Neutral Citation No: [2020] NICA 32 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **HOR11201** *Delivered:* **04/06/2020**

2018/117698/01

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE (QUEEN'S BENCH DIVISION)

IN THE MATTER OF AN APPLICATION BY PATRICK LYNCH FOR JUDICIAL REVIEW

Between:

PATRICK LYNCH

Appellant

and

THE BOUNDARY COMMISSIONER FOR NORTHERN IRELAND

Respondent

HORNER J

A. INTRODUCTION

[1] The appellant is Patrick Lynch. He brought a judicial review in respect of the proposals made by the Boundary Commission for Northern Ireland ("the Commission") in its report: "2018 Review of Parliamentary Constituencies: Final Recommendations Report" ("FRR") which was published in September 2018.

[2] The appellant enjoyed mixed success before McCloskey J. The judge in a clear and comprehensive judgment dismissed his claim that the Commission had failed to give reasons why it resorted to Rule 7 of Schedule 2 of the Parliamentary Constituencies Act 1986 ("the 1986 Act"). The judge was also not persuaded that the Commission had misdirected itself in terms of the application of Rule 7. But the judge did find that the Commission both fettered the discretion conferred on it by the legislature and also acted in contravention of those aspects of the common law principles governing consultation when it received the consultation responses to the Revised Proposals Report ("RPR"). The judge granted limited relief in respect of this ground after concluding that it was sufficient to make a declaration that:

> "At the final stage of the obligatory statutory process, which was fully observed procedurally, on the grounds set forth in its judgment, the Boundary Commission of Northern Ireland ("the Commission") erred in law procedurally and fettered its discretion in adopting the following approach of the totality of the representations received in the statutory process, in the language of Chapter 4 of its Final Recommendations Report ("the Report"):
>
> > '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 to avoid radical changes to revised proposals. An exception could be made if there were a strong public consensus in support of a major change and low probability of that change creating other issues of concern, whether in the constituencies affected or further afield. The 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.'"

[3] The appellant appealed on the grounds on which he was unsuccessful and also appealed on the basis that the learned trial judge erred in granting only a declaration and not quashing the FRR. The Commission cross-appealed on the basis that the learned trial judge had erred in concluding that the Commission had fettered its discretion in its consideration of the consultation proposals prior to its preparation of its FRR and that in consequence the FRR was vitiated by procedural unfairness. It also appealed against the decision of the learned trial judge to grant declaratory relief.

[4] To summarise the appellant has appealed on the following grounds:

(a) Error of law/incorrect reliance upon Rule 7.

(b) Failure to give reasons.

(c) Failure to quash the FRR.

In return the Commission has cross-appealed:

(a) The trial judge's conclusion that it had fettered its discretion in its consideration of the consultation responses prior to the preparation of the FRR and that as a consequence the FRR was vitiated by procedural unfairness.

(b) The decision to grant relief to the applicant and to make the declaration contained in the final order dated 14 June 2018.

The appellant has made it clear to the court that his challenge is not to the merits but to the decision-making process and its faithfulness to the statutory scheme under the 1986 Act.

[5] These are important matters. The fixing of the Parliamentary constituency borders in Northern Ireland is a matter which arouses considerable public interest and scrutiny. This task has the potential to affect how the population of Northern Ireland is represented at Westminster and as a consequence to some extent how it is governed for some years.

[6] Mr Scoffield QC led Mr Devine for the appellant. Dr McGleenan QC appeared with Mr McLaughlin for the Commission. Mr McAteer intervened on behalf of the Minister for the Cabinet Office on the discrete issue of the relief to be granted. The court is indebted to all counsel for the helpful written and oral submissions advanced on behalf of their respective clients.

[7] In the original judicial review papers the appellant made the case in his grounding affidavit that the "revised proposals" of the Commission discriminated against Roman Catholic voters. Mr Scoffield on behalf of the appellant has disavowed any suggestion of bias or prejudice on the part of the Commission and is content, if he succeeds in this appeal, for the matter to go back to the Commission as presently constituted so as to include the same Commissioners, the same secretariat and the same assessors. He was wise to abandon such claims as they are patently without substance or merit.

B. IS THE JUDGMENT ACADEMIC?

[8] Just before this court was about to hand down this judgment it was informed by the Commission that it considered that an announcement by the government about anticipated legislation would render any judgment of the court on the entire 2018 Boundary Review academic because it would remove the statutory obligation to implement the 2018 Boundary Review. The court agreed to investigate the matter and to receive further submissions on this discrete issue.

[9] The Commission stated in a letter of 21 April 2020 to the court that:

> "The Boundary Commission considers the government's announcement to be a significant development which is likely to result in the current appeal and cross-appeal becoming academic. If legislation in the terms anticipated is enacted, the entire 2018 Boundary Review will be aborted and the Final Recommendations for Northern Ireland would not be implemented. The outcome sought by the Appellant will therefore be achieved by alternative means."

[10] This court has had the opportunity to consider further information on this issue and the submissions of the parties. At the outset we should note that although legislation is anticipated it is far from guaranteed. On 20 February 2020 a Private Members' Bill was introduced in the House of Commons by Peter Bone MP without debate. The second reading was due to take place on 27 March 2020 but that did not happen. The second reading, scheduled for 15 May 2020, was postponed further to 12 June 2020. A draft government Bill has now been published. If the Bill is enacted in its present terms the 2018 Review will not result in the presentation of an Order in Council to Parliament. However, the Bill provides that Rules 2, 5 and 7 are to be retained (save for a minor amendment to Rule 5; see clause 6). The appellant submits that in light of the retention of Rules2, 5 and 7 the Court should issue a judgment to provide future guidance on the correct interpretation of these Rules. The respondent disagrees and as it contends that the Bill, if enacted, will render the appeal academic because with no 2018 Review there can be no justiciable outcome.

[11] In the light of the above circumstances, the Cabinet Office makes no positive submissions either way about whether the appeal is currently academic and adopts a neutral position.

[12] We do not consider this judgment to be academic for the following reasons:

(i) First of all, as we have said, there is no guarantee that any legislation will be passed which would make this appeal academic;

(ii) Regardless of whether there is any legislation passed as anticipated the issues of whether the Commission's approach to the consultation process and to Rules 5 and 7 was correct as a matter of law raise important legal questions which deserve a clear answer;

(iii) This is an area of law in which there is limited jurisprudence and a judgment may be of assistance in the understanding of the correct legal principles to be applied. We agree with the submission that it would be disproportionate and a breach of the overriding objective of Order 1, Rule 1A for the appeal to be dismissed at this point given the investment of so much time and costs, at the public expense, even if legislation is enacted;

(iv) Even if the result is academic, which it is not, this court retains a discretion to hear disputes on public law even where the result is academic: *R v Secretary of State for the Home Department ex parte Salem* [1999] 1 AC 450. It is in the public interest to do so in this case as there are points of statutory construction which it is anticipated are likely to arise again in the future.

C. BACKGROUND INFORMATION

[13] The appellant resides in Belfast. He is concerned about proposals contained in the FRR put forward by the Commission which he claims are not fair and equitable. As we have noted the appellant originally made the case that they discriminated against Roman Catholic voters. That claim has wisely been abandoned as such an allegation, which is without any legal or factual basis, serves only to distract from what should be the focus of this judicial review, namely whether or not the Commission acted lawfully in drawing up the boundaries for the 17 new constituencies in Northern Ireland. All the Commissions are independent, non-political and completely impartial bodies. They have no interest in past, present or future electoral outcomes. Nor do the Commissions consider the effects of the recommendation on future voting patterns.

[14] There are four Boundary Commissions in the UK; one each for England, Wales, Scotland and Northern Ireland. The Boundary Commissions are permanent bodies, constituted under the 1986 Act. They are required to keep the Parliamentary Constituencies of the United Kingdom under continuous review and periodically (every 8-12 years) to submit to the Secretary of State a report containing their recommendations as to the constituencies into which their part of the United Kingdom should be divided: see Explanatory Note to Parliamentary Voting System and Constituencies Act 2011 ("the 2011 Act") at pages 320-322.

[15] Each of the Commissions consists of:

(a) A chairperson,
(b) A deputy chairperson (who must be a judge), and
(c) Two other members appointed by the Secretary of State.

[16] The Speakers' Conference in 1944 marked the start of proposals for regular boundary reviews with permanent Boundary Commissions. The recommendation from the Speakers' Conference in respect of the distribution of seats was achieved through the House of Commons (Redistribution of Seats) Act 1944. This was then followed by the House of Commons (Redistribution of Seats) Act 1947. This in turn was followed by the Representation of the People Act 1948 which consolidated and amended the Rules in relation to the City of London and University seats and increased the number of seats for Great Britain to 613. The House of Commons (the Distribution of Seats) Act 1950 had introduced separate electoral quotas for Scotland, Wales and England, as Northern Ireland had its own quota. The number of seats in Northern Ireland was increased from 12 to between 16-18 following a Speakers'

Conference in 1978 in the House of Commons (Redistribution of Seats) Act 1978. The various Rules were consolidated by the 1986 Act: for further discussion see the House of Commons Library Research Paper: The Rules for the Redistribution of Seats – History of Reform.

[17] Part 2 of the 2011 Act has replaced the existing Schedule 2 of the 1986 Act with a new set of rules for the distribution of seats. These new Rules reduce the number of MPs from 650 to 600 members and "provide for the number of constituencies in each part of the UK to be determined by reference to the size of the electorate in each part of the UK, and place a limit on the permitted variations in the number of registered electors for a constituency recommended by a Boundary Commission." It seeks to address the potential impact of rounding to a whole number when apportioning constituencies in Northern Ireland. It has also changed the way boundary reviews were carried out in the past. Instead of local inquiries it provides for written representations, public hearings which allow oral representations to be made, and the publication of representations which are then followed by an opportunity to make further written representations in response to them: see Explanatory Note to the 2011 Act.

[18] The consequence for Northern Ireland of the reduction of seats, which was over-represented in strict numerical terms with 18 MPs, was to reduce the number of MPs elected from 18 to 17. The 2011 Act applies to the whole of the UK with the exception of Part 1 of Schedule 3 which extends only to Great Britain and Part 2 of Schedule 3, which extends only to Northern Ireland "and makes provisions specific to Northern Ireland's electoral system."

[19] Each of the Commissions are charged with two specific functions by Section 3 of the 1986 Act. They are:

(i) "... to keep under review the representation in the House of Commons of the part of the United Kingdom with which they are concerned"; and

(ii) To submit reports to the Secretary of State, which contain recommendations for the constituencies into which the area should be divided "in order to give effect to the Rules set out in Schedule 2."

[20] All Boundary Commissions are obliged by Order in Council to submit a Recommendations Report to the Secretary of State between 1 September 2018 and 1 October 2018 and, every fifth year thereafter: as per Section 3 of the 1986 Act. Under Section 3(4) the report is required to recommend:

(a) The proposed constituencies into which their respective area will be divided;

(b) The name by which each constituency shall be called; and

(c) Whether it should be a county or borough constituency.

[21] The reports are put before Parliament by the Secretary of State for Parliament's consideration. After all 4 reports are received the draft of an Order in Council has to be laid before Parliament which gives effect to the recommendations contained in the FRR. Modifications can be made to those recommendations by the Boundary Commission, upon notice to the Secretary of State, along with a Statement of Reasons before the Order in Council is laid before Parliament: see Section 3(5A) and (5B) of the 1986 Act. Both Houses have to approve the Order in Council before it is submitted to Her Majesty in Council.

D. STATUTORY FRAMEWORK

[22] The statutory background was fully set out in the judge's judgment. He stated:

> "[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.'

E. THE STATUTORY SCHEME AND HOW IT IS INTENDED TO OPERATE

[23] The statutory provisions may be briefly summarised as follows:

(i) Any Commission established by the 1986 Act is a public authority "of presumptive specialised expertise": see *Harper v Secretary of State for the Home Department* [1955] 1 All ER 331 at 338A-C.

(ii) We agree with the judge when he said: "The standard of review engaged should be that of **upper level irrationality** and the threshold for judicial intervention should be a high one."

(iii) A central plank of the scheme set up under the Act is Rule 2. It provides a maximum minimum limit for the electorate of any constituency by references to percentages of the UK electoral quota. This is to ensure as the appellant submitted "fairness and consistency between constituencies in terms of the size of the electorate. The parity principle as it is known is a governing principle which grounds the statutory scheme for the redistribution of seats". As Mr Scoffield observed: "It is in classical mandatory terms."

(iv) The preamble to the 2011 Act comments in respect of Rule 2 as follows:

> "It **requires** the Boundary Commission to recommend constituency boundaries that ensure that the electorate of each constituency is no more than 5% more or less than the electoral quota for the UK. Factors are set out which the Commission may have regard to when recommending constituency boundaries, **subject to the parity principle**". (Emphasis added)

(v) The parity principle applies and can only be relaxed to permit the operation of Rule 7 of the Rules when pursuant to Rule 7(1) particular mathematic formula as to the electorate applies (and there is no dispute that it applies here) and **the Boundary Commission for Northern Ireland .. considers that having to apply Rule 2 would unreasonably impair** (a) an ability to take into account the factors set out in Rule 5(1) or (b) their ability to comply with Section 3(2) of "the 1986 Act (which sets out the limits for publication of the Commission's report").

(vi) The Commission may under Rule 5(1) take into account, if and to such extent as it thinks fit, a number of different factors. They are:

(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.

It goes on to provide that in accordance with Rule 5 the application of (e) is excluded, in respect of a report due to be submitted before October 2018. It is agreed that the present report falls into this category.

It is important to note that Rule 5 is framed so as to give the Commission a very broad discretion. It sets out factors some or all or none of which the Commission may at its discretion decide to take into account. It does not require the Commission to take these factors into account nor does it restrict the Commission to only taking these factors into account, if it considers other factors to be relevant to the exercise of its powers.

(vii) Rule 7 only applies to Northern Ireland. Further it can only be resorted to by the Commission when it considers that having to apply Rule 2 would **unreasonably impair** the Commission's ability to "take into account the factors set out in Rule 5(1) …."

(viii) The 1986 Act does not define what "unreasonably impairs" means. Its meaning has to be divined from its statutory context. The appellant suggests that it arises when the Commission forms a judgment that it wishes to give more weight to some or all of the Rule 5 factors than the restrictions on electoral size will permit. We consider that the Commission is unreasonably impaired when it is prevented contrary to good sense from giving weight to any or all of the Rule 5(1) factors by restrictions on electoral size required by Rule 2: as provided for in Rule 7(1).

[24] The scheme set out in the 1986 Act as to how the Commission should go about making recommendations to the Secretary of State as to the makeup of constituencies in Northern Ireland can be briefly summarised as follows:

(i) Firstly, the Commission publishes its proposals for the Northern Ireland constituencies, the Preliminary Proposals Report ("PPR") for initial consultation during a 12 week period: see Section 5(1)(a) of the 1986 Act;

(ii) Secondly, there are public meetings during a period of 5-10 weeks held during the period beginning with the fifth week of the initial consultation period and ending with the tenth week of it: see Section 5(1)(b) and Schedule 2A;

(iii) Thirdly, there is publication of consultation responses and records of the public meetings with the opportunity to make written representations to the Commission during a specified period of 4 weeks, which is the second consultation period: see Section 5(4)(b);

(iv) Fourthly, at the end of the secondary consultation period if the Commission is minded to revise its original proposals it will publish its Revised Proposals Report ("RPR"). Written representations may be in respect of the Revised Proposals during a specified period of 8 weeks: see Section 5(5)(c). This phase is unnecessary if no changes are made to the original proposals;

(v) Fifthly, the Commission is bound to take into consideration written representations made to them during the consultation process and also representations made at public hearings: see Section 5(8);

(vi) The consultation process concludes with the publication of the FRR;

(vii) Finally, the only public hearings take place between the fifth week and the tenth week of the initial consultation period

[25] The consultation process is an iterative one. The Commission is required by statute to take into account the consultation responses at each stage of the process. There are:

(i) Initial proposals.

(ii) Revised proposals.

(iii) Final recommendations.

There are public consultations which take place in a prescribed manner during the first 2 processes only. The process of public consultation is highly regulated.

[26] The Commission followed the legislative scheme and produced 3 reports. These are:

(a) The PPR published in September 2016;

(b) The RPR published in January 2018; and

(c) The FRR published in September 2018.

[27] As previously noted the central issue which all four Boundary Commissions had to deal with was the reduction in the number of parliamentary constituencies from 650 to 600. As described above the particular consequence for Northern Ireland of this reduction was then instead of there being 18 seats as there had been in the last election, there would now only be 17 seats in the future.

[28] The appellant complains that in the FRR there is a marked failure to provide reasons and in particular to provide proper justification for the use of Rule 7, and how the usual application of Rule 2 would "unreasonably impair" consideration of the factors set out in Rule 5. The challenge in this judicial review is not to the merits of the Commission's decisions but rather as to the decision-making process and its faithfulness to the statutory scheme.

F. DISCUSSION

(i) Error of law/incorrect reliance on Rule 7

[29] Indubitably, the Commission were fully aware of the terms of Rule 7 and when it came into operation. For example, 3.8 of the PPR states:

> "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. 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 its ability to take the discretionary factors into account had been unreasonably impaired, the Commission concluded that Rule 7 should not be applied."

[30] The RPR at 2.6 states:

> "The second condition states that Rule 7 may be applied if the Commission considers that the application of Rule 2 would unreasonably impair their ability to take into account the (discretionary) factors set out in Rule 5(1) or their ability to submit their recommendations on time."

Again, the FRR states at 5.9:

> "We took the view that we should test public opinion before we could justifiably conclude, as required by the legislation, that our ability to take account of the Rule 5 discretionary factors had been **unreasonably impaired**."

Further, 7.1 of the FRR recorded:

> "We used Rule 7 to avoid unreasonably impairing our ability to take the discretionary factors into account."

So there can be no doubt that the Commission were alive fully to Rule 7 and how it should operate as a gateway condition.

[31] However, the RPR at 2.9 also states:

> "The strength and depth of submissions received during the consultations has persuaded us that the conditions for engaging Rule 7 have been met."

But the submissions, whether strong and/or deep, are irrelevant unless they demonstrate that the application of Rule 2 would unreasonably impair the ability of the Commission to take into account the discretionary factors set out in Rule 5. Nowhere in the FRR or the RPR or the PPR does the Commission set out any basis for concluding Rule 2 affects, never mind "unreasonably impairs" the Commission's ability to take into account the factors set out in Rule 5. It would appear that having set out the requirements of Rule 7 correctly, the Commission then appears to overlook this fundamental requirement namely that Rule 2 has to unreasonably impair the Commission in taking into account the Rule 5 factors.

[32] In the FRR the Commission sets out the condition which needs to be satisfied before Rule 7 is applied. The FRR states at Rule 3.11:

> "We are constrained to the extent that we can take discretionary factors into consideration because of the overriding requirement to fit within the quota - range. The legislation does not prioritise any of the discretionary factors."

[33] At 6.16 its states:

> "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."

The FRR then goes on to state 7.7:

> "Taking all the responses into account, I remain of the view that the Revised Proposals were substantially more compliant with our statutory framework than the Provisional Proposals."

[34] The fear is that the Commission appears to treat the Rule 5 factors as a goal or statutory objective to be achieved. This fear is compounded when one considers the Major Issues and General Recommendations paper which followed the RPR. In this it was noted at 1.6:

> "In addition, the Commission has already determined that the Revised Proposals are better aligned to the statutory criteria than the Provisional Proposals."

[35] Further at a meeting of the Commission on 17 May 2018 it is recorded at paragraph 3:

> "… the focus should be on making only those adjustments to the Revised Proposals which clearly meet the statutory criteria."

[36] In her notes, the Commissioner, Sarah Havlin notes at paragraph 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."

[37] Further, Mr McConville in his affidavit filed on behalf of the Commission, at paragraph [26](iv) refers to the Use of Rule 7 Paper and notes that those models prepared by the Commission which relied upon Rule 7 had "produced constituencies which better reflected the statutory factors". Further, at paragraph [29] he commented that the Revised Proposals "represented the best means of achieving the statutory electoral constituency quotas" while also taking account of the statutory factors contained in Rule 5. This is despite the fact that the purpose of Rule 7 was to disapply the obligation to comply with those constituency quotas.

[38] We do not agree with the statement at paragraph [46] of the judgment to the effect that the Commission was acting lawfully because in using "compliant" or similar phraseology it was directing its mind to the question of compatibility with the Rule 5 criteria. This is not the statutory test. The Commission should have been directing its mind to unreasonable impairment not to compatibility or compliance with the Rule 5 factors.

[39] We are satisfied in looking at the totality of all the evidence that the Commission did not truly treat Rule 7 as a gateway condition. If the Commission had adopted the correct approach then we would have expected evidence that the Commission had treated Rule 7 as the draftsman intended and that the Commission did not regard the factors under Rule 5 as constituting goals or objectives. Moreover, we would have expected the Commission to have set out briefly either in summary or by way of illustration some of the evidence of the "impairment" and why the Commission had concluded that such impairment was "unreasonable." Such discussion or exposition is absent from the PPR, the RPR or the FRR or indeed the working papers of the Commission.

[40] Finally, as Mr Scoffield has conceded quite properly, there was no challenge to the proposition that the consultation responses about for instance local ties were sufficient for the Commission to form the view that there was unreasonable impairment. He accepted that there was sufficient for a major volte face so that the Commission was entitled on the basis of the consultation responses to change its approach to the issue as to whether there was unreasonable impairment. He stated that "they had the building blocks for a volte face but (the Commission) misapplied the law and did not give reasons". Mr Scoffield also accepted that it was for the Commission to consider what a local tie was and whether it would be broken by changes in constituencies. This amounted to a clear acceptance that there were issues raised in the consultation responses which had the potential to lead the Commission to conclude that there had been unreasonable impairment of the Commission's ability to take into account the factors set out in Rule 5(1). The example of local ties being broken by changes in the constituency boundaries, does not preclude other instances of potential unreasonable impairment in relation to other matters in Rule 5(1).

ii. Failure to give reasons

[41] The appellant complains in the FRR there is a marked failure to provide reasons and in particular to provide proper justification for the application of Rule 7, and in particular how the usual application of Rule 5 would "unreasonably impair" consideration of the factors set out in Rule 5.

[42] The Commission respond by claiming that the RPR and the FRR explain the proposals in great detail and set out clearly the rationale supporting its proposals.

[43] De Smith on Judicial Review at 7-105 considers the duty to give reasons. It states:

> "It remains difficult to state precisely the standard of reasoning the court will demand ... Much depends upon the particular circumstances and the statutory context in which the duty to give reasons arises. … In short the reasons must show that the decision-maker successfully came to grips with the main contentions advanced by the parties and must tell the parties in broad terms why they lost, or, as the case may be, won'."

[44] In *Stefan v General Medical Council* [1999] 1 WLR 1293 at 1300 Lord Clyde delivering the judgment of the Privy Council said:

> "The advantages of the provision of reasons have been often rehearsed. They relate to the decision-making process, in strengthening that process itself, in increasing public confidence in it, and in desirability of the disclosure of error where error exists. They relate also to the parties immediately affected by the decision, in enabling them to have the strength and weaknesses of their respective cases, and to facilitate appeals where that course is appropriate."

[45] Supperstone and Others on Judicial Review (6th Edition) at 10-63 comment on the obligation to give reasons.

> "First, and most obviously, reasons explain the decision to interested persons and the general public. Reasons enable interested parties to appeal against or challenge the decision, where this avenue is available. Secondly, the obligation to give reasons may also be an integral part of the decision-making process, intended to concentrate the minds of the decision-makers and ensure that they take into account in a disciplined manner all issues relevant to their decision. There are therefore both normative and instrumental bases for reason-giving. Taken together, these purposes contribute to individual and public confidence in the decision-making process."

In *R (Asha) Foundation v Millennium Commission* [2003] EWCA Civ 88 Lord Woolf said at paragraph [29]:

> "If the Commission were to be required to do what Mr Gordon submits was their obligation here, the

> Commission would have had to set out in detail each commissioner's views in relation to each of the applications and to provide the background material to Asha so that they could assess whether those conclusions were appropriate. This would be an undue burden upon any commission. It would make their task almost impossible. It certainly would be in my judgment impracticable as a matter of good administration."

Thus, where the decision to be made is a pure exercise of judgment, as here, rather than a judicial decision, less detail justifying the decision is required.

[46] Counsel for the Commission also drew attention to the following matters:

(a) The target audience of the RPR was the general public. There was a much greater response to this report than to the PPR. It is thus clear that the public, including the appellant, knew what was being proposed and felt able to comment upon those proposals and the reasons offered for them by the Commission;

(b) The target audience for the FRR is Parliament, the decision-maker. It is best placed to decide if the proposals are logically compelling. It is Parliament who decides whether to enact the FRR as an Order in Council. In this process the Commission is not the decision-maker and the 1986 Act imposes no statutory obligation on the Commission to provide reasons.

[47] It is against that background that this Court has to determine whether the Commission gave adequate reasons for its conclusions. We are not satisfied that it did. As we have observed earlier we would have expected the Commission to set out, even if only briefly, the reasons why it concluded that Rule 2 impaired its ability to take into account the factors set out in Rule 5 and why that was unreasonable in all the circumstances.

iii. Fettering discretion and procedural unfairness

[48] As discussed above one of the effects of the 2011 Act was to reduce the number of constituencies in the United Kingdom by 50 and the number of constituencies in Northern Ireland from 18 to 17. When the PPR was published in September 2016 it noted the UK quota for the current review was 74,769 electors giving a +/- 5% range of 71,051 to 78,507 electors. It recorded at 1.7 of the PPR:

> "While certain other factors may be taken into account by the Commission, they are subordinate to the electoral parity requirement."

[49] It noted that a reduction of one seat allocated to Northern Ireland as a result of the reduction in overall seats would impact upon all of the constituencies. It then went on to set out the approach it had adopted to the exercise which was, amongst others, to use local government awards as building blocks for the proposed constituencies. The Commission concluded that "the best models were those which provided for a three-seat Belfast". The Commission quite properly took into account the Rule 5 factors excluding the last one "inconvenience", although one of the Commissioners, Sarah Havlin suggests she, at least, may have taken it into account. The Commission say that that was simply an error and did not impact on the decision-making process. We see no reason to doubt this. It said at 3.8:

> "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 discretionary factors into account had been unreasonably impaired, the Commission concluded that Rule 7 should not be applied."

[50] Finally, it concluded at 4.61:

> "Out of necessity the proposals require substantial changes to the existing constituency structure. The Commission has tried to minimise those changes".

This left all of the constituencies within the UK electoral quota of 71,051-78,507 electors.

[51] The RPR was published in January 2018. This report was the product of "the careful consideration of all the evidence collected during the initial and secondary consultation": see 1.4 of the RPR.

It stated at 2.9 of the RPR:

> "The strength and depth of submissions received during the consultation has persuaded us that the conditions for engaging Rule 7 have been met."

The Commission significantly "reduced the changes required to existing constituencies". Fermanagh and South Tyrone was returned to its current boundaries, except for the slight adjustments to be required to accommodate the new ward boundaries. The Commission significantly improved the retention of hinterlands around key road towns such as Newry and Coleraine. It also, most importantly, reversed the PPR to include a 4 seat Belfast instead of a 3 seat one.

[52] The FRR followed in September 2018. It correctly recorded that the Commission under Rule 5(1) "may take a number of discretionary factors into account" and then set out the 4 factors which could be taken into account under Rule 5.

[53] The RPR and the FRR should be informed by the consultations that our required under the 1986 Act. The purpose of these consultations is to allow the Commission to receive the view of the public and so to ensure that the Commission is properly informed so it can reach a fair and just conclusion. The reasons for consulting include:

(a) Any conclusion reached is infused by public involvement in the decision-making process.

(b) Consequently there is public confidence for the conclusions which are reached.

(c) The limited ability of Parliament to change the recommendations of the Commission not having the depth of knowledge or understanding of the Commission.

(d) The significance of setting Parliamentary boundaries and the effect this could have in terms of national Government;

[54] Lord Woolf in the House of Lords summarised requirements of the duty to consult in *R v North and East Devon Health Authority, Ex Parte Coughlan* [2001] QB 213 at [108] when he said:

> "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 consulting to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of the consultation must be conscientiously taken into account when the ultimate decision is taken."

[55] De Smith's Judicial Review (8th Edition) at 7.056 states:

> "… 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. Although consultation must take place at the formative stage, it does not require a consultation on every possible option and while a decision-maker is entitled to narrow the options prior to consultation, provided the proposed

> course can still be altered as a result of the consultation, there may be a necessity to deal with alternative options where it would be unfair not to do so … Proper consultation requires the **candid disclosure of the reasons for what is proposed** and that consulted parties are aware of the criteria to be adopted and any factors considered to be decisive or of substantial importance." (Emphasis added)

[56] Supperstone and Others on Judicial Review (6th Edition) state at 10.46:

> "If the consultation is to be genuine, there must be a real willingness to alter or even reject the proposals in the light of the consultation. The decision following consultation must extend beyond the mere repetition of assertion."

It is against such a background that we must look at what actually happened during the consultation process.

[57] The PPR had concluded that Rule 7 was not engaged because it "would not produce a significantly better outcome". The Commission concluded, inter alia that there should only be 3 constituencies with Belfast being "the starting point of the review process". Following the PPR and in accordance with the statutory consultation process there were written representations and public meetings held. This produced a volte-face in the RPR resulting in the engagement of Rule 7 because "the strength and depth of submissions received during the consultations has persuaded us that the conditions for engaging R7 have been met."

[58] The RPR concluded, inter alia, that a 4 seat Belfast was the best solution and that there should be a significant reduction in the changes required to the existing constituencies. The RPR was a genuine response to the arguments raised by those who responded: see 4.2 of the RPR.

[59] The RPR was then followed by further consultation which resulted in the FRR. In sub-heading entitled "Final Recommendations at 5.11 the Commission said:

> "We consider that the Final Recommendation should be derived from proposals which had 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 can be made if there were a strong public consensus in favour of a major change and 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."

Nowhere is an explanation provided by the Commission as to why it would be preferable to avoid radical changes except:

(a) Where there was a strong public consensus in support of a major change; and/or

(b) A low probability of major change creating other issues of concern;

(c) Why it was preferable for adjustments at this stage to be local and incremental?

[60] At 7.4 of the FRR the Commission said it could only accommodate submissions which "can be seen to have been publicly debated as openly and fairly as possible under the proscribed (sic) process of statutory consultation".

[61] It seems to us that the Commission has, inadvertently no doubt, taken a wrong turn in its consideration of the written representations following the RPR. There can be no consultation hierarchy. It is unfair to treat representations before the RPR differently to written representations made after the RPR and before the FRR. It may be, for example, that a member of the public who was in favour of not engaging Rule 7 and/or 3 seats for Belfast did not respond to the PPR for the very good reason that it reflected that person's opinion of how Northern Ireland in general should be divided into 17 constituencies and in particular why Belfast should be divided into 3 constituencies. But when the Commission decided to engage Rule 7 and create a 4 seat Belfast in the RPR, any representation from a member of the public who objected to this volte-face would be automatically devalued because the Commission had erected barriers to prevent that person's voice being heard. The Commission was effectively refusing to consider representations from such a person if they involved radical change which the engagement of Rule 7 was likely to involve unless there was a strong public consensus in favour of, for example, 4 seats for Belfast. We consider that if a consultee after the RPR had a point of substance to make, that consultee's submission should be given due consideration and not rejected out of hand because inter alia it involves radical change or does not reflect the consensus of opinion. A point may be a good one, deserving to be taken into account, even though it is only held by a small minority and/or has the potential to result in radical change. It is our view that the barriers unnecessarily erected by the Commission after the RPR to representations from members of the public as part of the statutory scheme of consultation subverted the process and unlawfully impugned the FRR and its final recommendations.

iv. Failure to give an adequate remedy

[62] The appellant complains that given the finding of the learned trial judge the obvious and proper course for the court was to quash the Commission's FRR so that it is required (at the very least) to reconsider in a proper and lawful fashion those consultation responses received after publication of the RPR. Additional weight is given to this complaint by our conclusion on the "error of law" issue. In any event the appellant complains that the declaration does not offer adequate relief in all the circumstances.

[63] The Commission considers that a declaration is appropriate given that Parliament is the final decision-maker on the issue of how the 17 constituencies in Northern Ireland should be made up even if it had fettered a discretion and/or been guilty of procedural unfairness.

[64] There is an additional submission made on behalf of the Minister for the Cabinet Office ("the Minister") who holds the relevant powers concurrently with the Secretary of State pursuant to Section 6C of the 1986 Act. He points out that the Minister does not have the power to modify a FRR. If it is quashed, subject only to any modification notified under Section 3(5)(b) of the 1986 Act, the recommendations contained in it will be mandatorily reflected in the draft Order in Council which the Minister is required to lay before Parliament. The Minister would resist any order that a declaration be appended to the FRR or any draft OIC to be laid before Parliament or "any approach that does not respect the separation of powers between the legislature and the judiciary".

[65] 7.58 of Judicial Review, Principles and Procedures by Auburn, Moffett and Sharland states:

> "As in all cases where a court finds that a decision is unlawful, where such unlawfulness arises as a result of a breach of a duty to consult, the court has a discretion as to what remedy, if any, to grant. However, a failure to consult at all in a case where there was a duty to consult is normally viewed as a serious matter, and the court will normally quash the resultant decision. The court will be more likely to exercise its discretion not to quash a decision where the unlawfulness rose out of inadequacies in a consultation exercise that was carried out, particularly if the inadequacy is one that is capable of being remedied within the consultation process itself. However, even in this context, the courts are likely to be reluctant to allow the resulting decision to stand."

[66] It seems to us that given our decision on the Rule 7 and consultation issues, it would be appropriate to quash the FRR and send this matter back to the Commission to reconsider the written representations afresh without pre-conditions.

G. CONCLUSION

[67] For the reasons set out above:

(a) We grant the appeals on the following grounds:

(i) The Commission failed to give adequate reasons for its decision in relation to unreasonable impairment.

(ii) The Commission failed to act lawfully in relying upon Rule 7.

(iii) The FRR should have been quashed and sent back to the Commission for reconsideration in the light of (i)-(ii) above and [63].

[68] We reject the cross appeals for the reasons given and affirm the judge's decision that the Commission had fettered it discretion in its approach to certain of the representations received prior to preparation of the FRR and as a consequence the FRR was vitiated by procedural unfairness.

[69] In the circumstances we quash the FRR and send it back to the Commission for reconsideration of two issues:

(a) The engagement and use of Rule 7; and

(b) The written consultation responses to the RPR.

[70] However, there will be no need for any reconsideration by the Commission should legislation be enacted that ensures that the Boundary review is abandoned and the Final Recommendations will not be implemented.

[71] We will hear the parties on the issue of costs.