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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **15/05/14**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Committee on the Administration of Justice's Application [2014] NIQB 67

AN APPLICATION BY THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE PAROLE COMMISSIONERS FOR NORTHERN IRELAND COMMUNICATED ON 28 FEBRUARY 2013 AND 9 APRIL 2013

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TREACY J

Introduction

[1] This is a challenge to a decision by the Parole Commissioners which was communicated to the Applicant by letters of 28 February 2013 and 9 April 2013 wherein the Parole Commissioners refused access to a representative of the CAJ to observe a parole hearing. There is a further challenge to an alleged implicit policy operated by the PCNI whereby representatives of responsible organisations will never be entitled to access to parole hearings.

Relief Sought

[2] The Applicant seeks the following relief:

(a) A declaration that the decision of the Parole Commissioners for Northern Ireland as communicated to the Applicant on 28 February 2013 and 9 April 2013 was unreasonable, unlawful and void.

(b) A declaration that the policy of the Parole Commissioners for Northern Ireland whereby they refuse to permit 'observer' status to NGO representatives at Parole Commissioners' hearings is unreasonable, unlawful and void.

Grounds upon which Relief is Sought

[3] The relief is sought on the following grounds:

(a) The decision of the Parole Commissioners as explained and communicated on 28 February 2013 and 9 April 2013 is unlawful in that:

(i) The decision-maker unlawfully and unreasonably treated an application to observe under Rule 22(4) of the Parole Commissioners' Rules (NI) 2009 as an application related to the 'representation' of the prisoner under Rule 7(8) and thereby misdirected itself in failing to exercise the separate discretion under Rule 22(4) to admit persons to hearings for reasons not related to 'representation'.

(ii) Alternatively the decision-maker unlawfully and unreasonably equated an application under Rule 22(4) with an application under Rule 7(8) in such a way that he failed to appreciate that the two Rules provided for separate discretions that should be separately exercised and thereby misdirected himself.

(iii) The decision was unlawful in that it represented an application of the unlawful policy complained of in paragraph 3(b) below.

(iv) The decision left out of account a relevant factor, namely the benefits of public scrutiny, added transparency and public confidence in the administration of justice that may be derived from granting applications for observers and in adding an extra layer of transparency to what are prima facie private proceedings.

(b) The policy of the Parole Commissioners whereby they determine that Parole Commissioners' hearings are 'private' and therefore 'confidential' and that as a result applications 'simply to observe' cannot be granted is unlawful in that:

(i) Rule 22(2) of the Parole Commissioners' Rules (NI) 2009 which requires that Commissioners hearings shall be 'private' does not require that such hearings shall be 'confidential' or 'secret' hearings.

(ii) Rule 22(2) of the relevant Rules requires that the hearings should be private as opposed to 'public' hearings.

(iii) In so restrictively interpreting Rule 22(2) the Commissioners fail to appreciate that Rule 22(2) does not prevent the Commissioners from granting applications to responsible bodies to observe hearings of this nature.

(iv) In so restrictively interpreting Rule 22(2) the Commissioners have in effect adopted a policy against allowing responsible bodies to observe such hearings.

(v) That policy derives from a misinterpretation of the relevant Rules and leads to a misinterpretation of the extent of the Commissioners discretion to grant admission to hearings under Rule 22(4) and moreover leads to the Commissioners failing to properly exercise any discretion under Rule 22(4) at all when application is made by responsible bodies to observe proceedings.

(vi) As a result of that policy the Commissioners have failed to appreciate the benefits of public scrutiny, added transparency and public confidence in the administration of justice that may be derived from granting applications for observers and in adding an extra layer of transparency to what are prima facie private proceedings.

(vii) The implied policy is objectionable and unlawful in that the Commissioners operate their policy in an unbalanced manner by refusing independent NGO observers but granting permission for employees of the Ministry of Justice to attend such hearings on a regular basis.

Factual Background / Sequence of Events

[4] The Applicant is a Non-Governmental Organisation practising a 'watch-dog' role in relation to civil liberties and human rights with an interest *inter alia* in prison law and

prisons administration. The Applicant's casework routinely involves it in attending and observing proceedings with a civil liberties or human rights slant.

[5] The CAJ became interested in litigation concerning a Mrs Marian McGlinchey. Mrs McGlinchey's case was well-known and had been widely reported in the press. The Applicant's interest arose in part due to its interest in criminal justice and partly due to its ongoing concerns about 'secret justice'. Its most immediate concern however was from a prison perspective about the conditions of her detention and the impact that this detention was having on her health. The Applicant had engaged in various correspondence related to the case with various agencies including the Justice Minister, the Special Rapporteur on Torture, the Committee on the Prevention of Torture, the Northern Ireland Human Rights Commission and so on.

[6] Mrs McGlinchey was known as a former Republican prisoner who had been convicted of bombings in London in 1973. Since May 2011 and until very recently, she had been detained by order of the Northern Ireland Secretary of State in connection with allegations that she had been involved in criminal activity notwithstanding the decision of various criminal courts to release her on bail. Her case attracted controversy as she asserted that she was issued a pardon in respect of her original offences in or about 1980. She was detained in May 2011 by the Secretary of State on foot of her apparent licence. This gave rise to some controversy as to whether the Secretary of State had power to do so given her alleged pardon. The NIO were reported as being unable to find the relevant pardon documentation to clear up this controversy in a definitive way. Her health was seriously affected by the conditions and duration of her detention.

[7] As well as communicating with the various bodies referred to above the Applicant made its broader concerns about the McGlinchey case known publicly via articles in the Applicant's various publications.

[8] The CAJ became aware that Mrs McGlinchey had a case due to be considered before the Parole Commissioners for Northern Ireland (PCNI) in March 2013.

[9] On 21 February 2013 the Applicant wrote to the PCNI in respect of these proceedings applying under Rule 22(4) of the Parole Commissioners' Rules (NI) 2009 asking for the PCNI Chairman to grant them permission to have an observer at the hearing on such terms and conditions as the PCNI Chairman considered appropriate.

[10] On 27 February 2013 the Applicant received correspondence from the PCNI. This correspondence read as follows:

'I refer to your letter of 21 February 2013.

The Chairman of the panel has asked me to inquire as to your reason or reasons for seeking to have an observer at the hearing in this referral. He notes that your letter states only that you have been 'closely monitoring' these proceedings which this would not in itself be a reason for the Chairman to allow an observer to attend a hearing which is confidential in nature.'

[11] On 28 February 2013 CAJ replied to the PCNI in the following terms:

'We refer to the above and to your letter of 27 February 2013. CAJ is an independent human rights organisation with a long history of monitoring human rights in Northern Ireland; making representations to governmental bodies and international organisations; and, participating in court proceedings on human rights issues. CAJ regularly monitors cases in the courts and has routinely been granted permission to observe and take notes on cases.

CAJ has had particular concerns about Ms McGlinchey's case and has made representations on both the process which led to her detention and the conditions of her detention. These representations have been made to the Minister of Justice, the Prisoner Ombudsman and the Chief Commissioner of the Human Rights Commission domestically. We have also made representations to international bodies such as the European Committee for the prevention of Torture, the United Nations' Special Rapporteur on Torture and the Association for the Prevention of Torture and the various 'National Preventative Mechanism' under the Optional Protocol to the Convention against Torture.

Non-Governmental Organisations have an important role to play in monitoring human rights and to exclude us from attending this hearing would operate [sic] our ability to monitor the human rights issues at stake in this very important case.

You will be aware that Ms McGlinchey and her legal representatives welcome our application to observe the

proceedings and we consider that it is entirely reasonable given our interest in the case and our role as an independent human rights organisation that we be granted permission to attend and monitor these proceedings. Permitting our attendance will ensure an additional layer of transparency and accountability.

The proceedings before the Parole Commissioners engaged Ms McGlinchey's Article 5 rights and you will be aware that the European Court of Human Rights has ruled in A v United Kingdom, dealing with control order that:

> '…in view of the dramatic impact of the lengthy – and what appeared at the time to be indefinite – deprivation of liberty on the applicants' fundamental rights, Article 5(4) must import substantially the same fair trial guarantees as Article 6(1) in its criminal aspect.'

You will also be aware that Article 6 requires a 'fair and public hearing'. You will appreciate that we are not seeking a public hearing, but in view of the Article 5/6 issues in play in this case we consider that to deny us the opportunity to attend and observe this hearing, in circumstances where that application is supported by Ms McGlinchey, would amount to a denial of her Article 5/6 rights.

Clearly we will in observing the hearing be subject to such terms and conditions as the Chairman of the panel considers appropriate, but we consider that this is an appropriate case in which to permit our attendance at the hearing. Should you be minded to refuse our application we would be obliged to receive detailed reasons for your refusal, because absent objection from Ms McGlinchey we consider that there can be no justification for seeking to deny our application to attend the hearing.

Given that this hearing commences tomorrow we would appreciate your prompt response to this request."

[12] 28 Feb 2013: This application was refused in a decision letter dated 28 February 2013. The text of that letter read as follows:

'I refer to your letters of 28 February 2013 requesting permission for a representative of your organisation to attend the hearings on 1, 11 and 12 March.

The Chairman of the panel has now considered this application and the decision and reasons are set out below.

The application is refused.

The chairman of the panel has noted that the reason for the attendance of your representative is that you have 'closely monitored' this case. Rule 7(8) enables the parties to apply in advance of the hearing for permission to be accompanied at the hearing 'by such other person or persons as he wishes' in addition to their representative. This provision must be read in the context of Rule 22(2) which provides that 'Oral hearings shall be held in private' and Rule 22(3) which provides that 'Information about the proceedings and the names of any persons concerned in the proceedings shall not be made public'. Rule 22(4) empowers the chairman to admit to the hearing such person on such terms and conditions as she considers appropriate.

It is the Commissioners'' policy that any application under Rule 7(8) should be judged from the standpoint of the achievement of the objective of the proceedings (i.e. the determination of whether it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined). The provisions of Rule 22(2) and (3) that the hearings should be private and that information about the proceedings and the names of any persons concerned in the proceedings shall not be made public tend to indicate that a cogent reason I required in support of an application under Rule 7(8).

Your 'close monitoring' of this case is not considered to be a sufficient reason to permit the attendance of your representative at the scheduled hearings of this referral.

As a public authority subject to the provisions of the Human Rights Act, the Parole Commissioners have a statutory duty to ensure compliance with the provisions of the European

> Convention on Human Rights. Furthermore, Mrs McGlinchey will be represented by very experienced solicitors and counsel all of whom are qualified to identify and raise any concerns in relation to human rights issues in the case.'

[13] The Applicant was concerned at the content of this letter for the following reasons:

(i) The Applicant had made clear in its application letter that its application had been made under Rule 22(4) of the relevant Rules. The letter of refusal clearly expressed itself as a refusal of an application under Rule 7(8).

(ii) The Applicant was refused permission to have an observer attend at a PCNI hearing when it was aware that applications to admit non-participants to observe in such cases are often/routinely granted by the PCNI to employees of the Probation Board for Northern Ireland and the Prison Service.

[14] On 1 March 2013 the Applicant wrote further to the PCNI referring to this letter of 28 February 2013. This letter read as follows:

> 'We refer to the above and to your letter of 28 February refusing CAJ permission to attend the hearings in the above matter.
>
> We are advised that such applications are routinely granted to Northern Ireland Prison Service, Probation Board for Northern Ireland and other staff to attend, when they have no particular connection to the case, which gives rise to the question as to what criteria has been applied to determine that CAJ has not demonstrated a sufficient reason to permit attendance at the hearings.
>
> We would be obliged if you would confirm what criteria is applied when determining whether to accede to such an application to attend these proceedings.
>
> Please also confirm on how many occasions since your establishment you have acceded to such requests at these proceedings.
>
> We look forward to your prompt response in this matter.'

[15] On 27 March 2013 CAJ sent further correspondence to PCNI by email. The text of this correspondence read as follows:

> 'We refer to the above and to correspondence of 1 March 2013, which we have not yet received a reply to.
>
> CAJ has previously sought permission to attend other hearings before the Parole Commissioners but has been refused without a satisfactory reason being provided. The response of the Chairman in relation to this matter as outlined in correspondence dated 27 and 28 February has caused us concern. Please confirm what policy is applied by the Parole Commissioners regarding the public scrutiny of these proceedings and please provide a copy of same.
>
> If we do not receive a reply we will proceed on the basis that there is no such written policy and will act accordingly.
>
> Please provide a response to this letter within 7 days.'

[16] The PCNI responded to CAJ on 9 April 2013 with expanded reasons.. This letter read as follows:

> 'The Chairman of the panel from whom you requested permission to attend the hearing on 1 March has asked me to reply to your letter.
>
> He would point out that he has already set out, in our email to you of 28 February 2012 the legal setting in which an application for admittance to a hearing would be considered.
>
> The Chairman would not accept that the applications for admittance to hearings are 'routinely' granted. Applications made under Rule 7(8) are carefully considered before a decision is made.
>
> In the past Chairmen have, in a very limited number of cases, permitted persons such as a member of the Prisoner's family, his priest or clergyman etc to attend. There must be a good reason for their attendance. Anyone admitted under this criteria is permitted to be there only on the basis that there

attendance will facilitate progressing the referral. The situation in which this would arise would normally be that the prisoner had a particular vulnerability and required the support of someone he or she knew over and above their legal advisers.

The other class of persons admitted would include psychologists or probation officers in training. The basis for admitting such persons as it is for the general good of the system that those appearing in such capacities before the Commissioners' should have had an opportunity to observe the system before taking part in it.

Your application was simply to 'observe' the proceedings. This would not be a sufficient ground to permit admission to a confidential hearing and if granted would mean that the hearing would no longer be confidential. In addition, anyone permitted to attend as an observer would, of course, remain subject to Rule 22(3) and, therefore, would not be in a position to disclose anything about what they had observed.

The Chairman notes you request that we inform you of the number of times we have acceded to applications 'for admission to hearing' since (our) establishment'. Given the number of cases that the Commissioners have dealt with since they were established under their original name of Life Sentence Commissioners or even from their renaming as Parole Commissioner, this would involve an enormous amount of research. It would also involve assigning a number of the Commissioners' Secretariat to carry out a task that the Chairman believes is of no value. The Chairman feels that the staff that would be required to answer your question would be better employed processing referrals.'

[17] On 30 April CAJ wrote again to PCNI in the following terms:

'We refer to the course of correspondence between us touching on our application to observe the PCNI proceedings in the case of Marian McGlinchey and to your refusal of our application. Please note that whilst we thank you for providing written reasons for the refusal of our application in your letters of 28th February and 9th April 2013 we are

dismayed by the thrust of those reasons on the following grounds:

(i) Whilst our application to observe was clearly expressed to be an application under Rule 22(4) of the 2009 Rules it appears to us to have been dealt with by you and explained/justified by you in terms of your having refused an application under Rule 7(8); it is our interpretation of the 2009 Rules that Rules 7(8) and 22(4) serve different purposes and provide for different discretions to be differently exercised, in this instance this appears not to have occurred.

(ii) Our application to observe has been refused on an erroneous basis in that it is repeatedly asserted in your decision letters that proceedings before the PCNI are 'confidential' whereas in truth and in fact they are not – they are 'private' proceedings as opposed to 'public' proceedings but this merely signifies the distinction that such hearings are conducted under the lex specialis of Article 5(4) ECHR as opposed to under Article 6 EcHR (whereby 'public' as opposed to 'private' hearings would be required).

(iii) Private hearings are not secret or 'confidential' hearings as you appear to suggest and private hearings are not barred by the Rules from enjoying the benefits of responsible observation by responsible bodies such as our organisation – the benefit that the added layer of transparency and public confidence that private hearings may gain from the observation and superintendence of responsible organisation appears to be something that has escaped your consideration entirely and this is a matter of concern.

(iv) The fact that you appear to have no published policy on the operation of Rule 22(4) is a further matter of concern.

(v) The fact that your approach implies that all future applications for observation by responsible NGOs and 'watchdogs' will be refused is furthermore a matter of concern as is the phraseology of your letter of 9th April 2013 which refers to our application in a rather dismissive manner as being 'simply' an application to observer. It can be seen

from the above that we consider that the manner in which you have dealt with our application has been unreasonable. Moreover it appears to us that you would intend dealing with similar applications in the future in a like manner. It appears to us that if we are to consider the prospect of judicial review of your refusal in the McGlinchey case then strictly speaking there is no requirement for a formal Pre-Action Protocol letter prior to any such judicial review application in that you have taken your decision and in practical terms it cannot now be 'changed' given that the open session in the case is concluded.

Notwithstanding the above please accept our respectful notice that we shall now proceed to investigate whether judicial review proceedings will be issued in respect of that decision and please accept this correspondence as relevant Pre-Action Protocol correspondence issued in accordance with High Court Practice Note 1/2008 on Judicial Review. Please be further advised that should the PCNI within 14 days of the date of this letter, publish or bring to our attention a relevant written policy of the PCNI detailing your approach to applications under Rule 22(4) which gives appropriate weight to the benefits of observation of PCNI proceedings by responsible NGOs or watchdogs such as our organisation then CAJ may reconsider our options at that stage.

In any such application for leave to apply for Judicial review the PCNI would be named as the Respondent and the Applicant would be CAJ. The matter for challenge would be PCNI's refusal of our application to attend as observers in the case of Marian McGlinchey and declaratory relief will be sought in respect of same.

The grounds will reflect broadly the concerns as set out in this correspondence in respect of that refusal. Any relevant correspondence in respect of this matter may be addressed to Gemma McKeown, Solicitor at these premises.'

[18] On 22 May the Applicant received a solicitor's letter in reply to its correspondence of 30 April. That letter contained assertions which are not accepted by the Applicant. The Applicant contends that it was further factually inaccurate and

disclosed an incomplete understanding of the relevant issues. In particular the Applicant says:

(a) That the solicitor's letter suggests that the Applicant had asserted that it had a 'right' pursuant to Rule 22(4) of the Rules to attend the hearing and that this 'right' arose from the Applicant having closely monitored the proceedings to date. The Applicant says that neither of these contentions are factually true.

(b) That the letter asserted that reasons had been given to the Applicant which had not in fact been given. Specifically the letter suggests that the Applicant had been told that its application

(i) Was refused pursuant to the Chairman's discretion under Rule 22(4).

(ii) That the application was refused taking Rule 22 into consideration.

(iii) That Rule 22 did not provide legal grounds for the chairman to exercise his discretion to admit persons to oral hearings on the basis of the prisoner and/or his legal team consent to such attendance.

The Applicant says no representations of the nature contended were made to it.

(c) That the letter asserted on various occasions that PCNI proceedings were confidential.

(d) In respect of the issue raised by the Applicant that the PCNI routinely allowed both probation board and prison service staff to attend such hearings the letter showed a complete misunderstanding of that issue and appeared to believe that it was the probation board and prison service that granted permission for their employees to attend hearing, whereas in truth and in fact the PCNI routinely grants such permissions to the Probation Board and Prison Service.

[19] Leave was granted on 9 October 2013. The Respondent's replying affidavit was received.

[20] The two reason letters indicate that the PCNI considered the application under Rule 7(8) of the relevant Rules rather than under Rule 22(4) or at any rate equated an application under Rule 22(4) with Rule 7(8) to such an extent as to make no difference between the two and thereby misdirected itself in law.

[21] Moreover the two reasons letters together indicate that the PCNI take the view that hearings before the PCNI are 'private' in nature, that 'private' means that they are

'confidential' (or secret) hearings and that applications 'simply to observe' such proceedings should not be granted.

[22] CAJ discerns from these reasons letters that PCNI have an implied policy which prohibits the PCNI from ever granting observer status to representatives of a responsible NGO seeking to observe PCNI proceedings. The PCNI often permit employees of the Probation Board for Northern Ireland and Prison Service employees with no connection to particular cases to sit in and observe PCNI hearings.

Statutory Framework

[23] Paragraph 4 of Schedule 4 of the Criminal Justice (NI) Order:

> 4.(1) The Secretary of State may make rules with respect to the proceedings of the Commissioners.
>
> (2) In particular the 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 of deputy Chief Commissioner.
>
> (d) About evidence and information including
>
> a. Requiring the Commissioners to send to the Secretary of State copies of such documents as the rules may specify.
>
> b. Requiring the Secretary of State to provide specified information to the Commissioner.
>
> c. For the giving of evidence by or on behalf of the Secretary of State, the Police Service of Northern Ireland and other.
>
> d. About the way in which information or evidence is to be given.
>
> e. For evidence or information about a prisoner not to be disclosed to anyone other than a Commissioner if the Secretary of State certifies that the evidence or information satisfies conditions specified in the rules.

f. Preventing a person from calling any witness without leave of the Commissioners

g. For proceedings to be held in private except where the Commissioners direct otherwise.

h. Preventing a person who is serving a sentence of imprisonment or detention from representing or acting on behalf of a prisoner.

i. 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.

[24] Rule 3 of the Parole Commissioners Rules (NI) 2009:

General Powers of the Commissioners

3.–(1) Subject to the provisions of these rules, the Commissioners may regulate their own procedure in dealing with any matter as they consider appropriate.

[25] Rule 7 of the Parole Commissioner Rules (NI) 2009

Representation

7.(8) 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.

(9) An application under paragraph (8) shall state the reason for the application, include the name, address and occupation of the person to whom it relates and be made no later than 3 weeks prior to the date of such hearing.

(10) The chairman of the panel may grant or refuse an application under paragraph (8) and shall communicate within 7 days the decision to both parties giving reasons in writing, in the case of a refusal, for the decision.

(11) Before granting any application under paragraph (8) the chairman of the panel shall obtain the agreement of:

(a) in the case where such hearing is to be held at a prison or other place of detention, a governor; and

(b) in any other case, the person in whom is vested the authority to agree

…

[26] Rule 22 PC Rules (NI)

Location and Privacy of Oral hearing

22.–(1) Subject to rule 18(9) oral hearings shall be held at the prison unless the chairman of the panel and the parties agree otherwise.

(2) Oral hearings shall be held in private.

(3) Information about the proceedings and the names of any persons concerned in the proceedings shall not be made public.

(4) The chairman of the panel may admit to the oral hearing such persons on such terms and conditions as the chairman of the panel considers appropriate.

[27] Rule 23 PC Rules (NI)

Oral Hearing Procedure

23-(5) The chairman of the panel may require any person present at the oral hearing who is, in the chairman of the panel's opinion, behaving in a contemptuous or disruptive manner, to leave, and may permit that person to return, if at all, only on such conditions as the chairman of the panel may direct…

(7) The panel shall require the prisoner, any witness appearing for the prisoner and any other person they think appropriate, to leave the hearing where argument is being

heard or evidence is being examined which includes or relates to information or reports withheld from the prisoner or others under rule 8(2).

(8) The panel shall require the prisoner, the prisoner's representative, any witness appearing for the prisoner and any other person they think appropriate, to leave the hearing where argument is being heard or evidence is being examined which includes or relates to confidential information which has not been made available to the prisoner or any other person under rule 9.

[28] Internal Guidance Document relating to rules 7(8) and 22(4):

ADMISSION OF PEOPLE TO HEARINGS

POLICY STATEMENT

(1) When an application is made under either Rule 7(8) or 22(4) the applicant should be required to state and demonstrate that there is a legitimate reason for the applicant wishing the person, the subject matter of the application, to be present at the hearing.

(2) A potent factor in relation to the legitimacy is how the person's presence may be compatible with the prohibition on publicity comprised in Rule 22(3)

(3) An application on behalf of a prisoner in relation to a spouse, a close relative or a minister of religion should normally be granted although regard may be had to the numbers involved and the accommodation available.

(4) A person or persons representing the Secretary of State should be admitted without being required to make an application under the Rules.
Notwithstanding this policy each application should be considered individually on its own merits.

(5) It would be prudent to explain at the start of each hearing to everyone present the prohibition on publicity comprised in Rule 22(3)

EXPLANATORY NOTES

(1) The requirement of fairness and Rule 23(3) entitle the prisoner and his representative to be present throughout the hearing subject to the exclusion requirements of Rule 22(7) and (8) ….

(2) There is no explicit provision in the Rules entitling witnesses to be present at the hearing when they are not giving evidence. Rule 22(2) provides that the hearing shall be held in private except insofar as the chairman of the panel otherwise directs. Rule 22(4 empowers the chairman to admit to the hearing such person on such terms and conditions as he considers appropriate (see further below)

(3) Rule 7(8) enables the parties to apply in advance of the hearing for permission to be accompanied at the hearing 'by such other person or persons as he wishes' in addition to their representative. The power comprised in Rule 22(4)… seems to be additional to that under rule 7(8)

(4) A possible explanation for the distinction between Rules 7(8) and 22(4) is that 7(8) is intended to deal with persons who have a connection with the parties whereas 22(4) is intended to cater for others. Furthermore it may be argued that the right approach to Rule 7(8) is to judge the application for the standpoint of the achievement of the objective of the proceedings (i.e. the determination of whether it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined). Thus, the presence of a person or persons who may enable the prisoner to present his case more effectively (by, for example, affording him the comfort and support of the proximity of his spouse, close relative, minister of religion etc.) would, on this analysis, be permissible and, therefore, permitted. Conversely, this test would require the exclusion of a person or persons the reason for whose presence did not comply with this criterion. The provisions of Rule 22(2) and (3) that the hearing should be private and that information about the proceedings and the names of any persons concerned in the proceedings shall not be made

public tend to indicate that a cogent reason is required in support of an application under Rule 7(8)

(5) Rule 22(4) may have been intended to permit the attendance of persons not having a connection with the parties or not having the type of connection referred to in paras 4 and 5 above. Presumably, this would include newly appointed Commissioners attending as observers as part of their training, members of the Parole Commissioner Secretariat and officials of other criminal justice agencies. Bearing in mind the provision that the hearing be held in private and the prohibition on information 'about the proceedings and the names of any persons concerned' being made public it is difficult to think of examples of 'non-official' people who might properly be admitted – even a PHD student would appear to be ruled out by the effect of Rule 22(2) and 22(3).

Arguments

Applicant's Arguments

[29] The Applicant argues that the internal guidance document discloses the following:

(a) That the PCNI are genuinely unsure of the purpose and nature of Rule 22(4);

(b) That the guidance imports a strong presumption against any other person being permitted entry to such proceedings; this imports an inherent imbalance in the manner in which the discretion is exercised i.e. it is exercised in favour of employees of the Ministry of Justice but apparently not otherwise.

[30] The Applicant argues that Rule 7(8) is intended to deal with applications that relate to the 'representation' of the prisoner and Rule 22(4) is general in nature and can be exercised for such considered objects as the Chairman might deem appropriate in an individual case, which may include the object of providing the additional layer of transparency and accountability that a watchdog observer can bring to proceedings.

[31] The Applicant argues that the Respondent's decisions unreasonably and improperly deal with the Applicant's requests for admission under Rule 22(4) as if they were applications made under Rule 7(8)

[32] The Applicant argues that the decisions appear to proceed on the unreasonable premise that the proceedings are confidential or secret when they are merely 'private' as opposed to public. The Applicant contends that the PCNI both in the impugned decisions and in its 'policy' interpret the 'privacy' restriction in Rule 22(2) unduly restrictively and in doing so misdirect themselves on the meaning of private as a matter of law and thus fail to properly interpret the extent of their discretion under Rule 22(4), fail to exercise any proper discretion under R 22(4) and leave out a relevant factor i.e. the benefit of an NGO 'simply observing' out of account.

[33] The Applicant argues that the unbalanced application of the implicit policy of refusing NGO observation of PCNI hearings while granting same to members of the Probation Board and Prison Service is unreasonable.

[34] The Applicant contends that a large part of the PCNI's policy is based upon its interpretation of Rule 22(3) to the effect that no information about the proceedings or the names of any persons concerned in the proceedings shall be made public. The PCNI appear to believe that any 'observer' attending hearings will not be able to do anything with the information it gathers as a result of such information and in this regard they appear to interpret the prohibition against making information 'public' too restrictively.

[35] The Applicant argues that it is not clear that Rule 22(3) has the injunctive effect which the PCNI seem to attach to it. The Applicant submits that Rule 22 as a whole is based upon the former rules regarding privacy in Mental Health Review Tribunals. The Mental Health Rules were supplemented by Section 12 of the Administration of Justice Act 1960 making publication of information relating to such proceedings contempt of court in and of itself. Contempt of court relating to proceedings not governed by Rule 12 of the 1960 Act are dealt with by the Contempt of Court Act 1981. As the Mental Health Tribunal Rules themselves (which are considered similar to the PC rules) have been found to have no injunctive effect if not considered alongside the 1960 Act, and that even with the consideration of the 1960 Act not all 'publication of information relating to proceedings' would be considered contempt of court, it is arguable that the PC rules, not supplemented by the 1960 Act do not have injunctive effect.

[36] In any event the Applicant submits that 'public' in Rule 24(4) can be presumed to refer to the making of information known to the public at large or a relevant section of the public. As a corollary of the above if the Applicant were to attend a hearing and use information gathered at hearing responsibly and in a manner that did not involve such 'publication' there would be nothing objectionable in such an approach. The Applicant submits that as a watchdog engaged in such activities (as making submissions in a particular case or lobbying in a general way in communications with the PCNI themselves) there are various ways in which it can make use of such information without breaching the spirit of Rule 24(4).

[37] The Applicant submits that the PCNI's policy and the decisions impugned did not consider the Applicant's application and do not consider the prospect of 'watchdogs' attending proceedings in this way. They appear to consider that Rule 24(4) has an injunctive effect in of itself and would disbar the applicant form making any use of information gathered in such proceedings. Moreover, they failed to recognise the benefits of additional accountability and transparency that trial-monitoring brings to any judicial process and fail to recognise the fact that the grant of 'observer status' to watch dogs in what would otherwise then be 'secret courts' assists in the general function of justice not only being done in such courts but being seen to be done.

[38] The Applicant submits that the PCNIs policy creates an anomaly that Rule 22 was not intended to create wherein watchdogs seeking to operate in this area will not be permitted to 'watch' anything and where this is not an anomaly intended by Rule 22 at all their decisions and policy are unreasonable.

[39] The Applicant submits that the Respondent's decisions appear to be founded on the Respondent's unlawful policy of interpreting the Rules in a particular way and are thus further unlawful.

[40] The Applicant submits that the decisions unreasonably fail to give any weight to the importance of the benefits that 'trial monitoring' can bring to proceedings in that such monitoring adds an extra layer of transparency and accountability to the proceedings.

Respondent's Arguments

[41] The Respondent argues that it does not operate a policy whereby all applications to observe hearings made by responsible organisations under Rule 22 of the Parole Commissioner's Rules (Northern Ireland) 2009 will be refused.

[42] The Respondent argues that the instant case deals with a statutory exception to the open justice principle.

[43] The Respondent argues that the Rules to be considered are expressed in clear and unequivocal language. In each of Rules 22(2) and 22(3) the imperative 'shall' is used. By comparison to similar provisions in the areas of Parole/early release and mental health law which are similarly drafted but contain qualifications, the Respondent argues that the rule making power conferred by the 2008 Order is such that the 2009 Rules made by virtue of that power can only be read (having regard to paragraph 4(2)(e) of schedule 4) as involving a deliberate choice not to qualify the rule that hearings shall be held in private. Similarly, the rule that information about the proceedings and

the names of those concerned are not to be made public is undiluted by any exception such as is found in comparable rules.

[44] The Respondent argues that the mandatory requirement imposed by Rule 22(2) that oral hearings shall be held in private means simply that the hearing is not one to which the public has access. The Respondent accepts that the chairperson of a PCNI panel has power to admit persons in the exercise of his or her discretion to a private hearing. However, the private nature of the hearing and the accompanying prohibition on information being made public are however important factors to be borne in mind in the exercise of the discretionary power. In the case of an application to observe a private hearing, it is appropriate to refuse to permit attendance unless that attendance will give rise to an identified and sufficient benefit.

[45] The Respondent argues that the effect of Rules 22(2) and 22(3) stymies the Applicant in its aim to bring to the proceedings an additional layer of transparency and accountability. As such the application to observe therefore failed to disclose sufficient utility or benefit to merit the admission of the applicant to perform the role of a watchdog at a private hearing with a prohibition on information about the proceedings being made public.

[46] The Respondent argues that it is clear from the PCNI internal guidance that admission under Rule 22(4) may be appropriate only in limited circumstances but that such applications are nonetheless to be considered individually on their merits.

Discussion

[47] It is clear from the two reason letters that the request to send a representative as an observer was considered under rule 7(8) instead of rule 22(4). These are clearly different tests with different considerations to be measured. For this reason the Commissioners misdirected themselves in law and could not have weighed the factors relevant to the Rule and the decision is therefore unlawful.

[48] In making his decision under the incorrect Rule, the Commissioner used the guidance that applied to Rule 7(8) (essentially that any admission of a person under that rule must be based on a cogent reason and that the admission will facilitate the referral). That rule relates to 'Representation' and the guidance reflects this, admission may be granted under that rule for priests and family members, people who may enhance the prisoner's capacity to make his case. There is reference to a second class of persons who may be admitted on the basis that it would be for the general good of the system. It seems that the admittance of NGOs is not considered in the guidance, but that the discussion of Rule 22(4) in the guidance does not exclude the possibility of the admission of an NGO representative. Because the decision was made under the

incorrect Rule, and the Respondent accepts in these proceedings that 'private' means merely that the proceedings are not open to the public, it seems that if the alleged implied policy, if it was operative at the time, was not the reason for the decision and in any case the definition of 'private' that the applicant contended for is now accepted by the Respondent so if the alleged implied policy was operative (which I cannot say on the evidence) it is no longer so.

[49] It is entirely at the discretion of the Commissioners whether or not to admit any person under Rule 22(4). It is not for the court to supplant this discretion and try to force the Commissioners hand in one way or the other. I would merely point out that any decision to admit or not to admit under Rule 22(4) must of course take into account all relevant considerations and leave out of account all irrelevant considerations. The weight to be attached to the considerations is likewise a matter for the Commissioners, however it is not accepted that Rules 22(2) and 22(3) stymie the Applicant's aim of adding transparency and accountability. In my view those sections are straightforward, the first dealing with the private nature of the proceedings as opposed to a publicly open nature – this definition is accepted by the Respondent, and the second dealing with the privacy to be attached to information about the proceedings and the details of the persons involved. These two considerations do not of themselves have the effect of stymieing the important considerations of transparency and accountability in the administration of justice. Even in circumstances where there is an exception to the general principle of open justice, there is still a public interest in proceedings being as transparent and accountable as possible and it is therefore a relevant consideration when raised as a reason in an application for admittance under Rule 22(4).

[50] The arguments raised by the Applicant in relation to the use it may be permitted to make of any information from the hearing if it were to attend seems to me to be outwith the scope of the pleadings and as such I do not propose to deal with it in this decision.

Conclusion

[51] For the above reasons I allow the application and will hear the parties as to what, if any, further relief is required.