

# Police Vetting

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- 1 This paper considers (i) the police vetting regime in overview; (ii) re-vetting of serving officers; (iii) the consequences for officers whose vetting is removed; (iv) recent challenges to the dismissal of officers as a consequence of their vetting being removed; (v) common pitfalls in vetting decisions; and (vi) vetting reform.
- 2 Vetting is highly topical because of the focus on vetting failings in the Casey Review,<sup>1</sup> Angiolini Inquiry,<sup>2</sup> and a recent HMICFRS report,<sup>3</sup> and because of the recent trend of removing officer's vetting clearance and then dismissing them due to their lack of clearance.
- 3 So called 'vetting dismissals' are controversial particularly in cases where an officer's vetting clearance is removed due to concerns about their conduct which either has been or arguably ought to have been addressed under the misconduct regime, which has greater protections for officers. This issue is being tested in ongoing litigation and is likely to be addressed in new legislation.

## The police vetting regime in overview

- 4 Robust vetting of police officers and staff is vital to Chief Constables' confidence in those under their direction and control and to public confidence in policing. The importance of vetting is underscored not only by the role police officers perform and the access that they have to sensitive information and vulnerable individuals, but also because there are limited routes by which an officer may be dismissed once they have been appointed (c.f. employees who may be dismissed on contractual notice).
- 5 The police vetting regime is (and has since 2017 been) contained in documents published by the College of Policing:
  - a. The Vetting Code of Practice ("the Vetting Code"), the most recent version of which was published in July 2023;<sup>4</sup> and
  - b. The Authorised Professional Practice: Vetting ("the APP Vetting"), the most recent version of which was published in 2021 (during the currency of the 2021 iteration of the Vetting Code; **a revised version of the APP Vetting is being consulted upon now**).<sup>5</sup>
- 6 There are two vetting regimes applied across the police service nationally:
  - a. Force Vetting is designed to protect police assets. Force Vetting (for police officers) has two levels: Recruitment Vetting ("RV") and Management Vetting ("MV"): APP Vetting at [6.1.1].
  - b. National Security Vetting is designed to protect government assets. NSV has three levels: Counter-Terrorist Check ("CTC"), Security Check ("SC") and Developed Vetting ("DV"): APP Vetting at [9.1].
- 7 The minimum level of Force Vetting for all police personnel is set at RV: APP Vetting at [7.11.1]. While the APP sets no minimum level of NSV, some forces (including the MPS) have imposed a minimum requirement of CTC.
- 8 There is not – at present – a requirement expressed in legislation for police officers to hold vetting clearance. The legal basis for the requirements above are found in section 39A(1) of the Police Act 1996 (requirement to have regard to a College of Policing Code of Practice); and chief officers' broad powers (i) of direction and control over their officers (sections 2(3)/4(3) of the Police Reform and Social Responsibility Act 2011 "PRSRA"); and (ii) to do anything which is calculated to facilitate, or is conducive or incidental to, the exercise of their functions: paragraph 7(1) of Schedule 2/paragraph 4(1) of Schedule 4 to the PRSRA).

9 Vetting is an exercise in risk assessment, with the principal risks considered being those relating to an applicant or serving officer's conduct, or (because of the vulnerability to corruption), their associations and their financial circumstances.

10 The 'vetting test' is set out in the Vetting Code at [5.6]:<sup>6</sup>

*"1. Are there reasonable grounds for suspecting that the applicant, a family member or other relevant associate:*

- *is, or has been, involved in criminal activity*
- *has financial vulnerabilities (applicant only)*
- *is, or has been, subjected to any adverse information*

*2. If so, is it appropriate, in all the circumstances, to refuse vetting clearance?"*

11 Where clearance is removed an officer may appeal internally (the process is set out in the APP Vetting at [8.44] et seq). Officers disappointed by an appeal decision in respect of Force Vetting may challenge the decision by way of judicial review. As regards NSV, an appeal may be made to the Security and Vetting Appeals Panel either instead of, or in addition to, judicial review (SVAP only makes a recommendation to the force vetting unit, but the recommendation is a weighty one and may be the result of closed proceedings in which a Special Advocate was instructed).

## The re-vetting of serving officers

12 Re-vetting is of vital importance for the maintenance of (i) chief officers' trust in officers; and (ii) public confidence in policing. As the APP Vetting explains at [8.48.1]: *"Vetting is based on a snapshot in time. Because an individual's circumstances can change, it is important that their ability to maintain their security clearance is assessed"*.

13 Anecdotally, it appears that – until recently – serving officers were seldom re-vetted outside the expiry of their clearance. Even then, at most, their clearance level was downgraded or conditions / aftercare measures were imposed on it.

14 In fact, the Vetting Code and the APP Vetting set a number of triggers requiring police forces to re-vet or review the clearance of serving officers which might lead to them being refused clearance or having their clearance removed, including:

- i) First, upon expiry of the vetting clearance. Clearances are valid only for a limited period. In the case of RV, the renewal period is 10 years. In the case of MV, the renewal period is 7 years. Renewal of vetting clearance requires a fresh vetting application and full re-vetting: Vetting Code at [5.18]; APP Vetting at [8.49.1] – [8.49.2]. (Forces may renew or review vetting clearance before the renewal or review date: Vetting Code at [5.7]).
- ii) Second, upon transfer from one force to another, in which case full re-vetting is required: Vetting Code at [5.14].
- iii) Third, where the officer has been out of force for 12 months or more e.g. on secondment or a career break in which case a review is required: APP Vetting at [8.56].
- iv) Fourth, where the officer holds MV it should be reviewed at least twice during the 7 year validity of the clearance: APP Vetting at [8.48.3].
- v) Fifth, where adverse information comes to light relating to the officer or there is a material change in their personal circumstances, in which case a review is required: Vetting Code at [5.7] and [5.9]; APP Vetting at [8.48.4].

vi) Sixth – and controversially – following the completion of misconduct proceedings that do not result in the officer’s dismissal, in which case a review is required: Vetting Code at [5.10]; APP Vetting at [8.50.1]. The Vetting Code states:

**“5.10. Vetting and misconduct**

*Following the conclusion of misconduct proceedings that result in a sanction other than dismissal, an individual’s vetting clearance will be reviewed. This does not preclude a decision to review a vetting clearance, even where no sanction is given (see the section above on ‘Adverse or other information’).*

*This review can result in the clearance being:*

- *granted*
- *granted with conditions*
- *downgraded (with or without conditions)*
- *declined.”*

## The consequences for officers whose vetting is removed

15 An issue of significant controversy at present is what the consequences are for serving officers whose vetting is withdrawn at the minimum level required.

16 The Vetting Code states at [5.7] and [5.10]:

*“...If a person working in policing is unable to hold the required vetting clearance to perform their role, the force will consider an alternative suitable role with a lower level of vetting clearance. If such a role is not available or clearance cannot be granted at the lowest level, the individual will be subject to dismissal proceedings, as vetting clearance is a requirement of their role.”*

17 The APP Vetting states at [8.47] (emphasis added):

**“Employment Rights Act 1996 and Police (Performance) Regulations 2020**

*[8.47.1] Where vetting clearance is withdrawn or refused on renewal for existing personnel, a different process will need to be followed for police officers and police staff. If vetting clearance is refused at RV, unsupervised access to police assets, including premises, information and systems, cannot be granted. If MV clearance is withdrawn, consideration must be given to whether RV clearance can be granted.*

*[8.47.2] For police staff, withdrawing RV clearance may lead to dismissal under section 98 of the Employment Rights Act 1996 (ERA). This would ultimately occur when the force decides that alternative employment is not possible and/or the risk cannot be managed.*

*[8.47.3] The ERA does not apply to police officers or special constables. Therefore, when clearance is withdrawn and suitable alternative employment cannot be identified, and/or the risk cannot be reasonably managed, the force should consider proceedings under the Police (Performance) Regulations 2020.*

*[8.47.4] When a police officer’s or special constable’s RV clearance is withdrawn, they will be unable to access police information and systems. Unsupervised access to police premises will also not be permitted. As a result, the police officer will be unable to perform their role to a satisfactory level. This could, therefore, amount to gross incompetence and a third-stage meeting should be considered.*

*[8.47.5] In cases where RV clearance is withdrawn and the risk cannot be managed, the matter should be referred to HR for progression.” (emphasis added)*

18 Without at least RV clearance, police officers are not allowed access to police information and systems or unsupervised access to police premises: APP Vetting at e.g. [8.47.4]. The lack of RV

clearance therefore very seriously limits (and in the long term, realistically prevents) an officer from performing any police role.

19 In the case of a probationer, their services may be dispensed with pursuant to regulation 13 of the Police Regulations 2003 on the basis that they are “*not likely to become an efficient or well conducted constable*”. That test is arguably met in circumstances where they do not hold the vetting clearance required to perform the functions of the role at all.

20 In the case of an officer who has completed their probation up to the level of Chief Superintendent, they may be dismissed for ‘gross incompetence’ at a third stage meeting under the Police (Performance) Regulations 2020. “Gross incompetence” is defined in regulation 4(1) as:

*“a serious inability or serious failure of a police officer to perform the duties of the officer’s rank or the role the officer is currently undertaking to a satisfactory standard or level, ... to the extent that dismissal would be justified and “grossly incompetent” is to be construed accordingly.”*

An officer arguably has a serious inability to perform their duties satisfactorily (or at all) if they lack vetting.

21 The chief officer at a regulation 13 meeting and the panel at a stage 3 gross incompetence meeting is not hearing an appeal against the withdrawal of vetting. Since they cannot go behind the vetting decision, unless they consider that, despite the withdrawal of vetting clearance, the relevant test is not met, the almost inevitable consequence will be the probationer’s discharge / the officer’s dismissal.

## Recent challenges to the dismissal of officers as a consequence of their vetting being removed

22 The legality of decisions to discharge / dismiss officers who have had their vetting clearance withdrawn has recently been considered by the Courts in a number of judicial review challenges. There is at least one further case where judgment is awaited, another listed for a hearing in January 2025, and others at pre-issue stage / awaiting a permission decision.

### **Victor**

23 In ***R (Victor) v Chief Constable of West Mercia Police*** [2023] EWHC 2119 (Admin), [2024] ICR 109, the claimant was a probationer. While off duty and in drink she verbally abused a member of the public using discriminatory terms in a pub and in the street. Following an investigation under the Police (Conduct) Regulations 2020 the matter was assessed as misconduct simpliciter and referred to a misconduct meeting. The officer substantially admitted the allegations. She was given a final written warning. A vetting review was conducted and her RV was withdrawn based on her behaviour that was the subject of the misconduct allegation. She was then discharged pursuant to regulation 13 of the Police Regulations 2003 in light of the absence of RV.

24 The claimant challenged the vetting removal and regulation 13 decisions by way of judicial review. She argued that they were unlawful inter alia because they were in “conflict” with the misconduct proceedings, which had not resulted in the outcome of dismissal. The claimant submitted that, because her behaviour had already been dealt with in the misconduct proceedings, any review of her vetting clearance should be limited to consideration of her integrity and her access to police assets, otherwise the protections of the conduct regulations would be frustrated.

25 The Court dismissed Ms Victor’s claim. Importantly, Eyre J found that the Chief Constable was

not only entitled to undertake a review of the claimant's vetting clearance following the conclusion of misconduct proceedings (see the review 'triggers' listed above) but "*it would ... have been an error of law*" not to (at [83]). Moreover, Eyre J confirmed (at [91]) that, in the case of a vetting review following misconduct proceedings, "*...for such a review to be undertaken properly it...had to be a genuine review of the vetting clearance having regard to all the considerations relevant to such a review*". In other words, it would not have been lawful to conduct a review in which the possibility of an officer's vetting clearance being withdrawn was taken off the table.

26 The judgment affirms that (at [80]):

*"The starting point is that the misconduct proceedings and the review of the Claimant's vetting clearance were different processes carried out by different officers applying different rules. The objectives of those processes were closely related but they were not identical. It is, accordingly, not surprising that the processes had different outcomes ..."*

27 Eyre J noted (at [83]) that APP Vetting "*...contemplates the prospect that the removal of vetting clearance could lead to the termination of an officer's service*".

28 The Judge observed (at [91]):

*"Although there is force in the Claimant's point that primacy should be accorded to the conclusion reached in the misconduct proceedings as to the measures necessary to maintain professional standards and public confidence it cannot outweigh the factors in favour of lawfulness. In particular it cannot prevail against the fact that the requirement that there was to be a review of the Claimant's vetting clearance is strongly indicative that this was to be a full and not an attenuated review..."*

29 There are limitations in the wider application of the judgment, notably that (i) it included a probationer; and (ii) the central facts relevant to the vetting decision were undisputed.

30 Eyre J sounded some *obiter* notes that are unhelpful (for forces) in cases where the basis for the withdrawal of vetting clearance is a **disputed** conduct concern *viz*:

a. At [62]: "*...where there is an issue as to whether particular conduct took place the protections provided by the Conduct Regulations should not be circumvented. In such cases the procedures laid down by those regulations should normally be followed. A failure to do so is likely to mean that a dismissal based on the misconduct is unlawful as in Monger...*" (**R (Monger) v Chief Constable of Cumbria** [2013] EWHC 455, a case in which a Chief Constable purported to require a special constable to retire under regulation 2(c) of the Special Constables Regulations 1965 on the grounds of disputed misconduct allegations, rather than going through the Conduct Regulations);

b. At [76]: "*There may be scope for debate where the conduct in question is disputed and the misconduct procedure does not find it established but a subsequent vetting clearance decision is then made by reference to suspicion in relation to the very conduct in issue...*"

### **Barnes**

31 While it was not a vetting case, the decision in **R (Barnes) v Chief Constable of Thames Valley Police** [2023] EWHC 2737 (Admin), [2024] ICR 161 is relevant in cases where allegations admitted or tested in misconduct proceedings that have not resulted in the officer's dismissal are then used in the vetting process.

32 As in **Victor**, the claimant was a probationer. He told a racist joke to colleagues while on duty. Following an investigation under the Police (Conduct) Regulations 2020 the matter was assessed as gross misconduct and referred to a misconduct hearing. The officer admitted using the alleged words. He was given a written warning. He was then discharged pursuant to

regulation 13 of the Police Regulations 2003 due to the Chief Constable's assessment of seriousness of the claimant's conduct in telling the racist joke, what it said about his future as a police constable and the risk to public confidence (and despite a senior officer recommending that he should be confirmed as an officer, given that the incident had been a one-off, he had strong testimonials, and he had not been dismissed by the disciplinary panel, which had considered the same facts).

- 33 The claimant challenged the regulation 13 decision by way of judicial review on grounds of irrationality, estoppel, breach of legitimate expectation and procedural fairness.
- 34 Lavender J noted (at [34]) that there was “...no authority which has considered the situation which arose in the present case, where the same matter gave rise to both misconduct proceedings, resulting in a finding of misconduct and a sanction falling short of dismissal, and a subsequent decision to discharge a probationary constable pursuant to Regulation 13...”.
- 35 The Court concluded that the Chief Constable, in taking an important managerial decision reserved to him (under regulation 13), was not acting as a litigant or judicial tribunal duplicating disciplinary proceedings, so cause of action estoppel and the collateral attack doctrine did not apply.
- 36 It was also not unfair or irrational, in the circumstances, for the Chief Constable to take a different view to earlier decision-makers as to the seriousness of the claimant's conduct (or the extent of his remorse and insight, the misconduct panel's assessment of which the Chief Constable had deprecated).
- 37 The Court also found that it was not unfair to take the regulation 13 decision on the papers, without giving the claimant a (further) hearing or sharing a provisional decision. The claimant had in substance known the evidence and points which may be said against him, had the opportunity to make representations, and the Chief Constable relied on no new matter.

#### **Watson**

38 The possibility of a serving officer who had completed their probation being dismissed in the Northern Ireland equivalent of a stage 3 gross incompetence meeting under the Police (Performance) Regulations 2020 was recognised by the Northern Ireland Court of Appeal in **Watson v Police Service of Northern Ireland** [2024] NICA 7 (at [58] – [60], and [63]). The Northern Ireland Court of Appeal's analysis was adopted by Holgate J in **R (Chief Constable of Thames Valley Police) v A Legally Qualified Chair** [2024] EWHC 1454 (Admin) (at [133] – [143]). Both of these cases concerned the issue of 'pre-attestation' misconduct rather than vetting, so the Courts' analysis is obiter, but useful nonetheless.

#### **Di Maria**

39 In January 2025 a major challenge to the process adopted in the MPS for reviewing officers' vetting and, where minimum clearance is withdrawn, referring them to regulation 13/stage 3 proceedings, will be heard in the Administrative Court. The College of Policing is an interested party because the parts of the Vetting Code and APP Vetting, which suggest that an officer might be dismissed as a consequence of their vetting being withdrawn (which is the process being followed by the MPS), is being impugned as unlawful.

- 40 The case concerns an officer whose MV and RV were removed as a result of disputed allegations of sexual misconduct in respect of which no case to answer was found. The claimant's arguments are that:
- a. Vetting removal is not a lawful basis for dismissal because vetting is not a legal pre-requisite

- to hold the office of constable and there is no lawful mechanism to dismiss for want of vetting.
- b. Dismissal for want of vetting is not Article 6 ECHR compliant.
- c. Dismissal for want of vetting in light of a conduct concern frustrates the Police (Conduct) Regulations 2020 under the auspices of which such concerns must be considered.
- d. Dismissal for want of vetting frustrates the Police (Performance) Regulations 2020 because an officer cannot be 'grossly incompetent' as a result of the actions of the force in removing their vetting.
- e. The decision was irrational on the facts.

41 Of these, the most interesting arguments are those at (b) and (c).

42 As to (b), Article 6 is likely to apply to a vetting clearance decision which is effectively determinative of proceedings (regulation 13 or stage 3) in which the officer may be dismissed. The key question is likely to be whether recourse to judicial review is sufficient to meet the requirement of a hearing 'by an independent and impartial tribunal'.

43 As to (c), there is a real issue over whether disputed conduct concerns that have not been established in misconduct proceedings can be the basis for vetting clearance to be withdrawn. The Vetting Code and the APP Vetting suggest that they can, but there is a solid counter-argument. The Police Federation understandably considers it unfair that a misconduct allegation that has not been tested (e.g. due to there being no case to answer) or was found not proved in formal misconduct proceedings to the civil standard, can then form for the basis for an officer's vetting to be withdrawn (leading to their dismissal) against the much lower standard of the reasonable grounds for suspicion.

44 Both arguments will require the Court to grapple with the fundamental difference between the police misconduct and vetting regimes. Police misconduct proceedings involve (i) the testing of a narrowly defined allegation of conduct that is said to breach the Standards of Professional Behaviour; (ii) to the civil standard of the balance of probabilities; (iii) against admissible evidence, namely evidence relevant to the particular allegation the officer is facing, and not evidence relevant to other concerns about the risk posed by the officer.

45 The vetting review process involves (i) a multifactorial assessment of the risk posed by the officer arising from matters potentially much broader than a single incident of alleged misconduct or (in some cases) not involving an incident of alleged misconduct at all; (ii) to the standard of reasonable grounds for suspicion; (iii) against a wide range evidence, information and intelligence that may not be admissible in police misconduct proceedings.

## Common pitfalls in vetting decisions

46 In addition to challenges to the consequence of vetting removal, there is a stream of challenges to the merits of decisions to remove vetting clearance. In our experience, there are six common pitfalls.

- \_\_\_47 First, failing to put the first instance/appeal decision maker's concerns to the officer and to give appropriate disclosure before the decision is made (suitably redacted or gisted where necessary). Common law procedural fairness includes a very long and well-established right for a person affected by a decision to have a reasonable opportunity to learn what is alleged against her and to put forward her own case in answer to it: **O'Reilly v Mackman** [1983] 2 AC 237 at 279F–G. That opportunity should generally be made available before a decision is taken: **R (Balajigari) v Secretary of State** [2019] 1 WLR 4647 at [60]; **R v Secretary of State for the Home Department, ex p. Doody** [1994] 1 AC 532 at p.560F–H. In the vetting context see: **R (Segalov) v**

**Chief Constable of Sussex & Chief Constable of Greater Manchester** [2018] EWHC 3187 (Admin) at [44] and [46]; **R (Kind) v Secretary of State for the Home Department** [2021] EWHC 710 (Admin) at [115]–[116]. Materially the same procedural fairness requirements apply under Article 8(1) ECHR which is likely to apply to at least some vetting decisions.

48 Second, where the first instance/appeal decision maker's concerns have been put to the officer, failing to address the officer's response to those concerns/the grounds of appeal advanced by the officer (see, in the context of a Victim's Right to Review: **R (Torpey) v DPP** [2019] EWHC 1804 (Admin) at [46]).

49 Third, failing to understand and/or apply the 'vetting test' set out in the Vetting Code at [5.6].

50 Fourth, where the officer raises (or there is evidence suggesting) a disability that might explain the decision maker's concerns, failing to investigate the issue (obtaining medical/expert evidence where necessary) and to consider it in a structured way pursuant to the Equality Act 2010.

51 Fifth, insufficient/unclear reasoning leading to classic public law challenges on the basis of irrationality/failure to give reasons. Often there is a significant quantity of text but only a small portion of it is high quality analysis of the salient issues.

52 Sixth, other departures from the provisions of the APP Vetting, without good reason (which good reason should be expressed).

## Vetting reform

53 In the dying days of the last government, draft Police (Vetting) Regulations 2024 were published for consultation by the Home Office. The fate of these Regulations was uncertain until 24 October 2024 when, three days after the acquittal of PS Martyn Blake, the Home Secretary announced reforms which will: "*for the first time, place vetting standards on a statutory footing [and] empower Chief Constables to promptly dismiss officers who fail their vetting*".<sup>7</sup>

54 It is not clear whether the Home Office will pick up where it left off with the pre-election draft Vetting Regulations. If it does, those draft Regulations:

- a. Provide a process for reviewing / withdrawing an officer's vetting clearance;
- b. Provide for what was effectively a vetting 'hearing' at which the officer can be legally represented and evidence may be called;
- c. Provide a power of dismissal following the withdrawal of clearance (although the process for exercising that power is unclear – officers whose clearance was withdrawn are simply described as "liable to dismissal without notice");
- d. Provide a power of suspension where an officer's clearance has been withdrawn;
- e. Provide a right of appeal against the withdrawal of vetting (after exhausting the internal appeal route) to the Police Appeals Tribunal.

55 If these or similar Regulations are brought into force, the prospect of an appeal to the independent PAT would (assuming that the appeal could essentially be a 're-hearing') be likely to provide an answer to the Article 6 issue. But there would continue to be disputes as to whether the appropriate forum for addressing conduct concerns was under the Vetting Regime or the Conduct Regulations, noting in particular the higher standard of proof and rules of evidence that apply to the benefit of officers under the latter.

### Footnotes

- 1 <https://www.met.police.uk/SysSiteAssets/media/downloads/met/about-us/baroness-casey-review/update-march-2023/baroness-casey-review-march-2023a.pdf> (March 2023; e.g. [3.3]).
- 2 [https://iipcv-prod.s3.eu-west-2.amazonaws.com/E02740018\\_Angiolini-Inquiry.pdf](https://iipcv-prod.s3.eu-west-2.amazonaws.com/E02740018_Angiolini-Inquiry.pdf) (February 2024; Chapter 4).
- 3 <https://hmicfrs.justiceinspectors.gov.uk/publications/an-inspection-of-vetting-misconduct-and-misogyny-in-the-police-service/> (November 2022).
- 4 By section 39A(1) of the Police Act 1996 the College of Policing is empowered, with the approval of the Secretary of State, to issue codes of practice “relating to the discharge of their functions by chief officers of police”. Such officers are required by section 39A(7) to have regard to such codes when discharging any function to which a code relates.
- 5 The Vetting Code explains at [5.5]: “*Forces are expected to have regard to APP in discharging their responsibilities and the standards adopted. This is the standard for police vetting and provides the operational guidance and detail on how to deliver vetting.*” In **R(J) v Chief Constable of West Mercia** [2022] EWHC 26 (Admin) Steyn J said of the APP (at [86]) that “...*there would need to be a good reason not to follow it*”.
- 6 The test is derived from **R(A) v Chief Constable of C Constabulary** [2014] EWHC 216 (Admin); [2014] WLR 2776 at [42].
- 7 <https://www.gov.uk/government/news/new-reforms-to-boost-confidence-in-police-accountability-system>