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| *Judgment: approved by the court for handing down (subject to editorial corrections)** | *Delivered:* **11/04/2025** |

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**KING'S BENCH DIVISION**
**(JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY THE DEPARTMENT OF JUSTICE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION BY THE PAROLE COMMISSIONERS FOR NORTHERN IRELAND DATED 19 SEPTEMBER 2024**

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**Tony McGleenan KC & Christopher Summers (instructed by the Departmental Solicitor's Office) for the Applicant**
**Donal Sayers KC & Gordon Anthony (instructed by Carson McDowell LLP) for the Proposed Respondent**
**Stephen Toal KC (instructed by Sheridan & Leonard Solicitors) for the first Notice Party, Martin McAllister**
**Matthew Corkey (instructed by the Directorate of Legal Services) for the second Notice Party, the Northern Health and Social Care Trust**

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**HUMPHREYS J**

## *Introduction*

[1] This application for leave to apply for judicial review, brought by the Department of Justice ('DOJ'), raises a single question of law namely, whether the Parole Commissioners for Northern Ireland ('PCNI') can lawfully direct the release of a prisoner under Article 28 of the Criminal Justice (Northern Ireland) Order 2008 ('the 2008 Order') on a conditional or contingent basis.

[2] By the time the application came on for hearing, the first notice party, Martin McAllister, had been released from prison into suitable accommodation. From that perspective, the practical issue presented by the proceedings had become academic. However, at the invitation of the parties, the court agreed to hear and determine the legal issue since, it was agreed, this was an important matter of practice and principle for the DOJ and the PCNI. The case proceeded as a rolled-up hearing.

*The factual background*

[3] On 27 April 2022 Mr McAllister was convicted of conspiracy to commit arson being reckless as to the endangerment of life and received an extended custodial sentence ('ECS') with a custodial element of two years and an extended licence term of two years. He was released automatically at the end of the custodial term on 1 August 2023 and his licence term will expire on 31 July 2025.

[4] On 2 August 2023 the applicant revoked his licence as a result of the withdrawal of his approved accommodation. On his recall, the applicant referred the case to the PCNI for review. On 2 November 2023, the Single Commissioner made a provisional direction that Mr McAllister not be released. He then exercised his right to have an oral hearing before a panel of PCNI.

[5] A series of oral hearings ensued as follows:

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| (i) | 4 December 2023 | Adjourned to allow for a case conference |
| (ii) | 4 March 2024 | Adjourned to enable Trust attendance |
| (iii) | 3 May 2024 | Adjourned for case management hearing |
| (iv) | 21 May 2024 | Case management hearing re accommodation |
| (v) | 4 July 2024 | Adjourned due to insurance issues |
| (vi) | 9 September 2024 | Final oral hearing |

*The PCNI decision*

[6] On 19 September 2024 the PCNI panel delivered its decision, stating:

> "Following consideration of the case, the Panel is satisfied that it is no longer necessary for the protection of the public from serious harm that Mr McAllister be confined and has directed that he be released on licence. This decision is binding on the Department of Justice." (para [4])

[7] The Panel explained that the key issue in the case was the availability of suitable accommodation. Various efforts were made in this regard but by the end of the summer of 2024, such accommodation had not yet been identified.

[8] The Panel concluded, after hearing the evidence, that Mr McAllister continued to pose a risk of serious harm. However, all the witnesses were in agreement that this risk could be managed with appropriate licence conditions provided he was placed in suitable accommodation. The decision states:

> "Very unusually the Panel has therefore come to the view that it can direct release based on the licence conditions below being in place. These include a recommendation relating to accommodation being approved by both PBNI and the relevant Trust" (para [50]
>
> "It is our clear understanding (and that of the other parties to the case) that release cannot take place until and unless these conditions are in place." (para [51])

[9] One of the recommended licence conditions was:

> "You must permanently reside at an approved address identified by the relevant Health and Social Care Trust and approved by PBNI".

[10] The Panel also recommended that any release be a graduated process which may entail a short series of temporary releases for familiarisation purposes (para [52]).

***The legislative framework***

[11] Part 2 of Chapter 3 of the 2008 Order made provision in relation to the imposition of public protection sentences for dangerous offenders. Article 14 governs the imposition of an ECS in respect of certain specified violent and sexual offences. Such a sentence is only to be imposed where the court is of the opinion that:

> "There is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences." (Article 14(1)(b)(i))

[12] Article 18 of the 2008 Order is concerned with the release of prisoners serving public protection sentences. A prisoner serving an ECS is eligible for release after serving the "relevant part of his sentence", which is defined as one half of the appropriate custodial term but only at the direction of the PCNI. Article 18(3) provides:

> "(3) As soon as—
>
> (a) P has served the relevant part of the sentence, and
>
> (b) the Parole Commissioners have directed P's release under this Article,
>
> the Department of Justice shall release P on licence under this Article."

[13] The PCNI are obliged not to give such a direction unless:

> "They are satisfied that it is no longer necessary for the protection of the public from serious harm that P should be confined." (Article 18(4)(b))

[14] Otherwise, by virtue of Article 18(8), the DOJ must release an ECS prisoner on licence at the end of the custodial term "unless P has previously been recalled under Article 28."

[15] Article 28 of the 2008 Order addresses the recall of prisoners who have been released on licence:

> "(1) In this Article "P" means a prisoner who has been released on licence under Article 17, 18, 20 or 20A.
>
> (2) The Department of Justice or the Secretary of State may revoke P's licence and recall P to prison—
>
> (a) if recommended to do so by the Parole Commissioners; or
>
> (b) without such a recommendation if it appears to the Department of Justice or (as the case may be) the Secretary of State that it is expedient in the public interest to recall P before such a recommendation is practicable.
>
> (3) P—
>
> (a) shall, on returning to prison, be informed of the reasons for the recall and of the right conferred by sub-paragraph (b); an
>
> (b) may make representations in writing with respect to the recall.
>
> (4) The Department of Justice or (as the case may be) the Secretary of State shall refer P's recall under paragraph (2) to the Parole Commissioners.
>
> (5) Where on a reference under paragraph (4) the Parole Commissioners direct P's immediate release on licence under this Chapter, the Department of Justice shall give effect to the direction.

(6) The Parole Commissioners shall not give a direction under paragraph (5) with respect to P unless they are satisfied that—

(a) where P is serving an indeterminate custodial sentence or an extended custodial sentence and was not released under Article 20A, it is no longer necessary for the protection of the public from serious harm that P should be confined;

(b) in any other case, it is no longer necessary for the protection of the public that P should be confined.

(7) On the revocation of P's licence, P shall be—

(a) liable to be detained in pursuance of P's sentence; and

(b) if at large, treated as being unlawfully at large.

(8) The Secretary of State may revoke P's licence and recall P to prison under paragraph (2) only if his decision to revoke P's licence and recall P to prison is arrived at (wholly or partly) on the basis of protected information."

[16] Thus, the legislation speaks of the direction by PCNI for "immediate release" of the prisoner which is binding on the DOJ. Such a direction cannot be given, in the case of a prisoner subject to an ECS, unless PCNI are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.

[17] In *Re Hilland's Application* [2024] UKSC 4, the Supreme Court explained:

> "…article 28(6)(a) and (b) do not provide a test for the exercise by the Parole Commissioners of the power to direct the release of a prisoner on licence. Rather, article 28(6)(a) and (b) limit the power of the Parole Commissioners to give such a direction. Accordingly, it is a threshold to be passed before a recommendation can be made but it is not a test as to the circumstances in which a direction will be given." (para [50])

[18] Article 24 relates to licence conditions. Any release of an ECS prisoner on licence will be subject to the "standard licence conditions", which are to be found in the Criminal Justice (Sentencing) (Licence Conditions) (Northern Ireland) Rules 2009

and to any other condition which the DOJ sees fit to specify, following consultation with the PCNI (Article 24(5)).

[19] One of the prescribed conditions (by rule 2(2)(c) of the 2009 Rules) is that the prisoner must:

> "Permanently reside at an address approved by the probation officer and obtain the prior permission of the probation officer for any change of address."

[20] It is noteworthy that the power of PCNI to recommend a date for the release of a prisoner on licence, contained in Article 29(2)(a) of the 2008 Order, does not apply to ECS prisoners.

***The DOJ evidence***

[21] Alison Redmond, the Head of the Public Protection Branch in the Safer Communities Directorate in the DOJ has deposed in an affidavit that where the PCNI issue a direction under Article 28(5), prisoners are "in effect released immediately." However, she says:

> "There has to be a reasonable period of time to allow for the processing of the prisoner out of custody and for all associated arrangements to be put in place…There may be some delays in releasing a prisoner over a weekend or on a public holiday. However, release is given effect as soon as possible and generally within a matter of hours of the Parole Commissioners' determination."

[22] Ms Redmond also acknowledges that where a particular address is specified by virtue of the licence conditions, release may be deferred for a short period until this is secured. She avers:

> "Whilst this can sometimes take 1 to 2 days to arrange, it is the Department's view that this still falls within what is considered reasonable in the context of an Article 28(4) *[sic]* direction for immediate release."

[23] Ms Redmond also emphasises that the setting of licence conditions is a matter for DOJ, not PCNI, albeit that there is a requirement for a consultation process under Article 24(5). This process is usually effected through the making of recommendations by the PCNI in any direction for release.

[24] In relation to the specific case of Mr McAllister, Ms Redmond notes that the series of adjourned hearings were concerned with the issue of availability of suitable accommodation. At the time of the oral hearing, efforts to identify same were

continuing but the position remained unclear. This was not a case where compliance with the licence condition could be achieved within a day or two.

[25] At the time of the swearing of the affidavit, almost three months after the PCNI direction, Mr McAllister remained in custody. Mr McAllister's solicitors had sent pre action protocol correspondence to the DOJ challenging its failure to release him on licence following the direction of PCNI, contending that he was subject to continuing unlawful detention. The DOJ responded, asserting that the direction made by PCNI was itself ultra vires and therefore unlawful. Ultimately it took around six months before the accommodation issue was resolved and the release of Mr McAllister was achieved.

[26] In a second affidavit, Ms Redmond brought to the attention of the court a second PCNI direction for release which was contingent upon specific accommodation being in place.

***The issue of statutory construction***

[27] Counsel for PCNI contends that the language of "immediate release" used in Article 28(5) must be read purposively as meaning "as soon as reasonably practicable" since there will always be some requirement to make arrangements prior to the release of a prisoner being effected. It is contended that release must then take place immediately once the necessary arrangements are in place.

[28] It is the DOJ's case that the words of the statute must be given their literal meaning. On this analysis, there is no power vested in PCNI to direct future or conditional release in the case of an ECS recall prisoner – either they direct immediate release or no release.

[29] In *R(O) v Secretary of State for the Home Department* [2022] UKSC 3, Lord Hodge stated:

> "The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:
>
> > 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.'
>
> (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). Words

> and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained."

[30] The relevant context for the enactment of the 2008 Order was to introduce the concept of public protection sentences into Northern Ireland. This followed the provisions of the Criminal Justice Act 2003 ('the 2003 Act') in England & Wales. In a recall case, a prisoner is only in custody by reason of risk since the punitive element of the sentence has been served. On the DOJ's analysis, this speaks to the "immediate release" issue – it is only where the PCNI are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner be confined that a direction can be made. It is open to the PCNI to have regard to licence conditions in arriving at this conclusion but, it is argued, these need to be readily and imminently achievable in order for release to be directed.

***The position in England & Wales***

[31] Chapter 5 of Part 12 of the 2003 Act contains provisions relating to public protection sentences for dangerous offenders. The question of recall after release is addressed in Chapter 6 of Part 12 and section 255C governs prisoners who are subject to extended sentences. Prior to 28 June 2022, section 255C(5) stated:

> "Where on a reference under subsection (4) the Board directs P's immediate release on licence under this Chapter, the Secretary of State must give effect to the direction."

[32] This provision was amended by section 139(2)(a) of the Police, Crime, Sentencing and Courts Act 2022 ('the 2022 Act') to omit the word "immediate." The same amendment introduced section 256AZC into the 2003 Act which reads:

> "(1) This section applies where the Board directs the release of a person on licence under this Chapter.
> (2) Secretary of State must give effect to the direction of the Parole Board as soon as is reasonably practicable in all the circumstances including, in particular, the need to make arrangements in connection with any conditions that are to be included in the person's licence under this Chapter."

[33] The DOJ contends that these legislative amendments in England & Wales reflect the fact that the previous regime, which still pertains in Northern Ireland, was unduly restrictive and did not permit release on conditions which required to be put into place before the prisoner could safely be released.

[34] In the Explanatory Notes to the Bill published on 9 March 2021 the Government stated:

> "134. Clause 114 amends existing legislation regarding the timing of a prisoner's release following a direction by the Parole Board. In all cases, when the Parole Board directs release, the Secretary of State must give effect to the direction 'as soon as it is reasonably practicable' to do so. In recall cases, the Parole Board will no longer be able to direct 'immediate' release. The reason for these changes is that in practice, decisions described as requiring 'immediate release' are unhelpful and unnecessary. They create false expectations because the release of a prisoner can never take place immediately following a direction by the Parole Board due to the need to make necessary arrangements for the licence conditions the Parole Board stipulates the prisoner must be subject to on release (for example, a requirement to reside in an approved premises). They may create an expectation that release will take place immediately after the Parole Board decision is made, which may not be possible due to the need to make necessary arrangements for the licence conditions the Parole Board stipulates the prisoner must be subject to on release (for example, a requirement to reside in an approved premises)."

[35] The position in relation to indeterminate sentences in England & Wales is governed by the Crime (Sentences) Act 1997 ('the 1997 Act'). Section 28(5) of this Act reads:

> "As soon as (a) a life prisoner to whom this section applies has served the relevant part of his sentence and (b) the Parole Board has directed his release under this section, it shall be the duty of the Secretary of State to release him on licence."

[36] Section 28(6) provides that the Board shall not make such a direction unless it is satisfied that "it is no longer necessary for the protection of the public that the prisoner should be confined." Section 31 sets out the powers of the Secretary of State to impose licence conditions following recommendations of the Parole Board.

[37] Section 32 of the 1997 Act is concerned with the recall of life prisoners and prior to the 2022 Act, it stated at section 32(5):

> "Where on a reference under subsection (4) above the Parole Board directs the immediate release on licence under this section of the life prisoner, the Secretary of State shall give effect to the direction."

[38] The word "immediate" was removed by section 139(1)(a) of the 2022 Act. The analogue provision in Article 9 of the Life Sentences (Northern Ireland) Order 2001 has not been subjected to any legislative amendment.

***Consideration***

[39] In *R (Bowen) v Secretary of State for Justice* [2017] EWCA Civ 2181, the Parole Board directed the release of two prisoners serving indeterminate sentences on the basis that the Secretary of State would impose certain conditions, including one relating to residence at an approved facility. There were significant delays in places becoming available at such approved premises, of 69 days in one case and 118 days in the other. The claimants challenged the lawfulness of their detention in the period between the directions of the Parole Board and their eventual release.

[40] The Court of Appeal approached the issue as a matter of the construction of the relevant statutory provisions. It concluded that, as a matter of law, the Secretary of State was not obliged to release a life prisoner as soon as release was directed by the Parole Board. McCombe LJ stated:

> "45. In the present cases, the panels knew when places were to be available at {Mandeville House} for these appellants and on that basis were prepared to direct release, compatible with public protection, with the recommendation that the appellants should reside at those premises when first released. It can safely be assumed, I think, that if that accommodation had not been available as part of the risk management plan, the panels would not have directed release at all.
>
> 46. The working of the Act is that the Board will direct a release in a manner that it consistent with the protection of the public. It may do so absolutely or it may do so, with the knowledge that certain safeguards can be put in place to achieve that result. The prisoner can have his release on that basis or not at all. In these cases, the appellants were released from custody in accordance with the release arrangements which the Board considered to be consistent with the protection of the public."

[41] The court held that the Parole Board decisions were properly to be construed as release subject to the risk management plan, including residence at approved facilities. It further held that where release is directed subject to such a condition then release must not be delayed beyond a reasonable time, which is to be determined on the facts of each individual case.

[42] In doing so, the court upheld the first instance decision of Whipple J, reported at [2016] EWHC 2057 (Admin), in which it was held:

> "As a matter of statutory construction, I conclude that the Secretary of State is not under any obligation to release a life prisoner from custody the moment the Parole Board directs release, rather he/she is obliged to implement that direction as soon as he/she is able to do so. Where residence at an {Approved Premises} is a condition of release, that moment comes when the condition is capable of being fulfilled." (para [35])

[43] A first instance leave decision of Langstaff J in *R (Elson) v Greater Manchester Probation Trust* [2011] EWHC 3692 (Admin) was cited in which the judge held:

> "s.28 of the 1997 Act cannot sensibly be interpreted to provide that as soon as a Parole Board takes a decision in which it directs release, albeit under conditions or at some future time, the Secretary of State is under a duty there and then and thereby to ensure that that release takes place forthwith. That would give no effect to the provisions of s.31; it would not recognise the difference in language between s.28 and s.32; it would in my view simply have been beyond the contemplation of Parliament that the alternative, which would need to have been in place *(for)* immediate release to be effected, would operate in an impractical way – as Ms Davies points out, if it were to be the case that it was anticipated that a Parole Board might make a direction which was conditional as to time or circumstance, that (so far as a circumstance such as accommodation in a hostel was concerned) the hostel would have to be held available just in case the Board at its hearing might decide that particular prisoner under review was to be released, even though it equally might not. Supervision arrangements would have to be made in anticipation of a possible outcome; appointments with psychiatrists and the like would have to be in place – all of which would be on a provisional basis which, given that the decision lies in the power of the Parole Board which has

not yet considered it, might or might not be given effect to. I cannot sensibly construe s.28 in such a way that it would have that effect." (para [23])

[44] The 2022 Act introduced a new section 32ZB into the 1997 Act as follows:

> "(2) The Secretary of State must give effect to the direction of the Parole Board as soon as is reasonably practicable in all the circumstances including, in particular, the need to make arrangements in connection with any conditions that are to be included in the life prisoner's licence under this Chapter."

[45] Thus, the criterion of reasonableness, at least in relation to section 28, has been placed on a statutory footing. The question at issue in these proceedings is whether, on a proper interpretation of Article 28 of the 2008 Order, the same criterion governs the release of a prisoner in Northern Ireland.

[46] The 2008 Order uses different forms of wording in Article 18 and Article 28 in relation to the question of release. Under Article 18, the DOJ's obligation to release arises "as soon as…the Parole Commissioners have directed P's release." By Article 28(5), "where…the Parole Commissioners direct P's immediate release on licence…the Department of Justice shall give effect to the direction."

[47] In *Elson* Langstaff J mentions the difference in statutory wording between sections 28 and 32 of the 2003 Act in its previous form. He does not, however, analyse whether, properly understood, there is any material difference between the obligations in terms of timing.

[48] The Article 18 duty on the DOJ, as interpreted in *Bowen*, is not to immediately release the prisoner on the making of the PCNI direction, but to release the prisoner as and when the necessary conditions are fulfilled, subject to this being achieved within a reasonable time. The Article 28 obligation is to give effect to a PCNI direction for immediate release. In semantic terms, "as soon as" and "immediate" convey the same meaning. They import an obligation to do a certain act without delay.

[49] As is apparent from the reasoning in *Bowen*, and the evidence in this case, the release of a prisoner cannot be effected immediately following a direction. There will always be a period of delay whilst administrative steps are taken and arrangements put in place. On the evidence of Ms Redmond, this may be a period of hours or days but, as the facts of *Bowen* illustrate, may be a much longer period.

[50] The statutory obligations must also be read in the context of the purpose of the legislation. The release of prisoners serving public protection sentences ought not to occur unless and until the threshold is met – namely, that it is no longer necessary for the protection of the public from serious harm that he should be confined. The use of

licence conditions is an integral part of this determination. One of the express statutory purposes of such conditions is, after all, the protection of the public – see Article 24(8) of the 2008 Order. The answer to the threshold question must entail a consideration of both the standard and more bespoke conditions – see Colton J in *Re Moon's Application* [2021] NIQB 59 at para [28] and Rooney J in *Re Whittle's Application* [2022] NIKB 7 at para [27].

[51] I am not persuaded that the difference in statutory wording between Article 18 and Article 28 should give rise to a different interpretation. It would be surprising, and anomalous, if the release of a prisoner pursuant to Article 18(3) was subject to a criterion of reasonable practicality whilst an Article 28(5) release was required to be effected immediately.

[52] I have therefore concluded that the PCNI can lawfully direct the release of a prisoner under Article 28 of the 2008 Order on a conditional or contingent basis. If they do, the DOJ is not obliged to release the prisoner immediately but only when the specified conditions are fulfilled. Once this has been achieved, the release must take place immediately. The conditions are to be fulfilled within a reasonable time, which is to be judged on the individual facts of any given case.

[53] I have reached this conclusion for the following reasons:

(i) It is entirely consistent with the purpose of the legislation which has, as its focus, the protection of the public;

(ii) The use of licence conditions is a key part of the PCNI's consideration of this issue in every case;

(iii) It cannot have been the intention of Parliament that prisoners subject to public protection sentences would be released immediately when licence conditions could not be fulfilled;

(iv) It is consistent with the evidence of the DOJ which is to the effect that, in every case, a reasonable period of time is required to allow for the processing of the prisoner out of custody and for all associated arrangements to be put in place;

(v) The analysis therefore chimes with both legislative purposes and pragmatic reality;

(vi) It also obviates the need for perpetual adjournment of PCNI hearings pending further inquiries as to the availability of, for example, suitable accommodation. Such adjournments can only cause delay and cost to public funds.

[54] The 2022 statutory amendments in England & Wales have brought welcome clarity to the issue but they do not, in my view, support the contention that the

retention of the word "immediate" in Article 28 in Northern Ireland prevents the conditional release approach.

[55] I have set out above the Explanatory Note in relation to the 2022 Act which focussed on the false expectations engendered by the use of the word "immediate" rather than any legal impediment created thereby. In *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, Lord Steyn observed:

> "Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like."

[56] I am therefore fortified in my ultimate conclusion by the context in which these legislative amendments were effected.

***Conclusion***

[57] I have therefore concluded that the decision of PCNI dated 19 September 2024 was lawful. The recommendation, at para [52] of the decision in relation to 'graduated release' was merely a recommendation and did not form part of the direction and therefore is not amenable to judicial review.

[58] The question of whether or not the conditions were fulfilled within a reasonable time in the case of Mr McAllister did not arise for determination in these proceedings and I make no finding in this regard.

[59] I am satisfied that the applicant raised an arguable case and I therefore grant leave but dismiss the application for judicial review. I will hear the parties on the question of costs.