019, he had failed to mention anything about kicking Mr Hague. She also emphasised that although he was able to identify two other officers on the (unenhanced) CCTV shown at the first interview, he positively asserted the officer seen coming from the right *was not him*; not that it might be him, or that he could not be sure.

70. In response to the specific grounds of challenge, Ms Checa-Dover submitted as follows.

71. On the first ground of challenge, she said there were two aspects to the first allegation relating to use of force: (a) what was the nature of the force used ?; (b) was the force as found not necessary, proportionate and reasonable ?

72. On the first question, for the reasons I have explained, before the PAT the force used was accepted by the Claimant to have been a kick to a handcuffed detainee. The Panel did not accept the Claimant's assertion that the action had been a 'sweep', or something less than a deliberate kick.

73. On the second issue, Ms Checa-Dover said the Panel was entitled to look to the Claimant for an explanation for the force used, which it would then take into account

in determining whether the Chief Constable had proved on a balance of probabilities that the force used was not necessary, proportionate or reasonable. She pointed out that the Claimant was, by virtue of the Code of Ethics, [4.4], under a mandatory duty to account for his use of force. In fact, the Claimant's explanation was also relevant to the first question, albeit the Panel rejected his suggestion of a 'sweep'.

74. She said there had been no reversal of the burden of proof by the Panel and that the Chair had been right (or, at a minimum, entitled) so to conclude. She pointed out that at [5] of its decision the Panel had directed itself the burden lay on the Chief Constable to prove the allegations. She put it this way in her Skeleton Argument at [40] (emphasis in original):

> "Seeking a *factual* explanation from a serving officer about why he kicked a man does not equate to reversing the *legal* burden of proof; it is an application of common sense and a realistic reflection of policing. This is well-known to all working in policing, including the Claimant'.

75. On the unreasonableness challenge more generally, Ms Checa-Dover said at [45]:

> "45. Ultimately, what to make of the CCTV and the witness accounts was a matter for the specialist Panel who heard and read the evidence at first instance. The Chair was right not to interfere with the Panel's assessment of the evidence before it and the weight to be attached to the same."

76. The Chief Constable's response on the expert evidence ground of challenge was as follows.

77. At [47] of her Skeleton Argument, Ms Checa-Dover said the Chief Constable would not resist the remission of this ground to the Chair for fuller reasons to be given that excluding Ms Caffrey's evidence was a proper exercise of the Panel's discretion, as a pragmatic remedy.

78. She said that in refusing to admit Ms Caffrey's evidence, the Chair was in receipt of the following submissions from the Chief Constable:

    a. The Chief Constable had sought to rely on an email from a police use of force expert, David Clarke, with his views on how Mr Hague had been dealt with. On 4 October 2019 the LQC had rejected this, saying 'this is not a case where expert evidence will assist the panel on the appropriateness of the use of force.' He therefore refused the Chief Constable permission to rely on this evidence.

    b. Ms Caffrey's report was served on the afternoon of 10 October 2019 (the Thursday before the Monday hearing). No forewarning had been given and it was outside the timetable for the service of evidence set out in reg 22 of the Conduct Regulations (which, absent any extension by the Panel's Chair, is 14 days beginning the day after receipt of the reg 21 notice).

c. Ms Checa-Dover drafted a submission opposing the admission of this evidence. She submitted that the reasonableness of the force used was a matter for the Panel and not expert evidence. Further, the late service of the report prejudiced the Chief Constable who had no time to respond to it.

79. The Chair's reasoning was as follows (Chief Constable, Skeleton Argument [48]):

> "Furthermore, adducing expert evidence at this stage is too late. Misconduct proceedings are to be conducted as expeditiously as possible. The introduction of such evidence will undoubtedly delay the commencement of the hearing and may necessitate an adjournment of it. These allegations relate to events which occurred some two years ago. The officer has been aware of the allegations since at least August 2018. It is not in the interests of justice for there to be any further delay in the proceedings. Also I have not had any explanation from the officer as to why the report was not obtained earlier. Its potential existence was not mentioned during the case management of this case and would have impacted on decisions relating to Mr Clarke's evidence. The late disclosure of the report causes obvious and significant prejudice to the Appropriate Authority."

80. Turning to the way the matter is put on behalf of the Claimant on this application, Ms Checa-Dover said the primary flaws in the argument are that: (a) the expert evidence is sought to be used impermissibly to fill a factual void; (b) the expert was opining on matters outside her expertise.

81. Finally, on the renewed ground of challenge relating to the honesty and integrity charge, Ms Checa-Dover said the Panel had had the opportunity of hearing from the Claimant and assessing the veracity of his account. She said it was open to the Panel reasonably to conclude that the Claimant had not told the truth when he positively asserted in his first interview that he was not the officer shown on the CCTV walking into shot from the right at 11:35:21 and then at 11:35:25 using his leg in some sort of motion, because it was inherently implausible that a police officer of 29 years would be able confidently to recognise others, but not himself. She pointed out that the Claimant had not expressed uncertainty but had positively asserted he was elsewhere at the relevant time. She therefore said, for the reasons given by His Honour Judge Saffman when refusing permission, the decision of the PAT could not be impugned.

82. Ms Checa-Dover therefore submitted I should dismiss Grounds 1 and 2 and refuse permission on Ground 3, although as I have indicated, she said she would not oppose, on a pragmatic basis, Ground 2 being remitted to the Chair for the provision of further reasons.

Discussion

The test I have to apply on this application

83. The approach the Administrative Court must take on a claim for judicial review of a decision of the PAT was stated by Burnett J (as he then was) in *R (Chief Constable of Dorset) v Police Appeals Tribunal* [2011] EWHC 3366 (Admin), [19], [25]:

> "19. … Proceedings in the Administrative Court seeking to challenge the decision of a Police Appeals Tribunal do not arise by way of appeal, but by way of a claim for judicial review. In those circumstances, a claimant in judicial review proceedings must establish a public law error before the decision of that Tribunal could be quashed.
>
> …
>
> 25. At each level in the disciplinary process, the decision maker or decision making body is expert in nature. It knows and understands how the police service works. It knows and understands the importance of maintaining integrity amongst police officers. It knows and understands the impact that serious misconduct can have on the force concerned and the police service in general. Parliament has provided that the Tribunal is the appellate body for these purposes. There is no further appeal to the High Court. The Tribunal is subject to the supervisory jurisdiction of this court. I have already observed that the approach of this court in judicial review is different from the approach adopted when sitting in an appellate capacity from the Solicitors Disciplinary Tribunal. Absent another error of law on the part of the Police Appeals Tribunal its decision on sanction could be interfered with only on classic *Wednesbury* grounds, in short that on the material before it no reasonable Tribunal could have reached the conclusion that it did."

84. In his oral submissions Mr Pitter correctly identified that I was concerned with whether the Chair's determination was *Wednesbury* unreasonable, and that he himself was concerned with whether the Panel's decision was arguably unreasonable or unfair. Mr Pitter described my task as a 'nuanced' and 'double layered' process.

85. Ms Checa-Dover also said that the PAT is a specialist tribunal and so I should be slow to interfere with the Chair's decision, and she referred to *R (Chief Constable of Northumbria) v Police Appeals Tribunal* [2019] EWHC 3352 (Admin), [29]:

> "29. The PAT's decision is entitled to 'deference' such that the court should be slow to interfere with it. The PAT is a specialist appellate tribunal, experienced and expert in assessing police misconduct, including the impact of an officer's misconduct on public confidence in and the reputation of the police. Although he deprecated the use of the term 'deference' in *Salter* [ie, *Chief Constable of Dorset*, supra] Burnett J (as he then was) said at [33]:
>
> > '…The reason why the court is slow to interfere with the decision of an expert tribunal is that the court does not share the expertise. It is not 'deference' but a proper recognition of the need for caution before disagreeing with someone making a

> judgment on a matter for which he is especially well qualified, when the court is not.'"

86. Without in any way doubting these passages, I consider they apply with particular force where, for example, the Administrative Court is asked to overturn a particular sanction imposed for misconduct. In that type of case, the Misconduct Panel and the PAT with its expertise are better placed that the Court to determine what is required by way of sanction to maintain confidence in policing. They may apply with lesser force, it seems to me, where the Court is asked to intervene because of an alleged error of law by the PAT (as in the first ground of challenge in this application). In such a case there is less need for caution or 'deference' because the Court is the ultimate arbiter of what is lawful. This approach is broadly similar to that taken by the Court on medical appeals: cf *General Medical Court v Jagivan* [2017] EWHC 1247 (Admin), [40(v) and (vi)] (the appellate court will approach medical Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the medical profession, with diffidence; but there may be other areas such as dishonesty or sexual misconduct where the court will attach less weight to the expertise of the Tribunal.)

87. Ms Checa-Dover also said that the Panel should be afforded a degree of latitude in their reasoning, it being 'right to adopt a generous approach to the reasoning provided by a misconduct panel': *R (Chief Constable of West Midlands Police) v Police Misconduct Panel* [2020] EWHC 1400 (Admin), [59].

Ground 1: *Did the Chair err in ruling that the Panel had not reversed the burden of proof in relation to the first allegation and that an appeal on this ground had no prospects of success ?*

88. I begin with the self-direction on the burden and standard of proof which the Panel set out at [5] of its decision:

> "5. The burden is on the Appropriate Authority to prove the allegation. The standard is the balance of probabilities. The more serious the allegation of misconduct that is made or the more serious the consequences for the individual which flow from a finding against him the more persuasive (cogent) the evidence will need to be to meet this standard."

89. This was a wholly correct direction. The third sentence is a reflection of what Lord Hoffmann said in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, 194:

> "The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the

> same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not."

90. There can be no doubt, therefore, that the Panel began from the correct starting point in considering on whom the burden of proof lay, and to what standard.

91. In considering whether the Chief Constable had proved the first misconduct allegation, there were two limbs to the charge which the Panel had to consider, both of which the Chief Constable had to prove in order to succeed:

    a. Did the Claimant use force against Mr Hague around the time of his arrest on 13 November 2017 ? If the Chief Constable failed to prove this on a balance of probabilities then the Claimant would be bound to have been acquitted.

    b. If the Panel *was* satisfied that the Claimant had used force on Mr Hague, was that force not necessary, proportionate or reasonable in the circumstances ?

92. On the first question, as I have set out, the Panel concluded that force had been used, and that that force was a deliberate kick which had made contact with Mr Hague.

93. I do not regard what the Panel said at [28] ('The second issue is whether the officer has provided justification for his actions on his honestly held belief at the time') or at [34] ('It is for the officer to provide evidence that his use of force was justified based on his honestly held belief at the time. He has provided no evidence to justify a kick') as amounting to a reversal of the burden of proof. That is for the following reasons.

94. It is a fundamental principle of policing that where an officer uses force then s/he must explain and justify why s/he did so. This principle is so deeply engrained so as not to require much by way of authority or explanation. In her oral submissions Ms Checa-Dover, correctly in my view, linked it to what is called 'policing by consent'. This refers to the long-standing philosophy of British policing, likely devised and set out in nine principles by the first Commissioners of Police of the Metropolis (Charles Rowan and Richard Mayne, not Sir Robert Peel as often claimed), which comprised the 'General Instructions' that were issued to every new police officer from 1829. The fifth of these was:

> "5. To use physical force only when the exercise of persuasion, advice and warning is found to be insufficient to obtain public co-operation to an extent necessary to secure observance of law or to restore order, and to use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police objective."

95. The corollary of this is that where an officer uses force, s/he must justify it and explain why they have done so. This explains why every police force in the country requires its officers to complete a Use of Force Form when force has been used. It finds its most vivid expression where lethal force is used; in such a case the obligations imposed on the State by Article 2 of the European Convention on Human

Rights requires the force used to be explained and justified: see eg *Armani da Silva v United Kingdom*, Application No 5878/08 (GC), [233].

96. The Code of Ethics, [4.4], reflects this fundamental principle by placing every police officer under a positive duty to account for any use of force, in other words, to justify it based upon his/her honestly held belief at the time that they used the force. Ms Checa-Dover described this duty as no more than the 'common sense expectation' on the part of the public that an officer should be able to account for his/her use of force.

97. Hence, the requirement for an explanation for the use of force imposed by the Code has nothing to do with reversing the burden of proof, even where an officer is accused of using excessive force. It is a general requirement in all cases when force of any type is used whether or not the officer is blameworthy. In this case, for example, the Claimant accepted in interview (Bundle, pp163 and 173 of 345) that he knew he would have to account for the use of Lex and for him biting Mr Hague, even though the Claimant was completely blameless because Mr Hague had twice deliberately provoked the dog before it bit him. It does not amount to a requirement that an officer explain himself or herself, in default of which they will be found to have used excessive force.

98. Where an officer who is accused of using excessive force provides an explanation pursuant to [4.4] of the Code, the Misconduct Panel must take that explanation into account *in determining whether the Chief Constable has discharged the burden of showing that the force used was not necessary, proportionate or reasonable in the circumstances*. The officer's account can also be used in determining whether and, if so, what force was used. But the burden of proof does not shift and remains on the Chief Constable throughout.

99. In the present case, the Panel had CCTV of the incident. It is not perfect, but it is tolerably clear. The Panel found that it showed the Claimant deliberately kicking a restrained detainee. Whilst it is not directly a matter for me, having viewed the footage myself, I am unsurprised by the Panel's conclusion. The Panel was required then to consider whether, on a balance of probabilities, that use of force was not necessary, proportionate or reasonable in the circumstances. In making that determination, as I have said, it was bound to consider and take into account the Claimant's explanation for his actions, not because there was any burden of proof on him, but because [4.4] of the Code required him to give an explanation and basic fairness required the Panel to take that explanation into account when considering whether the Chief Constable had proved the second limb of the charge.

100. The Claimant asserted a loss of memory and so could not explain his actions. There was, accordingly, nothing by way of explanation which the Panel could take into account in considering whether the Chief Constable had proved that second limb. The Panel was therefore entirely correct to observe that in the absence of any explanation from the Claimant, it was not for it to come up with its own potential justifications; to have done so would have meant the Panel impermissibly speculating. In fact, the Panel went further; as I have set out, in [33] it said that the Claimant knew he had had no justification for kicking Mr Hague and it therefore did not accept his claimed loss of memory.

101. Given the nature of the force used and the absence of any explanation from the Claimant, the Panel's conclusion that his deliberate kicking of a handcuffed and restrained detainee was not necessary, proportionate or reasonable in the circumstances, was not surprising.

102. It follows that I do not consider the Panel reversed the burden of proof. At the end of this section of its decision the Panel said, 'The [Chief Constable] has proved the first allegation.' So, as well as starting in the right place (as I have said), the Panel also ended in the right place. Hence, the Chair of the PAT was correct in his decision, and I therefore reject the first ground of challenge.

Ground 2*: Did the Chair err in concluding that the LQC's refusal to allow the Claimant to rely on expert evidence was reasonable and not beyond the range of decisions a reasonable Panel could reach, and therefore that an appeal on this ground had no prospects of success ?*

103. I accept, as indeed Ms Checa-Dover accepted, that the Chair's determination on this issue was brief and fairly cursory. Indeed, it was little more than a stated conclusion with little in the way of reasoning to support that conclusion. As a general matter, where an appeal is being refused under Rule 11, then there should be fuller reasoning than that given by the Chair in this case, so that the losing party is in no doubt why they have lost. Rather than expressing a global conclusion overall, as the Chair appeared to do at [18] of his decision, it would have been better if he had stated each ground of appeal and then briefly, in a few sentences, set out his reasoning and conclusions in relation to each.

104. That said, in looking at the Chair's reasoning, and in order to understand it, I am not limited to the formal record of his decision. When it is considering an appeal on the ground of what are said to be inadequate reasons, an appellate court can have regard to material outside the formal record of the reasons. For example, regard may be had to the Panel's reasoning, transcripts of evidence, and the like, in order to deduce the meaning of the Chair's reasons. In *English v. Emery Reimbold & Strick* [2002] 1 WLR 2409, [26], [57], the Court said:

> "26. Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. This was the approach adopted by this court, in the light of *Flannery's* case [*Flannery v Halifax Estate Agents Ltd* [2000] 1 WLR 377] in *Ludlow v National Power plc* (unreported) 17 November 2000; Court of Appeal (Civil Division) Transcript No 1945 of 2000. If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing or to direct a new trial.
>
> …

> 57. The judge could have explained the issue and his reasoning process in comparatively few words. It is regrettable that he did not do so and that it has taken the appellate process and the assistance of counsel who appeared at the trial to enable us to follow the judge's reasoning. Having done so we conclude that this appeal must be dismissed."

105. In *Phipps v. General Medical Council* [2006] EWCA Civ 397, [104], Arden LJ (as she then was) said:

> "Secondly, the decision in *English v Emery Reimbold* does not encourage appeals on the grounds of adequacy of reasons: see for example paras. 30 and 53 to 57 of the judgment of the court. In my judgment the *English* case establishes that a decision of a court does not infringe article 6 or the common law on the grounds that the reasons are not spelt out if the reasons can be deduced from other sources to which reference may properly be made: see the judgment in the *English* case at the paras already cited and para. 26. Applying that to this case, to the extent that the issue was for example whether Mr Phipps' explanations for his misstatements were accepted, it seems to me that Mr Phipps can have little doubt that the reason why he lost is that the GMC found his explanations incredible in the light of the evidence and general matters of practice of which both would be aware."

106. Adopting this approach, and looking at all the relevant materials (including the LQC's reasons that I have already quoted, and Ms Checa-Dover's written submission in opposition to the Claimant's application) in my judgment it is clear why the LQC refused to allow the Claimant to rely on the expert report, and it is clear why the Chair held that decision to be within the range of reasonable decisions by the LQC. In his oral submissions, Mr Pitter said the LQC had not focussed sufficiently on the question of unfairness to the Claimant if he was not entitled to rely on the expert's report.

107. The main reason why the LQC refused to allow the expert evidence was on case management grounds. He said that the report had been served late; that there had been no explanation about why it had been served late; and that to allow the Claimant to rely upon it would cause the Chief Constable significant prejudice. The LQC commented on the need to deal expeditiously with misconduct allegations, and that to allow the evidence in would necessitate an adjournment. He observed that the allegations related to events that had happened nearly two years earlier.

108. The reference to expedition was to reg 24(1)(b) of the Conduct Regulations, which provides that a misconduct hearing must take place within 30 days (beginning with the first working day after the reg 21 notice has been served, although that period can be extended). Because the LQC had, by 10 October 2017 when the application to rely on Ms Caffery was made, already refused the Chief Constable permission to rely on a use of force expert, to have allowed the Claimant's application would have led to the re-opening of the whole issue. The Chief Constable might have decided to commission a full report from Mr Clarke, which would likely have delayed matters for a considerable period. In the circumstances, it was reasonably open to the LQC to give primacy to the need to begin the hearing expeditiously in circumstances where he

had already determined that the Panel was not going to be assisted by expert evidence on the use of force.

109. In light of this, the LQC's decision to refuse the application seems to me to have been an unremarkable exercise of his case management powers which lay well within the bounds of what was reasonable, given all the circumstances.

110. Further and in any event, I do not consider that the expert's report was admissible or that it would have assisted the Claimant. Ms Checa-Dover was correct in substance when she argued at [7] of her written opposition to the Claimant's application:

> "… the Officer's case is that he cannot remember kicking out as he is seen to do on CCTV. A report citing all the reasons why one might have done so is not only irrelevant, and thus in admissible as a matter of common law; but also inviting dangerous and impermissible speculation."

111. The expert, Joanne Caffrey's, instructions were to (see report, [1]):

> "1. … provide [an] opinion on the use of force incident 'to consider the CCTV footage of the incident and, if possible, provide a foundation as to the circumstances in which you might use a leg to sweep or kick someone's legs away.'"

112. At [3.11] she listed her experience and qualifications. These included being a former police officer and member of the TSG who had conducted many stop and search incidents, arrests and violent incidents. She had current teaching experience in the use of force, stop and search, and managing challenging behaviour, along with associated risk assessments and care plans. As a general matter, I accept that Ms Caffrey was a properly qualified expert.

113. Section 5 of the report is headed 'Expert's Summary Opinion'. Ms Caffrey's summary conclusions at [5.1.3]-[5.1.4], [5.1.6] were (emphasis added):

> "5.1.3 I witnessed on the CCTV at least 5 leg sweeps/kicks, by what appears to be 3 or more different officers, being deployed during the incident. From the distance of the CCTV, and the vehicle obstruction, *they could be* for leg sweeping/kicking to assist with body positioning to gain control, to assist to move or control a limb, for the defence of another person, to activate a nerve point, to move an article on the ground, *or for malicious purposes*. It is also reasonable that such physical movements, during physical incidents, could be unconsciously applied as natural and instinctive responses, meaning the officers may not be conscious of the fact they did the act. Due to the fact that at least 5 kick/sweeps were deployed by officers indicates this is not an unusual tactical option in this policing area, and kicks, as a tactical option, are specifically listed in module 2 of the personal safety manual, 'accounting for your actions *aide memoir*. I am unable to describe, or identify, any of the officers based upon the qualified of the CCTV footage.

> …
>
> 5.1.4 In my opinion, it is possible for a person to have no recollection of a particular movement during a physical intervention activity, particularly if it was not applied with malicious intent. I speak to many professional staff, in my current role, who have no recollection of what actions they applied during behaviour and restraint incidents, and it is purely on the information from witnesses or CCTV that they accept they used particular methods.
>
> 5.1.6 In my opinion, I cannot form the opinion, beyond reasonable doubt, that I have witnessed a malicious kick of a detainee from the CCTV footage, but I have witnessed the use of legs, against the detainee, on at least five occasions by at least 3 different officers. Each leg use has been during a struggle or immediately after going to ground. The last leg use being at 5 minutes and 52 seconds (edited copy), immediately upon 2 officers taking the detainee back to the ground by force and he is not under fully under control. This *could have been* an officer attempting to immobilize, or contain, a limb prior to bending down to take hold of it, out of personal safety tactical options."

114. Although Ms Caffrey refers to a 'kick/sweep', of the officers who were present who were shown the CCTV of the Claimant's actions, none of them described it as a 'sweep' but said it looked like a 'kick'.

115. In Section 6 of her report, Ms Caffrey summarised parts of the College of Policing's Police Personal Safety Manual. At [6.6] she said:

> "6.6 … By 5 minutes 52 seconds, on the CCTV enhanced copy, the fifth use of legs by officers is deployed against the detainee (sic) and it is clear that by this time the detainee is still not fully under control by the officers. In their accounts the level of threat from the detainee remained high throughout the incident. The detainee is hand-cuffed and two other officers are present, however, they are struggling to keep him detained. Although a general principle would be that is now handcuffed and does not need additional use of force, the reality has to be assessed via the officers' assessment of risk and threat, and application of the tactical options available. The officers formed the opinion that leg restraints were necessary. A multiple kicking/sweep at this point may indicate the possibility of malice, but a single kick/leg sweep in the circumstances of no clear footage, and no challenge raised from the other officers' present, could be reasonable in the circumstances as a tactual option."

116. Essentially, that was the extent of her report.

117. The general rule is that expert evidence is admissible to furnish the court with information which is likely to be outside the experience and knowledge of the fact-

finder. If, on the proven facts, the fact-finder can form their own conclusions without help, then the opinion of an expert is unnecessary: *Turner (T)* [1975] QB 834, 841.

118. In my judgment that aptly described the situation here. The Panel had CCTV footage of the incident. It had the Claimant's account as given in his two interviews, including his claimed inability in the first interview to recognise himself whilst being able to identify other officers, and his overall inability to account for his actions. In due course he gave evidence. I can readily assume that the Panel, expert in policing matters as it was, would be familiar with the fact that police officers are allowed to use reasonable force in the course of an arrest, and that that force can include, on occasion, the use of a leg to sweep a detainee's legs from under them, or otherwise lawfully to control them. In the absence of any positive account from the Claimant, Ms Caffrey was necessarily driven to speculate; and even she could not rule out from what she had seen that the kick was a malicious one. It is therefore not difficult to surmise on what basis she would have been cross-examined. It would have been put to her that one possibility was that the Claimant had maliciously kicked Mr Hague. She would have been bound to agree, and that answer would not have helped the Claimant's case.

119. I note that the final sentence of [5.1.6] is significantly at odds with the evidence the Claimant was to give to the Panel, which was to the effect he might have been scooping something on the floor out of the way, eg glass, to stop Mr Hague from being injured (p304 of 345), but that he did not know what he had done.

120. Nor was her opinion about inability to remember in [5.1.4] of any assistance to the Claimant. That is because of the last sentence where she said that she had spoken to many professional staff who had no recollection of what actions they applied (emphasis added), '…and it is *purely on the information from witnesses or CCTV* that they accept they used particular methods.' Here, of course, even when shown the CCTV, the Claimant could not account for his actions, a matter which the Panel found telling on the issue of his credibility (Determination, [31]). At [32] it noted that PC Hunter, when shown the CCTV *had* been able to identify what he had done as a distraction strike.

121. Her opinion in [6.6] is again undermined by the fact that there was no evidence from the Claimant about why he did what he did, and hence no evidence about what his assessment of risk and threat was, nor what he thought the tactical options available were. There was, accordingly, nothing solid on which the Ms Caffrey could have based her opinion. What she said was, therefore, necessarily speculation.

122. For these reasons, her report was not admissible. Even had it had been deployed, it would have provided little or no assistance to the Claimant and might have positively harmed his case.

123. I therefore conclude, overall, that the LQC's decision to exclude Ms Caffrey's report was not unreasonable and did not cause unfairness to the Claimant within Rule 4(4)(a)(c) of the Appeal Rules. Further, although his decision was briefly stated, I readily understand why the Chair ruled as he did, and his conclusion that an appeal on this ground had no prospects of success was not wrong in public law terms.

124. I therefore reject this ground of appeal.

Ground 3*: Was the Chair's conclusion erroneous that an appeal to the PAT on the grounds that its conclusion on the second ground was unreasonable stood no prospects of success ?*

125. In my judgment the Panel's conclusion on this issue was obviously reasonable within the meaning of Rule 4(4)(a) of the Appeal Rules, and the Chair's decision that an appeal against it had no prospects of success was not *Wednesbury* unreasonable. Therefore, like His Honour Judge Saffman, I refuse permission on this ground.

126. The assessment of the Claimant's credibility, and whether the Chief Constable had proved that he was not genuinely telling the truth as he honestly believed it to be in his first interview, was classically one for the Panel. They heard the evidence and, in particular, saw and heard the Claimant give evidence and be cross-examined (Bundle, p265 of 345, et seq).

127. The Claimant said in his evidence in chief (Bundle, p277 of 345):

> "Q. That you have gone over to him and have in lay mans terms delivered the boot to him.
>
> A. Yeah
>
> Q. Do you have any memory of doing that at all ?
>
> A. No I don't.
>
> Q. Would you have delivered a boot to him ?
>
> A. That's not something I would do. I have never done anything like that. I am confident I would not have done it.
>
> Q. We know now that having seen the footage, the enhanced footage a number of times, that you now say well actually that is me.
>
> A. Yeah I accept that it must be me from what evidence has been presented yeah.
>
> Q. Doe having seen that footage assist you with any recollection of you carrying out …
>
> A. It doesn't show, I don't watch it and remember doing that, that act at all no."

128. At p281-2 of 345 he said:

> "Q. And you said in the first interview …
>
> A. It wasn't me.
>
> Q. It wasn't you. Why was it you said that ?
>
> A. Because that's what I remembered.

…

Q. Did you know at the time you were not being accurate about that ?

A. No no I told them what I thought was the truth at the time."

129. At p284 of 345 he said in cross-examination:

"A. … I have never taken a kick at somebody as a malicious kick no."

130. At p296 of 345 it was put to him that in his Use of Force form completed on the day he had mentioned the dog but not the kick:

"A. No because I didn't remember it at the time."

131. At p298 of 345 it was put to him that when shown the CCTV in his first interview he had *not* said that he was not sure whether the officer in question was him or not, but had positively asserted that it was not him. He replied:

"A. I thought I was sure, I was sure that I wasn't involved in that."

132. At p304-3 of 345 after giving various reasons what the movement of his leg might have been (to scoop something off the floor; to sweep something away that might have injured Mr Hague, eg, glass on the floor) he said, 'I don't know if that's what I did.'

133. The issue for the Panel was a straightforward one. In essence, it was whether the Chief Constable had proved that this account was not true.

134. The Panel's reasoning between [36] and [44] of its determination demonstrates that it properly understood what the issues before it were. Its reasoning was that even in its unenhanced state the CCTV was good enough for the Claimant to have been able identify himself, and especially when he admitted the officer shown 'walk[ed] like him to a degree.'. It concluded that in his first interview he 'was trying to advance an innocent explanation for events contrary to the reality' ([41]) and that 'he deliberately tried to evade his responsibility for his actions and knowingly provided inaccurate replies' ([43]).

135. These conclusions were reasonably open to the Panel on the material before it.

136. I do not accept the criticisms of the Panel's decision in [33] of the Claimant's Skeleton Argument at [33]. In particular, contrary to what is asserted in [33.2], it is clear why the Panel reached the conclusion that it did. It was that the unenhanced CCTV was a good enough prompt for him to be able to remember, even assuming that he initially could not remember events. It noted at [32] that PC Hunter, who also initially could not remember, was successfully prompted by the CCTV to recall that he had delivered a distraction strike. That I think answers the point Mr Pitter emphasised in his oral submissions, that other officers besides the Claimant could not remember what they did during the incident. The difference was that PC Hunter at

least was able to do so having seen the footage, whereas the Claimant professed not to be able to. The Panel therefore concluded the Claimant had not been telling the truth, deliberately.

137. Also, I do not regard it as realistic that the Panel would have, or did, fail to have regard, for example, to the passage of time from the incident to the date of the first interview. The fact that time had passed, and in the interim the Claimant had carried out many arrests, was specifically referred to in his reg 22 response at [3.2].

Conclusion

138. For these reasons, this application for judicial review is dismissed.