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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JOLENE BUNTING FOR JUDICIAL REVIEW

v

NORTHERN IRELAND LOCAL GOVERNMENT COMMISSIONER FOR STANDARDS

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Before: McCloskey LJ, Horner LJ and McFarland J

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Mr Ronan Lavery KC and Mr John Mackell (instructed by Brentnall Legal Ltd Solicitors) for the appellant
Fiona Fee (instructed by Elliott Duffy Garrett Solicitors) for the respondent

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McCLOSKEY LJ (*delivering the judgment of the court*)

Introduction

[1] The parties to this appeal are Jolene Bunting (the "appellant") and the Northern Ireland Local Government Commissioner for Standards (the "Commissioner"). In brief compass, between May 2015 and May 2019 the appellant had the status of a person elected to Belfast City Council (the "Council"). Some four years later she aspired to re-election. Local government elections were scheduled to be held in Northern Ireland in May 2023. Her aspiration, however, was unfulfilled in consequence of a decision made on behalf of the Commissioner by her deputy, the Assistant Commissioner, dated 6 March 2023, subjecting her to a disqualification period of three years, ("the impugned decision"). This was the culmination of a process initiated against the appellant by the Commissioner, dating from June 2019. One feature of this process was an oral hearing scheduled to be held on 7, 8 and 9 February 2023. The appellant strove, unsuccessfully, to have the hearing adjourned. She challenged the impugned decision by judicial review in consequence.

[2] The appellant's legal challenge was processed in the High Court with commendable expedition. By his judgement delivered on 21 April 2023 and consequential order dated 28 April 2023, Scoffield J granted leave to apply for judicial review and dismissed the application substantively. The appellant appeals to this court.

Statutory framework

[3] The material statutory arrangements are found in Part 9 of the Local Government (Northern Ireland) Act 2014 ("the 2014 Act"). At paras [35] – [38] of his judgment the judge outlined the statutory provisions. We gratefully adopt his summary, with some minor modifications, in paras [4]–[7] below. The essence of the statutory model is that the Commissioner investigates and adjudicates upon alleged breaches of the Code of Conduct (the "Code") governing elected counsellors. A so-called "adjudication hearing" is one of the features of this process. The overarching purpose of the process is to determine whether there has been a breach of the Code by the counsellor concerned. Where a breach of the Code is found disqualification for being, or becoming, a councillor may follow.

[4] Section 53 of the 2014 Act provides for the issue by the Department of the Code. Section 55 makes provision for the Commissioner to investigate cases in which a written allegation is made to her by any person that a councillor (or former councillor) has failed, or may have failed, to comply with the Code of Conduct. One outcome of such an investigation, pursuant to section 55(5)(c), is a finding that the Commissioner should make an adjudication on the matters which are the subject of the investigation. Where that is the case, the councillor (amongst others) must be sent a copy of the report on the outcome of the investigation: see section

57(2). During the course of the investigation itself, the Commissioner must give any person who is the subject of the investigation an opportunity to comment on any allegation that that person has failed, or may have failed, to comply with the Code, per section 56(2).

[5] Adjudication hearings are addressed very briefly in section 56A. It is a matter of discretion for the Commissioner as to whether such a hearing is held before making an adjudication. Where there is such a hearing, it will usually be held in public and, generally, the procedure for the hearing is to be such as the Commissioner considers appropriate in the circumstances of the case: see section 56A(3). However, additional provision is made for adjudication hearings by way of section 63, which provides that certain provisions of the Public Services Ombudsman Act (Northern Ireland) 2016 apply as if the references to the Ombudsman in that Act were references to the Commissioner.

[6] Section 59(1) provides that the Commissioner may make an adjudication on any matter by deciding whether any person to which that matter relates has failed to comply with the Code. Section 59(3) of the 2014 Act sets out a range of penalties which the Commissioner may impose having decided that a person has failed to comply with the Code. One of those disposals is the disqualification of that person from being, or becoming (whether by election or otherwise), a councillor.

[7] Section 59(13) of the 2014 Act provides a person who has been censured, suspended or disqualified with a right to appeal, with leave, to the High Court. Section 59(14) of the Act prescribes the grounds upon which an appeal may be pursued:

> "An appeal under subsection (13) may be made on one or more of the following grounds—
>
> (a) that the Commissioner's decision was based on an error of law;
>
> (b) that there has been procedural impropriety in the conduct of the investigation under section 58;
>
> (c) that the Commissioner has acted unreasonably in the exercise of the Commissioner's discretion;
>
> (d) that the Commissioner's decision was not supported by the facts found to be proved by the Commissioner;
>
> (e) that the sanction imposed was excessive."

Factual matrix

[8] In compliance with the court's case management order, the parties agreed a schedule of material facts in the following terms (with appropriate correction and modification by the court):

Schedule of Agreed Material Facts

24 May 2014	Appellant elected to Belfast City Council and signed declaration of office;
31 August 2018	Written complaint received by the NILGCS regarding the appellant's conduct;
2 May 2019	Local Government elections. Appellant is not re-elected.
7 June 2019	Report submitted by Deputy Commissioner;
25 November 2022	Pre-Hearing review fixed dates for Hearing of 10-12 January 2023;
5 January 2023	Pre-Hearing review vacated the January hearing dates. Hearing relisted for 7-9 February 2023. appellant's solicitor seeks time to assist the appellant to secure funding for the proceedings;
27 January 2023	Pre-Hearing review took place. appellant not in attendance;
27 January 2023	Respondent sends email to appellant's solicitor about the forthcoming hearing;
30 January 2023	Respondent sends correspondence to appellant about the pending hearing;
6 February 2023	Consultation between appellant and her solicitor. Confirmation that funding has not been secured and the solicitor will come off record in these proceedings;
6 February 2023	Respondent writes via email at 2.00pm to appellant's solicitor asking him to confirm if he is still on record for the Hearing which is due to start on 7 February at 12.00pm;
6 February 2023	Appellant's solicitor writes to respondent via email at 2.09pm Confirming he is no longer on record for the appellant. The Legal Assessor for the respondent emails the appellant's solicitor to check that the appellant was aware of this decision, and the appellant's solicitor confirmed that she was by return of email at 2.25pm.

6 February 2023 Appellant writes via email to the respondent at 6.39pm seeking an adjournment and providing reasons for such;

[9] Pausing at this juncture, the respondent received two material electronic communications on 6 February 2023. The first, bearing the time 14.09 hours, emanated from the appellant's former solicitors, stating in material part:

> "As the Tribunal is aware we were in some difficulties in respect of Ms Bunting's funding of her case. Legal aid funding was not available in this instance and as Ms Bunting is of very limited means, she was not in a position to fund the case herself. …..
>
> We are acting on a pro bono basis in what we described as a 'free speech' case which the Tribunal is also aware of and it is not feasible for our firm to act without remuneration in this instance …
>
> Therefore, **we can confirm that we are not currently acting for Ms Bunting** in this case for the aforementioned reasons."
> [Emphasis added]

At 18.39 hours on the same date the respondent received a further electronic communication. On its face, this emanated from 'Michael Brentnall', albeit the electronic signature was in the name of Jolene Bunting. This stated:

> "As the Commissioner will be aware I have been unable to secure legal representation for tomorrow's hearing. I was informed that an attempt was made to deliver documents to me on Thursday [….] however I am still not in possession of the documents. Therefore, I have not had any time to seek further funding for my legal representation or seek new representation. I would on this basis seek an adjournment of tomorrow's hearing …
>
> To expect me, as a mother of two children on benefits, to firstly present a case in this instance when all other parties have access to full legal representation is unfair. I feel I should be entitled to legal representation and in this case seek more time to do so …
>
> If the Commissioner is not in agreement with me in respect of this, then given my legal representatives were unable to

> proceed tomorrow, I should be permitted extra time to prepare for this hearing …
>
> Lastly, I would state that I am being thrust into a hearing in which the complainant is somebody who caused me great consternation and anxiety in his actions over the last number of years and I am genuinely in fear of this man. I am not emotionally ready to face him never mind engage with him …
>
> Furthermore, if the Commissioner is not prepared to accept this argument and adjourn the hearing tomorrow, I would seek to exercise my legal rights and seek legal advice on this issue at the very earliest opportunity."

[10] Turning to the events of the following day, 7 February 2023, the assembled evidence contains a single electronic communication. This was generated at 11.08 hours and was from one Mr Gregory Smyth, a solicitor in the employment of the Commissioner to the appellant, in the following terms:

> "Dear Ms Bunting
>
> I am writing on behalf of Assistant Commissioner Gordon, who is holding the hearing in respect of your case which is scheduled to commence this afternoon.
>
> I had phoned the number which we have on record for yourself this morning several times, however the number was engaged. The Assistant Commissioner has asked me to speak with you and **request that you either attend in person to make this application or we can provide a video link for you to attend virtually**. I would take this opportunity to confirm that The Office of Commissioner **has in place appropriate measures to ensure the safety of all persons attending this public hearing.**
>
> I should be grateful if you would confirm your intentions regarding this matter by return."
> [Emphasis added.]

On its face, the email address to which this communication was directed mirrored that from which the appellant had communicated with the Commissioner the previous day. At 11.16 the appellant forwarded Mr Smyth's email to the same solicitor who, the previous day, had informed the Commissioner that he was no longer "acting for" the appellant.

[11] The agreed timeline of events on 7 February 2023 following the last mentioned email is as follows:

7 February 2023 The hearing commences at approximately 12.20pm, there having been no response from the appellant to the email of 11.08am and despite attempts by the respondent to contact the appellant by phone three times. The respondent considers the appellant's adjournment application;

7 February 2023 At 13.18 hours the appellant sent the following email to the respondent:

> "I tried today to enter the Webex link sent to me by your staff. This link said 'You can join the meeting after the host lets you in' but after 35 minutes the host still had yet to let me into the meeting and it was knocked off. I was asked to come to the Webex meeting to discuss an adjournment, which I have already put in writing."

7 February 2023 The hearing is adjourned at approximately …pm for the purpose of…

7 February 2023 The appellant speaks by telephone with the Legal Assessor at approximately 13.30pm and is advised that the hearing is proceeding;

[12] The agreed timeline in respect of the following day, 8 February 2023, is the following:

8 February 2023 Pre-Action correspondence sent to respondent;

8 February 2023 Reply received from the respondent;

8 February 2023 The respondent upholds complaints of misconduct against the appellant and disqualifies her for becoming a Councillor for a period of three years;

[13] The aforementioned PAP letter was despatched electronically by the appellant's "former" solicitor at 10.22 hours on 8 February. This letter, properly construed and distilled to its core, canvassed a single central complaint, namely "... no adjournment application was ever heard by the Commissioner in respect of Ms Bunting" also asserting, in a slightly different linguistic formulation, an alleged "… failure of NIPSO to allow an adjournment application to be moved by the applicant …"

The Commissioner's proceedings

[14] It is necessary to address first the complaint which gave rise to the Commissioner's investigation and its outcome. This is outlined at paras [4]–[6] of the judgment under appeal:

> "On 31 August 2018 a written complaint was received by the Commissioner from Mr Paul Golding (the leader of the 'Britain First' group). Mr Golding alleged that the applicant, whilst a member of Belfast City Council, had, or may have, failed to comply with the Northern Ireland Local Government Code of Conduct for Councillors ("the Code of Conduct"). The applicant had been elected to the Council and signed the Declaration of Office on 24 May 2014. At the local government elections held on 2 May 2019, she was not re-elected and therefore no longer holds the position of councillor. However, the complaint related to the period of time when she did hold that position.
>
> Mr Golding's complaint alleged that the applicant contacted him by telephone and told him that she had been fined £500 by the Council as a punishment for an incident when Ms Jayda Fransen, the Deputy Leader of Britain First, had sat in the Lord Mayor's chair in January 2018. Mr Golding said that the applicant told him that she could not afford to pay the fine. He said he informed her that Britain First would pay the fine, but that it needed proof of her liability in that regard. He stated that the applicant emailed him a copy of her 'payslip' on 28 June 2018 and referred him to the 'Other Deductions' section of the payslip, showing deductions from her allowance to the value of £545.38. Mr Golding stated that the applicant informed him that this was the amount she had been fined as a result of the 'stunt' which had occurred on when Ms Fransen was filmed wearing Council ceremonial robes and speaking while seated in the Lord Mayor's chair in the Council Chamber. Mr Golding stated that he transferred £50 to applicant's bank account on 3 July 2018 and made a further transfer of £65 to the same account on 19 July 2018. He was later told that the applicant had not been fined.
>
> The kernel of the complaint was that the applicant had encouraged or procured Mr Golding to provide her with

> money under false pretences; and that she had altered or obscured the version of her payslip which had been emailed to him in order to persuade him to provide her with money to discharge a fine to which she had not been subject. The complaint included or amounted to contentions that the applicant had acted in breach of paras 4.2, 4.16, 4.18 and 5.3 of the Code of Conduct. These passages include prohibitions against conducting oneself in a manner which could reasonably be regarded as bringing one's position as a councillor into disrepute; using or attempting to use your position improperly to secure an advantage for yourself; and using the resources of your council other than in a manner which is calculated to facilitate the discharge of your functions as a councillor."

Summarising, the complainant alleged that the appellant had attempted to obtain £500 from him by deceit and, by the same deceit, had procured payments totalling £115 from him to her.

[15] An investigation by the Deputy Commissioner followed. At an early stage, on 7 June 2019, in observance of the relevant statutory requirements, the Deputy Commissioner submitted a report to the Commissioner (on 7 June 2019). This report concluded thus:

> "In determining the action to be taken in this case, I have taken into account the Commissioner's Public Interest considerations and have considered whether a finding that the Commissioner should make an adjudication in this case would reflect the seriousness of the complaint and would be proportionate. My view is that, given the reasoning set out in this report, this is a matter in which the Commissioner should make an adjudication."

This signalled the end of the investigation phase. The Deputy Commissioner's recommendation was evidently accepted, thereby triggering a further phase known as the "adjudication" phase.

[16] The controversial events and arrangements surrounding the hearing conducted by the Deputy Commissioner on 6 and 7 February 2023 belonged to the adjudication phase. This, the second, phase concluded on 6 March 2023 with the promulgation of the Commissioner's Decision Notice. This documented the Assistant Commissioner's conclusion that the appellant had engaged in the deceit alleged by altering her payslip and providing this to the complainant. In short, the two disputed facts (*infra*) were established to his satisfaction and taken together with

the undisputed facts, gave rise to three separate breaches of the Councillor's Code of Conduct. The three provisions in question are:

> "You must not conduct yourself in a manner which could reasonably be regarded as bringing your position as a councillor into disrepute ...
>
> You must not use or attempt to use your position improperly to confer on or secure an advantage for yourself or any other person …
>
> You must not use or authorise others to use the resources of your council other than in a manner which is calculated to facilitate or to be conducive to the discharge of the functions of your council or of the office to which you have been elected or appointed."

The consequential penalty determined by the Assistant Commissioner was the disqualification of the appellant for holding the office of Councillor for a period of three years commencing upon the date of his decision.

The judgment under appeal

[17] Scoffield J identified procedural unfairness as the "*nub*" of the appellant's legal challenge. The judge noted that the adjudication hearing had proceeded, in the appellant's absence, on 7 and 8 February 2023. The evidence considered by the Assistant Commissioner included a schedule of facts which had been generated at a stage when the appellant had legal representation. This contained a mixture of agreed facts (the majority) and two disputed facts. These were the following:

> "(i) That former Councillor Bunting told Mr Golding that the deduction of £545.38 from June 2018 allowance was as a result of the fine she received for organising a visit to the Council by Britain First on 9 January 2018 where Jayda Fransen sat in the Lord Mayor's chair wearing ceremonial robes and made a political statement.
>
> (ii) That former Councillor Bunting obscured the words Members Phone Repayment from the JPEG image prior to sending a JPEG image of her June payslip to Mr Golding on 28 June 2018."

[18] The judge next noted all of the following. On the second day of the hearing the Assistant Commissioner pronounced himself satisfied that the two disputed facts had been established. This was a prelude to his finding that the appellant had

breached the relevant provisions of the Code. At this point the Assistant Commissioner adjourned the hearing to consider a judicial review PAP letter just received from the solicitors representing the appellant in these proceedings. This incorporated a request that the process be stayed. The Assistant Commissioner refused this request. The adjudication hearing was completed, and the written decision of the Assistant Commissioner followed on 06 March 2023.

[19] Scoffield J diagnosed the centrepiece of the case presented on behalf of the appellant as the refusal of the Assistant Commissioner to adjourn the adjudication hearing in circumstances where the appellant was not physically present and was unable to achieve remote attendance by virtue of technical communication difficulties. The judge recorded the two key factual issues which the appellant was disputing namely, per para [49]:

> "In this case, the nub of the applicant's concern about the outcome is the Commissioner's finding of facts to the effect that she told Mr Golding that the relevant deduction from her allowance was as a result of the fine she received in respect of the incident involving Ms Fransen; and that she altered the version of her payslip which she emailed to Mr Golding. However, her grounds of appeal (in the application for leave to appeal which she has now protectively lodged) overlap entirely with the procedural fairness issues she has raised in this application for judicial review. Mr Mackell told me that the applicant accepts that if she is successful the result would be a further (and, she would say, fair) hearing before the Commissioner. She is not seeking for the High Court to conduct a full *de novo* hearing in respect of the factual issues. Indeed, in light of the guidance in *Brown*, although it would plainly be open to the High Court to receive oral evidence in the course of an appeal under section 59, this is likely to be rare."

Next, he recorded that the appellant had made an application for leave to appeal to the High Court, which lay undetermined.

[20] The judge's first conclusion was that section 59(14)(a) of the 2014 Act provided the appellant with a viable alternative remedy. He emphasised particularly the breadth of the "error of law" statutory ground of appeal. Second, the judge concluded that the possible unavailability of legal aid for a statutory appeal did not constitute an "exceptional factor" justifying pursuit of the judicial review route. The judge next set himself the task of formulating his "conclusions on the substance of the [appellant's] case." We distil the following conclusions from the passages which follow in the judgment:

(a) There was no failure by the Assistant Commissioner to take into account the appellant's asserted lack of readiness, in a context where her progression from the status of a legally represented person to that of an unrepresented litigant had eventuated the day preceding the first scheduled date of hearing.

(b) The protracted history of the process was a factor properly taken into account by the Assistant Commissioner.

(c) This factor also sounded on the appellant's presumed familiarity with her case.

(d) "It was perfectly open to the Assistant Commissioner … to take the view that the [appellant] could fairly make her case if she attended the hearing in person or remotely".

(e) It was material that if the appellant had attended the hearing (whether physically or remotely), the Assistant Commissioner would have been under an obligation to provide her with a fair hearing.

(f) It was material that the Assistant Commissioner specifically considered the written statement and representations of the appellant.

(g) The Assistant Commissioner properly concluded that the appellant's asserted fears about cross-examining the complainant were of no substance.

(h) The threshold for intervention by the High Court was "relatively high".

(i) The Assistant Commissioner properly took into account the remoteness of the possibility of the appellant securing further legal representation in light of the reason for the withdrawal of her appointed legal representatives, namely lack of remuneration.

[21] The judge expressed his overarching conclusions on the foregoing issues at paras [74]–[75]:

> "All of the factors summarised immediately above could be said to point in favour of refusing the application. The question is whether it was nonetheless a cause of substantial unfairness to the applicant to refuse the application. In my judgement, that turns to a large degree on how the applicant's case could have been presented and considered in the absence of her being legally represented. For the reasons summarised above, the Assistant Commissioner was entitled to reach the view that the applicant, as an unrepresented party, could participate in the proceedings fully and fairly. Courts and

> other tribunals frequently deal with such situations. Adjustments could properly be made to ensure that she was not prejudiced. The ability to fully present one's case does not equate to an absolute right to legal assistance, nor to a right to do so with optimal facilities. That is a corollary of the need to balance a variety of relevant interests.
>
> …
>
> Although the Assistant Commissioner's approach may be thought to have been robust, and may not have been the only way to deal with the situation with which he was faced, I do not consider that it was unreasonable or unfair in all of the circumstances. The decision not to participate in the proceedings at all was a matter of choice on the part of the applicant. She was at liberty to do so and the decision to proceed with the hearing in all of the circumstances outlined above was not, in my view, unfair."

[22] Finally, the judge addressed the following discrete aspect of the appellant's challenge, namely:

> "… a full examination of the circumstances behind her application to adjourn was not undertaken; and … she was not afforded a full opportunity to present her adjournment application."

He described this as "the strongest aspect of the [appellant's] case". The judge posed the following question:

> "Did [the Assistant Commissioner] unlawfully deprive the applicant of the opportunity of supplementing [the available] information in order to persuade him otherwise?"

The reasoning which followed has the following ingredients: neither party was at fault for the technical communication difficulties; there was a telephone conversation between the appellant and an official; the disagreement between the parties about the content of this conversation would be resolved in favour of the Assistant Commissioner; thus, as a matter of fact, the appellant had been informed that the Assistant Commissioner had considered her application for an adjournment and had decided to proceed with the hearing at the beginning of the afternoon session (ie about 30 minutes later); and, finally, the Assistant Commissioner, having been apprised of the phone conversation, reconsidered his decision and affirmed it.

[23] Having regard to all of the foregoing the judge concluded:

> "I have not been satisfied that it was unfair to the applicant for her not to be afforded the opportunity to advance her adjournment application orally."

The judge held in particular that the representations which the appellant wished to make in support of her adjournment request had been conveyed to the official who, in turn, relayed them to the Assistant Commissioner. Furthermore, these representations, in substance, simply repeated the electronic communication from the appellant the previous evening and the PAP letter from her solicitors.

[24] The judge formulated his conclusion on this discrete issue in these terms:

> "… I am satisfied to the high degree required that, even if the applicant had had the opportunity to speak to the Commissioner directly, the result would inevitably have been the same. She was simply reiterating points which, in substance, the Commissioner had already considered and had lawfully considered were not sufficient to warrant an adjournment of the hearing in all of the circumstances."

The judge continued:

> "The substance of the hearing could have been dealt with in a procedurally fair way with the applicant appearing without the benefit of legal representation, as is often the case in adjudication hearings before the Commissioner. The decision not to participate in the hearing at all in those circumstances was a matter of her own choice …"

This is followed by:

> "All of the factors summarised immediately above could be said to point in favour of refusing the application. The question is whether it was nonetheless a cause of substantial unfairness to the applicant to refuse the application. In my judgement, that turns to a large degree on how the applicant's case could have been presented and considered in the absence of her being legally represented. For the reasons summarised above, the Assistant Commissioner was entitled to reach the view that the applicant, as an unrepresented party, could participate in the proceedings fully and fairly. Courts and other tribunals frequently deal with such situations. Adjustments could properly be made to ensure that she was not prejudiced.

> The ability to fully present one's case does not equate to an absolute right to legal assistance, nor to a right to do so with optimal facilities. That is a corollary of the need to balance a variety of relevant interests.
>
> Although the Assistant Commissioner's approach may be thought to have been robust, and may not have been the only way to deal with the situation with which he was faced, I do not consider that it was unreasonable or unfair in all of the circumstances. The decision not to participate in the proceedings at all was a matter of choice on the part of the applicant. She was at liberty to do so and the decision to proceed with the hearing in all of the circumstances outlined above was not, in my view, unfair."

Commissioner's proceedings generally

[25] At the hearing, the court canvassed with the parties two suggestions in tentative terms. First, that Commissioner's proceedings are characterised by informality and a lack of strict procedural rigour. Second, that such proceedings are essentially inquisitorial by nature. The court having invited further assistance on these issues Ms Fee, on behalf of the Commissioner, made a commendably prompt and pertinent response.

[26] Ms Fee drew to the attention of the court the Commissioner's published "Procedures for the Adjudication of Cases referred to the Northern Ireland Public Services Ombudsman in her role as the Local Government Commissioner for Standards" (which we shall describe as the "Protocol"). This publication confirms the correctness of the first of the court's suggestions. Furthermore, the contents tend to confirm the court's provisional view that the proceedings are inquisitorial, rather than adversarial, in nature. In passing, though not of course determinative, this is precisely the label applied by the Assistant Commissioner in his communications with the parties relating to the initial scheduled adjudication hearing dates (10–12 January 2020). Interestingly, the Assistant Commissioner added:

> "… should the former Councillor Bunting be unrepresented, the Legal Assessor would provide advice and assistance to ensure that the hearing was conducted fairly."

This proved to be prophetically correct: in the event, this is precisely the role which the Legal Assessor discharged.

[27] The characterisation of Commissioner's proceedings as inquisitorial in nature finds support in three previous decisions of this court. First, in *Re O'Neill's Application* [2009] NICA 19 this court held that the proceedings of the Appeal

Tribunal, the statutory organ charged with the function of determining certain appeals in the realm of social security benefits, are both "inquisitorial in nature" and "can give rise to a proactive approach on the part of the Tribunal": see para [26]. To like effect is the decision of this court in *Mongan v Department for Social Development* [2005] NI16, another social security case: see paras [14]–[18] per Kerr LCJ.

[28] While *O'Neill* and *Mongan* concerned two types of adjudication which do not mirror precisely that under consideration in this appeal, they are nonetheless sufficiently analogous to support the conclusion we have reached above. Of more direct relevance is the decision of this court in *Re McShane's Application*" [2019] NICA 69, which concerned Commissioner's proceedings involving an elected Councillor and an allegation of conduct breaching the Code. At para [33] Morgan LCJ described the process as "by its nature inquisitorial".

[29] "Inquisitorial" is a familiar, convenient label which has no universally recognised meaning. What it conveys may vary according to the context. It will generally denote that the tribunal or adjudicator concerned will adopt a flexible approach to matters of procedure and will not apply the rules of evidence with strict rigour. This is reflected in para 30 of the Commissioner's Protocol. Furthermore, the role of the tribunal or adjudicator may be more interventionist than in typical adversarial proceedings, subject to the requirements of impartiality and procedural fairness. But that does not mean that there is no burden of proof. On the contrary, in regulatory proceedings the burden rests on the regulator: see by analogy *Jones v Commissioner for Social Care Inspection* [2004] EWCA Civ 1713. The standard of proof in any given context is determined primarily by the applicable procedural rules or kindred instrument (see Harris, Disciplinary and Regulatory Proceedings, 7th ed, para 12.10). The Commissioner's Protocol states unequivocally, at para 51 [c], that the burden of proving the alleged non-compliance with the Code rests on the Deputy Commissioner and the standard is the balance of probabilities (as to which see *B (Children*) [2008] UKHL 35). That is determinative, subject only to the possibility of the criminal standard applying in a given case because of the seriousness of the alleged misconduct – an issue which does not arise for determination in these proceedings. The overarching requirement – and duty - of procedural fairness to both parties, shines brightly in decisions such as *Bache v Essex County Council* [200] EWCA Civ 3.

The appeal

[30] At the case management stage the court directed both parties to formulate their core propositions. On behalf of the appellant the following was provided:

> "Alternative Remedy
>
> The appellant contends, at paragraphs [65-80] of the Skeleton Argument, that the defect in the decision making of the respondent has resulted in her non-participation at

the first-tier adjudication hearing. That is the defect, the appellant asserts, which must be remedied.

(a) The statutory grounds of appeal within Section 59 (14) Local Government Act (Northern Ireland) 2014 are primarily framed to address the final decision of the Assistant Commissioner, rather than procedural unfairness or illegality. Thus this remedy is not an effective alternative to judicial review.

(b) The respondent was informed the appellant had unsuccessfully attempted to gain access to the online hearing. The appellant's attendance to move her adjournment application was not, thereafter, facilitated. The respondent, through their legal assessor, advised the appellant the substantive hearing was proceeding. The hearing proceeded without ever hearing oral submissions from the appellant. Such decision making was irrational and procedurally unfair.

(c) … the procedural unfairness at the heart of the respondent's failure to adjourn the adjudication hearing.

(d) The respondent did not fully examine the reasons for her adjournment application including, her absence of legal representation, stated fear of the complainant and lack of hearing papers along with a failure to give weight to the 'equality of arms' principle. The respondent further failed to consider the gravity of a complaint of misconduct against the appellant, a public representative, when adjudicating upon the adjournment application. These failures were irrational and procedurally unfair."

[31] There are in essence three grounds of appeal:

(i) The statutory appeal is not an adequate alternative remedy.

(ii) It was procedurally unfair to proceed with the hearing without having first received oral representations from the appellant in person.

(iii) The Assistant Commissioner failed to fully examine the reasons for the appellant's adjournment application.

The first two grounds raise questions of law. The third entails an issue of fact.

[32] The following core propositions were advanced on behalf of the Assistant Commissioner:

(a) The procedure applied by the respondent was not unfair or unlawful. The appellant made an adjournment request in writing at the eleventh hour, which was nevertheless considered by the respondent. When it was brought to the attention of the respondent that the appellant was having IT difficulties (and notwithstanding the unsuccessful attempts made on behalf of the respondent to contact the appellant by telephone and email that morning), the proceedings were paused to allow a conversation between the respondent's legal assessor and the appellant. It was explained to the appellant that, if the IT was not working for her, she could attend the hearing in person in order to make any submissions that she wished.

(b) The appellant declined to attend or take any further part in the proceedings on the basis that she had received legal advice not to do so: this was her choice, rather than any outcome unilaterally thrust upon her by the respondent. Indeed, the legal assessor for the respondent (Michael Wilson) states in his affidavit at paragraph 19 that the appellant was informed that "<u>if she was not present</u> the Assistant Commissioner had determined to proceed as it was in the public interest to do so" [emphasis added].

(c) Given that the appellant was not present, and with the Assistant Commissioner having considered the relevant factors such as the long-running nature of the proceedings; the lateness of the adjournment application despite there having been numerous preliminary hearings at which these issues could have been (but were not) raised; the attendance in person from England of the complainant to give evidence; the fact that the Assistant Commissioner had the benefit of the appellant's Councillor Response Form and also her personal statement (both of which were prepared with the assistance of her legal advisers); the absence of medical or other evidence to support the adjournment application; and the appellant having confirmed that she was choosing not to attend on the basis of legal advice; it was entirely reasonable for the Assistant Commissioner to have decided not to adjourn and instead to continue with the proceedings.

Governing principles

[33] The refusal by a court or tribunal to adjourn a hearing has been the subject of consideration in a number of decided cases. While the material excerpts from the relevant decided cases are somewhat lengthy, we consider that it will be of benefit to the parties and any other reader to reproduce them in full. In his judgment Scoffield J recorded that in the course of the Assistant Commissioner's decision-making process his legal assessor drew to his attention the decision of the English Court of

Appeal in *General Medical Council v Ateogba* [2016] EWCA Civ 162. In this case hearings had been arranged in the context of disciplinary proceedings by the professional regulator against two medical practitioners. Each was notified of the hearing arrangements and declined to participate. The hearings proceeded and determinations adverse to the doctors were made. Their ensuing appeals to the Administrative Court succeeded.

[34] Sir Brian Leveson P, giving the unanimous decision of the Court of Appeal, traced the following jurisprudential path. First, he recalled an earlier decision of the same court, *R v Hayward and Others* [2001] EWCA Crim 68 at para [22]:

> "3. The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives.
>
> 4. That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented.
>
> 5. In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular:
>
> (i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;
>
> (ii) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings;
>
> (iii) the likely length of such an adjournment;
>
> (iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation;
>
> (v) whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence;

(vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him;

(vii) the risk of the jury reaching an improper conclusion about the absence of the defendant;

(viii) the seriousness of the offence, which affects defendant, victim and public;

(ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;

(x) the effect of delay on the memories of witnesses;

(xi) where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present."

The President then turned to consider the later decision of the House of Lords in *R v Jones* [2002] UKHL 5:

> " … where Lord Bingham (with whom Lord Nolan, Lord Hoffmann, Lord Hutton and Lord Rodger agreed) approved the guidance set out above (with the specific exception of that contained in [22(5)(viii)]) and emphasised, at [6], that the discretion to continue in the absence of a defendant should be "exercised with great caution and with close regard to the overall fairness of the proceedings". Lord Bingham observed that if attributable to involuntary illness or incapacity it would very rarely "if ever" be right to exercise discretion in favour of commencing the trial unless the defendant is represented and asks that the trial should begin. As for the guidance, Lord Bingham considered it "generally desirable" that a defendant be represented even if he had voluntarily absconded but also made it clear (at [14]):
>
> > 'I do not think that "the seriousness of the offence, which affects defendant, victim and public"… is a matter which should be considered. The judge's overriding concern will be to ensure that the trial, if conducted in

> the absence of the defendant, will be as fair as circumstances permit and lead to a just outcome. These objects are equally important, whether the offence charged be serious or relatively minor.'
>
> Lord Hoffmann (agreeing with Lord Rodger) expressed himself (at [19]) "not comfortable" with the notion of waiver which required "consciousness of the rights which have been waived"; he preferred to say that they "deliberately chose not to exercise their right to be present or to give adequate instructions to enable lawyers to represent them".

[35] Next the President considered the decision of the Judicial Council in *Tait v Royal College of Veterinary Surgeons* [2003] UKPC 34, which considered which concerned an application for a second adjournment of a disciplinary hearing on the grounds of ill health (hypertension) unsupported by medical evidence. The refusal to adjourn was quashed on the grounds that the direction did not comply with the requirements in *Jones*. Although citing the Court of Appeal's checklist in *Hayward* as approved by the House of Lords on appeal in *Jones*, the Board identified (at [5]) "the seriousness of the case against the defendant" as a relevant factor. In that regard, it does not appear that the Board's attention was drawn to the exception that Lord Bingham specifically made in relation to seriousness of the offence constituting an exception to Lord Bingham's approval. The judgment continues, at paras [18]–[20]:

> "[18] It goes without saying that fairness fully encompasses fairness to the affected medical practitioner (a feature of prime importance) but it also involves fairness to the GMC (described in this context as the prosecution in Hayward at [22(5)]). In that regard, it is important that the analogy between criminal prosecution and regulatory proceedings is not taken too far. Steps can be taken to enforce attendance by a defendant; he can be arrested and brought to court. No such remedy is available to a regulator.
>
> [19] There are other differences too. First, the GMC represent the public interest in relation to standards of healthcare. It would run entirely counter to the protection, promotion and maintenance of the health and safety of the public if a practitioner could effectively frustrate the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage in the process. The consequential cost and delay to other cases is real.

> Where there is good reason not to proceed, the case should be adjourned; where there is not, however, it is only right that it should proceed.
>
> [20] Second, there is a burden on medical practitioners, as there is with all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession."

[36] At para [23] the President continues:

> "Thus, the first question which must be addressed in any case such as these is whether all reasonable efforts have been taken to serve the practitioner with notice. That must be considered against the background of the requirement on the part of the practitioner to provide an address for the purposes of registration along with the methods used by the practitioner to communicate with the GMC and the relevant tribunal during the investigative and interlocutory phases of the case. Assuming that the Panel is satisfied about notice, discretion whether or not to proceed must then be exercised having regard to all the circumstances of which the Panel is aware with fairness to the practitioner being a prime consideration but fairness to the GMC and the interests of the public also taken into account; the criteria for criminal cases must be considered in the context of the different circumstances and different responsibilities of both the GMC and the practitioner."

The Court of Appeal was in "no doubt" that the Panel was entitled, on the information before it, to exercise its discretion by ordering that the hearing proceed: see para [58]. The court added, at para [62]:

> "I recognise the real significance of the fact that the Panel did not have the practitioner's input in relation to the facts, the question of impairment, or the ultimate decision of sanction (which always carried the risk of erasure). Whenever a practitioner does not attend, however, that is the position and, in this case, the Panel was very well aware of the difficulty which that created and made it clear that it would take all necessary steps to ensure that the hearing was fair to all. This difficulty cannot override all other

considerations for, if it did, it would provide a premium on non-co-operation."

The Court of Appeal reversed the decision of the High Court in both cases.

[37] At first instance the judge did not give consideration to either the decision in *Adeogba* or any of the leading authorities considered therein The judge did consider in some detail the decision in *Crown Prosecution Service v Picton* [2006] EWHC 1108. This was an appeal by case stated from the decision of a Magistrates' Court refusing a prosecution application for an adjournment, the charge against the defendant being common assault, in circumstances where the prosecution witnesses had failed to attend court. Having refused the adjournment request the Magistrates' Court dismissed the charge. The Divisional Court, on appeal, identified one of the leading judgments in this sphere, namely that of Lord Bingham CJ in *R v Hereford Magistrates' Court ex parte Rowlands* [1998] QB 110 , which contains detailed guidance at 127E–128C. The following code of principles was formulated:

"(a) A decision whether to adjourn is a decision within the discretion of the trial court. An appellate court will interfere only if very clear grounds for doing so are shown.

(b) Magistrates should pay great attention to the need for expedition in the prosecution of criminal proceedings; delays are scandalous; they bring the law into disrepute; summary justice should be speedy justice; an application for an adjournment should be rigorously scrutinised.

(c) Where an adjournment is sought by the prosecution, magistrates must consider both the interest of the defendant in getting the matter dealt with, and the interest of the public that criminal charges should be adjudicated upon, and the guilty convicted as well as the innocent acquitted. With a more serious charge the public interest that there be a trial will carry greater weight.

(d) Where an adjournment is sought by the accused, the magistrates must consider whether, if it is not granted, he will be able fully to present his defence and, if he will not be able to do so, the degree to which his ability to do so is compromised.

(e) In considering the competing interests of the parties the magistrates should examine the likely consequences of the proposed adjournment, in particular its likely length, and the need to decide the facts while recollections are fresh.

(f) The reason that the adjournment is required should be examined and, if it arises through the fault of the party asking for the adjournment, that is a factor against granting the adjournment, carrying weight in accordance with the gravity of the fault. If that party was not at fault, that may favour an adjournment. Likewise if the party opposing the adjournment has been at fault, that will favour an adjournment.

(g) The magistrates should take appropriate account of the history of the case, and whether there have been earlier adjournments and at whose request and why.

(h) Lastly, of course the factors to be considered cannot be comprehensively stated but depend upon the particular circumstances of each case, and they will often overlap. The court's duty is to do justice between the parties in the circumstances as they have arisen."

The Court of Appeal upheld the Magistrates' decision. In thus deciding it placed heavy emphasis on the breadth of the discretion in play.

[38] It is appropriate to reproduce the following passage in the judgment of Lord Bingham CJ, at 127F/H:

> "The decision whether to grant an adjournment does not depend upon a mechanical exercise of comparing previous delays in those cases with the delay in the instant applications. It is not possible or desirable to identify hard and fast rules as to when adjournments should or should not be granted. The guiding principle must be that justices should fully examine the circumstances leading to applications for delay, the reasons for those applications and the consequences both to the prosecution and the defence. Ultimately, they must decide what is fair in the light of all those circumstances.
>
> …

> This court will only interfere with the exercise of the justices' discretion whether to grant an adjournment in cases where it is plain that a refusal will cause substantial unfairness to one of the parties. Such unfairness may arise when a defendant is denied a full opportunity to present his case. But neither defendants nor their legal advisers should be permitted to frustrate the objective of a speedy trial without substantial grounds."

[39] There is another decision of some significance which was not cited to the judge, namely *Re DPP's Application* [2007] NIQB 3. The material passages are found in paras [10]–[21]. In view of their bulky nature we have assembled these in Appendix 1 to this judgment. In this decision one finds a heavy emphasis on the imperative of the decision maker being as fully informed as possible in determining the question of adjournment: see further our analysis in para [41] *infra*.

[40] This court made a series of material statements in its recent decision in *Galo v Bombardier Shorts* [2023] NICA 50. In view of the volume of these passages we have considered it convenient to reproduce them in Appendix 2 to this judgment. In summary, this court questioned whether it is correct to review the legality of adjournment decisions through the prism of the *Wednesbury* principle. Its central conclusion is encapsulated in the following short passage in para [64]:

> "The principle enunciated by this court is that in any review or appellate challenge to a first instance decision to refuse an adjournment application advanced on whatever grounds, the test to be applied is whether this has had the effect of unfairly depriving the litigant of a fair hearing." [Emphasis added]

This court's assessment

[41] The review of the decided cases undertaken above demonstrates that the approach of a court exercising an appellate or review jurisdiction in cases involving a challenge to an adjournment refusal decision has not been entirely uniform. In some contexts, there is a particular emphasis on the citizen's right to a fair hearing, the constitutional right of access to a court and procedural fairness. In other contexts the nuances and emphases differ. It may be said that the unifying legal standard is found in the applicability of the familiar public law framework: in short, the decision maker must take into account all material facts and factors, disregard the immaterial, act in a procedurally fair and avoid the misdemeanours of fetter of discretion, bias and irrationality.

[42] The appellant had no absolute right to make her representations orally, either at common law (see for example *Smith v Parole Board* [2005] UKHL 1, per

Lord Bingham at para [35]) or, insofar as applicable, under Art 6 ECHR (see *R (Thompson v Law Society* [2004] EWCA Civ 167). The contrary was not argued.

[43] We have reproduced in paras [17]–[24] above various passages from the judgment of Scoffield J. They contain no discernible error, of law or otherwise. We agree with all of them, unreservedly. In cogent terms, they provide a complete response to the appellant's grounds of appeal. We consider that, procedurally, the adjournment decision making process was conspicuously fair. Every effort was made to accommodate the appellant. Ultimately, her absence from the hearing was by personal choice. Her belated excuse for non–attendance, namely fear of her accuser, has rung hollow at every stage. It withers in any event in the face of this court's assessment of the nature and characterisation of Commissioner's hearings above and the uncontested evidence that adequate facilities to address any concerns of this kind would have been provided.

[44] Arguably most important of all, there is the specific finding of Scoffield J that all representations which the appellant wished to make in support of her adjournment quest were both conveyed to and considered by the decision maker. This finding is unchallenged – and, we would add, unchallengeable. Furthermore, the appellant's physical absence from the hearing resulted from her deliberate choice, in circumstances where her attempted explanation, or justification, for this course has not impressed either the adjudicator or Scoffield J: and, further, in a context wherein she continued to receive legal advice. Finally, an oral hearing to make an adjournment application, particularly one already made in clear and comprehensible written terms, in circumstances where this very facility was provided to the Applicant and rejected by her, is light years removed from those cases identified by Lord Bingham in *Smith*.

[45] We would add that the applicant's grounds of challenge are replete with speculation, coupled with bare and unsubstantiated assertions. The supporting evidence which the appellant has chosen to provide to two successive courts is a combination of the selective and the tenuous. The opportunity afforded by this court for the provision of further evidence bearing on the appellant's duty of candour to the court did not elicit anything from her.

[46] The thrust of the argument developed by Mr Lavery KC entailed an inappropriate parsing of certain words and passages in the impugned decision and the affidavits filed on behalf of the Commissioner, an approach which is readily confounded by recourse to the ancient adage that every document must always be considered in full and by reference to the entirety of the context to which it belongs. Mr Lavery's somewhat faint contention that the Assistant Commissioner attributed disproportionate weight to the personal convenience of the complainant on the date in question is a paradigm illustration of this misdemeanour. *Ditto* the bare assertion that the Assistant Commissioner failed to take all material facts and considerations into account in refusing the appellant's adjournment request. The central

submissions of Ms Fee on behalf of the Assistant Commissioner, set out in para [32] above, prevail comfortably.

[47] While the preceding conclusion disposes of this appeal, we have further viewed the appellant's case by reference to all of the public law touchstones rehearsed in paras [37]-[41] above. The appellant, on whom the onus rests (see for example *R v Birmingham City Council, ex parte O* [1983] I AC 578, 597 c/d, per Lord Brightman), has failed to establish non–compliance by the Assistant Commissioner with any of these standards. Furthermore, insofar as the appellant's grounds of appeal enshrine the suggestion that her physical absence from the substantive hearing *ipso facto* rendered this procedurally unfair, thereby vitiating the impugned substantive decision, this (i) in effect asserts an absolute right to be present, unsupported by legal principle and (ii) resolves to bare and unsubstantiated assertion.

[48] Finally, we endorse without hesitation the judge's assessment of the adequacy of the appeal remedy provided by s 59(13) of the 2014 Act. Appeal grounds (a), (b) and (c) are manifestly broad enough to encompass all of the grounds of challenge advanced in these judicial review proceedings. The suggestion that the statutory appeal route lacks the requisite quality of efficacy is pure speculation. It is clear to this court that this remedy was not pursued purely on account of an apprehension that it might not attract public funding. In the circumstances of this case this manifestly fails to constitute exceptional circumstances. Indeed it is highly unlikely that it could do so in any other case. The other exceptional circumstances factors advanced to this court are a combination of mere assertion and *ex post facto* rationalisation seasoned with conjecture and are in any event defeated by our analysis of the substantive grounds of appeal above.

[49] We are in little doubt that in the absence of the pressure of time factor the judge would have adopted the course of refusing leave to proceed on this ground or, as a minimum and generously to the appellant, would have stayed these proceedings pending exhaustion of the statutory appeal remedy, which is still pending before the High Court.

Duty of candour

[50] We refer to para [45] above. In advance of the substantive hearing of this appeal the court issued an order raising the following issue: having regard to *inter alia* Article 69 of the Solicitors (NI) Order 1976, the question arises whether the appellant's duty of candour, owed to the court by both litigants and legal practitioners, has been discharged: see eg *R (Mahmood) v Secretary of State for the Home Department* [2014] UKUT 439 (IAC), [2014] Imm AR 193 [15], *Re Farrell* [1999] NIJB 143, *R (Sky Blue Sports & Leisure Ltd) v Coventry City Council* [2013] EWHC 3366 (Admin) & [2014] ACD 48 §25), JR Guide 2022 *§15.3.2)*. No application to receive any further affidavit from the appellant eventuated. Her solicitor, in response to the court's directions, applied for leave to file a further affidavit. We refuse this

application, for four reasons. First, there has been abundant opportunity to file an affidavit of this kind, per the court's previous case management orders. Second, the proposed affidavit fails to address, adequately or at all, the factual issues rehearsed in paras [9] and [10] above. Third, the duty of candour issue was not explored at first instance. Finally, the dismissal of this appeal is not based on any duty of candour failure.

Conclusion

[51] This court entertains no reservations about the judgment and consequential order of Scoffield J. These are affirmed in full and the appeal is dismissed accordingly.

APPENDIX 1

Re DPP's Application [2007] NIQB 3

The relevant authorities

[10] In *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91, 118, in what has become a well-known passage, Lord Steyn described the various interests at stake in criminal proceedings as follows:

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

[11] All judges and magistrates need to keep this range of interests closely in mind whatever may be the decision as to the disposal of proceedings that they are called on to make. A conclusion, for instance, whether to accede to an application for an adjournment or whether to dismiss charges because of the absence of witnesses cannot properly be reached unless each of these interests (insofar as it may impinge on the decision) is taken into account and accorded appropriate weight.

[12] In *R v Enfield Magistrates' Court ex parte DPP* 153 JP 415, the Divisional Court in England and Wales (Parker LJ and Henry J) held that it was a breach of the rules of natural justice for justices to refuse an application by the prosecutor for an adjournment to enable his witnesses to attend the trial in circumstances where through no fault of their own the prosecution were unable to present their case. In that case the defendant, having agreed to be tried summarily, at first pleaded guilty but then, having taken advice on the suggestion of the justices, changed her plea. The prosecutor applied for an adjournment to enable his witnesses to attend. The application was refused, and the justices dismissed the case.

[13] It is unsurprising that this decision was quashed for it cannot be right to refuse an application for an adjournment where there has been no fault on the part of the prosecuting authorities for the absence of witnesses and no compelling reason that the matter should not be adjourned. The case is significant in the present context principally because of its recognition that the question of the fault (or the lack of it) on the part of the prosecution in bringing about the state of affairs that a necessary witness is absent is plainly germane to the question whether an adjournment should be granted. In the present case, the resident magistrate had no basis on which he

might reasonably have concluded that the prosecution was to blame for the absence of the witness.

[14] In *R v Birmingham Justices ex parte Lamb* [1983] 3 All ER 23, the Divisional Court (McNeill and Wolff JJ) stated that the discretion whether to adjourn cases must be exercised judicially. In deciding whether to accede to an application to adjourn made by the prosecution the magistrates were bound to take account of the interests of not only the defendant but also the prosecuting authorities.

[15] In *R v Neath and Port Talbot Justices ex parte DPP* [2000] 1 WLR 1376, the defendant was charged with indecently assaulting a neighbour at her home in the early hours of the morning of 27 June 1998. His defence was that he had been so drunk that he had entered the wrong house and mistaken his neighbour for his girlfriend. On 28 September 1998, the day fixed for the defendant's summary trial, the complainant was not present at court. The defendant's solicitor suggested that she had been aware of the hearing date and that she was absent because she did not wish to proceed with the case. The justices refused the prosecution's application for an adjournment. The prosecution offered no evidence, and the case was dismissed. In fact the complainant had informed the police that she wished to proceed with the case but that on the hearing date she would be away on holiday. The Divisional Court (Simon Brown LJ and Blofeld J) held that the justices should not have relied on the assertion of the solicitor for the defence that the complainant did not wish to proceed and that they should have acceded to the application to adjourn.

[16] In *R v Portsmouth Crown Court ex parte DPP* [2003] EWHC 1079 Scott Baker LJ reviewed a number of authorities relating to prosecution mishaps which led to charges being dismissed. He referred in particular to the statement of Mann LJ in *R v Hendon Justices ex parte DPP* [1967] 1 QB 167 at 174C, where he said:

> '… the duty of the court is to hear informations which are properly before it. The prosecution has a right to be heard and there is a public interest that, save in exceptional circumstances, it should be heard.'

The Divisional Court made the following conclusions:

[17] In any case where the prosecution applies for an adjournment, it is the duty of the judge or magistrate to ensure that he or she has been sufficiently appraised of all relevant matters before reaching his decision. He or she is, of course, entitled to expect that the prosecutor will put such matters before him or her in a lucid and comprehensive fashion but he or she cannot be relieved of their obligation to obtain all material information by the default of the prosecutor.

[18] Having ensured that all relevant information is available to him, the magistrate must take into account the interests that are at stake in deciding whether

to accede to an application to adjourn and have regard to the probable consequences of a refusal of such application.

[19] In the present case the magistrate made no inquiry of the prosecutor as to whether the witness had indicated a willingness to attend to give evidence. He asked merely whether there was an explanation for her failure to attend. He made no inquiry as to the steps taken by the police to ascertain Mrs McGurk's whereabouts. He did not ask if the defendant had contributed to adjournments in the past nor whether a short adjournment would have allowed the matter to proceed without substantial delay. He does not appear to have addressed the question whether the prosecution was in any way responsible for the non-attendance of the witness.

[20] One may take the view that the prosecutor should have volunteered this information to the magistrate but, as we have said, the failure of the prosecution to bring relevant material to the magistrate's attention cannot excuse an omission to seek it. All of the factors outlined in the preceding paragraph were plainly relevant to the decision whether to adjourn the prosecution. The magistrate's failure to make appropriate inquiry about these matters led inevitably to his not having all relevant material necessary for him to reach a proper conclusion on the application for an adjournment. We are confident that, if he had obtained that information, he would have acceded to the application.

[21] We therefore quashed the decision to refuse the adjournment and the dismissal of the charge that flowed inexorably from it and ordered that the matter proceed to trial before a different magistrate.”

APPENDIX 2

Galo v Bombardier Shorts [2023] NICA 50

"***Determining adjournment applications***

[61] Some of the issues raised in the regrettably protracted history of these proceedings - and which foreseeably may recur - relate to the issue of adjourning hearings. It is appropriate to draw attention to the correct doctrinal approach to this issue (and kindred issues), set out comprehensively in the decision of this court in *TF v NI Public Services Ombudsman* [2022] NICA 17 at paras [94]–[98]:

> "[94] In *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284 (cited in *Nwaigwe* above), the matrix was that of an immigration appeal in which the central issue was the claimant's age. A so-called "fast track" first instance tribunal hearing was arranged to take place within approximately one month of his arrival in the United Kingdom. An application for an adjournment for the purpose of obtaining a suitable expert report was made one week in advance and repeated at the hearing. Both applications were refused, and the appeal was dismissed. This was affirmed by the Upper Tribunal. Moses LJ, delivering the judgment of the Court of Appeal, stated at [13]–[14]:
>
> > '13. In relation to both the two issues I have identified, whether the Immigration judge erred in law in refusing an adjournment and as to whether he would have reached the same conclusion, in my judgement Judge King fell into serious error. 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. In *R v Secretary of State for the Home Department ex-parte the Kingdom of Belgium and Others* [CO/236/2000 15 February 2000] the issue was whether a requesting state and Human Rights organisations were entitled to see a medical report relevant to Pinochet's extradition. Simon Brown LJ took the view that the sole question was whether fairness required

> disclosure of the report (p24). He concluded that the procedure was not a matter for the Secretary of State but for the court. He endorsed a passage in the fifth edition of Smith Woolf and Jowell at pp406-7:
>
> > 'Whether fairness is required and what is involved in order to achieve fairness is for the decision of the courts as a matter of law. The issue is not one for the discretion of the decision-maker. The test is not whether no reasonable body would have thought it proper to dispense with a fair hearing. The Wednesbury reserve has no place in relation to procedural propriety.' (p24)
>
> The question for Judge King was whether it was unfair to refuse the appellant the opportunity to obtain an independent assessment of his age; the question was not whether it was reasonably open to the Immigration judge to take the view that no such opportunity should be afforded to the appellant. Where an appellant seeks to be allowed to establish by contrary evidence that the case against him is wrong, the question will always be, whatever stage the proceedings have reached, what does fairness demand? It is plain from reading his decision as a whole that that was not the test applied by Judge King. His failure to apply that test was a significant error."

[62] At this juncture, it is appropriate to draw attention to two reported Northern Ireland decisions, each directly in point, namely *R v SOSNI, ex parte Johnston* [1984] NIJB 10 and *In Re North Down Borough Council's Application* [1986] NI 304. Both decisions establish unequivocally the principle that the legal barometer to be applied to the lawfulness of an adjournment refusal decision of a court or tribunal (and by logical extension other public authorities) is that of natural justice, or fair hearing. The principle is expressed unambiguously by Carswell J in *North Down* at 323 a-d in a passage which bears repetition in full:

> "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 of the rules of natural justice. 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:** see *Ostreicher v Secretary of State for the Environment* [1978] 3 All ER 82, 86b, per Lord Denning MR; and see also the discussion in Wade on Administrative Law, 5th ed, pp465-8. There are occasions when it would not be unfair to the applicant to refuse an adjournment, for example, because it would be even more unfair to other persons, or because the applicant has brought it entirely on himself, or because the applicant can be accommodated in some other way, or through a combination of factors. Cases are infinitely diverse and the tribunal has to balance out the factors to reach a fair decision. If it is not unfair to refuse an adjournment, the applicant may indeed be deprived of an opportunity to present his case, but that deprivation does not constitute breach of the rules of natural justice.'"
> [Emphasis supplied]

Though not binding on this court as a matter of precedent, the correctness of neither decision has, to our knowledge, never been questioned and we can conceive of no reason not to follow them.

[63] In the present case, and in many of the cases considered above, the factual matrix has been one of the tribunal concerned refusing an application to adjourn the hearing by the claimant on medical grounds. Each of these cases is different, belonging to its particular fact sensitive context. In cases of this kind factual comparisons will almost invariably be inappropriate. Having registered this warning, lessons can sometimes be learned from individual illustrative decisions read through an open and flexible lens.

[64] The principle enunciated by this court is that in any review or appellate challenge to a first instance decision to refuse an adjournment application advanced on whatever grounds, the test to be applied is whether this has had the effect of unfairly depriving the litigant of a fair hearing. It is no answer, no objection in principle, to say, particularly in cases of asserted ill health, that this must almost invariably require the first instance court or tribunal to adjourn the hearing. There are three main reasons for this. First, a litigant's fundamental right of access to a court, which is constitutional in nature and its related common law right to a fair decision-making process, does not entitle the litigant to dictate how this process is to be undertaken. Second, every court and tribunal will be jealous in guarding against any possible misuse of its process. Third, the terms of the test (above) are not absolute.

[65] It follows that a review or appellate court is unlikely to hold that a litigant has been deprived of their common law right to a fair hearing where an adjournment application is refused in any of the following illustrative situations: where medical evidence is provided which the tribunal considers inadequate - for example, where there is medical evidence describing an ailment or illness but failing to address the

central question of whether the litigant is fit to attend a forthcoming hearing for its duration and give evidence and/or present their case; where a reasonable opportunity has been afforded to provide medical evidence and none is forthcoming; alternatively, where a reasonable opportunity has been afforded to provide medical evidence and something which the tribunal considers substandard materialises; where there are demonstrable inconsistencies or discrepancies in the assertion that a litigant is unfit to attend a hearing; and where the absence of medical evidence or *prima facie* reservations about any medical evidence provided is coupled with indications in the history of the proceedings of reluctant prosecution of the case or delay/obstructing tactics. The reasons why an adjournment refusal in any of these illustrations is unlikely to be unlawful are the same as set out above. First, in each of these illustrations the litigant has been afforded reasonable facilities to vindicate their fair hearing rights. Second, particularly in the last illustration, there are indications of misusing the process of the court or tribunal concerned."

[66] One of the decided cases helpfully brought to the attention of this court by counsels' researches is *Riley v CPS* [2013] EWCA Civ 951. We have considered in particular what the English Court of Appeal stated at paras [4], [24], [27] and [28]. If and insofar as these passages are to be construed as an espousal of the *Wednesbury* principle for the purpose of determining the kind of procedural issues thrown up by this appeal and considered in the immediately preceding paragraph, it suffices to say that we respectfully disagree and to emphasise that the correct approach is set out in this judgment and in *TF*. We refer also to *Andrews v Bryson House* [2023] NICA 26 at paras [5] and [25] particularly.

> "**[4]** Accordingly, the interesting question posed by Elias LJ for this court no longer arises; the appeal has to be disposed of but by reference to the *Wednesbury* test and can only succeed if there was an error of legal principle in the ET's approach or perversity in the outcome.
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> **[24]** On the basis of Judge Hall-Smith's findings Wilkie J came to the same conclusion because he could detect no error of law in the judge's approach on his decision. The only question for us is whether there was any error of law which Wilkie J failed to detect.
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> **[27]** It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. article 6 of the ECHR emphasises that every litigant is entitled to `a fair trial within a reasonable time'. That is an entitlement of both parties to litigation. It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time. Judge Hall-Smith correctly found assistance in remarks of

Peter Gibson LJ in *Andreou v The Lord Chancellors Department* which are as relevant today as they were 11 years ago:

> 'The tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to Mrs Andreou (of course an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights, having regard to the terms of article 6): they had to include fairness to the respondent. All accusations of racial discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take very seriously what is alleged against them. It is rightly considered that a complaint such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. This case concerned events which took place very many years ago, well outside the normal three months limitation period. The tribunal also had to take into account the fact that other litigants are waiting to have their cases heard. It is notorious how heavily burdened Employment Tribunals are these days.
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> **[28]** It would, in my judgment, be wrong to expect tribunals to adjourn heavy cases, which are fixed for a substantial amount of court time many months before they are due to start, merely in the hope that a Claimant's medical condition will improve. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out must be an option available to a tribunal. Like Wilkie J I can see no error of law and would dismiss this appeal."

[67] The foregoing approach is to be contrasted with that of this court in *TF v NI Public Services Ombudsman* [supra] at paras [94]–[98] and, more recently, *Andrews v Bryson House* [2023] NICA 26 at paras [5] and [25] particularly. We consider that the sustainability in law of strike out decisions under rule 32 should be assessed through the prism of the litigant's constitutional right of access to a court and their right to a fair hearing. It is difficult to identify any scope for the operation of the *Wednesbury* principle.