



Neutral Citation Number: [2022] EWHC 26 (Admin)

Case No: CO/5056/2019

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

Birmingham Civil Justice Centre
33 Bull St, Birmingham, B4 6DS

Date: 11/01/2022

Before :

THE HON. MRS JUSTICE STEYN DBE

Between :

THE QUEEN on the application of J

- and -

(1) THE CHIEF CONSTABLE OF WEST MERCIA POLICE

(2) THE CHIEF CONSTABLE OF WARWICKSHIRE POLICE

The **Claimant** appeared in person

Mark Thomas (instructed by **West Mercia Police Legal Services**) for the **Defendants**

Hearing date: 20 December 2021

Approved Judgment

Mrs Justice Steyn :

A.

Introduction

1.

This is a claim for judicial review. The claimant challenges the lawfulness of a decision made by the defendants' Vetting Appeal Panel ("the Panel") on 20 August 2019 to dismiss his appeal against a refusal to grant him Non-Police Personnel Vetting level 3 ("NPPV3") clearance ("the decision").

2.

I granted the claimant permission at a renewed oral permission hearing on 27 May 2021. The claimant has raised grounds of challenge under the three heads of illegality, irrationality and procedural impropriety. There are a number of elements to each of these grounds. In particular, he contends that the Panel had an ulterior motive in making the decision; they took into account irrelevant factors, failed to take relevant factors into account and/or made errors of fact; the decision was irrational in the sense that it falls beyond the range of decisions open to a reasonable decision-maker; the decision was infected by bias and/or predetermination; the Panel failed to give the claimant a fair hearing; and the reasons for the original decision were inadequate.

B.

The facts

3.

In 2012 West Mercia and Warwickshire Police forces entered into a strategic alliance which led to the merger and sharing of various police functions and services (“the alliance”). In 2019 the defendants announced that the alliance between the two forces was to end. In preparation for the end of the alliance, the defendants advertised through a recruitment agency called Talent International for a Programme Manager to work within the Digital Services department of the two forces to separate the shared information and communications technology systems used by the defendants.

4.

The claimant, through the IT consultancy company of which he is director, applied for the role of Programme Manager on about 6 June 2019. On 20 June 2019, the claimant was interviewed by a panel which included Nigel Lambie (the Senior Programme Manager in the Alliance Transformation Programme, of Warwickshire Police), Simon Bennett (the Head of Digital Services, of West Mercia Police, who was to manage the programme) and Paul Benfield (also of West Mercia Police). The interview panel decided that the claimant was the preferred candidate.

5.

On 21 June 2019, the claimant was offered the role, subject to the claimant successfully obtaining non-police personnel vetting level 3 (“NPPV3”) clearance. The contract was for an initial term (which appears on the face of the draft contract to have been for 12 months), with the possibility of a series of extensions subject to the claimant’s capability and performance.

6.

The claimant completed and submitted the NPPV3 application form on 9 July 2019. Under the heading “Financial”, the claimant recorded, so far as material:

“How would you describe your overall financial situation?”	Manageable
Please enter details of your current borrowings (e.g. loans, HP and mail order ? exclude mortgages). Include number of borrowings, amounts left to repay and total monthly repayments:	<u>£28K, £4 per month repayment</u>
Please indicate the purposes of these loans below, inclusive of home improvements, holidays, debt repayment, stocks and shares, cars consumer durables, bridging finance, general expenses, students loans or other:	<u>General expenses</u>

...	
Compared to a year ago do you owe more or less on your loans, cards and overdrafts?	Much less
...	
In the last 10 years, have you had a credit/store/charge card withdrawn or been notified that a card or account had been defaulted? If yes, please provide full details: (emphasis added)	Default on credit card around 7 years ago – do not have specific details any more as so long ago.”

7.

Mr Bennett contacted the Vetting Unit to ask them to consider giving the claimant conditional clearance so that he could begin work prior to the completion of the full, standard vetting process.

8.

The College of Policing Approved Professional Practice guidance entitled “APP Vetting”, published in May 2019 (“the APP Guidance”), states at paragraph 3.2:

“Vetting clearances must be granted before an individual is appointed or granted access to police assets. This is because the vetting process can uncover information which shows that the individual is unsuitable to serve in the police service, or to have access. To avoid undue delay in police business, vetting clearances need to be processed in a timely manner. Conditional clearances may be granted to an individual based on any known risks pending full clearance being received, or when an individual has been given a period of time to address any risks through the vetting clearance process. The acceptance of any identified risk should lie with the department to which the individual is being recruited, and it is recommended that either type of conditional clearance should only be used in exceptional circumstances where the force agrees that there is a justifiable business need to accelerate the appointment. ...”

9.

At the time, Amanda Blakeman was the Deputy Chief Constable for West Mercia Police (“DCC Blakeman”). As such, her responsibilities included being the line manager of the Head of the alliance’s Professional Standards Department, of which the Vetting Unit formed part. In this capacity, DCC Blakeman would consider requests for conditional clearance of applicants, although such requests were relatively rare, and she would chair the Vetting Appeal Panel. Michael Gillick, of Warwickshire Police, was employed as the Vetting Development Manager. Joanna Goodman, of Warwickshire Police, was employed as a Vetting Case Officer, a role which is referred to in the APP Guidance as Force Vetting Manager (or “FVM”), having the authority of the chief officer to grant, refuse or withdraw vetting clearance.

10.

In response to Mr Bennett’s request, DCC Blakeman requested that a series of checks be completed, and that Mr Gillick risk assess the claimant on the basis of those checks and report back to her with his recommendation as to whether to grant conditional clearance. Mr Gillick asked Ms Goodman to perform the preliminary vetting checks on the claimant with a view to considering whether conditional clearance could be granted. As requested, Ms Goodman completed checks on the Police National Computer (“PNC”), Police National Database (“PND”) and Experian. The PNC and PND

checks returned with no issues, but Ms Goodman noted that the loan disclosed by the claimant did not appear on the Experian report.

11.

On 24 July 2019, Ms Goodman telephoned the claimant to obtain more information about the loan that he had declared. In the "Vetting Tracing Sheet", Ms Goodman recorded:

"A telephone interview was conducted on 24/07/19 to ascertain more information regarding the applicant's declared £28k loan.

I asked the applicant if he could tell me who the £28k loan was with. He said this was a general loan and wasn't sure what company it was with. He said all the paperwork was gone.

When asked if it was one just one [sic] loan or multiple consolidated he said that he didn't know.

I asked why is he only paying £4 a month off and he said he was in between contracts at the minute but when he is back in contract he will 'ramp it up'. He made reference to it being 'flexible'.

When asked what year he got the loan he couldn't remember. He said it was going back a few years. I asked was it more than 3 less than 10 and he said yes.

He has no credit cards just one debit card.

When asked what the loan was initially for i.e. car, he said it was for general expenditure.

He said there are people out there with hundreds of thousands of pounds of mortgages so why should he worry about £28k.

As the applicant could not tell me anything more I thanked him for his time and hung up."

12.

In his witness statement, the claimant describes this as a "brief unannounced call" and he takes issue with the description of it as a "telephone interview". He states:

"The conversation during the informal call felt confrontational from Ms Goodman with requests to know what the loan was spent on and I explained that it was General Expenditure such as train tickets, meals etc going back as far as 10 years ago but I had no records on the specific itemised expenditures or any clear recollections as it was so long ago. Ms Goodman was not happy with this answer and I found it inexplicable how not having a photographic memory of all these expenditures had anything to do with a risk assessment vetting. The nature of the questions seemed to be very bizarre and little to do with a risk or threat assessment vetting and at one point remember thinking I had no idea what Ms Goodman was talking about as the questions made no sense at all; the vetting officer had not told me she had already undertaken a credit check and this had caused her concern, even though it was completely clean, which seems even more irrational. I did not believe that any reasonable person would be able to recall these details and so I asked Ms Goodman if she would be able to recall these details going back so far and she said that she would. At this point I began to feel that Ms Goodman had lost her objectivity and was determined to find a reason, no matter how unreasonable, to fail my vetting."

13.

Ms Goodman has given a witness statement in which she states that at the outset of such a telephone call, it was her "standard practice to ask whether the applicant was able to speak to discuss his vetting application and whether he was in a secure area due to the confidential nature of the phone

call". She explains, "I had concerns with J's loan, his attitude towards the loan and evasiveness and was of the belief that this was a risk." After this first telephone conversation, on the same day, Ms Goodman sent an email to Mr Gillick in the following terms:

"PNC & PND checks have been completed on the applicant and named associates. There are no problems here.

The applicant has declared he has £28,000.00 of debt and is currently paying £4 a month off of this. Experian does not show any debt in his name.

After a conversation on the phone with the applicant, he said this debt is a 'general loan' but could not tell me anything about it - what company it is with or how long he has had it. He also did not know what address he was residing in at the time. He said all paper work relating to it has gone. When asked why [sic] he got the loan for he said, 'it was for general expenditure'.

Having £28,000 of debt did not seem to be a problem to him.

I personally think there is a risk here."

14.

In her witness statement, Ms Goodman describes the conversation she had with the claimant on 24 July 2019 in essentially the same terms as the accounts given in the Vetting Trace Sheet and her email to Mr Gillick.

15.

Mr Gillick sent DCC Blakeman an email the same day in the following terms:

"You were asked to consider an urgent Conditional Clearance for an ICT consultant called [J].

There are no known PNC or PND Traces/issues on the applicant or any of the people named on his application, but there is a question mark over his Finances (please see below email from a Case Officer).

It is unusual for a loan not to appear on his Experian record, which suggests this may not have been an 'over the counter' arrangement?

His reluctance to provide specific details, his evasiveness and his general demeanour towards the Case Officer are not the sort of things that one would expect from someone with nothing to hide and keen to work for the police?

Is there a risk that if someone offered to clear this debt he might be drawn into corrupt or improper practices?

All speculation, but that's all we've got. He has no mortgage or HP/Car Loan.

He said he's only paying £4 a month because he has no work and it's all he can afford to pay. Which suggests Simon's concern about his being 'snapped up' by another employer may not hold water.

Based on the Case Officer's findings **I believe this application is a medium to high risk**; based on the fact we can't ascertain where the £28k came from; who he owes it to; and why he needed in excess of £28k in the first place.

For your consideration." (Original emphasis.)

16.

Mr Gillick's evidence is that his communication with DCC Blakeman regarding the claimant was by email, apart from when he attended the appeal panel meeting. Mr Gillick informed Mr Bennett that the claimant was unlikely to be granted conditional clearance due to his financial management.

17.

DCC Blakeman accepted Mr Gillick's recommendation and did not grant the claimant conditional clearance. As this was only a decision regarding conditional clearance, a formal decision letter was not sent to the claimant at that point. However, when the claimant telephoned Mr Bennett, a few days after 24 July, to enquire regarding the progress of his vetting, Mr Bennett informed the claimant that he was unlikely to obtain the required clearance.

18.

The claimant then telephoned Ms Goodman (twice on one day in late July 2019). On the Vetting Trace Sheet Ms Goodman recorded:

"He started with that he had received a call from Simon Bennett in ICT who advised he was unlikely to pass vetting as there were early indications due to his finances. I advised he couldn't start on a conditional basis but a decision had yet to be made. I said there were concerns regarding his finances and reiterated that he could not tell me any information regarding his loan.

He said that I misrepresented the need of knowing any information relating to it. He went on to say if he loses the contract the consequences to the organisation will be huge and there will be a big law suit landing on the Chief Constable's desk.

I told him if he did have documents relating to the loan then to find them and call me back and we would go from there.

[The claimant] phones back a little while later -

He said the loan was with IDR but he doesn't have any information relating to them, no address info, no statements etc.

I asked how he paid the £4 a month and he said via sort code and account number. He went on to say he has no contact with IDR though he pays a company called Link Financial who are representatives of IDR. I asked how long he has been paying £4 a month and he said about 2-3 years. He said he doesn't know the current figure. He said he doesn't go around memorising these things. He also said he is not paying interest on it.

The last he knew of the figure of the loan was 2-3 years ago. He said it was £28,939.80. He went on to say why would he check on it and it's not a significant sum so why would it cause him concern.

He asked 'if you were earning £100k a year would you be worried about a £28k loan?' so I asked if he was earning £100k a year [to] which he replied no.

I asked if he was working and he said he is not currently in a contract due to West Mercia wanting him to start ASAP. He said if he loses the 6 figure sum contract he'll be seeking to recoup.

He said he'll be writing to the chief constable and the ICO for misuse of personal data. He said he wanted to hear an answer by the end of the week."

19.

Ms Goodman's statement describes the conversations that she had with the claimant in similar terms to the contemporaneous notes that she kept. She states:

"I was shocked by the telephone call which I had received from [the claimant]. I was only trying to help [the claimant] by asking questions that would enable me to properly risk assess his application. His manner was rude and improper, and caused me to become upset once I had finished the telephone call. This is not usual behaviour for a vetting application and so my colleagues in the office had stopped working due to check that I was okay as they could hear the conversation I was having with [the claimant] and his tone.

Following this telephone conversation, I reported to Mick Gillick and explained the conversation that I had had with [the claimant] and that he was unable to provide any further information. I also explained that he had threatened legal action."

20.

Mr Gillick has given evidence that Ms Goodman reported this conversation to him at the time. The claimant

"had stated that she had misrepresented the need for knowing the information and that if he lost the contract, the consequences to the 'organisation would [be] huge' and that there would be 'a big law suit landing on the Chief Constable's desk'."

21.

Mr Gillick's evidence is that the claimant's words and demeanour caused Ms Goodman to become upset and tearful. He considered the claimant's behaviour was not what he would expect of an applicant for vetting clearance and he considered it to be contrary to the required Standards of Professional Behaviour.

22.

The claimant, in his statement, also describes having been advised that he was unlikely to pass the vetting, and so he searched his records and contacted Ms Goodman to provide the name of the loan company. He states:

"On this second contact with Ms Goodman, I was told that I had not explained what the loan was for and this was going to be formally recorded in the vetting decision. As this was not true, I reminded the vetting officer I had in fact provided this information and that I was being misrepresented."

23.

On 5 August 2019, Ms Goodman wrote to the claimant in the following terms:

"I am writing to inform you that your application to join Warwickshire Police/West Mercia Police has failed the vetting process. I have notified HR of the decision and consequently you will not be offered employment on this occasion.

The College of Policing Authorised Professional Practice for Vetting requires me to assess your ability to manage your finances effectively. From the information you have provided and by reference to the College of Policing Authorised Professional Practice it has been assessed that paying £4 per month off a £28,000 loan for a significant period of time does not amount to good financial management.

For this reason your application for NPPV3 vetting has been refused.

A future application would be considered if you were able to demonstrate a sustained period of sound financial management.

There will be no further communication about your failed vetting application unless you choose to appeal this decision within 28 days of this letter. If you wish to appeal please submit your grounds for appeal in writing (letter or email) to the Vetting Development Manager at the above address.”

24.

On about 8 August 2019, the claimant wrote a letter, formally appealing the decision of 5 August 2019. In his letter he asked for the appeal to be undertaken as soon as practically possible “to avoid unnecessary costs and to limit the need to claim damages”. He stated that he was “disappointed that written reference to specific and detailed vetting criteria has not been provided which gives the impression that the decision is entirely unfair and arbitrary”. He indicated that he was considering issuing a claim for judicial review and claiming substantial damages. He continued:

“I will set out relevant background information for my appeal

I completed the online vetting portal with what I believed was all the correct information that had been requested. I received a call from Joanna Goodman whilst I was in the middle of dealing with some other paperwork and she had a few questions for me. She asked me what the loan was for and I explained it was for general expenditure. She asked who the loan was with and I told her I could not recall as I had had the loan for a number of years (and it had changed hands a few times as well) and didn't have the information available at that moment. I suggested an Equifax check or similar would yield the information she was looking for and believed this is what she was going to do and that there was no further action required on my part and no more information outstanding. She also asked what my current income was and I explained as West Mercia Police has specifically asked me to be immediately available that meant I had no work income whilst waiting to start. She seemed to have an issue with my not working but having the £28K loan and I explained that as the role offered provided an income of £100K+ then the loan in this context was to all intents and purposes inconsequential and irrelevant and to raise this loan as an issue was entirely irrational and disproportionate in the circumstances. Also to highlight the rate at which I am currently paying off the loan is irrelevant to my financial management as no adverse impact can be shown to my financial circumstances by paying the loan off at this rate - again this logic is flawed and irrational. A few days later I chased progress of the vetting to be told that I was unlikely to pass the vetting and when I asked to know the reason, I was told by Joanna that I had told her I didn't know what the loan for [sic], which is not true as I explained above and she said I didn't know who the loan was with. If it was that important to know the loan company name then I could have gone away and found out the information which I then did and I should have been told that it was critical to the vetting process which I was not told - I assumed that the Equifax check would answer these questions. By inventing reasons that were not true to try to fail my vetting, I raise procedural impropriety in the way the vetting check was carried out and malice as to the reason why this was done and the decision based on this malice was then communicated which leads to defamation which I want the vetting team to retract and fully redress. The vetting team owed me a duty of care, this duty of care has been breached and this negligence has caused financial loss in terms of the unnecessary delay to my starting the provision of services.

After raising the issues in the previous paragraph with Joanna, I expected her to do the right thing and fairly reconsider the vetting, but instead I received the letter containing the vetting decision which in summary I challenge for procedural impropriety (as above) and for irrationality (as above) -

particularly for ignoring the context of my circumstances). I have also noted the negligence, malice and defamation which I trust will be fully addressed.”

25.

On receipt of the claimant’s appeal, Mr Gillick asked Ms Goodman to prepare the case file for the appeal. The file consisted of two documents, the claimant’s letter of appeal and a document dated 12 August 2019 headed “rationale for decision” (“the rationale document”). In the latter document, Ms Goodman noted that the claimant was “declined early conditional clearance” by DCC Blakeman and then continued:

“The applicant declared on his vetting form that he currently has a £28,000 loan which he pays a repayment of £4 a month. After conducting an Experian check, Experian showed no loan in his name. There was no outstanding debt (credit cards, HP loans etc). Just one active current account.

A telephone call was made to [the claimant] to ascertain some information relating to the declared loan. He could not tell me who the loan was with, how long he has had it or the current balance of the same. I asked if he had any paperwork and he said no. When asked why he received the loan he said it was for ‘general expenditure’. When asked why he only pays £4 a month he said it was a flexible loan and he could change the payment terms when it suits him.

I asked if he has any other debt and he said no. He has no credit cards, he owns his car and he pays rent for his flat.

He said there are people out there with hundreds and thousands of pounds of mortgages so £28,000 is nothing compared to that.

[The claimant] was very vague with his answers and was questioning why I was asking about it as he said it was an ‘insignificant’ amount. He also said that he thought I would have done an ‘Equifax’ check to which I responded that I wanted to hear the answers from him.

As he could not tell me hardly anything in relation to the £28,000, I thanked him for his time and ended the conversation.

As I had concerns with the loan and the applicant’s attitude and evasiveness, I reiterated this back to the Force Vetting Manager who directed it to DCC Blakeman.

A few days later [the claimant] phones me and states he has been contacted by Simon Bennett in ICT who said he was unlikely to pass vetting. I confirmed that he hadn’t failed vetting but there was a risk due to his finances and it was decided he would not be granted conditional clearance.

[The claimant] went on to say that I misrepresented the need of knowing all details of the loan and that if he loses this contract the consequences to the organisation will be huge and there will be a big law suit landing on the Chief Constable’s desk.

I reiterated again that a few days prior he told me that he couldn’t tell me anything about the loan and he knew no information about it. I told him if he does have documents to find them and phone me back.

The same day he rings back and told me the loan was with IDR and that he has no information regarding them, he has no address and he doesn’t receive monthly statements. I asked how does he pay the £4 and he said via sort code and account number. He said he has no contact with IDR as he pays Link Financial (a debt finance company) who are ‘representatives’ of them.

When asked how he gets in contact with them to change the monthly payment he said he's been paying £4 for the past 2-3 years. I asked what the current balance is and he said he didn't know and he doesn't go round memorising these things. He did say that he is not paying interest on it.

The last time that he did know the amount was 2-3 years ago and it was at £28,939.80. He said why would he check on it as it's not a significant sum so why would it cause him concern. He asked me 'if you was earning £100k a year would you be worried about a £28k loan?' so I asked him if he was earning £100k a year and he said no.

He also asked if I knew what goes out of my bank each month. As [the claimant] has no debt showing on his Experian, I find difficulty in thinking that he does not know his outgoings as he has already confirmed he pays rent and owns his car outright.

I asked if he was currently working and he said he's not in a contract due to West Mercia Police wanting him to start ASAP. He said if he loses the six figure sum contract he will be seeking to recoup.

He went on to say that if he didn't have an answer by Friday of that week he would be writing to the Chief Constable and ICO due to misuse of personal data and conduct in a public place [sic].

On Monday 5th August [the claimant] was refused vetting clearance.

During the telephone conversations, Mr Jones manner was rude and improper. Making threats to get your own way is not acceptable in any place of work."

26.

The claimant's appeal was one of a number of appeals considered by the Panel on 20 August 2019. The Panel was chaired by DCC Blakeman. The other three members were Mr Rob Hall, from Human Resources, and two independent members, Colonel Tony Ward and Mr Hayden Price. Mr Gillick was present, but his role was administrative. The claimant was not present and he was not provided with a copy of the rationale document.

27.

In his statement, Mr Gillick states:

"The facts of [the claimant's] case were not remarkable, however, I do recall that the Panel made comments about 'respect and courtesy' due to the 'tone' of [the claimant's] grounds of appeal, which they believed spent more time challenging the process and threatening further action instead of giving an account for the circumstances of the loan and the way that [the claimant] was managing his finances. I can recall the Panel asking me a question about the conduct of [the claimant] when dealing with the Vetting Case Officer whereby I informed the Panel that the contact had left the Vetting Case Officer upset and in tears."

The independent member, Haydn Price, led the discussion around [the claimant's] loan as he was certain that this would not have come from a 'high street' bank or money lender due to there being no financial interest rate and as such, no profit to the organisation. Concerns were expressed about where the loan had come from, that [the claimant] could not recall this and that this was for general expenditure. The Panel was concerned regarding the risk to the Alliance through possible corruption and as such, all four Panel members unanimously agreed to refuse [the claimant's] appeal."

28.

The claimant was informed of the decision which is challenged in this claim by a letter dated 20 August 2019 from Mr Gillick. The letter states:

“Further to your letter dated 8th August, appealing against the Force decision not to grant you vetting clearance, I am writing to advise you that this has been considered by a Vetting Appeals panel, chaired by the Deputy Chief Constable Amanda Blakeman, and, regrettably, I must inform you that the decision has been made and vetting clearance will not be granted.

The College of Policing Authorised Professional Practice for Vetting requires Chief Officers “to assess the applicant’s financial position”; in your vetting application you disclosed a £28k loan that was being paid off at a rate of £4 per month. This raised concerns and led to the Case Officer contacting you for clarity. During that conversation you were vague in your responses to reasonable questions, i.e. at that time you said you didn’t know who you were repaying the loan to, you said you didn’t know how long you had had the loan; and when asked for the purpose of the loan you said it was for “general expenditure”. None of this indicated sound financial judgement.

Several days later you contacted the Case Officer where you accused her of ‘misrepresenting’ you and threatening her with “huge consequences for the organisation” and a ‘big law suit landing on the Chief Constable’s desk”. You then told the Case Officer that the loan was with “IDR” but that you had no information about IDR because you paid a Company called Link Financial, but received no statements to show the repayments. You said you believed £28,000 “was not a significant sum” and you were challenging when you asked the Case Officer if she knew what goes out of her bank account every month.

The College of Policing Code of Ethics has an expectation that every person working in policing will adopt the Code of Ethics and this includes all those engaged on a consultancy or contract basis. The Code of Ethics requires those working in policing to “act with self-control and tolerance, treating colleagues with respect and courtesy”. The way you interacted with the Case Officer (who was carrying out her role in a necessary and proportionate way) failed the ‘respect and courtesy’ threshold.

In addition, the lack of transparency in your approach to financial management and the fact you are paying £4 per month a £28,000 loan “shows signs of financial irresponsibility”.

It is for these reasons that your application for NPPV3 has been refused.”

C.

The legal and policy framework

29.

The framework for the vetting decisions taken in this case is set by three documents published by the College of Policing. The first is the Vetting Code of Practice (“the Code of Practice”), the second is the APP Guidance, and the third is the Code of Ethics.

30.

The Code of Practice sets out the vetting standards which are to be applied by police forces in England and Wales (§2.1). The Code of Practice describes vetting as “an integral part of a police force’s framework of ethics and professional standards. It assists with identifying individuals who are unsuitable to work within the police service, or to have access to police assets”, which includes those who are “financially vulnerable” (§1.3). The Code of Practice “has been developed to help achieve, implement and maintain minimum national standards and ensure those standards are consistently applied across the police service” (§2.2).

31.

Paragraph 3.4 of the Code of Practice states:

“The Code will be supported by Authorised Professional Practice (APP) on Vetting which will describe the technical processes and detail needed to implement vetting.”

This is supplemented by Principle 4 which provides that “Police vetting should comply with the standards laid out in APP on Vetting”.

32.

Section 5 of the Code of Practice lists the 12 principles which should underpin all decision-making within vetting. In addition, to Principle 4 to which I have referred, these include the following principles:

i)

“In applying vetting, practitioners will comply with the requirements of this Code and the Code of Ethics. Each case must be treated on its own merits.” (Principle 1)

ii)

“Everyone working in a police environment will be vetted to the requisite level.” This includes those who “have unrestricted or unsupervised access to police information, assets or estates” and “have access to force or national police systems, be that directly or remotely”. (Principle 2)

iii)

“Decisions about vetting status should follow the national decision model (NDM) and must be accurately recorded. The presumption is that the rationale for any rejection should be communicated to the applicant in as much detail as possible. There are occasions where it is not possible to provide a detailed rationale, but where this is the case, the justification must be documented and be auditable.” (Principle 9)

iv)

“Where a person is subject to a vetting rejection they should have a right of appeal to a person independent of the original decision-maker. The outcome of an appeal should be communicated to the applicant in as much detail as possible.” (Principle 10)

33.

Section 6 of the Code of Practice describes the national decision making model and notes that the “vetting decision must be made on a case-by-case basis, taking into consideration all relevant matters”. (§6.2).

34.

The APP Guidance applies to, amongst others, “individuals and organisations working under contract to, in partnership with, or on a voluntary basis with police forces in England and Wales” (§2.1). Individuals “who are not appointed or employed by the police service, but require unsupervised access to police assets (including information, systems or premises), must comply with the vetting process” (§4.9.1).

35.

Paragraph 6.18 of the APP Guidance addresses non-police personnel vetting. Paragraph 6.18.1 states:

“Non-police personnel vetting (NPPV) assesses the honesty, integrity and reliability, and the overall suitability for clearance of anyone other than police officers, police staff and members of the special constabulary, who have unsupervised physical or remote access to any of the following:

- police premises
- information
- intelligence
- financial or operational assets
- corporate databases
- data networks or hard copy material.”

36.

There are four NPPV levels, namely, NPPV level 1, NPPV level 2 (abbreviated), NPPV level 2 (full) and NPPV level 3 (§6.18.4). NPPV3 applies to non-police personnel “having unsupervised, unrestricted access to police premises and systems and could include those working in areas where the police roles have been identified as designated posts” (§6.25). NPPV3 allows access to classified police material or information up to SECRET and occasional access to TOP SECRET. Paragraph 6.25 lists the minimum checks that must be conducted on an applicant for NPPV3 clearance. This includes “full financial checks on the applicant”.

37.

Paragraph 7.2 describes the assessment of threat and risk in these terms:

“7.2.1 Risk is determined by the consideration of three primary factors:

- threat
- vulnerability
- impact (see background document).

7.2.2 Acknowledged threats across the police service include:

- police corruption (including noble cause corruption where the perpetrator of the corrupt act believes that their actions are justified by the outcome of the actions)
- infiltration
- financial vulnerability
- criminal or other inappropriate association
- substance misuse
- information leakage
- coercion.

7.2.3 Where potential threats are identified, there will be an associated vulnerability. The level of vulnerability is case-specific and depends on the circumstances of the vetting subject. In assessing risk and vulnerability, forces should consider all possible threats and, where potential threats are identified, assess these when determining the level of risk.”

38.

Paragraph 7.9 of the APP Guidance is headed “Financial Checks”. It provides:

“7.9.1 These checks are used to assess whether applicants have been, are currently, or are likely to be in financial difficulty, or show signs of financial irresponsibility to the extent that they could become vulnerable to financial inducement.

7.9.2 Financial checks assess the applicant’s financial position:

- at the point of initial application
- as they apply to move into sensitive or designated posts
- where further information is received in relation to debt issues.

7.9.3 Forces should recognise that a different approach should be taken with those applying at the point of entry into the police service from those applicants already in the organisation. This is because forces are better placed to risk manage those currently holding vetting clearance, owing to the pre-existing relationship and their history being known to the police service. Where individuals can demonstrate a history of managing their finances with responsibility, integrity and honesty, even if they have experienced debt problems, the final vetting decision can be made proportionately with regard to the vulnerability posed by any debt issue.

...

7.9.5 The principles outlined above should be applied when considering the potential financial risk relating to those who require NPPV level 2 (full) and NPPV level 3 clearance.” (emphasis added)

39.

Financial assessment gathers information in seven areas, including “indications of previous financial unreliability”, “problems meeting current commitments”, “indications of poor financial judgement” and “potential for future financial difficulties”.

40.

Paragraph 7.10.5 states: “Where forces note anomalies between an applicant’s declarations and the information provided by the credit check, or where there is a need to clarify a particular issue, they should interview the individual concerned”. By §7.16.3: “The interview may be conducted on a face-to-face basis, but, due to the logistics of arranging this, telephone interviews can also be conducted”.

41.

Paragraph 7.17.1 suggests that “[a]ppropriate pre-interview communication sets the tone for all subsequent contact” and advises that “the FVM must not only review all relevant information but must also seek to establish an appropriately professional relationship with the applicant before the interview”. Paragraph 17.8.1 states:

“The FVM should take time to explain to applicants both the principles and process of vetting procedures, and the necessity for enquiries to cover each of the areas. They should explain the reasons for the interview and the sensitive nature of some of the questions and seek consent to proceed. ...”

42.

Paragraph 17.18.4 states:

“To obtain and retain a subject’s full cooperation, interviews must not become an interrogation but should be handled with sensitivity. Interviewers must emphasise that information revealed during a vetting enquiry is confidential. The way in which FVMs deal with sensitive information dictates the

extent to which people will entrust them with it. Those conducting the interview should never make assumptions or display a judgemental stance and, while appreciating the sensitivity and importance of the interview, they must display neutrality.”

43.

Paragraph 7.27 identifies factors requiring particular scrutiny:

“7.27.1 While each case needs to be considered on its own merits bearing in mind the role and assets to be accessed, where any of the following factors are present the case should receive particular scrutiny. In most cases the presence of one of these factors will properly lead to a vetting rejection. In cases where one of the following factors is present but it is decided this should not lead to a vetting rejection (perhaps because mitigating measures can be applied), the full rationale must be recorded and the decision approved by the force vetting manager.

- past infringement of security or vetting policy or procedures
- significant or repeated breaches of discipline
- providing false or deliberately misleading information, or omitting significant information from the vetting questionnaires
- unauthorised association with people with previous convictions or reasonably suspected of being involved in crime
- other identified areas of concerns, for example, drug and alcohol misuse
- abuse of position
- previous breaches of the Code of Ethics
- professional standards intelligence
- financial vulnerability
- identified conflict of interest
- other inappropriate behaviour which impinges on a person’s suitability to serve in the role.” (emphasis added)

44.

Paragraph 7.28.1 identifies factors that can “impair an individual’s judgement, which may lead to them being vulnerable to pressures or bribes”, including “financial difficulties or unmanageable debts”.

45.

Paragraph 70.40.3 provides:

“The vetting applicant can request in writing an appeal against the decision. On appeal, the applicant has the right to ask for the rationale behind the decision and should be provided with the information if the following applies:

- there is no risk to national security
- no laws are broken

- it does not frustrate the prevention or detection of a crime
- it will not impede the apprehension or prosecution of offenders
- it will not result in the disclosure of sensitive information
- it will not breach the confidentiality of any information provided.”

46.

Paragraph 7.43 of the APP Guidance provides for the right of appeal. Paragraph 7.45.2 states:

“An appeal may be made by the applicant in writing stating their grounds of appeal when one or more of the following factors apply:

- further information is available that was not considered by the decision-maker
- the vetting rejection was disproportionate considering the circumstances or details of the case
- the decision was perverse or unreasonable
- no explanation has been given for the decision.”

47.

Under the heading “Conducting Appeals”, the APP Guidance states:

“7.43.5 Appeals may be conducted by an individual of suitable seniority who:

- is independent of the original decision-making process
- has not been previously involved in any aspect of the case
- has a working knowledge of vetting.

7.43.6 This will ensure that the transparency and integrity of the appeals process is maintained.” (emphasis added)

48.

In most cases, the appeals process for applicants (other than existing police personnel) is paper-based and the applicant can make written representations (§7.43.12).

D.

Preliminary matters

49.

In his submissions, the claimant has alleged that he would not have had unrestricted access to police premises and systems and so he did not need to be vetted to NPPV3. This was a point that he reiterated in his oral submissions, stating that “in the real world” as Programme Manager he would not have directly accessed systems; rather, he would have given directions to individuals less senior than him regarding steps to be taken that involved accessing the defendants’ IT systems.

50.

However, the decision that the claimant required to be vetted to that level is not the subject of challenge in this claim. As he has acknowledged, the claimant agreed to seek NPPV3 clearance and it is the dismissal of his appeal against the refusal of that clearance which is challenged by his claim for judicial review.

51.

In any event, there is no sound basis for contesting the defendants' assessment that the successful candidate for the Programme Manager's role would need NPPV3 clearance because:

i)

The successful candidate would be the program lead for Digital Services Transformation;

ii)

They would have had uncontrolled access to information at a grade of Secret and occasional access to Top Secret assets.

iii)

They would have had unrestricted and uncontrolled access to the IT systems and content of those within the two forces, including access to a vast amount of data concerning members of the public, criminal investigations and ongoing police operations.

iv)

Given the specific skillset required of the successful candidate, that person would be uniquely placed to cause significant damage to the data held, for example, by installing viruses or malware within the IT systems.

v)

In addition, the successful candidate would have unsupervised access to the defendants' premises.

52.

Even if, as the claimant states, his role as the Programme Manager would generally have involved directing others, it is clear that the defendants intended to grant the person holding the role of Programme Manager the level of access to their systems and premises that I have described.

53.

It is necessary to consider the claimant's grounds on the understanding that the clearance he sought, and would have required to perform the role of Programme Manager, was NPPV3, the highest level of "non-police personnel vetting" clearance (albeit there are higher levels of clearance, such as developed vetting).

54.

In their submissions, the defendants contend that the claimant had an alternative remedy in the form of making a further application for NPPV3 clearance. Mr Gillick's evidence is that

"a failed vetting is not recorded as a 'black mark' on an Applicant's history nor is the Applicant 'black listed'. Vetting is only a 'snapshot' in time and provided that [the claimant] was able to evidence sound financial management, if he was to submit a further application to either Force, he may receive vetting clearance."

This reflects the penultimate paragraph of the letter from Ms Goodman to the claimant dated 5 August 2019 (see paragraph 23 above).

55.

I accept the defendants' evidence that a failed vetting does not result in an applicant being 'blacklisted'. A further vetting application would not automatically fail. But I do not accept that a further application constituted a suitable alternative remedy in this case.

56.

First, the defendants' evidence does not state that the fact that the claimant's application was unsuccessful on this occasion would be treated as irrelevant on any further application. It appears to be implicit in the letter of 5 August 2019 that the finding that the information provided by the claimant did not demonstrate good financial management would be potentially relevant to a future application, but would not preclude a successful application if the claimant could demonstrate a sustained period of sound financial management. In addition, paragraph 7.27.1 of the APP Guidance indicates that "previous breaches of the Code of Ethics" will, in most cases, properly lead to a vetting rejection. There is nothing in the letter of 20 August 2019, or the evidence, that would indicate that the finding that the claimant's interactions with Ms Goodman "failed the 'respect and courtesy' threshold" would (despite the terms of the APP Guidance) be treated as immaterial in the context of any further application for vetting clearance.

57.

Secondly, while I accept the defendants' submission that even if the claimant were to succeed on any of his grounds of judicial review, ordinarily a recognised cause of action would need to be pleaded and proved to recover damages, nevertheless, establishing that the decision was unlawful would be a necessary element.

58.

Thirdly, although I do not have evidence on the matter, I accept the claimant's submission that the fact that he has failed a vetting exercise is a matter that he may, potentially, have to disclose in future when seeking clearance in the context of work he may undertake for other bodies

E.

The Grounds

(1) Illegality - improper purpose/bad faith

59.

The claimant alleges that delay in the separation of the IT systems of the two police forces would benefit Warwickshire Police force. He contends that the decision that he failed the vetting process, led by Warwickshire Police, had the improper motive of sabotaging or delaying that separation, to the financial benefit of Warwickshire Police force. He asserts that the decision to fail his vetting was a consequence of the relationship between the two forces which he describes as dysfunctional and toxic.

60.

The claimant has given evidence that when he was interviewed for the post of Programme Manager, the interviewers emphasised that the IT separation was proving to be acrimonious and they asked a number of questions to determine how he would handle "such dysfunctional politics working with Warwickshire Police".

61.

The defendants did not seek to counter the claimant's evidence that the decision to cease the alliance was made unilaterally by West Mercia or that the relationship between the two forces was seriously strained as a result. I approach this ground on the basis that the claimant's evidence regarding the relationship between the forces is accurate.

62.

Nevertheless, in my judgement, the contention that the decision was made for an improper purpose is baseless. First, the impugned decision was not made, or led, by officers from Warwickshire. The chair of the Panel was the Deputy Chief Constable of West Mercia Police (not Warwickshire), and the Panel included two lay members. The evidence does not indicate whether the fourth member was employed by West Mercia or Warwickshire, but even assuming one of the four members of the Panel was employed by Warwickshire, the allegation that the Panel was motivated by an improper purpose of seeking to delay a separation sought by West Mercia, for the benefit of Warwickshire, lacks any evidential foundation. On the contrary, the evidence is that the Panel's discussion was led by one of the independent members, Mr Price, and that the Panel focused on assessing the risk arising from the claimant's financial circumstances, the tone of his letter and the way he had interacted with Ms Goodman.

63.

Moreover, the context is that the decision that the claimant was the preferred candidate was made jointly by a panel consisting of officers drawn from both forces. While the original vetting decision was made by a Warwickshire officer, there is nothing in the evidence that provides any sensible support for the suggestion that Ms Goodman made her decision other than in good faith and for proper purposes. Mr Gillick did not make either decision, but insofar as he was involved in the decision-making process, the same is true of him.

64.

In reality, the claimant has drawn the conclusion that the decision-makers acted in bad faith and from improper motives because he cannot understand, or at least appears to be unable to understand, why they had genuine concerns about his financial vulnerability based on the (limited) information he provided, or why they were concerned by the way in which he interacted with Ms Goodman or the tone of his letter of appeal. In my judgement, even if there was substance to the claimant's allegation that the decision is perverse, the claimant's contention that the decision-makers acted in bad faith and from improper motives would remain unfounded and unevidenced. It is a conclusion that I have no hesitation in rejecting.

(2) Errors of fact

65.

The leading case on mistake of fact as a ground of challenge in judicial review proceedings is *E v Secretary of State for the Home Department* [2004] QB 1044. To establish unfairness stemming from a mistake of fact it is generally necessary to meet the following requirements (see [66]):

"First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellatant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning."

66.

In his oral submissions, the claimant made clear that he does not seek to establish any error of fact as a ground of review. However, he relies on what he contends are factual errors made by the defendants in support of his claim that the defendants acted in bad faith. Most notably, these include:

i)

The claimant's contention that he would not have needed unrestricted access to the defendants' systems or premises, which I have addressed above.

ii)

The claimant's contention that the initial contract was for 12 months and that the defendants' evidence that the initial contract was for 6 months was false. On the basis of the evidence before me, I have accepted that the initial contract was for 12 months. Even if the defendants' evidence as to the length of the initial contract was inaccurate - and I have not seen the full terms and conditions of the draft contract - that is a matter that would only be of relevance to any private law cause of action for damages. Such an error provides no proper basis for an allegation of bad faith.

iii)

The claimant's contention that it is a falsehood to describe the telephone call on 24 July 2019 as an "interview" and that the "Vetting Trace Sheet" is fabricated. I reject as obviously wrong the contention that in labelling the telephone call an "interview" Ms Goodman has given false evidence. The claimant has raised significant issues as to the way in which that telephone call diverged from the guidance regarding the setting up of interviews (which I address below). But in taking issue with the fact that she has labelled it an "interview", the claimant has focused on a semantic issue. In reality, there is no difference of substance between the parties' evidence regarding the way in which the telephone call was made (in particular, it was not prearranged) or what was discussed. The allegation that the defendants have fabricated evidence is a grave allegation for which there is no basis whatsoever. The Vetting Trace Sheet is entirely consistent with Ms Goodman's email of 24 July 2019 and the rationale document of 12 August 2019. An allegation of such seriousness ought not to be made without a firm evidential foundation.

iv)

The claimant's contention that Ms Goodman's evidence is "entirely false" when she said that it would have been perfectly acceptable if the claimant had said, when she telephoned him on 24 July, that he could not recall the information she sought but would call her back later to provide it. He alleges this is untrue because he did say that he could not recall the information or know where it was and the result was that the call was confrontational. However, it is clear from the contemporaneous documents that he said during the initial call that all the paperwork relating to the loan was gone, not that he would look for the information and call her back.

v)

The claimant's contention that Ms Goodman misrepresented what he had said during their first conversation when she referred to him not knowing what the loan had been for. He relies on the fact that he had said it was for "general expenditure" as showing that this was a misrepresentation. This is misconceived. Ms Goodman was seeking information as to why the claimant had needed to take a loan of more than £28,000. His response that it was for general expenditure was extremely vague and provided no explanation as to the circumstances in which his expenditure had so far exceeded his income that he had needed to take out that loan. It was not a question of being faulted for not remembering every meal or train ticket that he bought ten years ago, as the claimant contends, but for giving no explanation as to why he had needed the loan.

vi)

The claimant's contention that Ms Goodman's evidence that she was upset by the way he spoke to her during their second and third conversations is "feigned". I reject this contention. First, Ms Goodman gives evidence that she was upset after the telephone call. This is supported by the evidence of Mr

Gillick, to whom she spoke about the conversations at the time, as well as by her contemporaneous rationale document in which, although she did not expressly say she was upset, Ms Goodman referred to finding the claimant's manner rude, improper and unacceptable. The claimant was not present after the call. He has no basis for alleging the defendants' witnesses are lying. Secondly, the claimant's own description, in his letter of appeal, of the conversations he had with Ms Goodman make clear that having been told he was unlikely to pass the vetting, he telephoned her and was highly confrontational, accusing her of misrepresentation, malice and negligence in the way she had conducted the vetting process, and threatening to take the matter to the court, the ICO and the chief constable if she did not retract her vetting assessment by the end of the week. It is unsurprising that a vetting officer who received such an unexpected response from a vetting applicant would find it upsetting.

67.

The errors of fact alleged by the claimant do not support his contention that the decision was made in bad faith or for an improper motive.

(3) Irrationality and irrelevant/relevant considerations

68.

The claimant contends that the decision was irrational because there is nothing unlawful about having a loan for general expenditure. It is normal for people to have debts. He contends this was a small debt which was insignificant compared to the context of what he describes as a £600,000 contract. This context was a material consideration that the decision-makers failed to take into account. What precisely he spent it on, and his lack of recall in that regard, was an irrelevant consideration. It was irrational and absurd, he contends, to fail his vetting for paying off this debt slowly. He had voluntarily disclosed the loan on the NPPV3 form, so it was untrue that his answers demonstrated a lack of transparency.

69.

The claimant relies on the judgment of the Supreme Court in *Samuels v Birmingham City Council* [2019] UKSC 28, a case concerning a local authority's approach to assessing whether a person was intentionally homeless, in which Lord Carnwath observed at [34] that "Assessment of what is reasonable requires an objective assessment; it cannot depend simply on the subjective view of the case officer". The claimant contends that the defendants' approach goes against this requirement, which he describes as a fundamental principle of the common law.

70.

In my judgement, the Panel's decision, and the vetting officer's decision which they upheld, were not irrational. It is, of course, true that it is lawful to obtain a loan for general expenditure, and that having debts, which is common, does not automatically show poor financial management. The defendants' decisions did not suggest otherwise. They were entitled to conclude that the information provided to them suggested that the claimant was financially vulnerable such that giving him NPPV3 clearance presented an unacceptable risk.

71.

In particular, they were entitled to reach that conclusion having regard to the following factors:

i)

The information the claimant provided about the loan was extremely vague. He was unable to say whether he had taken out a single loan or multiple loans that had subsequently been consolidated. He

was unable to say in what year he had taken out the loan. Beyond stating that it was for 'general expenditure' he gave no explanation as to why he had needed this unsecured loan. He gave the amount that he had owed 2-3 years earlier, but was unable to say what the current debt amounted to. He was unable to provide any contact details for the loan company.

ii)

The claimant at no stage provided any documentation in respect of the loan. He claimed to have no documentation and to receive no statements in respect of this loan. The claimant sought to contend that it was normal to destroy documents that were more than six years old. However, even if the loan had been taken out more than six years earlier, it remained a current debt. In the same way, a mortgage that might have been taken out decades earlier would remain current so long as it had not been fully paid off. In undertaking a full financial check for the purposes of NPPV3 clearance, the defendants could reasonably expect that ordinarily an applicant would have some documentation in respect of current loans.

iii)

The loan did not appear on the Experian report. The claimant sought to contend that the defendants should have known there was nothing untoward about that; it merely reflected the fact that the loan had been taken out more than six years earlier. Again, the claimant's submission ignores the fact that it was a current loan. It is absurd to suggest that a credit report would deliberately omit existing debts because they were first incurred more than six years earlier. If that were the case, such checks would regularly fail to identify the existence of mortgages as they will often last many years.

iv)

According to the claimant, he had been repaying the loan at a rate of £4 a month for about two to three years, he had had the loan for considerably longer, and he was not being charged interest.

v)

Having regard to each of these factors, it was open to the Panel (and the vetting officer) to consider that the loan appeared not to be a commercial arrangement and to assess that there was an unacceptable risk that the claimant was financially vulnerable.

72.

I also reject the contention that the defendants took into account irrelevant considerations or failed to take into account relevant considerations. In accordance with paragraph 7.9.2 of the APP Guidance, the vetting officer and the Panel made no error in assessing the claimant's financial position "at the point of initial application". And the purpose of the loan was a matter the defendants were entitled to regard as material in assessing his finances.

(4) Procedural impropriety: fairness and bias/predetermination

73.

First, under this head, the claimant alleges the appeal decision was unfair because one of the two bases for the decision, namely alleged lack of courtesy and disrespect on his part, was an issue he was wholly unaware of until he received the letter of 20 August 2019 stating the Panel's decision and reasons. It was not given as a reason in the decision of 5 August, and so he had no opportunity to address it in his submissions in support of his appeal. It was mentioned in the rationale document and during the course of the meeting on 20 August, but he did not see the rationale document and was not invited to attend the meeting. The claimant submits it was unfair to base the decision, in part, on a matter that he was given no opportunity at any stage to address.

74.

Secondly, the claimant contends that the letter of 5 August merely told him that paying £4 per month was considered not to amount to good financial management. It did not inform him that there was any concern that he had not been transparent about his finances. The claimant submits it was unfair to base the decision on this factor without giving him an opportunity to address it.

75.

Thirdly, the claimant's submission that the decision was marred by bias and/or predetermination is primarily based on the involvement of DCC Blakeman in the decision to refuse him conditional clearance and then, again, as the chair of the Panel that determined his appeal. He submits that her involvement at both stages breached paragraph 7.43.5 of the APP Guidance (see paragraph 47 above). He also contends that the original decision was marred by bias, which the Panel failed to correct. However, the allegation of bias and/or predetermination on the part of Ms Goodman is based on the allegations of improper motive and irrationality which, for the reasons I have already given, I consider have no substance.

76.

Fourthly, the claimant contends that Ms Goodman failed to comply with the APP Guidance regarding vetting interviews. In particular, he submits that she failed to engage in any pre-interview communication, instead telephoning him with no prior warning (cf §7.17.1 of the APP Guidance). She did not take time to explain the principles and process of vetting procedures or the necessity for the enquiries that she was making (cf 7.18.1 and 7.18.16). She did not seek to establish a rapport with him, but rather engaged in a judgemental interrogation of him (cf 7.18.4). And she did not take him through the forms he had completed or check he understood all the questions asked (cf 7.18.10 and 7.18.12).

77.

In accordance with principle 9 of the Code of Conduct, there is a presumption that the rationale for any rejection of vetting clearance should be communicated to the applicant in as much detail as possible. Paragraph 70.4.3 of the APP Guidance provides that, on appeal, the vetting applicant has the right to ask for the rationale behind the decision and, unless the specified circumstances apply, should be provided with that information.

78.

The claimant was not provided with a copy of the rationale document prior to these proceedings. That document made clear the vetting officer's concerns about the claimant's evasiveness and lack of transparency, as well as regarding his manner of interacting with her. This is not a case where there was any reason why the rationale could not be disclosed in full to the vetting applicant. Although it may be said that the claimant did not ask, as paragraph 70.4.3 of the APP Guidance envisages, for disclosure of the rationale behind the decision, that is because he had received the letter of 5 August 2019. He had no reason to know that there was a separate document explaining the rationale in more detail that would be considered by the Panel.

79.

In my judgement, fairness required the rationale document to be disclosed to the claimant prior to determination of his appeal, so that he could address it in the representations that he made. The failure to disclose it to him was a breach of natural justice.

80.

However, although I consider this caused some unfairness, the degree of unfairness caused by this omission is limited by two factors. First, although the claimant was not aware that the vetting officer described his manner as rude and improper, or that Mr Gillick responded to questioning from the Panel by informing them that his behaviour had upset Ms Goodman, and so he had no opportunity to address those matters, he was aware that his letter of appeal would be considered by the Panel. Insofar as the content and tone of that letter itself gave the Panel cause for concern about the claimant's compliance with the requirement to show courtesy and respect, I consider that was a matter the Panel were entitled to take into account without inviting further representations from the claimant.

81.

I accept that it could not fairly be taken to be rude or improper to describe the vetting officer's as irrational and disproportionate, given that is the terminology used in the APP Guidance in describing some of the possible grounds of appeal. I also accept that giving a warning that continuing down a particular path will lead to litigation may be entirely proper, albeit the Panel's surprise that the claimant would lay so much emphasis, in the context of an appeal, on threatening a variety of legal actions, rather than providing the information necessary to persuade the Panel that there was no need for concern about his financial management, was readily understandable. However, the claimant went further. It was readily apparent from the appeal letter itself that the claimant had leapt, without foundation, to accusing the vetting officer of dishonesty, malice and negligence. Their conclusion that this demonstrated a failure to show respect and courtesy was not irrational or unlawful.

82.

Secondly, although it would have been better if the letter of 5 August had spelt out more clearly the vetting officer's concerns about the claimant's evasiveness and lack of transparency about his finances, I accept Mr Thomas's submission on behalf of the defendants that read in the context of the three telephone calls, it was made sufficiently clear that the defendants' concerns flowed at least in part from the lack of information provided by the claimant. The claimant was clearly informed that the assessment was based on the information he had provided and that a different view might be taken if he could demonstrate a sustained period of sound financial management. He was fully aware of the information that Ms Goodman had sought and it would have been open to him to provide further information to the Panel to seek to assuage any concerns they might have about his financial management and vulnerability. He also had access to the published APP Guidance, to which Ms Goodman referred in her letter, in which the reasons for undertaking financial checks when vetting applicants were explained.

83.

The claimant's challenges based on bias and predetermination overlap. The test for apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision-maker was biased: *Porter v Magill* [2002] 2 AC 357, per Lord Hope at [103]. The test for predetermination is whether the fair-minded and informed observer, knowing the facts, would think that there was a real possibility that the decision-maker had predetermined the matter to be decided, in the sense of closing its mind to the merits of the matter: (*R (Lewis) v Redcar and Cleveland BC* [2009] 1 WLR 83, per Rix LJ at [96]-[97].

84.

In my judgement, properly analysed, this is an allegation of predetermination rather than bias. Insofar as bias is alleged, it is based on the allegation that the Panel had the improper motive of seeking to thwart the separation of the alliance, which I have rejected.

85.

Paragraph 7.43.5 of the APP Guidance (which I have set out in paragraph 47 above) sets out eligibility criteria for those conducting appeals. No issue is taken with the eligibility of Mr Hall, Colonel Ward or Mr Price to conduct the appeal. But the claimant contends that DCC Blakeman did not meet the requirements of (a) being “independent of the original decision-making process” and (b) not having been “previously involved in any aspect of the case”.

86.

DCC Blakeman’s prior involvement amounted to accepting the recommendation not to grant conditional clearance. I accept Mr Thomas’s submission that that did not amount to being involved in making the original decision. The original decision was not the refusal of conditional clearance: it was the refusal of NPPV3 clearance following the completion of the standard vetting process. However, in my judgement, it is clear that by making the conditional clearance decision DCC Blakeman had prior involvement in an aspect of the case. It was not fully consistent with paragraph 7.43.5 of the APP Guidance for the Panel that considered the claimant’s appeal to include, as its chair, DCC Blakeman. The APP Guidance is guidance, not legislation, but there would need to be a good reason not to follow it and none has been put forward. I therefore consider that the claimant has established an error of law in failing to follow the applicable guidance, without good reason.

87.

However, I reject the claimant’s contention that the decision on appeal was predetermined. I have borne in mind that the threshold for establishing predetermination is not as high in the context of a quasi-judicial decision as in the case of an administrative decision-maker, such as a local planning authority. But in both contexts, there is a distinction to be drawn between a predisposition to making a particular decision and predetermination. Only the latter is unlawful.

88.

There is no basis for a finding that DCC Blakeman approached the appeal with a closed mind. She would have been aware that her decision to refuse conditional clearance was made at a preliminary stage when the standard vetting process was incomplete. She had not had before her either of the two documents that were before the Panel when determining the appeal. The evidence is that the Panel’s approach was to focus on discussing the evidence before them. The APP Guidance takes a cautious approach in seeking to preclude anyone who has had any previous involvement in any aspect of the case from conducting an appeal. It does not follow from the fact that DCC Blakeman’s presence on the Panel did not fully comply with the APP Guidance that she had predetermined the outcome and on the evidence I find that the decision was not predetermined.

89.

As regards the way in which the interview was conducted by Ms Goodman, it is clear that an interview can be undertaken by telephone. It is apparent from the APP Guidance that it is good practice to engage in some pre-interview communication. The decision not to do so in this case was understandable, given that urgent conditional clearance was sought, and the limited scope of the questions which Ms Goodman wished to ask, although I accept the claimant’s submission that it would have been possible to send him an email arranging a time to speak with very little notice. The procedure adopted, in particular, asking the claimant at the outset of the telephone call if he was able to speak about his vetting application, and if he was in an area where he could speak confidentially, was not unfair. Nor was there anything unfair about the questions Ms Goodman asked the claimant, given the context that he was seeking NPPV3 clearance.

90.

In any event, the two subsequent telephone calls were made by the claimant at a time of his choosing. It was open to him to communicate in writing or by telephone. He could have taken the time to gather information to disclose regarding the loan, or to demonstrate his financial management more broadly, if he had wished to do so. In addition, the claimant was able to appeal, at which point it was again open to him to provide information to allay the concerns that had clearly been expressed in the letter of 5 August 2019 regarding his financial management. Accordingly, I reject the claimant's contention that the Panel decision is rendered unfair by reason of alleged unfairness in the original interview process.

F.

Relief and section 31(2A) of the Senior Courts Act 1981

91.

The claimant has succeeded to a limited extent in establishing (a) unfairness in the failure to give him an opportunity to see and respond to the rationale document in the context of his appeal and (b) non-compliance with paragraph 7.43.5 of the APP Guidance, without good reason, to the extent that DCC Blakeman had been involved in an aspect of the case prior to the meeting of the Panel. The question therefore arises whether to grant the relief sought, or any relief.

92.

Section 31(2A) of the Senior Courts Act 1981 provides so far as material:

"The High Court - (a) must refuse to grant relief on an application for judicial review... if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred".

93.

If the court is to consider whether a particular outcome was "highly likely" not to have been substantially different if the conduct complained of had not occurred, it must necessarily undertake its own objective assessment of the decision-making process, and what its result would have been if the decision-maker had not erred in law.

94.

Section 31(2A) is designed to ensure that the judicial review process remains flexible and realistic. Even if there has been some flaw in the decision-making process which might render the decision unlawful, if quashing the decision would be a waste of time and public money (because, even when adjustment is made for the error, it is highly likely that the same decision would be reached), the decision should not be quashed.

95.

In my judgement, this is a case in which it is highly likely that the outcome for the claimant would not have been substantially different if the flaws I have identified had not occurred. First, for the reasons that I have given in paragraphs 80 to 82 above, the unfairness caused by the failure to provide the claimant with the rationale document was limited. Secondly, it is highly likely that the Panel would have dismissed the appeal on the basis of their concerns about the claimant's financial vulnerability, even if they had not taken into account the way in which he had engaged with Ms Goodman. He was made sufficiently aware of those concerns and I have found that this basis for their decision was rational and lawful.

96.

The second identified flaw was not such as to render DCC Blakeman's involvement in the appeal unfair and the majority of the Panel fully met the eligibility criteria. The Panel's decision was led by one of the independent members and it was unanimous. Even if DCC Blakeman had not been present, it is highly likely the other three members would have reached the same decision.

G.

Conclusion

97.

For the reasons that I have given, this claim is dismissed.