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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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No: 2018/117698/01

IN THE MATTER OF AN APPLICATION BY PL FOR JUDICIAL REVIEW

v

BOUNDARY COMMISSION FOR NORTHERN IRELAND

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McCLOSKEY J

Introduction

[1] The central issue raised by this challenge is whether the Boundary Commission for Northern Ireland ("*the Commission*"), in adopting its "Final Recommendations Report" (the "*FRR*"), the product of its obligatory statutory review of Parliamentary constituencies in this jurisdiction, erred in law in its consideration and application of certain provisions of the governing legislation and/or in its observance of the common law principles relating to consultation.

Statutory Matrix

[2] The statutory framework within which the Commission was at all material times operating is contained in The Parliamentary Constituencies Act 1986 (the *"1986 Act"*). This has the following salient provisions.

> **Section 2**
>
> *"(1) For the purpose of the continuous review of the distribution of seats at parliamentary elections, there shall continue to be four permanent Boundary Commissions, namely a Boundary Commission for England, a Boundary Commission for Scotland, a Boundary Commission for Wales and a Boundary Commission for Northern Ireland.*

(2) Schedule 1 to this Act shall have effect with respect to the constitution of, and other matters relating to, the Boundary Commissions.

…

(5) As soon as may be after the submission of a report under subsection (1) above, the Secretary of State shall lay the report before Parliament.

(5A) As soon as may be after the submission of all four reports under subsection (1) above that are required by subsection (2) above to be submitted before a particular date, the Secretary of State shall lay before Parliament the draft of an Order in Council for giving effect to the recommendations contained in them."

Section 3

"(1) Each Boundary Commission shall keep under review the representation in the House of Commons of the part of the United Kingdom with which they are concerned and shall, in accordance with subsection (2) below, submit to the [Secretary of State/ Minister for the Cabinet Office] reports with respect to the whole of that part of the United Kingdom, either –

(a) showing the constituencies into which they recommend that it should be divided in order to give effect to the rules set out in Schedule 2 to this Act (read with paragraph 7 of that Schedule), or

(b) stating that, in the opinion of the Commission, no alteration is required to be made in respect of that part of the United Kingdom in order to give effect to the said rules.

(2) A Boundary Commission shall submit reports under subsection (1) above periodically –

(a) before 1st October 2018 but not before 1st September 2018, and

(b) before 1st October of every fifth year after that.

Section 4

(1) The draft of any Order in Council laid before Parliament by the [Secretary of State/Lord President of the

Council] under this Act for giving effect, whether with or without modifications, to the recommendations contained in the report of a Boundary Commission may make provision for any matters which appear to him to be incidental to, or consequential on, the recommendations.

(2) Where any such draft gives effect to any such recommendations with modifications, the [Secretary of State/Lord President of the Council] shall lay before Parliament together with the draft the statement submitted under section 3(5B)(c) above of the reasons for the modifications.

(3) If any such draft is approved by resolution of each House of Parliament, the [Secretary of State/Lord President of the Council] shall submit it to Her Majesty in Council.

(4) If a motion for the approval of any such draft is rejected by either House of Parliament or withdrawn by leave of the House, the [Secretary of State/Lord President of the Council] may amend the draft and lay the amended draft before Parliament, and if the draft as so amended is approved by resolution of each House of Parliament, the [Secretary of State/Lord President of the Council] shall submit it to Her Majesty in Council.

(5) Where the draft of an Order in Council is submitted to Her Majesty in Council under this Act, Her Majesty in Council may make an Order in terms of the draft which (subject to subsection (6) below) shall come into force on such date as may be specified in the Order and shall have effect notwithstanding anything in any enactment."

[3] The subject of "Publicity and Consultation" is regulated by **Section 5:**

"*Once a Boundary Commission have decided what constituencies they propose to recommend in a report under section 3(1)(a) above –*

(a) the Commission shall take such steps as they think fit to inform people in each of the proposed constituencies –

(i) what the proposals are,

(ii) that a copy of the proposals is open to inspection at a specified place within the proposed constituency, and

(iii) that written representations with respect to the proposals may be made to the Commission during a specified period of 12 weeks ("the initial consultation period");

(b) the Commission shall cause public hearings to be held during the period beginning with the fifth week of the initial consultation period and ending with the tenth week of it.

(2) Subsection (1)(a)(ii) above does not apply to a constituency with respect to which no alteration is proposed.

(3) Schedule 2A to this Act, which makes further provision about public hearings under subsection (1)(b) above, has effect.

(4) After the end of the initial consultation period the Commission –

(a) shall publish, in such manner as they think fit, representations made as mentioned in subsection (1)(a) above and records of public hearings held under subsection (1)(b) above;

(b) shall take such steps as they think fit to inform people in the proposed constituencies that further written representations with respect to the things published under paragraph (a) above may be made to the Commission during a specified period of four weeks ("the secondary consultation period").

(5) If after the end of the secondary consultation period the Commission are minded to revise their original proposals so as to recommend different constituencies, they shall take such steps as they see fit to inform people in each of those revised proposed constituencies –

(a) what the revised proposals are,

(b) that a copy of the revised proposals is open to inspection at a specified place within the revised proposed constituency, and

(c) that written representations with respect to the revised proposals may be made to the Commission during a specified period of eight weeks.

(6) Subsection (5) above does not apply to any proposals to make further revisions.

(7) Steps taken under subsection (4) or (5) above need not be of the same kind as those taken under subsection (1) above.

(8) A Boundary Commission shall take into consideration –

(a) written representations duly made to them as mentioned in subsection (1)(a), (4)(b) or (5)(c) above, and

(b) representations made at public hearings under subsection (1)(b) above.

(9) Except as provided by this section and Schedule 2A to this Act, a Boundary Commission shall not cause any public hearing or inquiry to be held for the purposes of a report under this Act.

(10) Where a Boundary Commission publish –

(a) general information about how they propose to carry out their functions (including, in the case of the Boundary Commission for England, information about the extent (if any) to which they propose to take into account the boundaries mentioned in rule 5(2) of Schedule 2 to this Act), or

(b) anything else to which subsection (1), (4) or (5) above does not apply,

it is for the Commission to determine whether to invite representations and, if they decide to do so, the procedure that is to apply."

[4] The subject matter of Schedule 2 to the 1986 Act is "Rules For Distribution For Seats". This contains the following material provisions:

Rule 1

"The number of constituencies in the United Kingdom shall be 600."

Rule 2

"(1) The electorate of any constituency shall be –

(a) no less than 95% of the United Kingdom electoral quota, and

(b) no more than 105% of that quota.

(2) This rule is subject to rules 4(2), 6(3) and 7.

(3) In this Schedule the "United Kingdom electoral quota" means – U ÷ 596 where U is the electorate of the United Kingdom minus the electorate of the constituencies mentioned in rule 6."

Rule 3

"(1) Each constituency shall be wholly in one of the four parts of the United Kingdom (England, Wales, Scotland and Northern Ireland).

(2) The number of constituencies in each part of the United Kingdom shall be determined in accordance with the allocation method set out in rule 8."

Rule 4

"(1) A constituency shall not have an area of more than 13,000 square kilometres.

(2) A constituency does not have to comply with rule 2(1)(a) if –

(a) it has an area of more than 12,000 square kilometres, and

(b) the Boundary Commission concerned are satisfied that it is not reasonably possible for the constituency to comply with that rule."

[5] Rules 5 and 7 occupy centre stage in these proceedings.

Rule 5

"(1) A Boundary Commission may take into account, if and to such extent as they think fit –

(a) special geographical considerations, including in particular the size, shape and accessibility of a constituency;

(b) local government boundaries as they exist on the most recent ordinary council-election day before the review date;

(c) boundaries of existing constituencies;

(d) any local ties that would be broken by changes in constituencies;

(e) the inconveniences attendant on such changes.
(2) (England)

(3) This rule has effect subject to rules 2 and 4."

[6] **Rule 7**

"(1) In relation to Northern Ireland, sub-paragraph (2) below applies in place of rule 2 where –

(a) the difference between –

(i) the electorate of Northern Ireland, and

(ii) the United Kingdom electoral quota multiplied by the number of seats in Northern Ireland (determined under rule 8),

exceeds one third of the United Kingdom electoral quota, and

(b) the Boundary Commission for Northern Ireland consider that having to apply rule 2 would unreasonably impair –

(i) their ability to take into account the factors set out in rule 5(1), or

(ii) their ability to comply with section 3(2) of this Act.

(2) The electorate of any constituency shall be –

(a) no less than whichever is the lesser of –
N - A

and 95% of the United Kingdom electoral quota, and

(b) no more than whichever is the greater of –
N + A
and 105% of the United Kingdom electoral quota, where –

N is the electorate of Northern Ireland divided by the number of seats in Northern Ireland (determined under rule 8), and

A is 5% of the United Kingdom electoral quota."

The Statutory Provisions Analysed

[7] Each of the Boundary Commissions established by the 1986 Act is a public authority of presumptive specialised expertise. While this presumption is in principle rebuttable no issues of this kind arises in the present proceedings. In *Harper v Secretary of State for the Home Department* [1955] 1 All ER 331 the English Court of Appeal gave consideration to one of the earlier statutory regimes relating to the activities of Boundary Commissions. The Master of the Rolls, delivering the judgment of court, stated at 338a:

> "*My reading of these rules and of the whole Act is that it was quite clearly intended that, insofar as the matter is not within the discretion of the Commission, it was certainly to be a matter for Parliament to determine. I find it impossible to suppose that Parliament contemplated that on any of these occasions when reports were presented it would be competent for the court to determine and pronounce on a very particular line which had commended itself to the Commission was one which the court thought the best line or the right line – one thing rather than another to be regarded as practicable, and so forth. If it were competent for the courts to pass judgments of that kind on the reports, I am at a loss to see where the process would end and what the function of Parliament would then turn out to be.*"

I accept the submission of Mr Tony McGleenan QC (with Mr Paul McLaughlin, of counsel), on behalf of the Commission, that this passage contains a strong adjuration

against merits review by the court. Applying a modern public law framework, the standard of review engaged would be that of "upper level" irrationality and the threshold for judicial intervention would be a high one.

[8] It was accepted, correctly in my view, that statutory reports of the Commission are justiciable. Neither the decision in *Harper* nor the more recent decision in *R v Boundary Commission for England, Ex parte Foot* [1983] 2 WLR 458 questions the correctness of this. In the judgment of the Master of the Rolls one finds some emphasis on the independent, non-political and advisory status of Boundary Commissions. Sir John Donaldson MR next drew attention to the absence of any recourse of statutory appeal while judicial review was available the statutory context indicated a restrictive approach:

> *"…. All that need be said is that it is common ground that in some circumstances it would be wholly proper for the courts to consider whether the Commission have, no doubt inadvertently, misconstrued the instructions which they have been given by Parliament and, if they had done so, to take such action as may be appropriate in order to ensure that the will of Parliament of done."*

(At 465g.)

In a later passage, at page 474g, the Master of the Rolls returns to this theme:

> "*A long line of cases has established that if public authorities purport to make decisions which are not in accordance with the terms of the powers conferred on them, such decisions can be attacked in the courts by way of an application for judicial review; and, furthermore, that even if such decisions on the face of them fall within the letter of their powers, they may be successfully attacked if shown to have been unreasonable.*"

It suffices to add that, in principle, the report of a Boundary Commission under the 1986 Act is vulnerable to challenge on the orthodox grounds of the disregard of a material fact or factor, the intrusion of something alien or immaterial, procedural fairness, error of law, bias, improper purpose and irrationality. A challenge by judicial review invoking any of these grounds will have to be calibrated by reference to the particular statutory context and the starting point noted above namely the Commission's presumptive expertise.

[9] The scheme of the legislation is that the Boundary Commission must prepare periodic reports for consideration by Parliament. There is a statutory time limit for doing so. The report under scrutiny in these proceedings had to be presented at some stage between 01 September 2018 and 01 October 2018. In passing, the deadline for the Commission's next report will be 01 October 2023. In the context of

Northern Ireland, the Commission's report is directed to the Secretary of State in the first place. This gives rise to an exercise culminating in the laying before Parliament of a draft Order in Council. The Secretary of State is not bound by the Commission's recommendations. Thus the draft Order in Council may contain modifications of the Commission's report and make provision for anything which the Secretary of State considers to be incidental to or consequential upon the recommendations. The draft is subject to the affirmative resolution procedure.

[10] Section 5 of the 1986 Act establishes a structured consultation process which the Commission is bound to observe. It operates in the following way. First, the Commission must "decide" on the constituencies which they are proposing to recommend in a forthcoming periodic report. One would expect that every such "decision" will be the product of careful internal deliberation, modelling and analysis. Neither this consideration nor the statutory language or scheme affects the analysis that what is published at this, the initial, stage is preliminary in nature. This is reinforced by the common law dimension *(infra).* The Commission must publish these proposals. This step triggers a statutory right, exercisable by anyone, to make representations within a 12 week period. The Commission is obliged to conduct public hearings between the fifth and tenth weeks of this period. Such hearings must observe the requirements of Schedule 2A.

[11] The phase described immediately above is labelled by Section 5(4) "the initial consultation period". Upon its completion, a second phase is initiated and the Commission is obliged to take three steps: to publish the representations received, to publish records of the public hearings and to consult further during a four week period ("the secondary consultation period") on each of these publications.

[12] Upon completion of the secondary consultation period the Commission has something of a binary choice. It may either adhere to its original proposals or contemplate revising them "so as to recommend different constituencies". If the former, no statutory obligation to consult further arises. If the latter, the Commission must formulate revised proposals and publish them, thereby triggering a <u>third</u> public consultation phase, of eight weeks duration. The somewhat cryptic language of Section 4(6) indicates that, at the conclusion of the third consultation phase (where this occurs), the Commission is empowered to make still further revisions without any statutory requirement of additional consultation. Section 5(8) unambiguously obliges the Commission to take into account the written representations made to it at every stage, together with representations made at the public hearings.

[13] Pausing at this juncture, it is appropriate to observe that the consultation regime established by Section 5 of the 1986 Act, supplemented by Schedule 2A, has a significant overlay of common law principle. The principles in play were expressed in *R v North and East Devon Health Authority, Ex parte Coughlan* QB 2013 in the following terms at [108]:

> "*To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.*"

In De Smith's Judicial Review (7th Edition) one finds the observation at paragraph 7-054:

> "*Essentially, in developing standards of consultation, and applying those standards to particular statutory contexts, the courts are using the general principles of fairness to ensure that the consulted party is able properly to address the concerns of the decision-maker.*"

[14] I turn to consider the material provisions of the Rules arranged in Schedule 2 to the 1986 Act. By Rule 2, the electorate of any constituency in the United Kingdom can, permissibly, be at most 5% above the "United Kingdom electoral quota", as defined, or 5% less. This is not expressed as an inflexible rule. Rather, it is expressly "subject to" three other provisions of the Rules, including Rule 7.

[15] Rule 5 operates as a guide to each Boundary Commission in the exercise of statutory responsibilities. It is framed in notably open – textured terms. It enshrines a list of five factors which a Boundary Commission may, at its option, take into account. There is no obligation to take into account any of these factors. Nor is there any attempt to prescribe factors which the Commission cannot permissibly take into account. Furthermore, the Commission is empowered to identify and take into account non-statutory factors of its choosing. The attribution of weight, if any, to each factor considered, statutory or otherwise, is a matter for the Commission, subject only to Wednesbury review. All of this, in my view, is a reflection of the starting point in this analysis at [7] above and the statutory language. Furthermore, it engages the well-established principle that the public authority concerned may legitimately take into account such non-statutory factors as the legislation implicitly permits it to do so see Re Findlay [1985] AC 318, 338e-f. per Lord Scarman).

[16] Rule 5(3) is a reminder of the dominant effect of Rule 2. However, as noted, Rule 2 is subject to *inter alia* Rule 7. The latter is a provision tailor-made for Northern Ireland. It enshrines a mechanism which may be applied "in place of" Rule 2. This substitution is permissible only where two conditions are satisfied. The first of these is purely arithmetical in nature (and, in passing, is not contentious in these proceedings). The second is of a quite distinctive character, recognising (again) the presumptive expertise of the Commission and the latitude endowed upon it by statute. It requires the Commission to form an evaluative judgement to the effect

that applying Rule 2 would "unreasonably impair" its ability to take into account the factors in Rule 5(1) or its ability to comply with Section 3(2) of the 1986 Act.

[17] The foregoing analysis gives rise to the formulation of the following guiding principles in particular:

(i) The common law principles identified in [13] above apply to every stage of the Commission's activities, from the publication of its initial proposals to the publication of its final proposals.

(ii) There is no hierarchy of consultation responses: all must be considered fairly, conscientiously and with an open mind.

(iii) The legislature has entrusted the Commission with a wide margin of appreciation.

(iv) The Commission may have recourse to Rule 7 only where it has opted to take into account any or all of the factors specified in Rule 5.

(v) The Commission is empowered to have resort to Rule 7 at any stage of the various phases identified above.

(vi) Electorally, in the broader United Kingdom panorama, Northern Ireland is a special case.

The Commission's Reports

[18] In this instance the Commission, faithful to the legislative scheme, published a total of three reports, sequentially:

(a) Its "Provisional Proposals Report" (the "PPR") was published in September 2016.

(b) Its "Revised Proposals Report" ("RPR") was published in January 2018.

(c) Its "Final Recommendations Report" ("FRR") was published in September 2018.

The target of the Applicant's challenge is the FRR.

The PPR

[19] The evidence establishes, as one would expect (and recalling my comment in [10] above) that the publication of PPR was the culmination of appropriate homework on the part of the Commission. The evidence bearing on this issue highlights, unsurprisingly, the role of the Commission's secretariat. The analysis

carried out prior to publication of the first report is described as "detailed". As the PPR explains, the cornerstone of this exercise was the reduction of the number of constituencies in the United Kingdom from 650 to 600 which, in the case of Northern Ireland, entailed a drop from 18 to 17. This prompted the observation at the outset of the Report:

> "*The reduction of one seat allocated to Northern Ireland as a result of the formula means that this review will have an impact across all existing constituencies.*"

[20] It is clear from the PPR that the Commission, in the exercise of its discretion, had determined to take into account certain of the Rule 5 factors: excluding the fifth – "inconvenience" – which, by statute, could not be reckoned in this particular exercise. In Chapter 3 the Commission enunciated something of a guiding principle:

> "*The statutory reduction in the number of constituencies, combined with the imposition of the tighter quota range, means that this review will require more radical changes in existing boundaries than its predecessor, the 2008 Review. Subject to the requirements of the legislation, the Commission has sought to minimise these changes.*"

The key passage in the PPR (for present purposes) is the following:

> "*Rule 7 would allow constituencies to be defined as low as 69401 if the Commission was satisfied that the application of the UK quota range would 'unreasonably impair' its ability to take into account the discretionary factors set out in Rule 5. The Commission tested a diverse range of options for a 17 seat regional structure and concluded that the limited flexibility afforded by Rule 7 would not produce a significantly better outcome. Since it was not in a position to advance a credible argument that its ability to take the discretion factors into account had been unreasonably impaired the Commission concluded that Rule 7 should not be applied.*"

In practical and arithmetical terms, the invocation of Rule 7 would permit the reduction of individual constituencies in Northern Ireland from 71,031 electors to 69,401. I would add that I consider this passage to be harmonious with the Commission's meeting (in June 2016) which preceded it. I further interpose the observation that this passage forms the centrepiece of the Applicant's challenge on the first main ground of challenge (*supra).*

Post - PPR

[21] The second major staging post in the activities of the Commission under scrutiny was the publication of its Revised Proposals Report ("RPR") in January 2018. This occurred following the 'phase one' statutory consultation exercise and was preceded by a series of internal papers, compiled in September and October 2017, all of which I have considered. These highlighted *inter alia* the difficulties of satisfactorily delineating the new 17 constituency model for Northern Ireland, together with the various representations received regarding the desirability of applying Rule 7. Pausing, it is abundantly clear that Rule 7 had emerged as a significant feature of the initial consultation responses. One of the internal working papers thereby generated ("The Use of Rule 7") focussed exclusively on this topic. It concluded:

> "*The secretariat has undertaken numerous modelling exercises to accommodate the major issues raised in the two consultations. These have included the use of Rule 7 in some but not in others. Those that use Rule 7 have allowed better constituencies to be created especially around the Newtownabbey/Glengormley area and generally across the whole of Northern Ireland ..... [Conclusion] ..... If the Commission is satisfied that the Provisional Proposals have to be amended to reflect the major issues identified through the consultations and that their ability to take those issues into consideration is unreasonably impaired without engaging Rule 7, then Rule 7 should be used.*"

[22] This paper must be considered in conjunction with the other of the internal working papers noted above, in particular the "Major Issues" paper.

[23] While certain passages in the Rule 7 working paper were criticised by Mr David Scoffield QC (with Mr Sean Devine, of counsel) on behalf of the Applicant, it must be observed that those belonging to the first and second pages (prior to the commencement of the "Analysis" section) are simply a rehearsal, in summary form, of the representations received favouring the retention of four constituencies in Belfast. This paper debated the alternatives of a three and four constituency model in Belfast, considering both to be "viable". It then examined the constituencies provisionally proposed (via the PPR) for other parts of the country. The analysis identified in the representations received a broad thrust of opinion opposing wholesale changes to existing boundaries. The paper recommended that the Commission amend its provisional proposals so as to achieve a better alignment with existing constituencies. It emphasised the importance of adhering to the statutory requirements.

[24] This recommendation was reflected also in the secretariat's "General Recommendations" Paper. This paper confirmed the problematic nature of the

Belfast constituency issue. The secretariat prepared certain viable revised proposal models for the consideration of the Commission. As the minutes of the meetings conducted during this period confirm, the Commission debated the consultation responses with an open mind and its deliberations included the question of recourse to Rule 7. Through the vehicle of the internal analyses and revised modelling, in tandem with discussions at meetings, the Commission formed the view that "… the four seat Belfast plan, which produced the least disruption across Northern Ireland, was the preferred solution".

[25] The "Use of Rule 7" paper contains the following material passage:

> "*In Northern Ireland only, Rule 7 would allow constituencies to be defined as low as 69,401 if the Commission was satisfied that the application of the UK quota range would 'unreasonably impair' its ability to take into account the discretionary factors set out in Rule 5. During the development of its initial proposals, it was not in a position to advance a credible argument that its ability to take the discretionary factors into account has been unreasonably impaired. Therefore the Commission concluded that Rule 7 should not be applied.*"

In the associated "Secretariat Plan for Proposal" paper, it was stated:

> "*The proposal includes four Belfast constituencies that extend beyond the 2008 boundaries in order to satisfy the new criteria and engages Rule 7 for a number of constituencies.*"

The secretariat also prepared for the Commission's consideration an alternative Belfast constituency model, consisting of three constituencies, which would also engage Rule 7. The former proposal was endorsed by the Commission at its meeting on 10 November 2017.

The RPR

[26] The next landmark development was the publication of the Revised Proposals Report ("RPR"), in January 2018. In Chapter 2 one finds the following passage:

> "*We decided not to use Rule 7 in developing our provisional proposals. We took the view that, under the second condition, we were required to test a range of possible constituency arrangements before we could justifiably conclude that our ability to take account of the discretionary factors had been unreasonably impaired. The strength and depth of submissions received during the*

consultations has persuaded us that the conditions for engaging Rule 7 have been met."

In the section relating to Belfast the following passages are of particular note:

> *"In preparing our provisional proposals we tested both 3-seat and 4-seat options for Belfast. At the time we took the view that the most compliant of our 3-seat options produced the best overall arrangement for Northern Ireland …*
>
> *We were greatly helped in developing these revised proposals by the quality of submissions advanced in favour of a 4-seat Belfast. Respondents provided a strong rationale supported by a rich store of detail on local ties …. In response to the submissions received we have undertaken extensive further work. We have thoroughly tested the alternative composite proposals and, taking them into account, drew up two new patterns of our own for the region, one with a 4-seat Belfast and the other with a 3-seat Belfast. We concluded that either of these proposals would have been more compliant with the statutory criteria than the provisional proposals or the best of the alternatives that we received. We concluded that our preferred 4-Belfast model would respect existing boundaries more comprehensively not only in the Belfast area but also across Northern Ireland. It would result in 10 constituencies having only minor changes (that is, affecting 5 wards or fewer: under our most compliant 3-seat Belfast model, only eight constituencies would have satisfied this test. The 4-seat model also produced a lower level of disruption amongst voters across the region as measured by the 'unmoved electors' metric ……"*

[27] It is appropriate at this juncture to introduce the following excerpt from the Commission's affidavit evidence:

> *"The Commissioners considered that across the entire NI region, this proposal represented the best means of achieving the statutory electoral constituency quotas, while also taking account of the statutory factors contained in Rule 5. The Commissioners considered that in light of the strength and merits of the consultation responses, the application of Rule 2 would unreasonably impair their ability to take the statutory factors into account. They therefore decided to rely upon Rule 7 so as to make revised proposals which gave rise to fewer changes to existing*

> *constituency boundaries across the region and better reflected the existence of local ties than was the case under the provisional proposals.*"

The Commission's deponent explains that the RPR generated a considerably higher number of responses than was stimulated by the PPR. The secretariat went to work once again, preparing summaries and analyses for consideration by the Commissioners. As appears from the "Summary Of Consultation Responses" paper, the main Unionist parties favoured a four constituency Belfast model engaging Rule 7, while the main Nationalist party, Sinn Féin, proposed a three constituency Belfast model without applying Rule 7.

[28] Within the secretariat's "Major Issues and General Recommendations Paper", one finds the statement, repeated, that –

> "*…. The Commission has already determined that the revised proposals are better aligned to the statutory criteria than the provisional proposals.*"

This was followed by "an extensive remodelling exercise to produce viable options for consideration." During the period falling between the April and May 2018 meetings of the Commission, the secretariat prepared a paper entitled "Final Recommendations – Revised Map Options". This reflected the developing view of the Commission, which was to espouse a final proposal entailing "minimal change only": the Dungiven ward would move into west Tyrone, while the Mallusk ward would move into south Antrim, two changes for which there was "clear support" in the consultation responses. The paper continues:

> "*Any further changes falling from the consultation responses would require more extensive reworking of the revised proposals. This would therefore infringe on the position put forward by Members that more significant changes should be avoided when no further public consultation will take place.*"

This was formulated as "Option 1". This paper also formulated five other options.

[30] At its ensuing meeting held on 17 May 2018 the Commissioners continued their deliberations. The minutes record inter *alia*:

> "*Members agreed that the focus should be on making only those adjustments to the revised proposals which clearly meet the statutory criteria …..*
>
> *Members agreed the two key issues that could be addressed without wider ripple effects to reduce the split effect on Dungiven and to move Mallusk from Belfast north to south*

> *Antrim. The rationale for this approach would be drafted by [two named Commissioners]. A draft would be provided to the secretariat for insertion in the draft Final Recommendations Report."*

The contemplated text was duly prepared by one of the Commissioners. As to this the Commission's deponent avers:

> "*I believe that the note sheds light upon the approach adopted by Commissioners and is also reflected in the Final Recommendations Report."*

The Commissioner author describes the text as "the broad principles which Commissioners have established to frame the decision-making" which would be incorporated as a "rationale" into the final report.

[31] The following passages in this Commissioner's text fall to be highlighted:

> "*The Commission has considered consultation responses to inform it of, among other things, local ties and community concerns. However, it is not merely the consultation responses which frame the Commission's deliberations. The Commission can only accommodate submissions which are legally relevant, feasible within the tight parameters of the statutory framework and which be seen to have been publicly debated as openly and as fairly as possible under the [prescribed] process of a statutory consultation. The Commission has adhered to the following guiding principles at this stage of the process:*
>
> *(1) Splitting of wards to achieve the overall model for Northern Ireland should be avoided unless in exceptional circumstances overwhelming evidence suggests that it is absolutely necessary …… Local government wards are the required 'building blocks' of the process …. the integrity of the wards should be preserved as much as possible and use of whole wards is preferred by the Commission ……*
>
> *(2) All tools available under the legislation should be used, including the use of Rule 7, in order to ensure that all potential options which are compliant with the statutory criteria are considered ……*
>
> *(3) In accordance with the statutory criteria under Rule 5, the Commission has taken into account of [sic]:*
>
> *(a) Special geographical considerations.*

(b) Local government boundaries.

(c) Boundaries of existing constituencies.

(d) Local ties.

(e) Inconvenience …….

The Commission believes that closer alignment to existing Parliamentary boundary lines is preferred to more significant shifts from existing boundary lines, both in Belfast and across Northern Ireland …….

The Commission believes that more limited change to existing boundary lines is its preferred guiding principle and the Commission has considered the criterion under Rule 5(1)(c) to an extent which it sees fit ……

(4) Given that the public consultation to respond to any changes at final proposal stage is now effectively closed, the Commission believes that the considerations at this stage should more properly be matters of 'fine tuning' rather than introducing matters of significant change from the revised proposals. That said, the Commission has not closed its mind to the idea that the secondary consultation could produce evidence of an entirely different and potentially more compliant model than that contained in its revised proposals. However, in light of the limited opportunity for the public to reply to the final proposals, the Commission believes that any significant changes to the revised proposals plan could only be justified by legally relevant evidence of an overwhelming degree."

At the next succeeding meeting of the Commission it was noted that the "composite draft" of the forthcoming final report incorporated this "draft rationale". There followed a meeting with the Assessors at which the draft final report was debated and, in substance, approved.

The FRR

[32] The final chapter in the story entailed publication of the Commission's Final Recommendations Report ("FRR"), on 05 September 2018. In paragraph 4.8 one finds the following self-direction:

"Ultimately it is the Commission's responsibility, informed by the consultation responses, to formulate final

> *recommendations which are as fully compliant with the statutory criteria as possible."*

Addressing Rule 7, the report repeats the terminology of its two predecessors, continuing:

> "*The strength and depth of submissions received during the consultations on our provisional proposals persuaded us that this condition had been met. This meant that in preparing our revised proposals we were able to design constituencies down to a lower limit of 69401 rather than 71031. By applying this flexibility across Northern Ireland, we were able to produce more compliant patterns."*

This is followed by a separate passage under the rubric "Final Recommendations":

> "*We consider that the final recommendations should be derived from proposals which have been publicly debated as openly and fairly as possible during earlier stages of the consultation process. Given that the consultation is now closed, it would be preferable at this stage to avoid radical changes to our revised proposals. An exception could be made if there were a strong public consensus in support of a major change and a low probability of that change creating other issues of concern, whether in the constituencies affected or further afield. Otherwise, it is preferable for adjustments at this stage to be local and incremental."*

[At paragraph 5.11]

[33] Returning to the theme of Rule 7, paragraphs 6.15/16 of the FRR state:

> "*A majority of those who produced composite plans asked us to deploy Rule 7 and use it in their own plans. It was argued that this would help to fulfil the purpose of Rule 5 and that not to use it would unreasonably impair our ability to take the discretionary factors into account ….*
>
> *Our subsequent modelling exercises demonstrated that the additional flexibility permitted by Rule 7 allowed for significantly greater alignment with the discretionary factors both in individual constituencies and across Northern Ireland."*

At paragraphs 7.4/5/7 the report states:

> *"The Commission has considered consultation responses to inform it of, among other things, local ties and community concerns. However, it is not merely the consultation responses which frame the deliberations and conclusions of the Commission. The Commission can only accommodate submissions which are legally relevant, are feasible within the parameters of the statutory criteria and can be seen to have been publicly debated as openly and as fairly as possible under the [prescribed] process of statutory consultation ……*
>
> *Therefore, some responses to the revised proposals which focused on local areas but which presented quite substantial 'ripple' effects elsewhere could not always be accommodated …..*
>
> *Taking all the responses into account, we remained of the view that the revised proposals were substantially more compliant with our statutory framework than the provisional proposals."*

[34] The RPR having made constituency configuration/reconfiguration proposals in respect of five discrete geographical areas, the FRR formulated the Commission's final proposals in terms which adhered to those in the RPR, with two adjustments namely:

(a) to transfer the Dungiven ward from mid-Ulster to Sperrin; and

(b) to retain the Mallusk ward within the constituency of south Antrim rather than Belfast north. Notably, in this context the Commission highlighted the "established principle of preserving the integrity of ward boundaries".

Grounds of Challenge

[35] The Applicant's grounds raise issues of error of law, the provision of reasons, procedural fairness and fetter of discretion. The first two issues are overlapping in nature. So too are the third and fourth. Overlap and merger are, of course, familiar themes of the principles and standards of public law.

The error of law and reasons issue

[36] It is convenient to begin with the reasons issue. The first of the issues posed by the Applicant's challenge is whether the Commission was under a duty to give reasons for deciding to resort to Rule 7. This question must be considered in the context of the full statutory matrix outlined above. One of the stand out themes of the statutory scheme is the structured obligatory interaction between the

Commission and the public. Regimented and staged engagement with the public is compulsory in a process which was accurately described by Mr McGleenan QC as iterative.

[37] There is evident interplay between the relevant provisions of primary legislation and the Rules contained in Schedule 2, particularly Rules 2, 5 and 7. The legislation, by necessary implication, having regard particularly to the common law overlay discussed above, clearly envisages that the successive engagements between the Commission and the public will be imbued with the values of fairness and transparency. It is also appropriate to take into account that throughout the process the Commission's activities unfold in a specialised field and against a backdrop of statutory rules of a little complexity. Yet another feature is the broad discretion entrusted to the Commission and the factor of evaluative judgement at every stage of its conduct. The proposition that the Commission is obliged to equip the public with sufficient information to ensure that representations and responses are made on an informed basis is incontestable.

[38] The statute does not expressly require the Commission to provide reasons for resorting to Rule 7 where it chooses to do so. Nor has the common law developed to the stage of imposing an absolute duty on public authorities to provide reasons for their decisions, albeit the momentum has been in this direction: see for example *R v Secretary of State for the Home Department, ex parte Doody & others* [1994] 1 AC 531, 564e-f. However, I consider that the combination of considerations identified in the immediately two preceding paragraphs impels to the conclusion that reasons should be provided where the Commission determines to invoke Rule 7. This will promote observance of the common law principles of consultation, together with the implicit values of fairness and transparency. Furthermore, the duty has a particular resonance in a case such as the present where, in embarking upon the initial statutory consultation period, the Commission explicitly broadcast to the public that it had consciously determined not to resort to Rule 7 at that stage and explained why.

[39] Logically, the next question must be whether the Commission has discharged its duty to explain its recourse to Rule 7 following the initial consultation period. The determination of this issue requires consideration of a discrete cohort of common law principles. As the survey of the decided cases in Chapter 7 of De Smith's Judicial Review (7th Edition) demonstrates there is no universal standard to be applied. The context, including the statutory context, must be considered. Furthermore, in the circumstances of these proceedings, one must bear in mind that there was no adversarial or adjudicative element in what the Commission was doing. Thus there was no duty to state material findings of fact or to resolve conflicts of evidence. Nor was there any element of participants or stakeholders winning or losing.

[40] A further legal perspective arises. As a corollary of the specialist character of the Commission and the specialised field in which it was operating I consider that

the court's review of its conduct should recognise an appropriate degree of latitude, a reasonable margin of appreciation. This is fortified by the consideration that the court cannot match the expertise of the Commission. Furthermore, particularly in a non-adversarial and non-adjudicative context, it has frequently been recognised, as the authors of De Smith state at paragraph 7-102, that:

> "*Courts should also not scrutinise reasons with the analytical rigour employed on statutes or trust instruments and ought to forgive obvious mistakes that were unlikely to have misled anyone.*"

A further principle frequently encountered in this sphere is that where reasons are to be provided they must be sufficient to facilitate assessment of whether the authority concerned has made a material error of law. Another formulation of general principle is found *Stefan v General Medical Council* [1999] 1 WLR 1293 at 1304B:

> "*The extent and substance of the reasons must depend upon the circumstances. They need not be elaborate nor lengthy. But they should be such as to tell the parties in broad terms why the decision was reached.*"

To like effect is the statement of Lord Clyde in *R (Alconbury Developments) v Secretary of State* [2003] 2 AC 295 at 170:

> "*As a general rule at least, the provision of 'all the thinking which lies behind' is not required.*"

[41] I further consider that in a case such as the present the standard and adequacy of the reasons provided falls to be considered from the perspective of the litigant bringing the challenge. The complainant is the litigant, not his lawyers. The skilled advocate and the complainant are not one and the same person. Furthermore, the court must take into account whether the complainant can fairly and reasonably be considered a member of an informed audience.

[42] In the present instance the Applicant became an active participant in the Commission's statutory process following the publication of its RPR. That was not, however, the beginning of his involvement. It is clear from his affidavit and his written representations to the Commission that he had been a keen and informed observer from the outset. His representations were articulate and well-reasoned. Furthermore, he clearly had familiarity with the Rules in play and formulated well-constructed arguments in his critique of the RPR and, in particular, the Commission's invocation of Rule 7. In my estimation there is a sufficient evidential foundation to warrant viewing the Applicant as a knowledgeable and informed member of the broader audience which was considering the Commission's successive reports.

[43] At the beginning of the overall process, the Commission's stance (expressed in the PPR) was that resort to Rule 7 was not considered to be justified. The evidence suggests that up to that point the Commission had been acting largely unilaterally. It had, via its secretariat and one of the Commissioners in particular, undertaken certain internal modelling and analyses. The important step of engaging with the public had not been taken. Furthermore, the constituency proposals formulated at this stage were provisional: this was a recurring theme. The Commission's approach to Rule 7 was, plainly, not a concluded one. Moreover, it was obliged as a matter of law to retain an open mind on this issue, as well as others.

[44] As a starting point, it is clear that the Commission was, throughout the process, "taking into account" (the statutory language) the four permitted statutory factors enshrined in Rule 5. Armed with its broad statutory discretion, it was not required to do so. However, it clearly did. Having embarked on its task in this way the statutory requirement was to take these four factors into account "to such extent as they think fit". Furthermore, the Commission was not precluded from taking into account other factors. Thus a statutory discretion of unmistakable breadth was in play.

[45] The reports indicate that the second, third and fourth of the statutory factors emerged, recurrently so, as matters of substance as the process advanced. Giving the statutory language its ordinary and natural meaning, I consider that the maintenance of the status quo so far as possible and an inclination towards minimal change are clearly identifiable features. Furthermore, it would be reasonable to expect the informed participant and reader to possess this appreciation and understanding.

[46] It follows that insofar as Mr Scoffield QC argued that the Commission's espousal of least change, or minimal change, was incompatible with the statutory criteria, considered in tandem with the breadth of the Commission's statutory discretion, I cannot agree. Furthermore, I consider it clear that in those parts of the various texts where the phraseology "compliant" and its derivatives is found the Commission was clearly directing its mind to the question of compatibility with the Rule 5 criteria.

[47] I consider that when one reads the various texts published by the Commission fairly, reasonably and through the lens of legal principle outlined above, it emerges with sufficient clarity that the Commission resorted to Rule 7 in fulfilment of the guiding principles which it had devised for itself, namely maintenance of the status quo as far as possible and, consequentially, minimal change to existing constituencies. These principles are entirely compatible with the specific statutory factors and the broad discretion invested in the Commission. There is force in Mr Scoffield's submission that in the RPR the Commission declared its recourse to Rule 7 in conclusionary terms. However, this passage must be considered in its full statutory and evidential context. The latter includes in

particular the representations outlined in the Commission's texts, which urged the invocation of Rule 7.

[48] Giving effect to all of the foregoing, I conclude that the Commission's decision to resort to Rule 7, while expressed in somewhat cryptic terms, was in accordance with the governing legal standards regarding the provision of reasons. The Commission will, doubtless, be mindful that it can aspire beyond compliance with minimum legal requirements and, further, that one aspect of such aspiration could entail expressing itself more fully and clearly upon issues of this kind, with the consequential benefit of stronger insulation against this species of legal challenge. In this context I refer to *Re Knox's Application* [2019] NIQB 34 at [59].

Error of law?

[49] The analysis in [36]-[48] above should, I trust, make clear the considerable overlap between the reasons challenge and the error of law challenge. In my view the issue is not whether one can identify isolated passages attracting skilled forensic criticism in the various published texts of the Commission or its secretariat's detailed periodic analyses of the ingredients of the Rule 7(1)(b) test or its application, actual or potential, in the evolving context. Equally, the issue is not whether there is explicit reference to the statutory test in certain parts of the Commission's texts. Rather, the question for the court is whether, considering the evidence in its totality, the conclusion that the Commission misdirected itself in law on the Rule 7 issue is warranted. The court must stand back, adopting a panoramic view. I consider that, in substance, the analysis to be applied to this facet of the Applicant's challenge differs not from that already applied to the reasons challenge. Logically the error of law challenge must fail accordingly.

[50] This aspect of the Applicant's challenge has one discrete, detached limb. In [30] – [31] above I have reproduced substantial extracts from the internal writings of one of the Commissioners compiled at the stage when the FRR was in the throes of preparation. The Applicant, not improperly, seizes on the reference to "inconvenience" in this text. While this is the fifth of the statutory factors enshrined in Rule 7 it was, by virtue of the applicable statutory jigsaw, an inadmissible consideration in the exercise which the Commission was performing. Mr Scoffield QC submitted that the Commission's final report is vitiated by the intrusion of this alien element. A material consideration, he submitted, has been permitted to intrude and infect.

[51] The question for the court, in my view, is whether considering the evidence as a whole there is sufficient to warrant the inference that the FRR was influenced to a material extent by this alien invader. This entails consideration particularly, though not exclusively, of the FRR itself, which is the target of the Applicant's challenge. I must also bear in mind the "obvious mistakes" adjuration in the passage from De Smith quoted in [40] above. Having conducted an exercise of penetrating scrutiny, I note in particular that, in an extensive corpus of evidence, this is a single, isolated

reference to the inapplicable statutory factor. This is not repeated, either expressly or obliquely, in the FRR. Furthermore, there are no other signs or signals that it has had a contaminating effect. While this was indeed an aberration, I am satisfied that it has given rise to no contamination in the finished product, namely the FRR. This discrete ground of challenge is rejected accordingly.

Fetter of discretion/unlawful consultation

[52] The final limb of the Applicant's challenge is based on paragraph 5.11 of the FRR, reproduced in [32] above. The ground of challenge arising therefrom is formulated in counsels' skeleton argument thus:

> "*The Applicant also contends that the Respondent wrongfully and unlawfully fettered its discretion after having adopted its revised recommendations. As disclosed in the FRR, from that point on the Commission erected artificial hurdles to the giving of proper weight to consultation responses ……..*"

In the argument of Mr Scoffield QC this ground assumed two central particulars. First, the Commission erroneously stated in its FRR that it could "…. *only accommodate submissions which ….. can be seen to have been publicly debated as openly and as fairly as possible under the prescribed process of a statutory consultation*". Second, the Commission stated, again erroneously:

> "*Given that the consultation is now closed, it would be preferable at this stage to avoid radical changes to our revised proposals.*"

I refer also to the other passages reproduced in [32] and [33] above.

[53] The replying submission of Mr McGleenan QC and Mr McLaughlin had the following ingredients. The FRR was the product of an iterative process; its compilation was preceded by two separate consultation exercises; its finalisation had to accord with the statutory deadline; the Commission had a wide discretion concerning the recommendations contained in the report and the weight to be attributed to the various views and representations received; and the statute made no provision for any further consultation with the public.

[54] I consider it appropriate to leave open the interesting question of whether the detailed and structured publicity and consultation model established by Section 5 of the 1986 Act precludes any further consultation. The elaborate nature of the model established, considered in tandem with sub-section (6), lends force to the argument that this is an unbending statutory model. On the other hand, the overlying common law principles may have sufficient flexibility and dominance to displace this view. Furthermore, the legislation envisages the delivery of late reports following expiry of the statutory time limit: per section 3(2A) and (2B) of the 1986

Act. Since the latter case was not made on behalf of the Applicant, with a resulting lack of full argument on the issue, which would doubtless have addressed *inter alia* decisions such as *R v Secretary of State for the Home Department, ex parte Al Fayed* [1998] 1 WLR 76, I shall in this case proceed on the basis that the consultation arrangements established by Section 5 are exhaustive.

[55] The real question thrown up by this ground of challenge is whether the approach of the Commission to consultation responses, as disclosed in the FRR, accords with the overlying common law principles and, more specifically, the principle which requires the maintenance of an open mind from the beginning of the process in question to its conclusion and the associated requirement of applying conscientious consideration to all representations and views received, at whatever stage. I consider that implicit in these common law principles is a further requirement that all consultation responses be treated equally. The common law does not recognise hierarchies of consultees or priorities in consultation responses. Nor, it may be added, does the statutory regime under scrutiny.

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

Conclusion

[57] The Commission and its secretariat undertook their task assiduously and conscientiously at every stage, demonstrably so. Furthermore, the Commission's engagement with the court was manifestly candid. And I find no merit in the suggestion that the selection of its deponent was inappropriate. However, the objective application of the applicable legal rules and principles by this court of supervisory superintendence impels to the conclusion that the Commission has fallen into error in one specific and undeniably material respect.

[58] The Applicant's challenge succeeds to the foregoing, and limited, extent accordingly. The court will make arrangements for the convening of a separate hearing for the purpose of considering argument on the interrelated issues of final order and remedies, together with that of costs.

Postscript: Final Order

[59] The court, having considered the parties' further oral and written submissions, has determined that the discretionary grant of a remedy is appropriate and that this should be declaratory, rather than quashing, in nature. See *Re General Consumer Council (NI)'s Application* [2006] NIQB 86, *R(SS) v SSHD* {2015] UKUT 462 (IAC) and '*Family Reunification and Judicial Review Remedies in UTIAC* ' JR 2017, Vol 22, No 1, 42. The effect of this conclusion is that Parliament shall remain the final decision maker. The transcript of the court's separate ruling in this respect shall be promulgated separately. The terms of the final Order will be finalised following further engagement with the parties' representatives.