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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY CD

AND IN THE MATTER OF A DECISION TAKEN BY THE LIFE SENTENCE REVIEW COMMISSIONERS ON 3 AUGUST 2005

AND IN THE MATTER OF THE HEARING OF A REFERRAL BY THE LIFE SENTENCE REVIEW COMMISSIONERS IN THE CASE OF CD

AND IN THE MATTER OF THE LIFE SENTENCES (NORTHERN IRELAND) ORDER 2001

Before Kerr LCJ, Campbell LJ and Higgins LJ

KERR LCJ

Introduction

[1] The appellant is a life sentenced prisoner. He was released on licence in 1996 and recalled to prison for alleged breach of his licence in 1997. He appeals from a judgment of Girvan J dismissing his application for judicial review of the decision of Life Sentence Commissioners on 3 August 2005 not to direct his release from prison.

[2] The appeal gives rise to a number of issues: the standard of proof required to establish serious criminal allegations made in proceedings before the Commissioners; whether cross-examination of witnesses on key issues is necessary for such proceedings to be compliant with the European Convention on Human Rights and Fundamental Freedoms (ECHR); and the

extent to which there has been delay such as to offend against article 5 (4) ECHR.

Factual background

[3] The appellant is now aged 46. On 16 September 1982, he and a co-accused were convicted of the murder of a Mr Farren. The appellant was also convicted of robbery. He was sentenced to life imprisonment on the charge of murder and to a determinate sentence in respect of the robbery. On 26 April 1996, having been in custody for somewhat over 14 years, he was released on licence under section 23 of the Prison Act (Northern Ireland) 1953.

[4] On 5 March 1997 the appellant was arrested for alleged sexual abuse of his two nieces. The alleged offences included acts of indecent assault, gross indecency and buggery. There was objective medical evidence that the girls had been sexually abused by someone. When interviewed by the police, the appellant denied the allegations.

[5] The older niece, G, made allegations to a teacher which were investigated by the relevant Health and Social Services Trust. Further allegations were made by her sister, L. Both G and L were interviewed and their evidence was videotaped. L's allegation involved complaints of oral and anal sexual assaults. There was medical evidence of repeated anal penetration of L. She alleged that the sexual assaults had occurred with emission of semen, some having fallen on the living-room carpet of the girls' grandmother's house where the assaults took place. The appellant lived at that house at the material time. Traces of semen attributable to the appellant were found there. He declined initially to explain how that came about but subsequently alleged that solitary masturbation in the living room was the explanation. G made allegations of a similar nature and alleged inter alia emission of semen in the appellant's bedroom. Traces of semen were found on the bedroom carpet. The appellant claimed that this again was due to solitary masturbation.

[6] On 13 January 1998, the charges against the appellant were withdrawn by the Director of Public Prosecutions following a direction of no prosecution. The reason for the decision was, apparently, that to require the nieces to give evidence was not in their best interests.

[7] Between 12 November 1998 and 10 November 2000 the Life Sentence Review Board, which was then the non-statutory administrative advisory body that advised the Secretary of State on matters relating to life sentence prisoners, refused to recommend the appellant's release. He unsuccessfully challenged the decision of the Board. In a judgment delivered on 29 June 2001, Nicholson LJ rejected the argument that the assessment of the applicant's guilt could only be made following conviction by a court of competent jurisdiction. He held that the function of the Board was to assess

the risk to the public if the prisoner was released and that it should take into account the extent of risk arising from offences which the Board believed he had committed, even if he had not been charged.

[8] On 8 October 2001 the Life Sentences (Northern Ireland) Order 2001 and the Life Sentence Commissioners Rules (Northern Ireland) 2001 came into force. On 29 October 2001 the appellant's case was referred to the Commissioners. Although originally recalled under the earlier legislation (the Prison Act), he fell to be treated as a recall prisoner within the definition of the 2001 Order. The panel which ultimately heard the referral under article 9(4) of the 2001 Order was chaired by Mr Peter Smith QC. The hearing of the referral was completed on 15 June 2005 and judgment was given on 3 August 2005.

[9] The panel heard evidence from a number of professional witnesses and police officers on behalf of the Secretary of State, and from three witnesses on behalf of the appellant, who also gave evidence on his own behalf. Transcripts of the police interviews of L, G and the appellant were read and the panel saw the video-recorded evidence of L and G. Neither G nor L was called to give oral evidence.

[10] Following objection by the appellant's legal advisers, on 16 March 2004, Mr Smith convened a preliminary hearing on the question whether the Secretary of State should be directed to subpoena the two witnesses. On 12 May, the Secretary of State applied under Rule 19(1) to call G (now an adult) as a witness. At a hearing before the panel on 18 May 2004, the Secretary of State's solicitor indicated that she was not willing to attend and that it was felt to be inappropriate to subpoena her. The Secretary of State proposed to rely on the documentary and video evidence. The panel directed that G be afforded by the Secretary of State such encouragement and support as might be reasonable to secure her voluntary attendance. If she remained unwilling, the Secretary of State should obtain information as to the reasons for declining.

[11] It became clear that G feared ostracism by her family if she gave evidence. In light of this, and of the fact that she had been the victim of a serious sexual assault, the panel thought it would be unreasonable to compel her to give evidence. It transpired, however, that G was planning to move to Turkey and counsel argued before the panel that this undermined her claim to fear of ostracism. The panel does not appear to have accepted this and following further objections, it indicated that it would favourably consider an application by the applicant to subpoena G to allow her to be cross-examined as if she had been called as a witness by the Secretary of State. The appellant declined to take this course, a move which the panel (at paragraph 15 of its decision) characterised as "a perfectly legitimate tactical manoeuvre" allowing him to complain about the unfairness of the failure to subpoena G

while avoiding the danger that her oral evidence could strengthen the case against him.

[12] The hearing before the Commissioners took place on 21 March 2005, 31 May and 1 June 2005, concluding on 15 June 2005. The decision was issued on 3 August 2005.

The panel's decision

[13] The panel described its function in paragraph 3 of its decision in the following terms: -

> "…the Secretary of State must first prove on the balance of probabilities facts which, on the assumption that CD was released on the basis that there was no more than minimal risk of him committing serious harm, indicate that at the date of recall there was a significant risk of him committing serious harm. If, but only if, such facts are proved, we must then go on to consider whether the risk posed at this point in time by CD is capable of being safely managed in the community and, if not, whether there are steps that might be taken with a view to reducing the current risk to a level that could, in the future, be safely managed in the community."

[14] The admissibility of the evidence of L and G is dealt with in paragraphs 15-22 of the decision. The panel relied on *R (Brooks) v Parole Board* [2004] EWCA Civ 80 in concluding that the evidence of the recorded interviews was admissible. Then at paragraph 15 the panel said: -

> "The panel has concluded that [applicant's counsel's] approach to the issue of G being subpoenaed was a perfectly legitimate tactical manoeuvre by which he sought, on the one hand, to characterise the failure to subpoena G as unfair while, on the other hand, he sought to avoid being instrumental in securing her attendance at the hearing and giving evidence with the consequent danger of the case against CD being strengthened. The panel remains of the opinion, for the reasons given, that it would have been unreasonable to have directed that G be subpoenaed".

[15] The panel went on to accept, however, that the decision not to direct the Secretary of State to subpoena G did not dispose of the argument that the use of the video and written evidence was so unfair that it should not rely on the documents. It held that it was not bound by the strict rules of evidence, and that the criterion for admissibility was relevance. The panel considered *R v Parole Board ex p Smith and ex p West* [2005] UKHL 1 and *R (Sim) v Parole Board* [2003] All ER (D) 368 and noted that in *Sim*, Keene LJ could "…envisage the possibility of circumstances where the evidence in question is so fundamental to the decision that fairness requires that the offender be given the opportunity to test it by cross-examination before it is taken into account at all". Ultimately, however, it relied on Kennedy LJ's dictum at paragraph 37 of *Brooks* that even if evidence was "fundamental" it could, depending on the circumstances, still be taken into account notwithstanding that it had not been given orally. The panel explained its reasons for taking it into account in the present case in paragraph 22: -

> "…not just transcripts but video-recordings of the girls' interviews are available not only to us, but also to [the applicant] and his legal representatives. Given that the two children can be both seen and heard giving their evidence and that [the applicant] has been afforded a full opportunity to refute their allegations we do not think it is unreasonable to take their evidence into account, nor do we think that doing so amounts to a denial of a fair hearing".

[16] It had been submitted for the applicant that, because the allegations made against him amounted to criminal conduct, a particular approach to the standard of proof of those allegations was required. The panel dealt with this at paragraph 50 as follows: -

> "Mr Hutton submitted that because the conduct alleged against [the applicant] involved the commission of criminal offences we could only reach the conclusion we have reached if the case against [the appellant] was "compelling". For our part we are uncertain as to what this adds to the requirement that we must be satisfied (as we are) on the balance of probabilities that [the applicant] committed the acts alleged against him. We understand the point made in *Re H and others* [1996] AC 563 at 586 to the effect that the more serious the allegation the less likely it is that it occurred. But this had no bearing on the instant case. Here it is clear beyond peradventure that

> both girls were the victims of buggery. There is nothing inherently unlikely in a member of their family having been the perpetrator. Indeed, Ms Deirdre Mahon gave evidence to the effect that most children who are abused are abused by male relatives. We do not pretend that this was an easy case to decide, but for that very reason we gave every aspect of it most careful scrutiny and we are clear in our minds that [the applicant] committed the grave sexual assaults on L and G to which we have referred"

[17] Having expressed itself satisfied on the balance of probabilities that the applicant did carry out the sexual abuse alleged, the panel then considered whether it would be safe to direct his release, and at paragraphs 54 *et seq* determined that to do so would be inappropriate at this stage.

Girvan J's judgment

[18] The learned judge dealt with the standard of proof issue in paragraphs 23 and 24 of his judgment. Having referred to the opinion of Lord Nicholls of Birkenhead in *Re H (Minors)* [1996] AC 563, at paragraph 24 the judge said: -

> "[24] In paragraph 50 the panel stated they understood the point made in *Re H* to the effect that the more serious the allegation the less likely it was to have occurred. The panel went on to state that this had no bearing in the instant case because it was clear that the girls had been the victims of buggery and there was nothing inherently unlikely in a member of the family being the perpetrator bearing in mind that most children who are abused are abused by male relatives. It is true that many abusers are family members. However it remains the fact that deliberate abuse by a family member is abnormal and out of the ordinary. An uncle is usually less likely to have subjected his nieces to a sexual abuse attack than to have lost his temper and slapped them, as Lord Nicholls pointed out in the context of a stepfather. However the standard of proof remains a standard of proof on a balance of probabilities. The inherent improbability of an event in itself is taken into account in weighing the probabilities in deciding whether the event occurred. The way the panel expressed the

> decision in paragraph 50 might at first sight suggest that in this case the panel did not give full weight to what Lord Nicholls was saying in *Re H*. The decision however goes on to show that the panel members were "clear" that the applicant committed the sexual assaults. The panel expressed itself in a way indicating that the evidence fully satisfied the panel of the involvement of the applicant in the sexual abuse. The applicant has failed to persuade me that the panel in fact approached its decision-making in the wrong way or misconceived the issue as to the cogency of the evidence required. Being "clear" in their mind after careful consideration of the evidence that he committed the "grave sexual assaults" the panel clearly considered the evidence of sufficient cogency to persuade them of such grave charges."

[19] The arguments in relation to the calling of witnesses were considered by the judge in paragraph 22 of his judgment. He concluded that there no misdirection or error of law in the panel's approach. The decisions not to issue subpoenae to require the attendance of the witnesses and not to require the Secretary of State to secure their attendance were "based on tenable viewpoints". The judge said, "looking at the procedure as a whole what the panel did was fair and did not result in any procedural unfairness to the applicant since the applicant could [have], if he had wished, subpoenaed and cross-examined G and L". Referring to the decision of the House of Lords in *Re McClean* [2005] UKHL 46, the judge expressed himself satisfied that the approach adopted by the panel did not work any unfairness to the appellant.

[20] In relation to the argument that there was a breach of the applicant's article 5 (4) right to a speedy determination of the lawfulness of his detention because of undue delay by the Commissioners, Girvan J concluded that "the applicant's side" was largely to blame for the delay and that there had not been no violation of this right. In any event, since the detention was not unlawful, the applicant had suffered no loss of liberty in consequence of any breach.

[21] Other arguments – particularly in relation to whether the allegations made against the appellant were fresh criminal allegations of an entirely different character which could not be said to be related to the original murder conviction and that the Commissioners had allowed a number of unqualified witnesses to give evidence – were dealt with by the judge but since these have not been pursued on appeal, we do not need to refer further to them.

The arguments on appeal

[22] For the appellant Mr Gerald Simpson QC made three principal submissions. He argued that the Commissioners had misdirected themselves on the standard of proof required to establish the allegations against the appellant. In particular, they had failed to adopt the approach outlined in the decision of the Court of Appeal in England and Wales in *R (N) v Mental Health Review Tribunal* [2005] EWCA Civ 1605. That decision, he suggested, made clear that the need for compelling evidence (and therefore an adjustment to the flexibility by which the conventional standard of proof was applied) arose not only because of the inherent unlikelihood of particular allegations but also because of the serious consequences to the person against whom they were made. Although the judgment in that case was given after the Commissioners' decision, it merely reflected the law as it existed at the time that their decision was given and indeed the statement of the law in the *N* case was to be found in earlier decisions.

[23] On the question whether G and L should have been required to give evidence, Mr Simpson said that their evidence was fundamental to the allegations that lay at the heart of the determination of the facts. The proceedings before the Commissioners were adversarial. The only proper way in which this central evidence could be tested was by cross examination of the key witnesses. The appellant should at least have been entitled to cross examine G, who was an adult at the time of the hearing before the Commissioners. Moreover, he argued, it was inappropriate to impose on the appellant the task of calling the witness. In the context of an adversarial oral hearing this placed the appellant in an invidious and disadvantageous position. It left him open to the suggestion (which the panel duly made) that those representing the appellant were engaged in a tactical manoeuvre. It made no difference to the level of disadvantage suffered by the appellant that the panel did not intend that this observation be taken as pejorative. The conclusion of the panel had the effect of rendering the appellant unable to make effective submissions that the failure to produce the witness deprived him of the right to challenge her critical evidence in an effective way.

[24] Mr Simpson took us through the various letters that passed between the Commissioners, the Prison Service and the Police Service in relation to efforts made by the Commissioners to persuade G to give evidence. These included the suggestion that G might be permitted to give evidence by video-link. Mr Simpson claimed that no-one had spoken directly to G and the liaison officer, Detective Constable Williamson, had only had contact with G's mother. There was therefore, he said, no evidence before the Commissioners of the steps taken to encourage G to give evidence, despite the direction of Mr Smith that this should take place. No full investigation of the reasons that she would not attend was undertaken, therefore, Mr Simpson argued. The

decision not to subpoena the witness or to require the Secretary of State to secure her attendance could be impeached on that account.

[25] In relation to the final issue (the question whether there was a delay constituting a violation of the appellant's right to a speedy determination of the lawfulness of his detention) it was submitted that the period between 29 November 2001 when the matter was first referred to the Commissioners and the decision given on 3 August 2005 - a period of 45 months, the equivalent of a determinate sentence of imprisonment of 7½ years - did not fall within the definition of a meaningful safeguard and could not be regarded as amounting to a speedy determination. Mr Simpson examined each of the periods comprised in the time that passed between the original referral and suggested that fault for the delay that occurred could not be attributed to the appellant.

[26] For the Commissioners Mr Larkin QC dealt first with the issue of delay. He referred to a detailed chronology provided by the Commissioners. He claimed that in this complex case the Commissioners did all that lay in their power to ensure that the matter was dealt with as expeditiously as possible. This extended to contact between the chairman of the panel and the Legal Services Commission to try to deal with the issue of legal aid for the appellant. A number of hearing dates were proposed that proved not to be suitable. Much of the time was taken up with the question of whether G would give evidence. Mr Larkin claimed that a full examination of all the stages of the hearing and the preparation for it would reveal that there was no delay on the part of the Commissioners.

[27] On the subject of whether G should have been called as a witness, Mr Larkin suggested that the issue of a subpoena was clearly contemplated as an exceptional measure by the court in *Brooks*. In any event, no conceivable disadvantage accrued to the appellant because he was given the opportunity to issue a witness summons and to cross examine the witness.

[28] In relation to the issue whether the panel had applied the correct standard of proof, Mr Larkin claimed that the panel was clearly aware of the serious consequences for the appellant of an adverse decision on the question whether he had committed the sexual abuse. He suggested that the painstaking approach of the panel, as evidenced by the language of paragraph 50 of the decision, demonstrated that it was scrupulous in its examination of the evidence against the appellant. The starting and end point for the Commissioners was their statutory function. If, at the end of the day, the Commissioners were satisfied to the civil standard that the appellant has committed the offences concerned which moves risk from minimal to non-minimal, their duty was clear. Mr Larkin claimed that the Commissioners had followed *Re H*. He suggested that this was a case in which they were clear that the evidence against the appellant was of "high quality".

Delay

[29] We can deal with this issue briefly. Having examined the chronology furnished by the Commissioners, we are satisfied that there was no delay on the part of the respondent in dealing with this case. It was beset with a number of problems, not the least of which was the obtaining of legal aid for the appellant. We are satisfied that the Commissioners acted with appropriate dispatch.

Procedural irregularity

[30] It is beyond debate that the evidence of G and L was central to the case against the appellant. The question whether they should be required to give oral evidence and whether, if they declined to do so, their evidence should be accepted in any other form, is immediately relevant. In *Hussain v UK* [1996] 22 EHRR 1, ECtHR discussed the requirements for an oral hearing where a review of the continued detention of a life sentence prisoner who has served the relevant punitive or tariff part of his sentence is undertaken. At paragraph 60 of the judgment the court said: -

> "The court is of the view that, in a situation such as that of the applicant, where a substantial term of imprisonment may be at stake and where characteristics pertaining to his personality and level of maturity are of importance in deciding on his dangerousness, Article 5(4) requires an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses."

[31] Although these observations relate more directly to the second stage of the process, they were considered in *Brooks* to apply to the first, fact-finding stage and we can conceive of no reason that they should not be so applied. The case of *Brooks* almost completely parallels the instant case, save for one salient feature. In that case the applicant was recalled for offences against his ex-partner, including rape. Still loving the applicant, and being sorry that he was in prison (while not saying the offences did not occur), she withdrew her allegations and declined to give evidence before the Parole Board that considered the applicant's case. By a majority (Kennedy LJ and Wall LJ) the Court of Appeal held that hearsay evidence of her allegations could be taken into account. Clarke LJ dissented, stating that the evidence of the former partner was so fundamental to the case that the opportunity to cross-examine her should have been given. Kennedy LJ acknowledged that there could be circumstances where the importance of the evidence made it essential that it be given orally but this depended on the particular facts of the case. At paragraph 37 he said: -

> "I, like Keene LJ in *Sim* can envisage the possibility of circumstances where the evidence in question is so fundamental to the decision that fairness requires that the offender be given the opportunity to test it by cross-examination before it is taken into account at all. As Elias J indicated in the present case, that could require production of the complainant if someone in the position of SL was willing to testify, but as Keene LJ went on to point out, the requirements of fairness depend on the circumstances of the individual case, and in my judgment there was nothing unfair about the decision of this panel to proceed as it did."

[32] The difference between this and the present case is that no-one in *Brooks* appeared to raise the question of issuing a witness summons to the claimant's ex-partner. Here, the question of whether a subpoena should be issued to the witness was dealt with exhaustively. The appellant in this case relied heavily on what it was suggested was the anomalous position adopted by the panel of concluding, on the one hand, that it would be unfair for it to subpoena the witness and, on the other, that it would accede to a request from CD to apply for a subpoena. We confess that we have found these two positions somewhat difficult to reconcile but, ultimately, the issue, as it seems to us, is whether unfairness accrued to the appellant by the course that the panel decided to follow.

[33] What disadvantage, one may ask rhetorically, in fact accrued to the appellant? He could have subpoenaed the witness and had been assured that if she attended, his counsel could have cross examined her. If she refused to attend, he could have argued that this had an adverse impact on the credibility of her story. (Indeed, an analogous argument was in fact made based on G's initial professed intention to give evidence and her subsequent decision that she would not). When pressed on the matter, Mr Simpson was driven to say that what the appellant lost was the chance to have the witness refuse the subpoena and then to argue that her evidence should either be left out of account altogether or rejected. But, as we have pointed out, such an argument was available and in fact was deployed on his behalf.

[34] Given the established unwillingness of G to attend to give evidence (about which we shall say a little more presently) the choice faced by the panel in relation to her evidence was a stark one. Should they ignore evidence which, if accepted, would be critical to their decision as to whether the appellant should be released? We consider that the proposition that this evidence be ignored is simply untenable. As Lord Bingham of Cornhill said in *Re McClean* [2005] NI 490 (paragraph 29), the primary concern of the commissioners is to protect the safety of the public. It is inconceivable that

evidence such as this should have been wholly discounted if the commissioners were to keep faith with their statutory obligation.

[35] Mr Simpson raised a further argument about the evidence in relation to G's unwillingness to attend which does not appear to have been canvassed before Girvan J. This was to the effect that the inquiry into her reasons for not wishing to give evidence was insufficient and was not pursued in the manner that the chairman of the panel had directed. From a perusal of the contemporaneous records we are satisfied that this claim cannot be accepted. While there may not be unequivocal evidence that Detective Constable Williamson spoke directly to G about the possibility of her testifying by video-link, we think that this is more likely than not. In any event, G's mother made it absolutely clear that she was not prepared to give evidence in this way. We are satisfied that the procedure chosen by the panel "worked no unfairness" to the appellant, to borrow the language of Lord Bingham in *McClean*. We therefore reject this ground of appeal also.

The standard of proof

[36] The debate as to whether there is a "third standard of proof" somewhere between the civil and criminal standards is a venerable one, but it has been put to rest by the decision in *Re H*. It is now clear that there is a single civil standard, which is flexible (although in some exceptional cases, such as the making of ASBOs, the criminal standard is used in civil matters *R (on the application of McCann) v Crown Court at Manchester* [2001] EWCA Civ 281). As Lord Nicholls said in *Re H* at pp. 586-7: -

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age step-daughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a

> generous degree of flexibility in respect of the seriousness of the allegation."

[37] Mr Larkin claimed that the panel had in fact applied the principle articulated in this passage but we cannot agree with that submission in light of what was said in paragraph 50 of the decision. It is true that the panel acknowledged the existence of the principle but it proceeded then to explain why it considered that it should not be applied. It said that the "point made in *Re H* that the more serious the allegation the less likely it is that it occurred … had no bearing on the instant case" because there was medical evidence that the girls had been sexually abused and that there was nothing inherently unlikely in a member of the family being the perpetrator bearing in mind that sexual abuse of children is most frequently carried out by male relatives. This betrays an incorrect approach, in our opinion. The improbability of the appellant having committed the offences is not eliminated simply because it can be shown that the complainants had been the victims of sexual abuse. As Girvan J pointed out, deliberate abuse by a family member is abnormal. It appears to us, therefore, that the panel should have recognised that the offences alleged against the appellant called for a flexible approach to the civil standard of proof requiring more cogent evidence than would be conventionally required.

[38] It is clear that the need to look for compelling evidence to discharge the burden of proof is not confined to the situation where it can be said that the commission of offences is inherently unlikely. This proposition was examined by Richards LJ in *N's* case. At paragraph 64 he said: -

> "It is true that the rationalisation put forward in *In re H* and followed in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 focused on the seriousness of the allegation rather than on the seriousness of the consequences if the allegation is proved. The reasoning was that the more serious the allegation the less likely it is that the event occurred and that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. In general, the seriousness of an allegation is a function of the seriousness of its consequences, and vice versa, so that the rationalisation in *In re H* and *Secretary of State for the Home Department v Rehman* will take due account of the seriousness of the consequences if an allegation is proved. We accept Mr Bowen's submission, however, that there will be cases

> where proof of an allegation may have serious consequences even though it cannot be said that the matter alleged is inherently improbable. It seems to us that the same general approach must apply in such cases, even though the rationalisation put forward in *In re H* does not readily accommodate it. The more serious the consequences, the stronger the evidence required in practice to prove the matter on the balance of probabilities."

[39] We agree with the reasoning in this passage. It would be illogical not to recognise that where serious consequences will accrue to the person against whom allegations are made that this should be reflected in the quality of the evidence that will be required to make them good. Mr Larkin claimed that the panel recognised that high quality evidence was required to establish the allegations that G and L had made but there is no reference to this in paragraph 50 or elsewhere in the decision and, as we have said, the panel appears clearly to have stated that the need for more compelling evidence did not arise in this case.

[40] It is true that the panel stated that they scrutinised every aspect of the case and that they were clear that the appellant had committed the sexual assaults. These statements led Girvan J to conclude that the panel had *in effect* applied an adequately rigorous approach to the examination of the evidence so as to be satisfied that the calibre of the evidence was sufficient to establish the case against the appellant. We respectfully cannot agree. If the panel considered that no higher quality of evidence than normal was required, the fact that the evidence was scrupulously examined and that the panel was clear in its conclusion cannot convert the proof against the appellant to a condition to which the panel believed it did not need to aspire. It is clear that the panel did not consider that a more compelling quality of evidence was required. For the reasons that we have given, we consider that this was necessary.

Conclusions

[41] We have determined that there was no avoidable delay in this case that can be laid at the door of the commissioners. We have decided that the procedure adopted by the panel and in particular its decision not to issue a subpoena or to require the Secretary of State to do so did not work an unfairness to the appellant. We have concluded, however, that the panel was wrong in deciding that no higher quality of evidence than normal was required in order to establish the allegations against the appellant. It may well be that, if it had recognised that this was necessary, it would have found

that the evidence was sufficiently compelling but we cannot be sure that this would inevitably have been the outcome.

[42] We will therefore allow the appeal and grant the appellant judicial review of the panel's decision in the form of an order of certiorari quashing it. His application will have to be considered afresh and we suggest that this should be by a differently constituted panel.