

Judicial Communications Office

28 May 2019

COURT FINDS THAT BOUNDARY COMMISSION FAILED TO FULLY CONSIDER CONSULTATION RESPONSES

Summary of Judgment

Mr Justice McCloskey, sitting today in the High Court, allowed a challenge brought by an interested member of the NI electorate [to whom anonymity has been granted] to the Boundary Commission for Northern Ireland's Final Recommendations Report, presented to the Secretary of State for NI last September, relating to the configuration of the Northern Ireland constituencies following their reduction from 18 to 17. The judicial review challenge was allowed on the grounds that the Commission fettered its discretion and infringed the legal principles governing public consultation by failing to fully consider consultation responses received in the final stage of the elaborate statutory process which it had followed.

The Parliamentary Constituencies Act 1986 ("the 1986 Act") is the statutory framework within which the Boundary Commission for Northern Ireland ("the Commission") has to operate. The 1986 Act provides that the Commission must prepare periodic reports for consideration by Parliament. There is a statutory time limit for doing so (the report at the centre of these proceedings had to be presented between 1 September and 1 October 2018). The Commission's report is directed to the Secretary of State in the first instance with the exercise culminating in the laying before Parliament of a draft Order in Council. The Secretary of State is not bound by the Commission's recommendations.

Section 5 of the 1986 Act establishes a structured consultation process which the Commission is bound to observe. It first must decide on the constituencies which the Commission is proposing to recommend and then publish the proposals. This triggers a twelve week period for the making of representations. The Commission is obliged to conduct public hearings between the fifth and tenth weeks of this period. This is known as the "initial consultation period". Upon its completion, a second phase is initiated where the Commission must publish the representations received and the records of the public hearings and consult on these for a four week period (the "secondary consultation period"). At this stage the Commission may either adhere to its original proposals or contemplate revising them so as to recommend different constituencies. If the former, no statutory obligation to consult further arises. If the latter, the Commission must formulate revised proposals and publish them triggering a third public consultation phase of eight weeks' duration. At the conclusion of this third phase (where it arises) the Commission may make further revisions without an additional consultation. The Commission must take into account the written representations made to it at every stage together with representations made at the public hearings.

The key provisions in these proceedings are Rules 5 and 7 of Schedule 2 to the 1986 Act – "Rules for Distribution of Seats". Rule 5 lists five matters which a Commission may take into account in reviewing the distribution of seats, if and to such extent as they think fit:

- Special geographical considerations, including in particular the size, shape and accessibility of a constituency;

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- Local government boundaries as they exist on the most recent ordinary council election day before the review date;
- Boundaries of existing constituencies;
- Any local ties that would be broken by changes in constituencies; and
- The inconveniences attendant on such changes.

There is no obligation on the Commission to take any of these factors into account, nor does the legislation attempt to prescribe factors which the Commission cannot permissibly take into account.

Rule 7 provides for different arrangements to be applied in Northern Ireland where the Commission consider that having to apply Rule 2 (which prescribes how to calculate the electorate of any constituency against the UK electoral quota) would unreasonably impair their ability to take into account the factors set out in Rule 5 or their ability to comply with requirements for the periodic submission of reports. Rule 7 therefore enshrines a mechanism which may be applied in place of Rule 2. It is permissible only where two conditions are satisfied: the first is purely arithmetical in nature (and is not contentious in these proceedings) and the second requires the Commission to form an evaluative judgement to the effect that applying Rule 2 would “unreasonably impair” its ability to take into account the factors in Rule 5 or its ability to comply with section 3(2) of the 1986 Act (the submission of reports by a specified date).

In considering the statutory framework, the Court formulated the following guiding principles:

- The common law principles on consultation apply to every stage of the Commission’s activities from the publication of its initial proposals to the publication of its final proposals;
- There is no hierarchy of consultation responses: all must be considered fairly, conscientiously and with an open mind;
- The legislature has entrusted the Commission with a wide margin of appreciation;
- The Commission may have recourse to Rule 7 only where it has opted to take into account any or all of the factors specified in Rule 5;
- The Commission is empowered to have resort to Rule 7 at any stage of the various phases identified above; and
- Electorally, Northern Ireland is a special case.

The Commission’s Reports

The Commission, faithful to the legislative scheme, published a total of three reports:

- The “Provisional Proposals Report” (the “PPR”) published in September 2016.
- The “Revised Proposals Report” (“RPR”) published in January 2018.
- The “Final Recommendations Report” (“FRR”) published in September 2018.

The PPR

The foundation of this exercise by the Commission was the reduction of the number of constituencies in the UK from 650 to 600 which, in the case of Northern Ireland, entailed a drop from 18 to 17. The Court said it was clear from the PPR that the Commission, in the exercise of its discretion, had determined to take into account certain of the Rule 5 factors: excluding the fifth – “inconvenience” – which, by statute, could not be reckoned in this particular exercise. The

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Commission said it had tested a diverse range of options for a 17 seat regional structure and concluded that the limited flexibility afforded by Rule 7 would not produce a significantly better outcome. It concluded that Rule 7 should not be applied.

The results of the first consultation exercise highlighted the difficulties of satisfactorily delineating the new 17 constituency model together with the various representations received regarding the propriety of applying Rule 7 which had emerged as a significant feature. The paper debated the alternatives of a three and four constituency model in Belfast and then examined the constituencies provisionally proposed for other parts of the country. The Commission formed the view that “the four seat Belfast plan, which produced the least disruption across Northern Ireland, was the preferred solution”.

The RPR

In the RPR, the Commission said the strength and depth of submissions received during the consultations had now persuaded it that the conditions for engaging Rule 7 had been met. In the section relating to Belfast, the Commission said it had tested both 3-seat and 4-seat options and, having taken account of the submissions and further extensive work, had concluded that its preferred 4-seat model would respect existing boundaries more comprehensively not only in the Belfast area but also across Northern Ireland. This would result in 10 constituencies having only minor changes (whereas under the most 3-seat Belfast model, only eight constituencies would have satisfied this test). The Commission further commented that the 4-seat model produced a lower level of disruption amongst voters across the region.

In an affidavit to the Court, the Commission said it had considered this proposal represented the best means of achieving the statutory electoral constituency quotas, whilst also taking account of the statutory factors contained in Rule 5. The Commissioners considered that the application of Rule 2 would unreasonably impair their ability to take the statutory factors into account and they therefore decided to rely upon Rule 7 to make revised proposals which gave rise to fewer changes to existing constituency boundaries across the region and better reflected the existence of local ties than was the case under the previous proposals. The Commission explained that the RPR generated a considerably higher number of responses than was stimulated by the PPR. The summary of consultation responses paper stated that the main Unionist parties favoured a four constituency Belfast model engaging Rule 7, while the main Nationalist party, Sinn Fein, proposed a three constituency Belfast model without applying Rule 7.

There then followed “an extensive remodelling exercise to produce viable options for consideration.” The Commission considered that the splitting of wards to achieve the overall model for Northern Ireland should be avoided unless there was overwhelming evidence suggesting that it was absolutely necessary. In accordance with the statutory criteria under Rule 5, the Commission said it had taken the following factors into account: special geographical considerations; local government boundaries; boundaries of existing constituencies; local ties; and inconvenience. The Commission said it believed that the considerations at this stage should be matters of ‘fine tuning’ rather than the introduction of matters of significant change. It said it had not closed its mind to the idea that the secondary consultation could produce evidence of an entirely different and potentially more compliant model than that contained in its revised proposals but, in light of the limited opportunity for the public to reply to the final proposals, the Commission believed that any significant changes to the revised proposals plan could only be justified by legally relevant evidence of an overwhelming degree.

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The FRR

This report stated that the strength and depth of submissions received during the consultations on the provisional proposals persuaded the Commission that the condition in respect of Rule 7 had been met. It said the additional flexibility permitted by Rule 7 allowed for significantly greater alignment with the discretionary factors both in individual constituencies and across Northern Ireland. The FRR formulated the Commission's final proposals in terms which adhered to those in the RPR, with two adjustments namely:

- To transfer the Dungiven ward from mid-Ulster to Sperrin, and
- To retain the Mallusk ward within the constituency of south Antrim rather than Belfast north. Notably, in this context the Commission highlighted the "established principle of pre-serving the integrity of ward boundaries".

Grounds of Challenge

PL ("the Applicant") challenged the FRR. The grounds of challenge raised issues of error of law, the provision of reasons, procedural fairness and fetter of discretion.

The error of law and reasons issue

The first issue was whether the Commission was under a duty to give reasons for deciding to resort to Rule 7. In the opinion of the court, the Commission is obliged to equip the public with sufficient information to ensure that representations and responses are made on an informed basis.

The Court commented:

"The statute does not expressly require the Commission to provide reasons for resorting to Rule 7 where it chooses to do so. However, I consider that the combination of considerations identified [above] impels to the conclusion that reasons should be provided where the Commission determines to invoke Rule 7. This will promote observance of the common law principles of consultation, together with the implicit values of fairness and transparency. Furthermore, the duty has a particular resonance in a case such as the present where, in embarking upon the initial statutory consultation period, the Commission explicitly broadcast to the public that it had consciously determined not to resort to Rule 7 at that stage and explained why."

The court reasoned that, logically, the next question must be whether the Commission had discharged its duty to explain its recourse to Rule 7 following the initial consultation period. The determination of this issue required consideration of the discrete cohort of common law principles. The Court said there is no universal standard to be applied but the context, including the statutory context, must be considered. Furthermore, it should be borne in mind that there was no adversarial or adjudicative element in what the Commission was doing. Thus there was no duty to state material findings of fact or to resolve conflicts of evidence. Nor was there any element of participants or stakeholders winning or losing.

The Court considered that its review of the Commission's conduct should recognise an appropriate degree of latitude given the specialised field in which it was operating. Furthermore, it recognised

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that courts should not scrutinise reasons with “analytical rigor” and ought to forgive obvious mistakes that were unlikely to have misled anyone.

The Court considered there was a sufficient evidential foundation to warrant viewing the Applicant as a knowledgeable and informed member of the broader audience considering the Commission’s successive reports.

The Commission’s initial stance (expressed in the PPR) was that resort to Rule 7 was not considered to be justified. The Court commented that it had undertaken internal modelling and analyses but the important step of engaging with the public had not been taken. Furthermore, the constituency proposals formulated at this stage were provisional: “The Commission’s approach to Rule 7 was, plainly, not a concluded one. Furthermore, it was obliged as a matter of law to retain an open mind on this issue, as well as others”. The Court said it was clear that the Commission was, throughout the process, “taking into account” the four permitted statutory factors enshrined in Rule 5.

The Court said it could not agree with the argument that the Commission’s espousal of least change, or minimal change, was incompatible with the statutory criteria, considered in tandem with the breadth of the Commission’s statutory discretion. The judge stated:

“I consider that when one reads the various texts published by the Commission fairly, reasonably and through the lens of legal principle outlined above, it emerges with sufficient clarity that the Commission resorted to Rule 7 in fulfilment of the guiding principles which it had devised for itself, namely maintenance of the status quo as far as possible and, consequentially, minimal change to existing constituencies. These principles are entirely compatible with the specific statutory factors and the broad discretion invested in the Commission. ... Giving effect to all of the foregoing, I conclude that the Commission’s decision to resort to Rule 7, while expressed in somewhat cryptic terms, was in accordance with the governing legal standards regarding the provision of reasons. The Commission will, doubtless, be mindful that it can aspire beyond compliance with minimum legal requirements and, further, that one aspect of such aspiration could entail expressing itself more fully and clearly upon issues of this kind, with the consequential benefit of stronger insulation against this species of legal challenge.”

The Error of Law Issue

The Court said there was a considerable overlap between the reasons challenge and the error of law challenge. The Applicant had seized on the reference in one of the Commissioners’ papers to “inconvenience”. While this is the fifth of the statutory factors enshrined in Rule 7 it was, by virtue of the applicable statutory jigsaw, an inadmissible consideration in the exercise which the Commission was performing. The Court noted that, in an extensive body of evidence, this was a sole and isolated reference to the inapplicable statutory factor. Furthermore, there were no other signs or signals that it had a contaminating effect. The court was satisfied that the reference had given rise to no contamination in the FRR and rejected this discrete ground of challenge.

Fetter of discretion/unlawful consultation

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The final limb of the Applicant's challenge was based on paragraph 5.11 of the FRR and contended that the Commission wrongfully and unlawfully fettered its discretion after having adopted its revised recommendations.

The Court said it would in this case proceed on the basis that the consultation arrangements established by Section 5 are exhaustive.

The Court considered that all consultation responses be treated equally. It said the common law does not recognise hierarchies of consultees or priorities in consultation responses. Nor does the statutory regime in play. The judge stated:

"The Commission's approach to and treatment of representations made in response to the consultation invitation during the second of the statutory engagement periods is expressed unambiguously. It proceeded on the basis of a self-devised stratagem of a general rule and an exception. It failed to appreciate the full extent of what the statutory provisions permitted it to do or what was required of it by the common law. It considered itself bound in some way, though not absolutely, by the proposals published in its RPR. I conclude that the Commission thereby fettered its broad discretion. Simultaneously, its decision making process was vitiated by procedural unfairness, as the common law right of all consultees to have their views considered fully and conscientiously and on the basis of a level playing field was frustrated. The Commission failed to recognise that as an unavoidable consequence of the structured and staged consultation process established by the governing legislation certain themes, suggestions and proposals might be more fully debated and ventilated in public than others and, separately, might emerge for the first time in the latter stages of the overall exercise. Summarising, I conclude that, in consequence of this approach, the Commission, at one and the same time, fettered the demonstrably broad discretion conferred on it by the legislature and acted in contravention of those aspects of the common law principles governing consultation which I have identified."

Conclusion

The Court concluded:

"The Commission and its Secretariat undertook their task assiduously and conscientiously at every stage, demonstrably so. However, the objective application of the applicable legal rules and principles by this court of supervisory superintendence impels to the conclusion that it has fallen into error in one specific and undeniably material respect. The Applicant's challenge succeeds accordingly."

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (www.judiciary-ni.gov.uk).

ENDS

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