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Judgment: approved by the court for handing down (subject to editorial corrections)*	***Delivered ex tempore:*** **01/06/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Between

MARK TOAL

Appellant

and

DEPARTMENT OF JUSTICE

Respondent

Mr Hugh Southey KC and Mr David Heraghty (instructed by Higgins Hollywood Deazley Solicitors) for the Appellant
Mr Tony McGleenan KC and Mr Philip McAteer (instructed by The Departmental Solicitor) for the Respondent

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Before: McCloskey LJ, Horner LJ and Scoffield J

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

[1] The following is the unanimous decision of the court.

[2] The appellant was granted leave to apply for judicial review following a contested inter-partes hearing. That hearing was preceded by a period of delay. The court has been informed that the principal reason for that delay was not necessarily the pandemic but was rather the passage of the case of *Hilland* through the Northern Ireland Court of Appeal. We note, parenthetically, that leave to appeal to the Supreme Court was later granted and *Hilland* will be listed, we are told, in October of this year. The materiality of *Hilland*, one would add at this stage, is really quite peripheral given that it is first and foremost an Article 14 ECHR case.

[3] The factual framework of the present case, subject only to the question of the respondent's affidavit evidence, is either uncontested or incontestable. In short, this is a prisoner recall case, the appellant having received an extended custodial sentence, having served the custodial part of that sentence and then having been released on licence subject to conditions. Thereafter, he was the subject of a recall to

prison following a decision of the Department of Justice (the Respondent/DOJ) which is contained in a letter dated 23 May 2020.

[4] That act gave effect to a recommendation of the single member of the Parole Commissioners. The respondent's recall decision, as is emphasised by both the judge and by Mr McGleenan on behalf of the respondent, forms part of a suite of documents including, in particular, the recommendation of the single Parole Commissioner. This was followed by the impugned recall decision of the respondent. The most important feature of that recommendation in the context of this legal challenge is that in three separate places, that is to say at paras [3], [19] and [23], the author of the recommendation formulated the correct legal test. It is not, and could not be plausibly, suggested that the decision-maker overlooked or in some way neglected the recommendation of the single Parole Commissioner.

[5] Returning to the narrative, leave to apply for judicial review having been granted and following the delay that I have mentioned, a contested inter-partes hearing materialised before the deputy judge. By his reserved judgment delivered on 23 September 2022 and consequential order, the judge dismissed the application. The framework of the proceedings at first instance was shaped fundamentally by, on the one hand, the DoJ letter of decision and surrounding documents and, on the other hand, the DoJ affidavit sworn by Mr Matthew Neill.

[6] It is convenient at this stage to refer to the judgment of the deputy judge. First of all at para [35] he records that effectively the appellant was asking the court wholly to ignore everything which Mr Neill swore in his affidavit about how he had reached his decision. So this was very much an all or nothing situation when issue was joined between the parties. At para [36] the judge recorded the principal submission on behalf of the respondent, namely that the affidavit sworn by Mr Neill ought to be received in evidence and given appropriate weight. The respondent (per the judge) denied that there is anything inconsistent between the affidavit and the revocation letter and further submitted that the letter read together with the contemporaneous documentation available to the decision-maker provided the proper basis for the decision made.

[7] We consider that submission to be a faithful reflection of what was said on behalf of the respondent in the pre-action protocol response letter of 18 August 2020 and, in particular, the second and third paragraphs on the second page. We take into account what Mr Southey says about the first paragraph. However, reading the letter as a whole it is clear to this court that there was no misdirection of any kind in the text.

[8] The judge then considered the decided cases bearing on the issue of affidavit evidence supplementing, substituting or elucidating the underlying decision. In this context, it is appropriate to take into account that the impugned decision was not contained in a judgment or order or anything kindred. Rather, it was enshrined in a letter written by a public servant. That is a relevant contextual feature. The judge

posed the question of whether within the affidavit there were averments that merely elucidated or supplemented what was originally said in the decision letter or which in any way contradicted that letter or provided something wholly new. He was asking himself those questions by reference to a number of decisions which are routinely considered by the courts when issues of this kind arise. These included, pertinently, *Inclusion Housing Community Interest Co v Regulator of Social Housing* [2020] EWHC 346(Admin) at [78].

[9] Thus far, there is no suggestion that the judge in any way failed to consider any material jurisprudence, albeit we would add that in the context of the English decisions he was directed to purely first instance judgments which, of course, would not have been binding upon him. However, this court accepts that those judgments articulate in broad terms the principles to be applied in both jurisdictions and the judge was, therefore, entirely on the correct track.

[10] At para [43] the judge prefaced his conclusion by observing, firstly, that the reasons given in the impugned decision letter satisfied the test of sufficiency, the test of comprehensibility and the test of enabling the recipient with the benefit of legal advice to make an informed response in the form of further representations. This, we consider, to have been clearly demonstrated by the terms of the pre-action protocol letter which followed.

[11] Next, the judge drew attention to the contextual consideration to which I have already referred, albeit in somewhat different terms, by adopting without qualification the observation of Deeny LJ in *Re Osborne* [2018] NIQB 44 at para [44].

[12] Pausing at this stage, at first instance the primary submission advanced on behalf of the respondent, as already observed, was that there was no defect of reasoning or, alternatively framed, no failure to discharge the statutory duty to give reasons in the impugned decision letter read together with all of the surrounding material. Carefully analysed the judge did not engage frontally with that submission and has not formulated a conclusion upon it.

[13] The judge, instead, embarked upon the primary exercise of considering whether he should accede to the appellant's contention which was, in the pithy language of para [35] of the judgment:

> "…to wholly ignore everything which Mr Neill says in his affidavit about how he, the decision-maker, reached his decision."

The judge rejected that submission in uncompromising terms. First of all, he stated at para [45]:

> "In the particular circumstances it would be entirely artificial for me to ignore what Mr Neill says in his

> affidavit. He is a civil servant, experienced in this particular field and his assertions are challenged only in submission. I consider that it would fly in the face of common sense for me to ignore his affidavit and, notwithstanding his explanations, to hold that he applied an incorrect test. So, to hold would mean, in effect, that I would be ignoring also the context provided by all the contemporaneous material which he had before him, including the recommendation of the Single Commissioner."

[14] Within the foregoing passage one finds a tacit acceptance of the respondent's primary submission. This passage, read as a whole, constitutes a robust rejection of the appellant's challenge to the respondent's affidavit and is expressed, in our view, in unimpeachable terms. It demonstrates that the judge was correctly conducting the exercise of evaluating the strength and persuasiveness of the affidavit considered in its full context and determining what weight should be accorded to it. This is an exercise which falls four square within the *DB* v *Chief Constable* [2017] UKSC 7 principles and we remind ourselves, as we also reminded counsel, of the threshold to be overcome in a challenge on appeal in a case of this kind.

[15] In the opinion of this court the respondent's primary submission is harmonious with elementary principle. It is incumbent upon the court of review to consider not only the text of the impugned decision but also everything which surrounds it and merges with it. To do otherwise would be to commit the error of disregarding the full context.

[16] Our evaluation of the first instance judgment and our characterisation of the robustness of the judge's rejection of the appellant's case applies fully also to para [46] of the text where he elaborates on his primary conclusion and then formulates an alternative conclusion. This gave rise to the omnibus conclusion that in all the circumstances he was satisfied that the decision-maker had applied the correct test having regard to the material which he had before him, in particular the recommendation of the single Parole Commissioner. No error of law had been demonstrated.

[17] We are unable to identify any material error in the analysis, reasoning or conclusion of the deputy judge. Indeed, the judge could have added other reasons to his conclusion. First, that the evidence of Mr Neill in the jurisdiction of Northern Ireland has the status of sworn testimony. Second, it was not tested by cross-examination. Third, the appellant's case in substance invited the first instance court (and continues to invite this court) to conclude that two courts have been misled by a public servant in certain fundamental respects. That is a conclusion which any court would make only following anxious reflection on the materials concerned. It is one which this court is not disposed to make, by some measure. This is demonstrably less, rather than more, likely to be a correct assessment.

Furthermore, of course, one must take into account the grave consequences to which this public servant would be exposed in the event of legal proceedings, which from his perspective have lacked due process, making a damning conclusion of this kind.

[18] We have considered all of the submissions that have been advanced on behalf of the appellant. As will be apparent, we find no merit in the contention that the affidavit reasons are inconsistent with those in the decision letter. Nor in the contention that they in some way supplement what is contained in the decision letter. All of that is clear from our primary conclusion.

[19] We acknowledge the discrete submission on behalf of the appellant that the affidavit may have been coloured by a temptation to defensiveness. We find no evidential basis for concluding that a defensive approach resulted in an affidavit which was misleading or incorrect in any material way. We are mindful of the consideration that the duty to give reasons was a statutory duty in a context involving the liberty of the citizen. Again, that factor is encompassed within our primary conclusion. We reject the submission that the affidavit was not simply clarificatory of the impugned letter of decision and was, in fact, manifestly inconsistent with the latter. Finally, we attribute no significant weight to the observation that the affidavit was filed long after the event. When one takes into account the pre-action protocol response letter, one finds a manifest consistency between the central thrust of the affidavit and what was said on behalf of the respondent in the pre-litigation phase. That the PAP response letter might have more closely mirrored the affidavit which followed later is, in this case, but a forensic criticism of no moment.

[20] Accordingly, for the reasons given we can identify no merit in the specific submissions advanced on behalf of the appellant to this court. It follows that the appeal is dismissed, and this court affirms the decision of the first instance court in all respects.