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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MARK PATRICK TOAL FOR JUDICIAL REVIEW

-v-

PAROLE COMMISSIONERS FOR NORTHERN IRELAND

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McCloskey J

Introduction

[1] The decision of the court granting leave to apply for judicial review is attached at Appendix 1. This sets out the nature and contours of the Applicant's challenge. In brief compass, the Applicant's central contention is that the impugned decision of a three member panel of the Parole Commissioners (the "*Commissioners*"), whereby they directed that the Applicant, a sentenced prisoner aged 33 years, would not be released is unlawful because the panel "… *declined to permit* [the Applicant] *to have witnesses called and examined at the oral hearing*". This is said to have given rise to procedural unfairness. As appears from what follows, consideration will also have to be given to the inter-related question of whether the panel, in its consideration and refusal of the Appellant's proposal that its decision be deferred for the specified purpose, erred in law in other associated respects.

Outline Factual Matrix

[2] The Applicant, having been convicted of robbery, criminal damage, attempted criminal damage, possessing a bladed article in public and two counts of assaulting police officers, was punished on 24 February 2012 by the imposition of an extended custodial sentence with a minimum term of

eight years' detention, coupled with two years on licence, in respect of the robbery offence and five further sentences of three months' imprisonment, ordered to operate concurrently. His criminal record dates from the age of 13 and contains over 100 further convictions.

[3] The following are the material dates and events:

(i) On 13 February 2017 the Department of Justice ("*DOJ*") referred the Applicant's case to the Commissioners.

(ii) On 21 June 2017 a single Commissioner provisionally directed that the Applicant should not be released.

(iii) On 18 August 2017 a hearing before a panel of three Commissioners was convened. This culminated in the Applicant's application to adjourn/defer the Commissioner's final decision.

(iv) On 25 August 2017 the panel promulgated its decision, the core aspect whereof was that it declined to direct the Applicant's release on licence.

Hitherto, it was the Commissioners' position that by virtue of their cyclical *modus operandi*, the effect of this decision is that the earliest date when the Applicant can expect a further oral hearing is May 2018. The intervention of this court, therefore, occurs at a point just short of halfway of the twilight period separating the two oral hearings. This issue may have to be probed further from the perspective of remedy *(infra).*

Statutory Framework

[4] The subject matter of Part 2, chapter 4 of the Criminal Justice (Northern Ireland) Order 2008 (the "*2008 Order*") is "*Release on Licence*". As the Applicant is the subject of an extended custodial sentence, Article 18 applies to him. This provides:

> *"(1) This Article applies to a prisoner who is serving –*
> *(a) an indeterminate custodial sentence; or*
> *(b) an extended custodial sentence.*
> *(2) In this Article –*
> *"P" means a prisoner to whom this Article applies;*
> *"relevant part of the sentence" means –*
> *(a) in relation to an indeterminate custodial sentence, the period specified by the court under Article 13(3) as the minimum period for the purposes of this Article;*

(b) in relation to an extended custodial sentence, one-half of the period determined by the court as the appropriate custodial term under Article 14.

(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.

(4) The Parole Commissioners shall not give a direction under paragraph (3) with respect to P unless –

(a) the Department of Justice has referred P's case to them; and

(b) they are satisfied that it is no longer necessary for the protection of the public from serious harm that P should be confined.

(5) P may require the Department of Justice to refer P's case to the Parole Commissioners at any time –

(a) after P has served the relevant part of the sentence; and

(b) where there has been a previous reference of P's case to the Parole Commissioners, after the expiration of the period of 2 years beginning with the disposal of that reference or such shorter period as the Parole Commissioners may on the disposal of that reference determine;

and in this paragraph "previous reference" means a reference under paragraph (4) or Article 28(4).

(6) Where the Parole Commissioners do not direct P's release under paragraph (3)(b), the Department of Justice shall refer the case to them again not later than the expiration of the period of 2 years beginning with the disposal of that reference.

(7) In determining for the purpose of this Article whether P has served the relevant part of a sentence, no account shall be taken of any time during which P was unlawfully at large, unless the Department of Justice otherwise directs.

(8) Where P is serving an extended custodial sentence, the Department of Justice shall release P on licence under this Article as soon as the period determined by the court as the appropriate custodial term under Article 14 ends unless P has previously been recalled under Article 28."

In the statutory language the Applicant's "appropriate custodial term" is eight years, while the "extension period" is two years, per article 14(3)(a) and (b). His release entitlement date under Article 18(8) has not yet been reached. However, by virtue of Article 18(2)(b) and (c) he has been eligible for release on licence since 24 August 2015. The statutory test of "… satisfied that it is no longer necessary for the protection of the public from

serious harm that P should be confined" is colloquially expressed in the acronym "SROSH".

[5] By virtue of paragraph 1 of Schedule 4 to the 2008 Order, the Parole Commissioners are a statutory entity whose members possess expertise from a range of material disciplines – psychiatric, psychological, legal and others. The "*Proceedings of the Commissioners*" are governed by procedural rules made under paragraph 4 of Schedule 4, which provides:

> *"4.—(1) The Department of Justice may make rules with respect to the proceedings of the Commissioners.*
> *(2) In particular rules may include provision—*
> *(a) for the allocation of proceedings to panels of Commissioners;*
> *(b) for the taking of specified decisions by a single Commissioner;*
> *(c) conferring functions on the Chief Commissioner or deputy Chief Commissioner;*
> *(d) about evidence and information, including provision—*
> *(i) requiring the Commissioners to send to the Department of Justice copies of such documents as the rules may specify;*
> *(ii) requiring the Department of Justice to provide specified information to the Commissioners;*
> *(iii) for the giving of evidence by or on behalf of the Department of Justice, the Police Service of Northern Ireland and others;*
> *(iv) about the way in which information or evidence is to be given;*
> *(v) for evidence or information about a prisoner not to be disclosed to anyone other than a Commissioner if the Department of Justice certifies that the evidence or information satisfies conditions specified in the rules;*
> *(vi) preventing a person from calling any witness without leave of the Commissioners;*
> *(e) for proceedings to be held in private except where the Commissioners direct otherwise;*
> *(f) preventing a person who is serving a sentence of imprisonment or detention from representing or acting on behalf of a prisoner;*
> *(g) permitting the Commissioners to hold proceedings in specified circumstances in the absence of any person, including the prisoner concerned and any representative appointed by the prisoner."*

This is the enabling power which gave birth to the Parole Commissioners' Rules (Northern Ireland) 2009, (the "*2009 Rules"*).

[6] Certain aspects of this procedural code fall to be considered in this judgment. Rule 3 prescribes the "General Powers of the Commissioners". Rule 3(1) provides:

> "*Subject to the provisions of these rules, the Commissioners may regulate their own procedure in dealing with any matter as they consider appropriate.*"

Rule 7, under the rubric of "Representation", provides:

> "*Where a party wishes another person other than a representative or a witness to be admitted to an oral hearing, the party shall make a written application to the Commissioners for the admission of such person.*"

[7] By Rule 8 DOJ must provide the Commissioners and the prisoner with specified information and reports in advance of a hearing. Herein lies the genesis of the so–called "dossier". Rule 11 provides, under the rubric "*Evidence of the Prisoner*":

> *"Where the prisoner wishes to make representations about the case or to adduce documentary evidence, the prisoner shall serve such representations and documentary evidence on the Commissioners and the Secretary of State within 14 weeks of the case being listed."*
>
> *1) Following receipt of the papers from the parties, the single Commissioner or the chairman of the panel may require either party to produce further evidence or information on any topic relevant to the conduct or determination of the case and may stay the progress of the case until a response to their requirement has been received.*
>
> *(2) Subject to rules 8(2) and 9, any further evidence or information produced under paragraph (1) shall be served by the party responding on the Commissioners and on the other party.*
>
> *(3) A party may not supplement or add to case papers, response papers or further evidence and information produced and served under this rule without the leave of the*

single Commissioner or the chairman of the panel dealing with the case, as the case may be."

Once again, the dominant role of the adjudicating and decision making agency, the Commissioners, coupled with the conferral and exercise of appropriate discretionary powers, is notable.

[8] The power of adjournment reposes in Rule 15. This provides:

"(1) The single Commissioner or the panel may at any time adjourn the consideration of a prisoner's case by way of direction for any purpose they consider appropriate

(2) On adjourning a case under paragraph (1), the single Commissioner or chairman of the panel shall give such directions as they consider appropriate for ensuring the prompt consideration of the case.

(3) Any direction made under paragraphs (1) or (2) shall be recorded in writing and shall be provided to the parties within 7 days of the date of the direction and reasons for that direction shall be given at the same time.

(4) Where an oral hearing is adjourned without a date having been fixed under paragraph (2), the chairman of the panel shall give the parties not less than 14 days notice, or such shorter notice to which all parties may consent, of the date, time and place of the resumed hearing."

This is one of the more important procedural provisions in the context of the present challenge. I shall examine the contours of this discrete power in a little detail *infra*.

[9] The subject matter of Rule 18 is "Directions of Chairman of the Panel". This provides, in material part:

> *"(1) Subject to paragraph (2), the chairman of the panel may give, vary or revoke directions for the conduct of the case allocated to the panel, including directions in respect of matters such as:*
>
> *(a) the timetable for the case;*
>
> *(b) the varying of the time within which or by which an act, required or authorised by these rules, is to be done;*
>
> *(c) the service of documents;*

(d) the submission and production of evidence;

(e) the curing or waiving of irregularities;

(f) the listing, location and adjournment of hearings, including hearings under paragraph 7(b);

(g) the calling of witnesses;

(h) the appointment of a special advocate and the conduct of a special advocate under rule 19;

(i) the representation of the prisoner;

and following appointment under rule 12(2), the chairman of the panel shall consider whether such directions need to be given at any time.

(2) Directions under paragraph (1) may be given, varied or revoked either:

(a) of the chairman of the panel's own motion; or

(b) on the written application of a party to the Commissioners which has been served on the other party and which specifies the direction which is sought.

(3) Within 7 days of making a direction under paragraph (1) the chairman of the panel shall serve on the parties such direction which shall be recorded in writing with reasons and dated and signed by the chairman of the panel.

(4) Within 7 days of being served with a direction given under paragraph (3) either party may appeal to the Chief Commissioner by serving a written notice of appeal on both the Chief Commissioner and the other party stating the grounds of the appeal."

This broadly formulated power is one of the important components of the panoply of procedural mechanisms available to the Commissioners under the 2009 Rules. I consider that it invites the following analysis:

(i) It is plainly directed to matters of procedure pertaining to hearings conducted by panels of Commissioners.

(ii) The words "*such as*" convey clearly that the list which follows in (a) to (i) is not an exhaustive one.

(iii) The rule is empowering in nature, conferring on the chairman of the panel a self-evidently broad discretionary power.

(iv) The illustrative list of (a) – (i) indicates that certain directions will be received by the parties in purely passive mode, whereas other directions may require the parties to react positively, for example by serving documents or providing specified evidence.

[10] Rule 21, under the rubric of "Witnesses", provides:

> *"(1) Where one party wishes to call witnesses at the oral hearing, that party shall make a written application to the chairman of the panel, and shall serve a copy on the other party at least 6 weeks before the date of the hearing, giving the name, address and occupation of the witnesses whom that party wishes to call and the substance of the evidence that party proposes to adduce.*
>
> *(2) The chairman of the panel may grant or refuse an application under paragraph (1) and shall communicate within 7 days the decision to both parties, giving reasons in writing, in the case of a refusal, for the decision.*"

Though not spelled out in express and prescriptive terms, I consider it clear that every application under this Rule should specify the grounds upon which it is proposed that oral evidence be adduced from the witness in question. Two scenarios, inexhaustively, immediately come to mind. The first is that of a witness who might be, for instance, a family member or a prison chaplain or a fellow prisoner who has not reduced his or her evidence to written form in the medium of a report or witness statement. The second is that of a professional witness who has done so and whose written evidence the Applicant may be seeking, in specified respects, to challenge, elucidate or augment.

[11] By Rule 22(2) oral hearings are conducted in private. Rule 23, entitled "Oral Hearing Procedure", provides in material part:

> *"(1) At the beginning of the oral hearing the chairman of the panel shall explain the order of proceedings which the panel proposes to adopt.*
>
> *(2) Subject to this rule, the panel shall conduct the oral hearing in such manner as they consider most suitable to the clarification of the issues before them and generally to the just handling of the case and they shall, so far as appears to them appropriate, seek to avoid formality in the proceedings.*
>
> *(3) Subject to paragraphs (5), (7) and (8) the parties shall be entitled to appear and be heard at the oral hearing and take such part in the proceedings as the panel considers appropriate and the parties may:*
>
> *(a) make submissions;*
>
> *(b) hear each other's evidence and submissions;*
>
> ***(c) call any witnesses whom the chairman of the panel has authorised to give evidence in accordance with rule 21**; and*
>
> *(d) put questions to any witness appearing at the oral hearing.*
>
> *(4) Subject to rule 11 the parties may not, without leave of the panel, rely on or refer to documents, information or evidence which do not appear in substance in the case papers."*

[Emphasis added]

Thus the parties to a hearing are entitled to adduce oral evidence from a witness provided that a prior written application under Rule 21 has been made to and approved by the panel chairman. I shall consider further this discrete procedural mechanism *infra*.

The dossier in this case

[12] The panel, in the usual way, had available to it a dossier of information consisting mainly of a range of reports prepared by certain professionals and agencies. Having regard to the issues (figuratively) joined between the Applicant and the panel at the conclusion of the hearing on 18 August 2017, it is appropriate to highlight the reports within the dossier emanating from three disciplines in particular. First, there were two reports prepared by an officer of the Probation Board for Northern Ireland ("*PBNI*"). The first of these describes the outcome of a risk management

meeting attended by relevant professionals, including the author, on 13 June 2017 in the following terms:

> "…….. *Mr Toal no longer meets the criteria to be assessed as Significant Risk of Serious Harm. This assessment has been influenced by PBNI's recent change in policy regarding Significant Risk of Serious Harm. However, this remains a dynamic assessment and should Mr Toal's circumstances change, the assessment will be reviewed immediately.*"

The report further explains that the Applicant was on a waiting list for participation in the following programmes: sensory attachment intervention (8 sessions), wellness recovery action plan (4 sessions) and the well man programme (6 sessions). The Applicant was also awaiting an assessment of a psychiatric nature in order to determine the desirability of offering him cognitive behavioural therapy.

[13] The first of the PBNI reports concludes in the following terms:

> "….. *PBNI remain of the view that Mr Toal should not be released. In addition to the relevant points made in the PDP co-ordinator's report conclusion (dated 27.03.17), PBNI are now concerned that there is some evidence of Mr Toal having difficulties in managing his own behaviour within this period (in terms of his adjudications), while still subject to the controlled environment of the prison. Aside from this, it remains important for the previously identified pieces of work to be completed. The analysis of such work will determine how best to navigate the assessed risks regarding Mr Toal and if there are any further issues which have been identified and need to be addressed prior to his release.*"

The "*adjudications*" mentioned in this passage were five in total, all occurred during the period 09 May to 02 June 2017 and they resulted in the suspension of the Applicant from the temporary release scheme.

[14] The second of the two PBNI reports is dated 14 August 2017. This was generated by a direction of the panel Chairman. It notes that the assessment of the Applicant's suitability for cognitive behavioural therapy had commenced but was not yet completed. The assessments of a high likelihood of re-offending and posing a risk of serious harm ("*ROSH*")

were repeated, as was the progression from "*significant risk of serious harm*" ("*SROSH*") to a (mere) "*risk of serious harm*". The report continues:

> "*PBNI do not feel that the risks surrounding Mr Toal's offending have dramatically changed or reduced since the previous Risk Management meeting on 22/11/16. Indeed, in consideration of the events of the past nine months, it would be PBNI's view that the risks surrounding Mr Toal's offending largely remain and that these need to be further addressed before he could be considered suitable for release.* ***Rather, the change regarding his*** [SROSH] ***status*** *solely arises as a result of PBNI's revised ["ROSH"]* ***to others policy and procedures***."
>
> [My emphasis.]

[15] This second PBNI report concludes:

> "*PBNI maintain a view that Mr Toal is not suitable for release at present. PBNI feel that Mr Toal would benefit from the further planned intervention from NIPS psychology to address issues of emotional regulation. Mr Toal's response to such interventions will be crucial in fully evaluating whether he can be managed in the community and, if not, what outstanding pieces of work need to be progressed.*"

The report then adverts to planned psychological intervention and the absence of any associated timescale, continuing:

> "*…. PBNI need to see evidence that Mr Toal can maintain such progress and his current level of stability within the controlled environment of the prison for a sustained time scale in order to demonstrate that his risk can be managed in the community ….*
>
> *PBNI also believe that a return to Pre-Release Testing would be necessary to facilitate some further measure of Mr Toal's ability to manage in the community prior to any release. However, any such progression would need to be further considered within a multi-agency forum ….*"

[16] Within the dossier also was an "ADEPT" report, dated 18 August 2017. This date indicates that the report was made available to both the panel and the Applicant on the day of the Commissioners' hearing. "ADEPT" is the name of a HMP Maghaberry project concerned with addressing the evils of drug and alcohol dependency and addiction. The project employs case workers who possess appropriate health, social care and counselling qualifications. The author of this particular report had engaged with the Applicant in six dedicated sessions during the period June to August 2017. The author, having noted *inter alia* the Applicant's lapse in May 2017 when on temporary release, expressed the following opinion:

> "*Given Mr Toal's demonstration of his willingness to work with services I would say he is in maintenance in his recovery journey; which suggests that he is not thinking of using and is working to maintain a drug and alcohol free lifestyle.*"

[17] The third component of the dossier which it is appropriate to highlight is the "Psychology" section. This reveals that the panel had available to it two separate, and detailed, reports from this discipline compiled in August 2015 and November 2016 respectively. The more recent of these two reports had the following expressed aim:

> "*….. to provide an assessment of Mr Toal's risk and to make recommendations for any intervention work which may be required to assess his level of risk ….* [and to make] *…. an assessment of Mr Toal's cognitive functioning.*"

The author, a Principal Forensic Psychologist, provided a detailed and impressively structured report containing the following "*summary and opinion*":

> "*…. Mr Toal has a number of both static and dynamic risk factors present. A number of recommendations have been made within this report in order for him to try to reduce his level of risk. These include individual intervention in relation to his offending behaviour, further exploration regarding his attitudes and beliefs about violence, relapse prevention work in relation to misuse of alcohol or other substances, further relaxation/mindfulness courses in order to help him to regulate his emotions and intervention in relation to* [a specified matter]... "

The report concludes:

> "*I do not recommend Mr Toal for release at this stage, but recommend that he commences the aforementioned intervention work at the earliest opportunity and that he progresses towards pre-releasing testing at the appropriate point in time, subject to the usual risk assessments.*"

The Applicant signalled his concurrence with the author's recommendations.

The hearing before the Panel

[18] The decision under challenge was the product of an oral hearing conducted by a panel of three Commissioners on 18 August 2017. This date is to be considered within the framework of the chronology in [3] above. The Applicant was represented by counsel. He was in attendance and gave evidence, elicited by questioning from his counsel followed by panel members' questions. The panel's decision states:

> "*Mr Toal's barrister then made some closing submissions, after taking instructions. The panel agreed to consider all of the submissions and deal with them in this decision.* ***His first submission was that the case should be adjourned for three months and the reconvened panel should take oral evidence from PBNI, Psychology and ADEPT about the risks posed by Mr Toal. That timescale could allow for some pre-release testing to occur.***"
>
> [Emphasis added.]

Thus the panel, having reserved its decision on this adjournment application in due course, promulgated its substantive decision, which incorporated a discrete refusal ruling. At this juncture it is necessary to consider the other sources of the evidence of the adjournment application made to the panel of Commissioners towards the conclusion of the hearing. These are threefold.

[19] First there is a partial transcript of the hearing. This discloses that at one point there was a recess of several minutes to enable the Applicant to confer with his counsel. When the hearing resumed there was a lengthy question and answer session involving one of the panel and the Applicant. During these exchanges the Applicant stated:

> "*I would prefer for this to be adjourned for a few months and go get psychology to work with me, I would work with your man, I'm not hiding I could do that within three months, not a problem and then I can come and present myself and go 'I'm ready to be released'.*"

A few moments later the Applicant continued:

> "*…. I'm getting knocked back and people are not coming and taking responsibility and doing their work. What I'd prefer to happen is if I'm going to be knocked back adjourn for a few months cos I don't want to be sitting here again next year, next nine months with the same thing happening again …*
>
> *I want people to just turn round and say put this back and say to psychology look work with Mark, get the work done so he can present himself, knowing I'm ready for release …..*"

The Applicant next protested, in terms, that the professional help which he had expected to receive in prison had not begun until the last six months of his determinate term. The Applicant's counsel then addressed the panel:

> "*The panel would have heard in some of Mr Toal's last evidence twice it was mentioned his preference to adjourn this hearing, now I'm under instructions to make that application …. He's anxious that ADEPT would certainly be given the opportunity of voicing their opinion of Mr Toal …. that's his application.*"

In further exchanges with the panel counsel stated that the "*adjournment application*" had "*… developed organically over this hearing*". Adjourn to what end? Counsel stated:

> "*… in order for probation psychology ADEPT to come and offer their views personally before the panel and for oral evidence to be heard in that regard ….* [and] *it may also allow a period of time in the interim to see what in the way of pre-release testing and further work could be done … His eligibility for that is on the horizon now and that is perhaps an additional benefit that could be derived from an adjournment.*"

[20] As appears from [10] – [16] above, the dossier compiled for the purpose of the panel hearing on 18 August 2017 included reports from the separate disciplines of probation, psychology and ADEPT. This is the preface to what the panel chairman said at the conclusion of the hearing (per the transcript):

> "*Maybe we could issue an adjournment direction post the closing of the hearing if we decide and issue directions for whatever further evidence we want to take if that's the road we go down or whether if we go down a different, whether it's release or not release, all our options are open to us then at the end ….*
>
> *So we are quite clear what your case is and the applications before us so we will now have a think about the best thing to do in your case. Your solicitors will get notified of our decision which could be for release, could be for not release or it could be an adjournment any one of those three things. We are going to have a discussion now about what we think is best and make that decision and your solicitor will be notified next week.*"

The Applicant, seizing the final say, rejoined:

> "*….. I would just prefer an adjournment if yous are not going to let me out and get the work done ….*"

The final source of evidence relating to the adjournment issue is the following passage in the Applicant's affidavit:

> "*At the oral hearing, it was submitted on my behalf that in the light of the fact that no witnesses had been put forward by the* [DOJ] *the hearing should be adjourned for three months to permit the panel to receive oral evidence from, in particular, a member of the Probation Service who had submitted reports of relevance to my case. It was also submitted that such an adjournment would allow for pre-release testing to occur.*

The Impugned Decision

[21] In its written decision, which followed a week later, the panel dealt with the adjournment application in these terms:

> "*This submission was rejected by the panel. Firstly, three months would be insufficient to allow any significant pre-release testing to occur.* ***Secondly, the panel do not have the power to require witnesses to attend oral hearings.*** *Thirdly, the panel felt that the position of the parties and witnesses was clearly set out in the dossier.*"
>
> [Emphasis added.]

The panel's substantive decision was:

> "*The panel …… was not satisfied that it is no longer necessary for the protection of the public from serious harm that Mr Toal be confined and therefore directs that he not be released at this time.*"

In thus deciding the panel made a series of recommendations relating to good conduct, engagement with professionals and pre-release testing.

[22] In the pre–action protocol ("PAP") letter the Applicant's solicitors formulated three discrete challenges to the panel's decision, namely (in substance) irrationality, inadequate reasons and misdirection in law in the panel's approach to the attendance of witnesses at oral hearings. The last of these three challenges ultimately matured into the basis of the court's decision to grant permission to apply for judicial review (see Appendix 1). The solicitors developed this ground firstly by referring to Rules 18 and 21 of the 2009 Rules, continuing:

> "*The Applicant would therefore say the hearing could have been adjourned and directions given by the chairman for certain witnesses to attend and give oral evidence. In the light of the change in the ROSH finding and the lack of clarity with respect to the change in policy which it is said resulted in the changed finding, it was important for the Applicant to be given an opportunity to explore this issue with, in particular, the Probation Officer in the case. In order for the panel and the Applicant to properly understand the new policy and its implications in this case, the panel should have directed that the Probation Officer attend the oral hearing.*"

The contention ultimately advanced was that the panel "*… should reconsider its decision in the light of the contents of this letter and direct the Applicant's release*".

[23] The Commissioners' solicitors, addressing the foregoing issue in their letter of reply, stated the following:

> "*In the first instance, as set out in paragraph 18 of the Decision, the Commissioners do not have the power to require witnesses to attend an oral hearing.*
>
> *However, in line with the judgment of Maguire J in [***CK***], the Commissioners accept that, in "an exceptional case", they possess the ability to call a witness, where "there is a compelling justification for doing so".*
>
> *Maguire J opined that such an exceptional case might arise:*
>
> *"…where the failure to hear from a witness, whom neither party has chosen to call, might significantly impede the panel from being able to carry out its function or where to leave matters without calling the witness might cause a substantial injustice or a fundamental procedural unfairness."*
>
> *In this case, no application for a Direction under Rule 18 PCRNI in respect of the attendance of any witness was made by any party either prior to, or during, the oral hearing. If, as the final paragraph of section 4 of your pre-action letter suggests, your client wished to receive oral evidence from the probation officer, it was open to your client to make such an application, but as outlined, no such application was received.*
>
> *In any event, as set out in paragraph 18 of the Decision, the Commissioners "felt that the position of the parties and witnesses was clearly set out in the dossier", and confirm that they had sufficient information from the updated reports, and from the evidence provided at the oral hearing, to discharge their statutory responsibility under Article 18(4)(b) CJNIO**."*

[** the 2008 Order]

[24] The Commissioners' solicitors then turned to the refusal of the adjournment application, stating:

> *"As set out in Paragraph 18 of the Decision, the Panel received and considered your client's application for an adjournment (to take oral evidence from various individuals, and to allow some pre-release testing to occur), and declined the application on the basis that:*
>
> - *Three months would be insufficient to allow any significant pre-release testing to occur;*
> - *The Commissioners felt the position of the parties and witnesses was clearly set out in the dossier;*
> - *The Commissioners do not have the power to require witnesses to attend oral hearings;*
>
> *As a consequence, in light of the preceding section, and the view of the Commissioners that they were in possession of sufficient information in order to discharge their statutory responsibility, it was entirely appropriate for the Commissioners to decline the application to adjourn the hearing, and issue the Decision of 25th August 2017."*

Issue having been duly joined, the next material development was the initiation of these proceedings.

Panel hearings: the attendance of witnesses

[25] Rule 21 of the 2009 Rules, reproduced in [10] above, establishes a mechanism for the adduction of oral evidence from witnesses at hearings of panels of the Parole Commissioners. It has two main features. First, the initiative lies with the party desirous of adducing evidence in this fashion. Second, the decision whether to permit the reception of such evidence lies within the discretion of the panel chairman who must provide written reasons in the case of a refusal. Rule 21 co-exists with Rule 23(3)(c) and (d) (*supra*).

[26] The 2009 Rules do not expressly empower the panel to request, or require, the attendance of witnesses. This issue was considered recently in Re CK's Application [2017] NIQB 34, where a "no release" decision of a panel of Commissioners was challenged on the ground, *inter alia*, that the panel should of its own motion have required the attendance at the hearing of a Prison Service Psychologist who was the author of several reports included among the evidence considered. The main theme of the judgment of Maguire J is that the 2009 Rules are not to be placed in a linguistic straight jacket. Rather, they are to be construed and applied with a degree of flexibility appropriate to the individual context. So much is apparent from three passages in particular. First at [38]:

> *"The rules cannot deal with every eventuality and so should be approached flexibly and in a way that can take into account the unexpected factual scenario or the exceptional case and the need to equip the panel to perform its function judicially and in a manner which balances appropriately the interests involved, particularly the public interest in protecting society from the risk which a prisoner may represent together with the interest of doing justice to the individual whose liberty is at stake."*

Second, at [39]:

> *"It should usually be possible to read the rules in a way which is capable of dealing with the situation which has arisen."*

Third, with specific reference to Rule 21, at [40]:

> *"In a proper case, it seems to the court, there is room for sensible adjustment within the rules, though it equally seems to the court that any panel should have at the forefront of its mind the need to maintain the rule's evident purpose of preventing, by control of the process of adducing oral evidence, the risk of unfairness to a party or forensic ambush."*

[27] Next, the court decided unequivocally that a panel of Commissioners is empowered to call a witness. See [42]:

> *"Consistently with the court's acceptance that the rules should not be given an unduly confined or rigid reading, the better view, in the court's estimation, is to hold that the language of the rules read as a whole does not rule out the use of general powers, such as those found in rule 23, from enabling the panel itself to call a witness. This conclusion requires a number of suitable reservations, however. It seems to the court that the recognition of the existence of such a power does not mean that it should become a regular feature of the operation of panels. If that had been the intention, the court is inclined to accept that a rule modelled on the England and Wales rules would have been the appropriate course for the rule maker to have adopted. But it should not be impossible for the panel to call a witness in a*

case in which there is a compelling justification for doing so."

Pausing at this juncture, the submissions of Mr Sayers (of counsel), on behalf of the Commissioners, did not embody any contention that CK should not be followed as it is wrongly decided. For the avoidance of any doubt, I concur unreservedly with the reasoning and conclusions of Maguire J, while adding that the issues raised in these proceedings invite some development of the decision in CK, to be addressed *infra*.

The witnesses issue: analysis and conclusions:

[28] Mr Sayers submitted that the panel's statement that they "… *do not have the power to require witnesses to attend oral hearings*" discloses no error of law. Following some vacillation, I accept that "*require*", considered in the full context where it appears, attracts its narrow, ordinary and natural meaning. Thus this statement, viewed in isolation, is correct. This is not, however, the end of the matter. I consider that the panel's approach to the issue of deferring their final decision until the completion of a reconvened hearing entailing the reception of further evidence from specified professional witnesses invites the following analysis.

[29] First, there is no suggestion in the panel's formulation of the adjournment application or in any of the other relevant sources of evidence digested above that the panel was being asked to take any steps to arrange the attendance of any witness. Second, there is no acknowledgment in the panel's decision that, per Re CK, it was legally empowered to ask, or invite, witnesses to attend. Third, there is no recognition, express or implied, of the Rule 21 mechanism for securing the attendance of witnesses. Furthermore, there is no acknowledgment in the panel's adjournment refusal decision of the lateness of service of the ADEPT report or the rather lean terms in which it is framed or the possibility that oral evidence favourable to the Applicant could be elicited from its author.

[30] In addition there is no indication that the panel was alert to the possibility that its decision could be informed, enhanced and enriched by oral evidence from the author of the two PBNI reports on the important "SROSH/ROSH" issue, bearing in mind that the Board's new policy/revised criteria are not expounded adequately in either report. The court would be far more likely to accept than reject any reasoned consideration of this discrete issue by the panel. However, there is no evidence of such consideration. Nor was it argued, correctly in my view, that there is evidence from which this may properly be inferred.

[31] The foregoing analysis impels to the following conclusions. First, the panel misunderstood the Applicant's adjournment application and, in consequence, failed to engage with its essence. Second, the panel's approach was altogether too narrow and was not guided or informed by a consideration of all material factors, as detailed above. Third, the panel in my judgment failed to give consideration to the critical issue of fairness to the prisoner. Fairness, in this context, denotes fairness of the procedural species. There was no consideration of the question of whether the panel's overall decision making process might, as a matter of basic procedural fairness, require an adjournment for the purpose which the Applicant was pursuing.

[32] Mr Sayers placed some emphasis on the fact that the panel's refusal of the Applicant's adjournment application was based on three reasons, the second whereof was the statement that the panel "… *do not have the power to require witnesses to attend oral hearings*"(see [21] above). He submitted that if the court were to find an error of law in this aspect of the panel's decision, it would be appropriate to sever the unsustainable reason from the other two: the juridical equivalent of the familiar saying that one bad apple does not spoil the entire barrel. It was further argued that the Court should treat the first and third of the reasons given as dominant and to view the second as ancillary or peripheral in nature. I shall consider this submission through the prism of the analysis and diagnosis in [28] - [31] above.

[33] This argument engages two settled principles that the construction of every document is a question of law for the court and, where an intention on the part of the author is unexpressed, the essential question is whether it may reasonably be implied. Giving effect to the basic touchstones of considering the panel's report as a whole and in its full context, which includes the evidential materials highlighted above, I do not find it possible to infer an unexpressed intention to the effect advocated. Quite the contrary: an intention that the three reasons should have more or less equal force and validity is, in my judgement, readily distilled.

[34] One further offshoot of Mr Sayers' submission on this discrete issue was his invocation of [28] of Re McKevitt's Application [2004] NIQB 70, where Girvan J cited, and gave effect to, the following passage in De Smith, Wolff and Jowell, Judicial Review at 9-054:

> "*If good and bad reasons for a decision are given, the decision should stand provided that the reasons are independent and severable or the dominant reason is lawful.*"

I have already held that as a matter of construction the three reasons under scrutiny are not independent and severable and that neither (nor both) of the first and third reasons is (or are) to be construed as dominant. It follows that this passage does not avail the Respondent.

[35] I would, in any event, have certain reservations about its doctrinal correctness. It is not easily reconciled with well established principles applicable to the construction of words and passages, namely that they should be considered as a whole and in their full context. Nor does it harmonise readily with the entrenched principle that the intrusion of an immaterial consideration normally vitiates the end product. Furthermore, and notably, the passage invoked by Mr Sayers in argument belongs to an earlier edition of this work and is not reproduced in the equivalent chapter of the current incarnation of this work, De Smith's Judicial Review (7th Edition: See chapter 7 especially) or in the predecessor edition (the 6th). Finally, and in any event, I consider that, as submitted by Mr Heraghty (of counsel) on behalf of the Applicant the decision in McKevitt related to the taking into account of an impermissible consideration rather than the articulation of a reason bad in law.

[36] The court's final observation on the "witnesses issue" is that the exercise of juxtaposing the relevant passage in the panel's decision with the relevant extract from the PAP response of its solicitors (all reproduced above) is a revealing one. Fundamentally, it serves to highlight one important aspect of what the panel failed to do. Stated succinctly, the panel failed to acknowledge the powers available to it deriving from the 2009 Rules as construed in CK. I am not suggesting that the elegant essay contained in the solicitors' letter necessarily had to be mirrored precisely in the panel's decision. However, the latter should have contained at least a basic acknowledgement of the powers available to be exercised. There is none. Furthermore, I can identify no sufficient basis in the primary evidence to warrant an inference of this awareness. Finally, Mr Sayers' resort to the argument that the Parole Commissioners are an expert tribunal cannot, in this context, serve to redeem a failure so clearly diagnosed.

[37] On the grounds and for the reasons elaborated above I conclude that the panel erred in law in its assessment, consideration and determination of the Applicant's adjournment application.

The adjournment issue: further analysis

[38] While I have singled out what is termed the "witnesses issue" for focused consideration it is, of course, part and parcel of the wider adjournment issue forming the centrepiece of the Applicant's challenge. In short, while the several interrelated errors of law on the part of the panel diagnosed above vitiate its discrete decision to refuse the Applicant's

adjournment application and, in consequence, its inextricably linked substantive decision some further analysis, which serves to reinforce this conclusion, is appropriate.

[39] The main issue to be addressed under this banner is the correct construction and scope of the power of adjournment conferred on both the single Commissioner and the panel of Commissioners. This power is conferred explicitly by Rule 15 (*supra*). One of the arguments formulated by Mr Sayers in support of the panel's adjournment refusal decision was that Rule 15 confers a broad discretion. If one were to develop this argument, it would lead into that habitat of public law populated by concepts such as wide margin of appreciation and limited supervisory review by the court, normally confined to the extreme and unpromising pastures of Wednesbury irrationality.

[40] The flaw in this argument, in my judgement, is that it neither contains nor entails any recognition of the duty of procedural fairness owed to the prisoner – and, indeed, the other party, DOJ (per Rule 2) – at all stages of the Commissioners' process. This duty and the corresponding rights enjoyed by the prisoner are of the due process variety. They represent an implied element of all of the Commissioners' procedural powers. They constitute touchstones to be applied in any review of the lawfulness of the ultimate outcome, namely the Commissioners' substantive decision. In this context, the question is not whether the decision is substantively fair to the prisoner. Rather, the enquiry is whether it is infected by procedural unfairness.

[41] Procedural codes such as the 2009 Rules have, from time immemorial, incorporated powers of adjournment exercisable by the adjudicating agency concerned. The legality of the exercise of such powers has been the subject of judicial consideration in the decided cases from time to time, normally in the context of applications for judicial review of the acts of so-called "inferior" (not an attractive appellation) courts or tribunals. This has generated a clear and consistent line of authority that the judicial exercise of a power to adjourn hearings, processes or proceedings is to be scrutinised primarily through the prism of fairness, in the procedural (or due process) sense, to the affected party or parties. Some brief illustrations will suffice. It matters not that these belong to judicial decision making contexts other than that of the Parole Commissioners, given that the language in which a power to adjourn is formulated does not vary substantially from one procedural code to another and, further, taking into account that one is dealing here with an issue of general principle.

[42] As the decision of the Court of Appeal in SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284 illustrates clearly, any suggestion that the judicial exercise of a power of

adjournment is to be reviewed through the lens of rationality is fallacious. In that case the Court, in considering a complaint that a first instance immigration tribunal had erred in law in refusing an adjournment request, stated at [13]:

> *"First, when considering whether the immigration judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse.* ***The test and sole test was whether it was unfair.***"
>
> [Emphasis added.]

Thus any enquiry into the question of whether the refusal of an adjournment application lay within the range of reasonable responses available to the judicial entity in question is a misguided one.

[43] This issue was considered quite fully by the Upper Tribunal (Immigration and Asylum Chamber) in Nwaigwe v Secretary of State for the Home Department [2014] UKUT 00418 (IAC). This was an appeal against a decision of the first instance tribunal dismissing the appellant's appeal substantively and, *en route* thereto, refusing an application in writing for an adjournment by the appellant's solicitors made some few days previously on the ground that they had instructions that their client would be unable to attend the hearing on account of ill health. It was held that if a tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question is not whether the first instance tribunal acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing?

[44] A further illustration, from the local context, is instructive. In Re North Down Borough Council's Application [1986] NI 304, a challenge by judicial review was mounted to a decision of the Planning Appeals Commission refusing the application of an interested party for an adjournment of an appeal hearing. Carswell J advanced the proposition, uncontroversial I would suggest, that the Commission was duty bound to observe the rules of natural justice (at 321G/H), adding (at 322A/C):

> "*It has been constantly repeated that the tribunal must give to each of the parties the opportunity of adequately presenting the case made and that the ordinary principles of fair play must be observed ….*
>
> *It follows from these principles that if a party is to be given the opportunity of adequately presenting his case, the tribunal falls short of that standard when it fails to give him a fair chance of effective participation in its proceedings. What that degree of participation will be depends upon the nature of the procedure adopted by the Tribunal in question.*"

And at 323A/B:

> "*If a person entitled to appear at a hearing is unfairly deprived of an opportunity to present his case, that constitutes a breach of the rules of natural justice. The rule is necessarily qualified by reference to the standard of fairness, because not every refusal of an adjournment will constitute a breach ….*
>
> *It has to be an unfair refusal, which ties the concept of fairness in with the concept of observance of the rules of natural justice.*"

And finally at 323/D:

> "*Cases are infinitely diverse and the tribunal has to balance out the factors to reach a fair decision.*"

[44] Finally, on this discrete issue, I consider it appropriate to draw attention to the erudite analysis of Kelly LJ in Re Johnstone's Application [1984] 10 NIJB, at 16 – 17 especially, which makes clear the correct doctrinal approach to the interface of a discretionary power to adjourn a hearing and the affected party's right to procedural fairness in the process in question. Multiplication of the examples to be found in the decided cases is unnecessary.

[45] It follows from the above that any suggestion that the decision in CK establishes a principle of exceptionality is, in my view, misconceived. The overarching principle is rooted in the prisoner's common law right to a fair hearing and a procedurally fair decision making process. The outworkings of this principle will require the Commissioners, in certain circumstances, to request the attendance of a witness at a hearing. It may be that, in practice, requests of this nature will be the exception rather than the rule. It is in this focused sense that, in my estimation, the exceptionality element of the decision in CK is to be understood and applied. But, in my judgement,

there is no legal principle that the attendance of a witness at a hearing via the panel's power of request requires the demonstration of something exceptional or is to occur only exceptionally. Practical reality is not to be confused with legal principle. The unyielding prism must be that of procedural fairness to the party concerned.

[46] Mr Sayers' submission, which I have rejected, in substance mirrors the panel's decision on the adjournment application. The decision contains no acknowledgment, explicit or implicit, of the primacy to be given to procedural fairness to the prisoner in deciding the adjournment application. For the further reasons elaborated above, I consider that the panel's approach was demonstrably erroneous in law.

[47] While I did not understand Mr Sayers to advance the discrete argument that the course advocated by and on behalf of the Applicant, namely an adjournment to be followed by a resumed hearing at which oral evidence would be adduced from specified witnesses, would have made no difference to the substantive outcome viz the panel's decision that the Applicant's release would not be directed, it is nonetheless instructive to address this issue briefly. In the realm of procedural fairness, the vocabulary is that of possibility, to be contrasted with probability or certainty. This is the consistent thread of the leading authorities. It is expressed with particular clarity in R v Chief Constable of Thames Valley Police, ex parte Cotton [1990] WL 753309 and [1990] IRLR 344, at 352, per Bingham LJ:

> "*In considering whether the complainant's representations would have made any difference to the outcome, the court may unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of a decision.*"

This was prefaced by the observation:

> "*While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity.*"

There is no such suggestion in the present case.

[48] I have already noted above the rather important issue of the new PBNI policy and criteria. The significance of the Applicant's graduation from "SROSH" to "ROSH" is both clear and uncontested. The possibility of

oral evidence from the Probation Officer fortifying the Applicant's case cannot be dismissed as purely fanciful or negligible. In addition, the Probation Officer would have been bound, at a resumed oral hearing, to address evidence elicited from the ADEPT report's author and the report itself. Furthermore, as submitted by Mr Heraghty, it is at least possible that the questioning of the Probation Officer at a resumed oral hearing would have probed the record of the risk management meeting held on 14 June 2017, two days in advance of the first PBNI report.

[49] These considerations, in my estimation, are sufficient to yield the conclusion that the panel's refusal to defer its final determination until oral evidence from certain witnesses, in particular the Probation Officer and the ADEPT report's author, had been received deprived the Applicant of his fundamental right to a fair hearing and a procedurally fair decision making process. The mere possibility that the panel's substantive decision might have been more favourable to the Applicant if the procedural course urged on his behalf had been adopted suffices for this conclusion to be made.

[50] I further consider this analysis and conclusion to be harmonious with the passage in the opinion of Lord Judge LCJ in James v Secretary of State for Justice [2009] UKHL 22 upon which Mr Sayers relied. The Lord Chief Justice stated at [133]:

> "*The question whether the Parole Board believes itself to be sufficiently informed is a matter for the Parole Board.*"

And at [134]:

> "*… I am not to be taken to being encouraging applications by prisoners for judicial review on the basis that the prisoner may somehow direct the process by which the Parole Board should decide to approach its ….. responsibilities, either generally, or on any individual case. These are questions pre-eminently for the Parole Board itself. Although possessed of an ultimate supervisory jurisdiction to ensure that the Parole Board complies with its duties, the Administrative Court cannot be invited to second guess the decisions of the Parole Board, or the way it chooses to exercise its responsibilities.*"

In my judgement there is nothing in this passage supportive of the contention that the supervisory jurisdiction of the High Court is not exercisable in the context of this case where the decision under challenge namely an adjournment refusal decision – to be contrasted with the panel's

substantive decision – is susceptible to the orthodox public law analysis undertaken above**.**

[51] My final observation on this issue is that panels of the Parole Commissioners, in common with all judicial bodies, will of course be alert to any attempt by a party to manipulate or undermine the proceedings at any stage to the extent that a diagnosis of misuse of process is appropriate. Alertness to this possibility should serve to cater for those cases in which wholly unmeritorious, mischievous and misconceived applications for an adjournment are made.

Omnibus Conclusion and Remedy

[52] On the grounds and for the reasons elaborated above, I conclude that the impugned decision of the Commissioners is vitiated by error of law and procedural unfairness.

[53] In formulating the appropriate remedy, if any, which is a matter of judicial discretion, I note that the Commissioners remain seized of the Applicant's case. The DOJ dossier of evidence is to be provided this week, an event which will trigger a period of six weeks for written representations on behalf of the Applicant, to be followed in turn five weeks later by (a) a provisional direction to release the Applicant or (b) a provisional direction not to release him or (c) a direction that a further oral hearing before a panel of Commissioners will ensue. Scenarios (b) and (c) would normally trigger a period of eight weeks for the oral hearing to be conducted. An oral hearing, on current projections, will not be held until circa May 2018. In the abstract, and without venturing further, the court considers that this timetable could be accelerated.

[54] The normal effect and purpose of a quashing order is to require the public authority concerned to undertake a conscientious reconsideration and make a fresh decision. If, for example, the intervention of this court had arisen at a stage when the panel had not published its decision, a quashing order may well have been the appropriate remedy, though not necessarily the only one. However, given the foregoing, a fresh decision is reasonably imminent in the context of a further phase of the Commissioners' cyclical decision making processes and this, in my view, contraindicates an order quashing the impugned decision or the more intrusive remedy of a mandatory order.

[55] The intrinsically flexible and pliable mechanism of a declaration will provide the Applicant with an adequate remedy as it will both vindicate his legal challenge and provide the Commissioners with the education and

guidance necessary to avoid a repetition of the relevant errors of law in both this case and other cases. Furthermore, the legal and practical effect of this judgment will be reflected in the following declaration:

> ***The court declares*** *that the discrete decision of the Parole Commissioners whereby the Applicant's application for the deferral of the Commissioners' final decision to enable a resumed hearing entailing oral evidence from specified professional witnesses to be conducted involved errors of law in the terms set forth below and was unlawful on the further ground that it deprived the Applicant of his right to a procedurally fair decision making process, thereby vitiating their substantive decision not to recommend the Applicant's release.*
>
> *(i) The panel misunderstood the Applicant's adjournment application and, in consequence, failed to engage with its essence.*
>
> *(ii) The panel's approach was not guided or informed by a consideration of all material factors, namely those identified at [29] - [30] of the judgment herein.*
>
> *(iii) The panel failed to give consideration to the issue of procedural fairness to the Applicant.*
>
> *(iv) The panel failed to acknowledge and appreciate the powers available to it deriving from the Parole Commissioners' Rules (Northern Ireland) 2009 as construed in Re CK's Application [2017] NIQB 34.*
>
> ***It is further declared*** *that the Commissioners are under a public law duty to complete the next phase of their decision making in the Applicant's case as soon as reasonably practicable, which must entail a willingness to accelerate the extant timetable if reasonably feasible.*

I add that there will be liberty to apply: see, in this context, R (AM) v Secretary of State for the Home Department [2017] UKUT 372 (IAC) at [36] – [49].

The Parole Commissioners' Rules: a footnote

[56] Being aware that the Commissioners' procedural rules are in the process of being reviewed at present, I offer the following observations:

(i) The mechanism established by rule 21 for the attendance of witnesses at panel hearings should, in principle, accommodate most cases.

(ii) Given the decision in Re CK, it might be preferable for any revised procedural code to spell out clearly the power of the Commissioners declared therein, viz the power to call witnesses to attend a hearing.

(iii) However, the correct analysis of "call" being (merely) to ask or to invite a witness's attendance points up immediately the intrinsic limitations and frailties in a power formulated in this way.

(iv) The better solution may be to devise new procedural provisions which empower the Commissioners to require the attendance of witnesses viz to summon their attendance. In common with other procedural codes (and there are several examples) the desirability of reinforcing this power with appropriate sanctions seems compelling. One of the sanctions frequently used is the contempt of court mechanism. However, it is not entirely clear whether this would require prescription by primary legislation, to be contrasted with the subordinate legislative vehicle of procedural rules.

APPENDIX 1

[Judgment delivered *ex tempore* on 14 November 2017]

[1] This application for leave to apply for judicial review has been processed with considerable expedition as it involves the liberty of the citizen and has materialised at a stage when a further decision making process and decision of the Parole Commissioners are pending.

[2] Having considered the oral and written submissions of the parties' respective counsel, I am satisfied that the grounds of challenge resolve to two central complaints. The first concerns the overall fairness of the Commissioners' decision making process, the main aspect whereof is the approach which was taken to the question of witnesses being called at the hearing giving rise to the impugned decision, namely a decision made in the wake of a hearing conducted on 18 August 2017 that the Applicant would not be released on licence. The panel dealt with this issue at [18] of its decision dated 25 August 2017, stating "….. *the panel do not have the power to require witnesses to attend oral hearings*". I am satisfied to the level required at this stage of the proceedings that in thus determining the Commissioners erred in law and/or that their decision making process is tainted by procedural unfairness. Leave is granted on this ground.

[3] The second main ground challenges the adequacy of the reasons provided by the Commissioners for the impugned decision. It is trite law that where there is a duty to give reasons they must be couched in adequate and intelligible terms and convey to the affected parties how the decision maker has grappled with the principal controversial issues and, fundamentally, why the outcome under scrutiny has been reached. In considering whether the legal standard has been observed, the decision must be evaluated as a whole and in its full surrounding context, which includes all of the evidence assembled.

[4] The core of the Applicant's complaint concerns how the Commissioners dealt with his progression, in the Probation Report assessment, from the level of "significant risk of serious harm to the public" to "risk of serious harm to the public". While the Applicant seeks to contrast this assessment with that of the various professionals with input into the preceding risk management review, the outcome whereof was an evaluation that the Applicant does <u>not</u> present a "significant risk of serious harm to the public", this does not lie at the centre of this ground.

[5] In its "Reasons", at [20] – [24] of its decision, the panel highlighted the very serious nature of both the index offences and previous offences committed by the Applicant; the limited evidence of any significant change in the Applicant since the last review one year previously; the need for the Applicant to continue to pursue specified programmes; the necessity that he demonstrate his ability to implement what he has learned; and the importance of pre-release testing. The panel stated *inter alia*:

> "*By spending increasing periods of time unaccompanied, and avoiding alcohol, drugs and trouble, confidence will grow that he is ready for release. This will take some time.*"

The panel further explained that it did not consider possible licence conditions to provide the public with sufficient protection. It explicitly agreed with the substance of the PDP co-ordinator's report. It also highlighted the possibility of medication assisting the Applicant to engage in psychotherapeutic work, given the possible diagnosis of adult ADHD and the desirability of an assessment of his cognitive difficulties to this end. The panel resolved that the Applicant's case should be reviewed in 8 months' time.

[6] I am of the opinion that the exercise of considering the panel's report as a whole and in its full context, including in particular the PDP report and the PBNI report, yields the conclusion the decision conveys with sufficient clarity why the panel concluded that the release of the Applicant on licence was not appropriate. The PBNI assessment is explicitly mentioned in their decision, at [9, 14, 15, 18 & 20]. The Applicant cannot realistically be labouring under any misapprehension that the panel adopted the substance of the assessment, analysis, opinions and recommendations in the PBNI report. The multiplicity of references to the report, in tandem with the expressed reasoning of the panel, impels to this conclusion.

[7] I have considered whether the Applicant's real complaint in this respect is that the panel left out of account the revised "ROSH" assessment. However, as appears from the above, I consider this unsustainable.

[8] Accordingly, leave to apply for judicial review is confined to the first ground.