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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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

AND IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND LOCAL GOVERNMENT COMMISSIONER FOR STANDARDS

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John Mackell (instructed by Brentnall Legal Ltd) for the Applicant
Fiona Fee (instructed by Elliott Duffy Garrett, Solicitors) for the Respondent

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SCOFFIELD J

Introduction

[1] The applicant was formerly an elected councillor on Belfast City Council ("the Council") from May 2015 until May 2019. She hopes to stand for election again in the forthcoming local government elections to be held next month. By these proceedings she seeks to challenge a decision made on behalf of the Northern Ireland Local Government Commissioner for Standards (NILGCS) ("the Commissioner") imposing a three-year disqualification upon her becoming a councillor. This followed an adjudication hearing which took place over 7 and 8 February 2023. The nub of the applicant's complaint is one of procedural unfairness. In particular, she challenges the failure of the Assistant Commissioner (who was appointed to conduct the relevant hearing on behalf of the Commissioner) to facilitate her making an adjournment application in person, so as to seek to persuade him to adjourn the hearing; and, relatedly, she challenges the Assistant Commissioner's decision not to adjourn the hearing.

[2] In light of the imminence of the local government elections, this application has been dealt with by way of rolled-up hearing. The Commissioner contends that leave should be refused because the applicant has a viable and effective alternative remedy. Both this issue and the substance of the case have been considered at the recent

hearing held on 19 April. A considerable degree of urgency has arisen because, if she intends to stand in the forthcoming local elections, the applicant would be obliged to complete the necessary paperwork no later than Monday 24 April, including a declaration to the effect that she has not been disqualified from acting as a councillor. She seeks to have her disqualification quashed by these proceedings.

[3] Mr Mackell appeared for the applicant and Ms Fee for the respondent. I am grateful to both counsel for their detailed and well-presented written submissions, supplemented by focused yet persuasive oral argument.

Factual background

The complaint and investigation

[4] On 31 August 2018 a written complaint was received by the Commissioner from Mr Paul Golding (the leader of the 'Britain First' group). Mr Golding alleged that the applicant, whilst a member of Belfast City Council, had, or may have, failed to comply with the Northern Ireland Local Government Code of Conduct for Councillors ("the Code of Conduct"). The applicant had been elected to the Council and signed the Declaration of Office on 24 May 2014. At the local government elections held on 2 May 2019, she was not re-elected and therefore no longer holds the position of councillor. However, the complaint related to the period of time when she did hold that position.

[5] Mr Golding's complaint alleged that the applicant contacted him by telephone and told him that she had been fined £500 by the Council as a punishment for an incident when Ms Jayda Fransen, the Deputy Leader of Britain First, had sat in the Lord Mayor's chair in January 2018. Mr Golding said that the applicant told him that she could not afford to pay the fine. He said he informed her that Britain First would pay the fine, but that it needed proof of her liability in that regard. He stated that the applicant emailed him a copy of her 'payslip' on 28 June 2018 and referred him to the 'Other Deductions' section of the payslip, showing deductions from her allowance to the value of £545.38. Mr Golding stated that the applicant informed him that this was the amount she had been fined as a result of the 'stunt' which had occurred on when Ms Fransen was filmed wearing Council ceremonial robes and speaking while seated in the Lord Mayor's chair in the Council Chamber. Mr Golding stated that he transferred £50 to applicant's bank account on 3 July 2018 and made a further transfer of £65 to the same account on 19 July 2018. He was later told that the applicant had not been fined.

[6] The kernel of the complaint was that the applicant had encouraged or procured Mr Golding to provide her with money under false pretences; and that she had altered or obscured the version of her payslip which had been emailed to him in order to persuade him to provide her with money to discharge a fine to which she had not been subject. The complaint included or amounted to contentions that the applicant had acted in breach of paras 4.2, 4.16, 4.18 and 5.3 of the Code of Conduct. These passages

include prohibitions against conducting oneself in a manner which could reasonably be regarded as bringing one's position as a councillor into disrepute; using or attempting to use your position improperly to secure an advantage for yourself; and using the resources of your council other than in a manner which is calculated to facilitate the discharge of your functions as a councillor.

[7] The allegation was investigated by Mr Paul McFadden, then Deputy Commissioner for the Local Government Ethical Standards (LGES) Directorate of the Northern Ireland Ombudsman's Office. The Commissioner or Assistant Commissioner has no role in the receipt, assessment or investigation of a complaint in order to maintain their independence in the event that an adjudication hearing is required. The Deputy Commissioner submitted a report to the Commissioner on 7 June 2019 in accordance with sections 55 and 56 of Part 9 of the Local Government Act (Northern Ireland) 2014.

The proceedings before the Assistant Commissioner up to 6 February 2023

[8] The substantive hearing for adjudication upon the complaint was listed for 7 February 2023 for three days. As appears further below, these hearings are conducted in three stages, which generally follow on from each other: the fact-finding stage, the determination stage and then the sanction stage, should a finding of breach of the Code of Conduct have been made at the second stage. However, there had been a considerable history to this case in advance of the February 2023 hearing dates. The matter had been investigated and a report submitted by the Deputy Commissioner in June 2019. As I have already alluded to, the Commissioner, Ms Margaret Kelly, who also holds the post of Northern Ireland Public Services Ombudsman, had appointed her Assistant Commissioner, Mr Ian Gordon OBE QPM, to conduct the adjudication hearing on her behalf in this case; and the adjudication proceedings had been actively case managed by him for quite some time before the substantive hearing dates.

[9] Prior to the adjudication hearing, the Assistant Commissioner had conducted nine pre-hearing reviews (PHRs) to deal with issues of case management. With the exception of a small number of these, at each PHR the applicant was present and/or legally represented. The respondent has provided the following summary:

(i) There was a PHR on 16 February 2021 at which the applicant was represented by counsel, instructed on her behalf by John J Rice & Co, Solicitors. A further PHR was held on 14 May 2021 at which the applicant was again represented and a hearing date of 13 September 2021 was proposed for the substantive hearing. Further PHRs at which the applicant was represented by counsel and/or the same firm of solicitors occurred on 28 September 2021 and 12 May 2022.

(ii) On 17 August 2022 the applicant's solicitors advised that they were no longer acting for her. However, around six weeks later, on 30 September 2022, Brentnall Legal Ltd advised that they were now acting for Ms Bunting in

relation to the proceedings before the Commissioner. Notwithstanding this, there was no appearance by or on behalf of the applicant at the next two PHRs which occurred on 17 October 2022 and 14 November 2022. On the latter of these two dates, an email was received from Mr Brentnall on the morning of the PHR explaining the non-attendance and apologising for this, accepting that it was not a satisfactory situation given the length of time for which the proceedings had been ongoing.

(iii) Another PHR was convened on 25 November 2022, at which the applicant was represented by Mr Brentnall. He explained at that stage that the applicant did not have the benefit of legal aid for the proceedings before the Commissioner; but he suggested that a listing would "bring focus." The substantive adjudication hearing was listed for 10-12 January 2023.

(iv) A further PHR was held on 5 January 2023. The applicant was again represented by Mr Brentnall. At his request the January hearing dates were vacated and the adjudication hearing was re-listed for 7-9 February 2023. The respondent says that one reason for the adjournment from January to February was to provide the applicant's solicitor with time to assist the applicant to secure funding for the proceedings. The Assistant Commissioner also noted at this point that his role was inquisitorial and that, should the applicant be unrepresented at the hearing, the appointed legal assessor would provide advice and assistance in order to ensure that the hearing was conducted fairly.

(v) Finally, a PHR was held on 27 January 2023 at which the applicant was not represented. Further details of the steps taken by the Assistant Commissioner following this are set out below. These are detailed in the Assistant Commissioner's decision notice in the case which was issued later.

[10] Once the issue of funding for the applicant's representation had been raised again at the PHR on 5 January, and Mr Brentnall had then not appeared at the PHR on 27 January, the Assistant Commissioner was obviously concerned to ascertain the position and plan for the forthcoming hearing. At his direction, an email was sent to Mr Brentnall on 27 January noting his non-attendance at the PHR that day, confirming that the substantive hearing would commence at 12.00 noon on 7 February, and asking him to acknowledge the email by close of business on 30 January "with a clear indication of whether or not you continue to represent Ms Bunting in this matter or, if not, [whether] you are aware of any other legal representative she may have." No response was received to this email by the suggested reply date.

[11] On the same day, 30 January, a letter was sent by courier to the applicant from the Commissioner's office (with confirmation later being received that this had been delivered). It advised the applicant of the intended hearing date and commencement time and then said the following:

> "Your solicitor Mr Brentnall has been informed of the Hearing and he is aware of my intention that the Hearing will proceed on that day whether or not you have legal or other representation. I would urge you to contact Mr Brentnall on this matter.
>
> If Mr Brentnall no longer represents you, a copy of the Bundle of Papers, to be used at the Hearing can be provided by the Deputy Commissioner's Office. It is important that you contact this office about this matter.
>
> I urge you to attend the Hearing; it is important that you give your response to the complaints made against you."

[12] In addition, on 2 February the Assistant Commissioner's staff were informed by the Deputy Commissioner's Senior Investigating Officer (SIO) that he had called to the applicant's home address that afternoon to hand deliver a copy of the evidential bundle in the case. No one answered the door. (The applicant has indicated through counsel that she does not believe anyone called to her house that day or that, if they did, she was not at the house at the time.) The SIO then emailed the applicant to inform her that he had called at her house and of the purpose of the call. He asked her to contact the office to arrange collection or delivery of the documents before the hearing date. Later that day, on 2 February, a member of the Assistant Commissioner's staff also called Mr Brentnall's office. He was unavailable but a message was to be left for him to contact the NILGSC office. It does not appear that this message was responded to. It is disappointing that, in the face of what I accept were concerted efforts on the part of the Commissioner's office to clarify the position, there was a lack of communication from the applicant and her solicitors for a period of 10 days from 27 January until 6 February (the day before the hearing).

[13] On 6 February, the applicant says that she was informed by her legal representatives that, in the absence of remuneration, they were not able to appear on her behalf at the scheduled hearing. On that same date, the legal representatives wrote to NILGCS informing it of the fact that the applicant no longer had legal representation as she was not in a position to fund the case herself. Why this was only communicated the day before the hearing is not clear and has not, in my view, been adequately explained. Mr Mackell provided some further information, on instruction, in the course of the hearing. It seems that there was a 'lengthy' telephone consultation between Mr Brentnall and the applicant on the morning of 6 February. This was to discuss the hearing and various options. It became clear that Mr Brentnall was not prepared to conduct what was possibly a three-day hearing without remuneration (particularly as his firm had already undertaken or was undertaking some other work for the applicant on a pro bono basis). It should go without saying that I make absolutely no criticism of him or his firm for adopting that perfectly reasonable stance. As already indicated above, however, it would have been much preferable if this position had been resolved some time previously.

[14] At 2.00 pm, at the request of the Assistant Commissioner, his legal assessor (Mr Michael Wilson) emailed Mr Brentnall on an urgent basis indicating that they were still unaware if Mr Brentnall was acting for Ms Bunting and asking that the position be confirmed. Mr Brentnall replied at 2:09pm to indicate that funding was not available for his services and that "we can confirm that we are not currently acting for Ms Bunting in this case." There was no indication that there would be an application for an adjournment. The legal assessor immediately sought clarification of whether the applicant herself was aware of Mr Brentnall's position. In a further email of 2:25pm Mr Brentnall confirmed that he had consulted with the applicant at length (at lunchtime that day, he said) and that she was fully aware of his decision.

[15] On the evening of 6 February, the applicant herself emailed NILGSC at 6:39pm indicating that she was unable to secure legal representation for the hearing; that she was aware that an attempt had been made to deliver documents to her the previous Thursday but that she was not yet in possession of the documents; that she had not had time to seek further funding for legal representation or to seek alternative representation; and that she therefore sought an adjournment of the scheduled hearing. In this email, the applicant further indicated her view that it would be unfair to expect her to present a case in circumstances where all other parties would have access to full legal representation. She believed that she should be entitled to legal representation and to further time to try to secure this. In the alternative, the applicant also requested further time to enable her to prepare for the hearing personally, in the event that the Commissioner was not prepared to adjourn the case for her to obtain another legal team. Finally, the applicant referred to the complainant in the case as someone "who has caused me great consternation and anxiety in his actions over the last number of years" and said that she was "genuinely in fear" of him. She said she was not ready to face the complainant, let alone engage with him.

The events on 7 February 2023

[16] Since the email referred to above was sent after business hours, I understand that it was only accessed by the Commissioner's staff the following morning, on 7 February. The Assistant Commissioner considered the email and then asked his staff to contact Ms Bunting. This was done by way of email sent at 11.08 am. It advised that the applicant should either attend in person to make her adjournment application or that NILGCS could provide a video link (via the WebEx platform) for her to attend virtually. I take from this that the Assistant Commissioner was aware of the applicant's desire for an adjournment; that he had not determined this issue; but that he wished to hear from the applicant as to whether there was anything else she wished to say in support of the application. No doubt he also wished to hear any representations on behalf of the Deputy Commissioner in response to the application. The email also confirmed that the Commissioner had in place appropriate measures to ensure the safety of all persons attending the hearing. It is clear to me that this was a reference to the applicant's concerns about being in fear of the complainant.

[17] The hearing had been scheduled to commence at 12.00 noon but there was a short delay as a result of the further efforts being made to contact the applicant. As a result, the hearing commenced at 12:20pm. At this point, the Assistant Commissioner noted that there had been no reply from the applicant despite three telephone calls having been made to her that morning (with no answer) and the email having been sent at 11:08am. He therefore proceeded at the start of the hearing by considering the request she had made for an adjournment. He asked counsel for the Deputy Commissioner (Ms Best BL), who was presenting the case against the applicant, to make any representation she wished in respect of the application. On behalf of the Deputy Commissioner, Ms Best submitted that the hearing should proceed for a variety of reasons. These included that it was the applicant herself who had asked for an in-person hearing; the applicant had had the benefit of advice and assistance from two sets of solicitors and counsel up until very recently; that the matter had been listed for hearing on a number of occasions; and that the applicant's solicitors had been provided with a full set of papers in the case in mid-January and attempts had been made to provide a copy of the papers directly to the applicant herself. Ms Best accepted that the issue was finely balanced but submitted that the interests of justice and the public interest were such that the case should proceed, particularly in light of the time which had passed since the complaint was originally made (some 4½ years) and the fact that the complainant was in attendance and had travelled some distance to give oral evidence.

[18] The legal assessor also gave the Assistant Commissioner some advice at this point. He made reference to the three telephone calls which had been made to the applicant that morning which had not been answered, which were in addition to the email which had been sent to the applicant and attempted contact by way of text message. A WebEx link to the hearing had also been sent to the applicant. Mr Wilson advised that a further check should be made if there was anyone on the WebEx waiting to be admitted.

[19] In addition, Mr Wilson's advice was that the Commissioner was entitled to exercise his discretion but should consider whether all reasonable efforts had been made to advise the applicant in order to ensure that she was aware of the hearing. Assuming that the Assistant Commissioner was satisfied with that, then he ought to have regard to all of the other circumstances and balance fairness to the applicant with the interests of the public. Mr Wilson gave additional advice in respect of a number of other relevant considerations, including that the applicant had had legal representation until the previous day; that she had personally appeared in a number of the PHRs; and that, through her legal representatives, she had provided a response to the case against her by means of both a councillor response form and a personal statement. He also noted guidance in the case of *General Medical Council v Adeogba* [2016] EWCA Civ 162. Finally, he reminded the Assistant Commissioner that the Commissioner's guidance on adjudication procedures, at para 48, addresses the failure of a party to attend an adjudication hearing and gave the Commissioner the authority to proceed in their absence.

[20] The Assistant Commissioner then adjourned to consider the application. The decision notice which was later issued in the case summarises the decision which was made at that point, at section 3, in the following terms:

> "The Assistant Commissioner said that he had considered the papers in the Hearing bundle and had taken into account the submissions from Ms. Best BL and the advice from Mr. Wilson, his Legal Adviser. He was very aware that it was important to exercise the utmost care and caution in deciding whether or not to proceed in the absence of former Councillor Bunting.
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> Former Councillor Bunting and her previous legal representatives had clearly shown that they were aware of the contents of the investigation report. To date there had been nine pre-hearing reviews since the case was first referred for adjudication, and in those hearings, there has been involvement by her various legal representatives in all but two of these.
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> In the absence of former Councillor Bunting, the Assistant Commissioner had a discretion whether to proceed or not. He had to be satisfied that all reasonable efforts had been made to contact her and he was so satisfied. He also accepted the propositions put forward by Ms Best BL opposing the adjournment.
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> Whilst former Councillor Bunting had requested an adjournment at a very late stage the Assistant Commissioner was satisfied that she was fully aware of the arrangements for the Hearing. He noted that if her legal representative had not withdrawn, she presumably would have been present and her absence was not based on any medical or other similar evidence.
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> Furthermore, in his consideration of the matter the Assistant Commissioner would have the benefit of her Councillor Response Form and also her personal statement, both of which were prepared with the assistance of her legal advisers. This was a case in which many of the facts were not in dispute, having already been agreed through Counsel on behalf of former Councillor Bunting.
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> Therefore, on balance, the public interest in having this matter concluded outweighed the application to adjourn. In proceeding in the absence of former Councillor Bunting,

> the Assistant Commissioner also reminded Counsel for the Deputy Commissioner of her obligation to draw to his attention, not only the evidence relied on by the Deputy Commissioner, but also the issues raised by former Councillor Bunting in her Councillor Response Form and her personal statement. The Assistant Commissioner also noted that, with the assistance of his Legal Assessor, he might also ask questions of a witness."

[21] In a further twist however, the applicant had in fact logged on to the WebEx link which had been provided by the Commissioner's office. However, she says that, as a result of technical problems, she was unable to gain virtual access to the hearing itself in order to make oral representations. She says that she made contact with the NILGSC office and subsequently spoke with the appointed legal assessor at around 1:30pm. She says that she was informed by the legal assessor that the matter was proceeding, which was later confirmed to her in writing.

[22] After her attempt to engage with the proceedings during the morning session on 7 February and her telephone discussion with the legal assessor around 1:30pm that day, the applicant says that she then had no involvement in the hearing. She was later informed that the Commissioner had imposed a three-year disqualification upon her, thus preventing her from seeking election as a councillor during that period.

[23] What precisely happened during the course of the day on 7 February is obviously important to the court's consideration of this case; and this has been dealt with in detail in evidence filed on behalf of the respondent, which is summarised below. There are some details which still remain uncertain. However, from the respondent's affidavit evidence and the applicant's rejoining affidavit, a picture emerges which is tolerably clear.

[24] The adjudication hearing had been due to commence at 12 noon. In the event, it commenced late, at approximately 12:20pm, because of delay occasioned by the Commissioner's office trying to contact the applicant by telephone and text. The applicant says that she tried to connect onto the WebEx link at 12:07pm. (No explanation has been provided as to how or why she was unable to answer the telephone calls which had been made to her by the Commissioner's staff.) She says that she was unable to access the link provided and was unsure what caused the difficulty. However, she has averred that she was unable to secure access to the hearing. She has further averred that she waited for 35 minutes having logged into the link, during which she was advised by the software that she could join the meeting after the host had admitted her to the meeting. This proved unsuccessful. She therefore contacted the Commissioner's office at 1.18 pm. (It is not clear why she did not do so earlier if the 35 minutes she waited after dialling in at 12:07 concluded around 12:42pm. It is also not clear if a check was made, when Mr Wilson suggested this, to see if there were any remote participants waiting to be admitted. I assume this would have been done but the precise timing of it has not been set out.) In any event,

the applicant made contact with the Commissioner's office by email (a copy of which has been exhibited). Her email said:

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

[25] At approximately 1:30pm, Mr Wilson interrupted the hearing to inform the Assistant Commissioner that he had been advised by a member of the Commissioner's staff that Ms Bunting had been trying to join the hearing by WebEx. Mr Wilson stated that he wished to try to verify this and that, if that was the case, the Assistant Commissioner would have to recap matters which had already been addressed since the hearing had commenced. He therefore suggested that there should be a lunch break "so that this important matter could be addressed."

[26] The respondent has filed evidence from a solicitor employed within the NILGSC office, Mr Smyth, whose role it was, amongst other things, to provide administrative support to the Assistant Commissioner. This support extended to making arrangements for the oversight of virtual adjudication hearings and the attendance of witnesses both in person and remotely. It was Mr Smyth who engaged with Ms Bunting in relation to the WebEx link, which she was attempting to use via her mobile telephone. He avers:

> "Ms Bunting appeared to have no sound. I contacted the NIPSO IT specialist who confirmed that there was no fault with the system. The stenographer, who was operating from Dublin, was using Webex with all sound working. The terminal in our Legal Team office was also successfully connected. I inadvertently spoke on this at one stage and was heard in the Hearing Room. Any difficulty therefore appeared to relate to Ms Bunting's audio or audio settings. Our IT specialist spoke to Ms Bunting by phone to talk her through using her phone to connect. I am aware that Mr Wilson, Legal Assessor, also spoke to Ms Bunting by telephone and that she indicated during the call that she would not be attending on Webex or in person.
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> Ms Bunting had previously successfully accessed PHRs from her phone via Webex."

[27] In his affidavit evidence Mr Wilson has then addressed the telephone conversation which he had with Ms Bunting from a telephone in a private office. He advised her that the Assistant Commissioner had received her email which had been

sent the night before, after close of business, but that the Assistant Commissioner had decided to proceed with the adjudication and briefly outlined the reasons for his having done so. He also noted that, prior to the hearing commencing, the Assistant Commissioner had offered to facilitate Ms Bunting in making her application for an adjournment either in person or by WebEx and that he (Mr Wilson) had been surprised that Ms Bunting was not present. At this point the applicant referred to her apprehension of Mr Golding whom she said had harassed her (referring to a particular incident which was said to have occurred at a petrol station). Mr Wilson replied by stating that any harassment would be a matter for the police but that the Assistant Commissioner would ensure that she would not have contact with Mr Golding in the hearing venue. He also noted that no such issue had been raised when the hearing dates had previously been fixed and when she had been represented. Ms Bunting said that she was worried that Mr Golding would ascertain her address; but Mr Wilson assured her that, so far as the hearing was concerned, there was no basis for this concern.

[28] On Mr Wilson's evidence, he asked the applicant if she would be joining the hearing by WebEx or attending in person, noting that the Assistant Commissioner had offered both of these options; and the applicant said "no" and that she would be speaking to her legal representative. She also said she was not prepared for the hearing and had no papers. Mr Wilson replied by referring to the correspondence of 27 January 2023 discussed above and the attempt made by the Deputy Commissioner's staff to hand deliver papers to her home address. No one had answered; nor had she contacted the Commissioner's office in response to the Assistant Commissioner's correspondence. Mr Wilson's evidence, which is not disputed, is that the applicant disclosed that her lack of response had been "done on legal advice." Mr Wilson did not delve further into that issue since he was (quite properly) immediately concerned that he should not prompt her to disclose information or advice which may be subject to legal professional privilege. He therefore said he could not go into that issue with the applicant, save that he asked again if she was coming to the hearing. She replied, "No." Mr Wilson again noted that the hearing had been fixed for several weeks "and that if she was not present the Assistant Commissioner had determined to proceed as it was in the public interest to do so." Also significantly in my view, he avers that he told the applicant "that I would pass the details of this call to the Assistant Commissioner, which I then did."

[29] In the applicant's grounding affidavit she recounts this call in only very brief detail (and wrongly averred that she spoke to Mr Smyth, rather than Mr Wilson). She said that she "was informed that the hearing had proceeded in the absence of my oral submissions." Mr Wilson does not dispute that he provided this information and, indeed, that was factually correct. The more important aspect of the exchange in my view was the remainder of the conversation. As to that, it is addressed in slightly more detail in the applicant's rejoining affidavit (which was filed in response to the affidavit of Mr Wilson). It contains the following averments:

> "I set out to the Legal Assessor that the purpose of my seeking to attend the hearing that morning was to make the adjournment application as directed. The Legal Assessor explained to me that the hearing was proceeding following consideration of my adjournment application.
>
> I was not provided with an opportunity to link onto the hearing to make further submissions on the adjournment application. During my discussion with the Legal Assessor, I was left with the clear impression that the hearing would be proceeding and would not be adjourned as the decision had been made already. As such, I did not feel that I was in a position to participate further without legal representation."

[30] Returning to Mr Wilson's evidence, he says that he had mentioned the contact from the applicant in the course of the hearing prior to the break for lunch. When the hearing resumed after lunch therefore, he wished to place on the public record that the Commissioner's office had been contacted by the applicant to say that she was endeavouring to make contact through WebEx. He noted for the record that, with the Assistant Commissioner's permission, he had spoken with the applicant and that the outcome of that discussion was that he advised the Assistant Commissioner that he should proceed with the hearing. He was careful not to trespass on the issue of what advice the applicant may have received from her lawyers but briefly stated that she did not intend to participate in the hearing and that this reflected legal advice that she had received.

The remainder of the proceedings before the Commissioner

[31] In the event, the Assistant Commissioner proceeded with the hearing. He conducted the fact-finding element of the hearing on 7 February by reference to the evidence presented and, where appropriate, the contents of the investigation report and the representations made at the hearing. This included a statement of facts which had been agreed between the parties at a time when the applicant was represented. There were only two disputed facts in that document. He also heard witness evidence, including from Mr Golding, from a Democratic Support Services Assistant employed by the Council, and from the investigating officer in the Commissioner's office. The hearing was then adjourned to 10:00am on 8 February 2023.

[32] On that morning, the Assistant Commissioner reopened the hearing and dealt with the findings of fact which he had made. He concluded that the 21 undisputed facts had been made out to his satisfaction. He expressly recorded that, in circumstances where the respondent (the applicant in these proceedings) was not present or represented, he had been careful to ensure that in coming to his conclusion sufficient consideration had been given to the case she had made in her response form, her personal statement, and the record of her interview with the investigating officer.

The Assistant Commissioner was also satisfied on the basis of the evidence before him that the two disputed facts had been made out. He gave reasons for this, which I do not need set out for present purposes. He then moved on stage 2 of the hearing and was (perhaps unsurprisingly in light of his findings of fact) satisfied that there had been a breach of relevant provisions of the Code of Conduct.

[33] While submissions were being made on this aspect of the case, Mr Wilson advised the Assistant Commissioner that a letter had been received from the former solicitors for Ms Bunting, which was in the form of a judicial review pre-action protocol letter relating to the proceedings which had been held the day before. Mr Wilson advised the Assistant Commissioner that he should adjourn to consider this, and the hearing was duly adjourned. The Assistant Commissioner later reopened the hearing and made reference to the correspondence which had been received. This correspondence had asked for the adjudication hearing to be stayed but the Assistant Commissioner indicated that it was not his intention to do so.

[34] Having concluded that the applicant was in breach of relevant provisions of the Code of Conduct, the Assistant Commissioner moved on to consider the appropriate sanction at stage 3 of the proceedings. This was done by reference to the guidance on sanctions which has been published by the Commissioner's office. The sanction ultimately imposed has been referred to above. The Assistant Commissioner's written decision in the case was later issued on 6 March 2023.

Relevant statutory provisions

[35] Part 9 of the Local Government (Northern Ireland) Act 2014 ("the 2014 Act") sets out the legal framework within which the Commissioner may investigate and adjudicate upon alleged breaches of the Code of Conduct. It is unnecessary for present purposes to discuss much of the detail of the provisions contained within Part 9. Section 53 provides for the issue by the Department of the Code of Conduct. Section 55 makes provision for the Commissioner to investigate cases in which a written allegation is made to her by any person that a councillor (or former councillor) has failed, or may have failed, to comply with the Code of Conduct. One outcome of such an investigation, pursuant to section 55(5)(c), is a finding that the Commissioner should make an adjudication on the matters which are the subject of the investigation. Where that is the case, the councillor (amongst others) must be sent a copy of the report on the outcome of the investigation: see section 57(2). During the course of the investigation itself, the Commissioner must give any person who is the subject of the investigation an opportunity to comment on any allegation that that person has failed, or may have failed, to comply with the Code of Conduct: see section 56(2).

[36] Adjudication hearings are dealt with very briefly in section 56A. It is a matter of discretion for the Commissioner (no doubt subject to the requirements of fairness) as to whether such a hearing is held before making an adjudication. Where there is such a hearing, it will usually be held in public and, generally, the procedure for the hearing is to be such as the Commissioner considers appropriate in the circumstances

of the case: see section 56A(3). However, additional provision is made for adjudication hearings by way of section 63, which provides that certain provisions of the Public Services Ombudsman Act (Northern Ireland) 2016 apply as if the references to the Ombudsman in that Act were references to the Commissioner.

[37] Section 59(1) provides that the Commissioner may make an adjudication on any matter by deciding whether or not any person to which that matter relates has failed to comply with the Code of Conduct. Section 59(3) of the 2014 Act sets out a range of penalties which the Commissioner may impose where she has decided that a person has failed to comply with the Code. One of those disposals is the disqualification of that person from being, or becoming (whether by election or otherwise), a councillor.

[38] Importantly, section 59(13) of the Act provides a person who has been censured, suspended or disqualified with a right to appeal, with leave, to the High Court. Section 59(14) of the Act sets out the grounds upon which such an appeal may be pursued. It provides as follows:

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

Summary of the parties' cases

[39] The applicant relies upon breach of article 6 ECHR. She contends (relying upon *Kulkarni v Milton Keynes Hospital NHS Foundation Trust & Others* [2009] EWCA Civ 789, at para [65]) that the civil limb of the article 6 fair trial guarantee is engaged on the basis that the outcome of the proceedings before the Commissioner could (and did) determine her right to stand for election and, relatedly, to hold office which in turn attracts a degree of remuneration. She asserts that the Commissioner's actions were unreasonable and unfair. She further contends that any breach cannot be cured by the availability of, or the pursuit of, an appeal to the High Court (assuming leave to appeal

were to be granted), largely because this would result in her having lost the opportunity to have a full and fair hearing of her case before the Commissioner herself (or, in this case, the Assistant Commissioner).

[40] Mr Mackell's written submissions described the key matter as being the refusal to adjourn the hearing on 7 February 2023. In his oral submissions, he focused on an asserted failure on the part of the Assistant Commissioner to appropriately recognise that the applicant could not *fully* present her case in the circumstances which had arisen; that, by reason of technical difficulties, the applicant was not given an opportunity to address the Assistant Commissioner directly as she had hoped; and that issues she had raised with Mr Wilson in her telephone discussion with him were not adequately reflected in the Commissioner's written reasoning in respect of the refusal of the adjournment application.

[41] For the proposed respondent, Ms Fee contended that leave should be refused on the simple basis that the applicant enjoyed an effective alternative remedy, namely the statutory right of appeal under section 59(13) and (14). She further contended that, on the substance of the challenge, leave or relief should be refused on the basis that there was no unfairness in the procedure adopted by the Assistant Commissioner. In her submission, the Commissioner's office had gone out of its way to facilitate the applicant and the Assistant Commissioner exercised his discretion in a way which was legally open to him and resulted in no unfairness to the applicant. She could and would have been able to present her case had she chosen to participate in the proceedings; but she chose not to.

Alternative remedy

[42] As a matter of principle, it is right to deal first with the contention that this application for judicial review should not be entertained because the applicant has failed to exhaust an adequate and specifically tailored statutory alternative remedy. The applicant contends that the frailties in the Commissioner's decision-making cannot be cured simply by her availing of an appeal to the High Court. She has lost the opportunity, she submits, of fully presenting her case – and testing that of the complainant – before the primary finder of fact.

[43] Mr Mackell also relies upon the fact that the right of appeal to the High Court is not absolute. The applicant cannot appeal as of right; she must seek and obtain leave to do so. As I indicated during the hearing, I do not find that objection at all persuasive. First, if the applicant has an arguable case with a realistic prospect of success leave to appeal is likely to be granted. Second, the applicant has chosen to pursue an application for judicial review which also contains a leave filter.

[44] The applicant's concern about losing the opportunity to defend herself in substance and argue her case before the specialist tribunal itself is a point of more weight in my view. The applicant relies on the decision in *Re Hartlands (NI) Ltd's Application* [2021] NIQB 94 in which I permitted an application for judicial review of a

council's planning decision to proceed notwithstanding the availability of a right of appeal to the Planning Appeals Commission (PAC), since there was force in the applicant's argument that it had been deprived of a proper first instance determination of its application on the planning merits (see para [108] of that decision). Mr Mackell seeks to draw an analogy between that situation and the present case. There were specific facts in the *Hartlands* case (namely that the planning applicant was seeking a departure from planning policy on the basis of acute housing need in the area) which made a lawful decision-making process before the first-instance decision-maker all the more important. However, whether the analogy is well drawn also depends upon the nature of the appeal process and the powers available to the court.

[45] Both parties accept that there is limited statutory guidance on the nature of the appeal process under section 59 of the 2014 Act and the powers available to the court. Section 59(13) provides a right of appeal and section 59(14) sets out the grounds of appeal; but little, if any, further guidance is to be found in the 2014 Act itself as to how the High Court should conduct an appeal. There is no specific secondary legislation making supplementary provision for such appeals. This may be because the Bill which became the 2014 Act did not initially contain a proposed right of appeal from an adjudication on the part of the Commissioner. This was added by way of amendment at the committee stage after concern had been raised about the lack of provision for an appeal mechanism. The relevant report indicates that in his evidence to the Committee for the Environment which was scrutinising the draft Bill the Commissioner took the view that judicial review was an appropriate option for appeal; but the Committee felt that judicial review was not only time-consuming but "too limited in scope to be adequate." In response to these concerns, the Department agreed to amend the Bill to provide a right of appeal to the High Court. The members of the Committee believed that the grounds for appeal to the High Court should be specified on the face of the Bill – which is likely to have given rise to what became section 59(14) – and that they should include a right of appeal in substance against an incorrect decision or an unduly excessive sanction.

[46] Keegan J (as the now Lady Chief Justice then was) considered the nature of an appeal under section 59 of the 2014 Act in *Re Brown's Application* [2018] NIQB 62. At para [27] of her judgment she said this:

> "It is important to note that this is a statutory appeal. It is not a simple judicial review, neither is it a hearing de novo. However, the court must apply some test to assess whether the appeal should succeed. It seems to me that there is strength in the submission that the first port of call is the statutory language which sets out when a court can intervene. The various headings there are in relation to error of law, procedural impropriety, error of fact, excessive sanction."

[47] The learned judge went on, by reference to English authority which she described as providing useful guidance, to recognise that, in such an appeal, the court must engage with the merits of the case, although appropriate deference to the tribunal below will be paid depending on the nature of the issue. Then, at para [30], she provided the following guidance:

> "In my view the test is best described as whether or not the decision was wrong applying the statutory language. I do not consider that the adverb 'plainly' adds anything for the reasons given by the Supreme Court in *Re B* [2013] UKSC 33. The appellant must satisfy the burden of proof. I do not accept the argument made by the respondent that the court is simply exercising a supervisory function as in a judicial review. In my view the jurisdiction of the court is broader within the parameters of the statutory provisions, allowing due deference to the decision maker."

[48] The result is that in an appeal under section 59, the starting point is the decision reached by the Commissioner. It is for the appellant to show that the decision was wrong in a way which engages one of the statutory grounds of appeal. I would add that this can include showing that the decision was wrongly *reached*, in a way which was infected with an error of law.

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

[50] As to the procedure to be followed by the court in a section 59 appeal, it will be subject to the provisions of Part II of Order 55 of the Rules of the Court of Judicature (Northern Ireland) 1980, which applies to appeals to the High Court made under a variety of miscellaneous statutory provisions. By virtue of Order 55, rule 22, the provisions of Order 59, rule 10 apply to an appeal under that Part. That provision provides the court with a range of general powers for the purpose of doing justice between the parties in an appeal. It includes power, at rule 10(4) to "make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties."

[51] I accept Ms Fee's submission that there is a viable alternative remedy available to the applicant in this case. Section 59(14)(a) of the 2014 Act specifies as a ground of appeal that "the Commissioner's decision was based on an error of law." I consider this wide enough to encompass a situation where the Commissioner has wrongly considered that it was procedurally fair and/or lawful for him to proceed with an adjudication hearing when, as a matter of law, it was not. It would also encompass a situation where the Commissioner acted in breach of article 6 ECHR. Alternatively, the Commissioner may be found to have "acted unreasonably in the exercise of the [her] discretion" (the ground at section 59(14)(c)) where an adjournment is unfairly refused. Where such a ground of appeal is made out before the High Court, there may be cases where the court itself can, in the course of the appeal process, remedy the unfairness. In other cases, such as this, where the complaint is that the whole adjudication hearing was therefore unfair, I consider it to be within the powers of the High Court hearing an appeal to set aside the Commissioner's decision with the result that the Commissioner should then conduct a fair adjudication procedure afresh and reach a lawful decision. The grounds specified in section 59(14) are such that the statutory intention was plainly that an appeal could operate in place of an application for judicial review and indeed should afford additional grounds of challenge. I see no reason why, if an application for judicial review could succeed in this case, the same outcome would not be achievable through the means of the statutory appeal.

[52] Ms Fee relied strongly on the recent decision of the Court of Appeal in *Re Alpha Resource Management Ltd's Application* [2022] NICA 27. There, the Court of Appeal helpfully reiterated the nature of judicial review as a remedy of last resort and set out the following principles (at para [20]):

> "(i) Judicial review is a remedy of last resort and may not be the only available avenue of challenging a particular decision. That is because statute may have provided an appellate machinery to deal with appeals against decisions of public bodies.
>
> (ii) A court may, in its discretion, refuse to grant permission to apply for judicial review or refuse a remedy at the substantive hearing if an adequate alternative remedy exists, or if such a remedy existed but the claimant had failed to use it.
>
> (iii) The general principle is that an individual should normally use alternative remedies where these are available rather than judicial review. The courts take the view that save in the most exceptional circumstances, the judicial review jurisdiction will not be exercised where other remedies were available and have not been used.

(iv) The rationale for the exhaustion of alternative remedies principle is that it is not for the courts to usurp the functions of the appellate body which has the expertise and ability to determine disputes.

(v) The courts will not insist that claimants pursue an alternative remedy which is inadequate. The principle can be defined as one that requires the use of adequate alternative remedies, or the fact that an alternative remedy is inadequate may be seen as an exceptional reason why judicial review may be used.

(vi) There may be other exceptional reasons why judicial review is the preferred course as each case is fact sensitive and the court must consider in exercising its discretion to hear a judicial review where an alternative remedy is available the overall circumstances including in some cases the urgency of the case, delay, cost, or public interest concerns."

[53] An unusual feature of this case is that the alternative remedy is an appeal to the High Court which, like an application for judicial review, will be dealt with in the King's Bench Division. Accordingly, sub-para (iv) quoted above may not apply with its usual force. However, that does not affect the basic principle that something exceptional will be required before the court will exercise its discretion to grant leave or grant a remedy in an application for judicial review where a specific statutory right of appeal is available.

[54] It may be that the applicant's preference for judicial review was because it was not appreciated that the scope of an appeal or the court's powers on appeal were as I have held above (see para [51]). Another factor might have been the availability of legal aid to pursue an application for judicial review when legal aid does not appear to be available in respect of the statutory appeal. I would not view that alone as an exceptional factor justifying permitting a judicial review to proceed instead of the appropriate statutory appeal route; nor as a factor which necessarily rendered the statutory appeal inadequate or ineffective. Leaving aside some exceptional case, to take that approach would be to rob the alternative remedy doctrine in judicial review of much of its substantive effect in any case where the applicant would be eligible for the grant of legal aid. The adequacy of the alternative remedy is to be judged principally by reference to the grounds upon which it is available and the powers available to the alternative tribunal, not the availability of public funding.

[55] For these reasons, I consider that the proposed respondent's objection on the basis of alternative remedy is well made. Since there is some time sensitivity in this

case and it has been fully argued before me, I would not propose to refuse leave to apply for judicial review on this ground alone without expressing any view on the substance of the applicant's challenge (although, if the issue had arisen, it may have been a proper basis for refusing relief). To do so would not be an efficient use of court time and resources. It would require the substantive arguments to be argued again, on an application for leave to appeal, at a time when the practical utility of the application from the applicant's perspective would have expired. I therefore set out below my conclusions on the substance of the applicant's case.

The refusal of the adjournment

[56] The applicant relied upon the case of *CPS v Picton* [2006] EWHC 1108 in relation to when an adjournment should be granted in criminal proceedings and submitted that an equivalent approach was appropriate in respect of regulatory proceedings which concerned allegations of serious misconduct. In the *Picton* case, at para [9], the following guidance is offered:

> "(a) A decision whether to adjourn is a decision within the discretion of the trial court. An appellate court will interfere only if very clear grounds for doing so are shown.
>
> (b) Magistrates should pay great attention to the need for expedition in the prosecution of criminal proceedings; delays are scandalous; they bring the law into disrepute; summary justice should be speedy justice; an application for an adjournment should be rigorously scrutinised.
>
> (c) Where an adjournment is sought by the prosecution, magistrates must consider both the interest of the Defendant in getting the matter dealt with, and the interest of the public that criminal charges should be adjudicated upon, and the guilty convicted as well as the innocent acquitted. With a more serious charge the public interest that there be a trial will carry greater weight.
>
> (d) Where an adjournment is sought by the accused, the magistrates must consider whether, if it is not granted, he will be able fully to present his defence and, if he will not be able to do so, the degree to which his ability to do so is compromised.
>
> (e) In considering the competing interests of the parties the magistrates should examine the likely

consequences of the proposed adjournment, in particular its likely length, and the need to decide the facts while recollections are fresh.

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

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

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

[57] Although the analogy between criminal proceedings and proceedings before the Commissioner is far from exact, Ms Fee did not strongly oppose the suggestion that the type of factors identified in the *Picton* case would be relevant. The applicant emphasised the considerations at sub-paras (d) and (f) in this passage – since the essence of her case is that she was not able to fully present her case in light of the refusal of the adjournment (and, indeed, that her ability to do so was seriously undermined); and that she was not at fault in terms of the reason for the adjournment request.

[58] I have difficulty with the submission that the applicant was not "at fault" (insofar as it is appropriate to talk about fault in this context) in terms of the reason for the adjournment request or the late stage at which that request was made. She relies upon the fact that she had raised this issue in an earlier hearing and "it would therefore not have come as a complete surprise to the respondent where an application to adjourn was submitted as a result of the applicant no longer having legal representation." That may be so but, as Ms Fee submitted, this was also an issue which had been on the applicant's radar for quite some time. The Assistant Commissioner had previously granted more time and adjourned a scheduled hearing in order to allow concerns about funding of the applicant's representation to be addressed. It is disappointing that – on the applicant's own case – she was only told by her legal team the day before the scheduled hearing that they were unable to appear on her behalf.

How that came about, I do not know. It may have been because it was only at that point that it became clear that the applicant was not in a position to pay them. Plainly, however, this was an issue which had been a matter of concern for some time and which the applicant's team had been granted time to resolve one way or the other well in advance of the hearing.

[59] Mr Mackell fairly conceded that it was likely to be an uphill struggle for the applicant to secure further legal representation in light of her inability to pay for this and the unavailability of legal aid. Although the possibility of crowd-funding was mentioned, this was an avenue which could and should have been explored much earlier. Circumstances often arise where litigants have to represent themselves and that, of course, does not of itself give rise to any unfairness. Rather, it gives rise to a heightened obligation on the part of the tribunal – of which I am satisfied the Assistant Commissioner was aware – to ensure that the party concerned is facilitated in presenting their case.

[60] I was told by Ms Fee from the Bar that, in the majority of adjudication hearings before the Commissioner, councillors or former councillors are not legally represented. As I have mentioned above, that does not of itself mean that a hearing will be unfair. The applicant also relied upon the principle of equality of arms and the asserted unfairness which, she submits, arose from the fact that other parties to the proceedings were legally represented by counsel or (in the Assistant Commissioner's case) were assisted by a legal assessor. Again, that does not of itself mean that a hearing will be unfair. In the case of the Commissioner, part of the legal assessor's role is to ensure that the hearing is conducted in a fair way, which may involve his or her giving advice which is to the assistance of an unrepresented party, including by prompting questions which probe the case against unrepresented councillor.

[61] The two issues which are more cogent objections in this case are, firstly, the applicant's asserted lack of preparedness; and, secondly, her asserted apprehension in relation to Mr Golding.

[62] The applicant contends that her lack of preparedness was given scant attention by the Assistant Commissioner and is not recorded in the decision notice. She relies upon the fact that, in the legal assessor's affidavit which deals with the discussion he had with the applicant on 7 February, he confirms that she had indicated to him that "she was not prepared for the hearing, and had no papers." The fact that mention of this is not made in the decision notice is not determinative. The Commissioner was plainly aware of the case made by the applicant in her email of 6 February that she was "still… not in possession of the documents" (that is, the hearing bundle). He was also aware of the unsuccessful attempts to deliver this bundle to the applicant. This factor was not left out of account in the Commissioner's consideration. He was entitled to take into account that the applicant had access to the papers which had been in her solicitor's possession; and that she was aware of the offer of a set of papers from the Deputy Commissioner.

[63] At the same time, the Assistant Commissioner was also entitled to take into account that the proceedings had a long history. The complaint - which at its heart was not a complex one – had been made over four years earlier. The applicant had been provided with a copy of the investigation report in June 2019. As the decision records, the Assistant Commissioner had the benefit of the applicant's councillor response form, as well as her personal statement, both of which had been prepared by her with the assistance of legal representatives. It was plain that the applicant was well aware of the nature of the complaint and the key factual issues; and she had been provided with a number of opportunities to give an evidential response to these.

[64] As noted above, there was a wide range of relevant undisputed and agreed facts in the case. These included factual details about the applicant's basic annual allowance as a councillor and how this was paid; her liability to repay the Council when she exceeded the data usage limits on the mobile phone provided to her by the Council, as a result of which those amounts were deducted automatically from her councillor allowance; that such a deduction was made from her monthly allowance in June 2018 in the sum of £545.39; and that her payslip dated 27 June 2018 contained a deduction in respect of that (although not rounded up in the same way) in the sum of £545.38 which was noted as 'Members Phone Repayment.' Other agreed facts, relating to information which had been provided by the Council, included that the applicant forwarded an electronic image of her payslip by email to the complainant and that the image which he received included the deducted amount but did not show the words "members phone repayment" as recorded on the original copy of the payslip. It was also agreed that the applicant had sent a number of text messages to the complainant. It may reasonably be thought that at least some of these communications were clearly requesting the transfer of monies. It was also an agreed fact that Mr Golding did in fact provide two payments to the applicant by way of bank transfer from an account held by Britain First, authorised by him. It was further agreed that the reference created for the payments by Mr Golding the time of making them in July 2018 was "Jolene Bunting Belfast Penalty."

[65] The two relevant disputed facts which had been identified by the applicant were as follows:

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

[66] The applicant's case on this was also well known to her. She did not accept that she altered the payslip, nor that she had requested money from Mr Golding in respect of repayment of a fine. She contended that he had simply alleged this after there had been a breakdown in their relationship.

[67] It was perfectly open to the Assistant Commissioner, in my view, to take the view that the applicant could fairly make her case if she attended the hearing in person or remotely. Should any issue have arisen in the course of the hearing which required the applicant to be given more time to consider a document, that could have been facilitated. This was not a case, for instance, where a failure to adjourn would result in her losing the evidence of a supporting witness.

[68] In the event, when it became clear that the applicant had decided not to attend, the Assistant Commissioner reminded counsel for the Deputy Commissioner of her obligation to draw to his attention the issues raised by the applicant in her councillor response form and personal statement.

[69] The applicant also strongly relies upon the contention that, in the absence of legal representation, she would have been required to cross-examine a witness (the complainant) of whom she had stated that she was afraid. Again, she is extremely critical of this fact are not having been mentioned in the Assistant Commissioner's decision notice. Once again, however, this is an issue which was squarely raised by the applicant's email of 6 February and of which the Assistant Commissioner was aware. The mere fact that it is not recorded in the decision notice does not establish that this factor was not properly considered by the Assistant Commissioner.

[70] The respondent was of the view that any concern on Ms Bunting's behalf in relation to fear of Mr Golding could be appropriate managed in the hearing. The email sent to her from NILGSC on the morning of 7 February confirmed to her that the Commissioner's office had in place appropriate measures to ensure the safety of all persons attending the public hearing. That was plainly a reference back to the concerns expressed in her email. The respondent's evidence also makes the point that at none of the nine earlier PHRs did the applicant, or her representatives, ever raise any concern about her attendance at an in-person adjudication hearing with the complainant present. This included a PHR held on 14 May 2021 in which the Assistant Commissioner confirmed that the adjudication hearing would be held in public, which represented the agreed position of the parties. This case management decision was reached after the Assistant Commissioner had considered para 45 of the NILGSC Adjudication Procedures document, which would also have been available to the parties, and which states:

> "All Adjudication Hearings will be held in public except where the Commissioner determines that this would not be in the public interest. The Commissioner considers that it would not be in the public interest to hold a public hearing where this would prejudice the interests of fairness or

> would threaten the personal safety/security of any parties involved in the case… In relation to the issue of personal safety/security the Commissioner will normally require evidence of a risk of substantial harm to either the individuals involved in the Adjudication Hearing or to the public interest generally before holding an Adjudication Hearing or any part of an Adjudication Hearing in private."

[71] In light of the fact that the applicant's personal safety was not raised at this PHR, nor indeed at any earlier PHR, it seems that the Assistant Commissioner approached the applicant's belated reliance upon an asserted fear of the complainant with a degree of caution. There may, of course, be a qualitative difference between attending a hearing as a represented respondent with the support and additional safeguards provided by one's own lawyers on the one hand and, on the other, attending as an unrepresented respondent. However, the Assistant Commissioner was entitled to take into account the safeguards which he and his office could and would offer any unrepresented party in such circumstances. For instance, Mr Wilson made clear to the applicant that arrangements could be made such that she was not expected to be in the same room as Mr Golding. As Ms Fee described (and as appears from Mr Smyth's affidavit), there was a facility to link into the hearing remotely from another room in the building, if and when that was considered necessary. This would have afforded Ms Bunting a degree of protection and reassurance equivalent to what courts can provide by way of special measures. Given the inquisitorial nature of the process, questions could be put to Mr Golding to probe his evidence by the Assistant Commissioner (as they were) and could have been put to him by Ms Bunting either remotely and/or through the Commissioner.

[72] The threshold for intervention in a decision of this type is relatively high. Albeit the matter is one of procedural fairness and therefore a hard-edged question of law for resolution by this court, the authorities show that appropriate respect should be given to the case management discretion of lower courts and tribunals in making finely balanced decisions about whether adjournments should be granted. In *R v Hereford Magistrate's Court, ex parte Rowlands* [1998] QB 110, Lord Bingham said that a higher court will "only interfere with the exercise of the justices' discretion whether to grant an adjournment in cases where it is plain that the refusal will cause substantial unfairness of the parties" [underlined emphasis added]. He went on to observe that such unfairness may arise where the defendant is denied a full opportunity to present their case. Similar reticence on the part of a superior court to interfere with a lower tribunal's discretion in this context is displayed in the first principle adumbrated in the portion of the *Picton* case cited above:

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

[73] In this case the Assistant Commissioner was entitled to give some weight to the need to get on with the proceedings. He was entitled to give weight to the fact that neither the complainant nor the party who stood in the shoes of the prosecutor was at fault. He was entitled to take into consideration that, in light of the applicant's lack of means to fund her previous legal team, there may have been slim chance (if any) of her securing alternative representation. He was also entitled to take into account the lateness of the request; and, for the reasons given above, the fact that any fault to be attributed in the circumstances lay on the applicant's side of the house.

[74] All of the factors summarised immediately above could be said to point in favour of refusing the application. The question is whether it was nonetheless a cause of substantial unfairness to the applicant to refuse the application. In my judgement, that turns to a large degree on how the applicant's case could have been presented and considered in the absence of her being legally represented. For the reasons summarised above, the Assistant Commissioner was entitled to reach the view that the applicant, as an unrepresented party, could participate in the proceedings fully and fairly. Courts and other tribunals frequently deal with such situations. Adjustments could properly be made to ensure that she was not prejudiced. The ability to fully present one's case does not equate to an absolute right to legal assistance, nor to a right to do so with optimal facilities. That is a corollary of the need to balance a variety of relevant interests.

[75] Although the Assistant Commissioner's approach may be thought to have been robust, and may not have been the only way to deal with the situation with which he was faced, I do not consider that it was unreasonable or unfair in all of the circumstances. The decision not to participate in the proceedings at all was a matter of choice on the part of the applicant. She was at liberty to do so and the decision to proceed with the hearing in all of the circumstances outlined above was not, in my view, unfair.

The failure to facilitate oral submissions on the adjournment application

[76] A further major strand of the applicant's case is that a full examination of the circumstances behind her application to adjourn was not undertaken; and that she was not afforded a full opportunity to present her adjournment application. Mr Mackell relied upon the indication in the *Rowlands* case (*supra*), *per* Lord Bingham at para [30], that it was a guiding principle that such applications should be fully examined.

[77] As the applicant has pointed out in her evidence, the respondent has published a protocol governing the conduct of adjudication hearings which are conducted remotely. A specific ground cited as a potential reason for adjourning a remote hearing is "resolving any technical issues arising with the Webex software." Ms Fee made a point that this hearing was *not* in fact a remote hearing but had been scheduled as an in-person hearing (albeit with a facility for some to dial in). That appears to me to be a highly technical cavil. The applicant had, by the NILGSC email of 11.08 am,

been given the option of dialing in by WebEx and it stands to reason that, in any case where that facility has been offered and availed of, an adjournment may be required where technical issues arise which affects the relevant party's participation in proceedings.

[78] To my mind, this is the strongest aspect of the applicant's case. Albeit the Assistant Commissioner may have been entitled to refuse the adjournment application on the basis of the written information before him, did he unlawfully deprive the applicant of the opportunity of supplementing that information in order to persuade him otherwise?

[79] On this issue, it is certainly not clear that any difficulty with the applicant connecting to the hearing was her fault, much less deliberate. At the same time, it is also clear that the fault did not lie with the respondent's office or staff. It is common case that the applicant made an attempt to dial in to the hearing. In this respect, she seems to have complied with the Assistant Commissioner's invitation to move the adjournment application in person, albeit on her evidence she also sought to connect into the hearing sometime after it had been due to commence. She then advised the respondent of her unsuccessful attempt to gain access. On the respondent's part, once this information became known, the hearing was promptly adjourned in order not to prejudice the applicant's position and in order that contact could be made with her. As Mr Smyth's affidavit discloses, significant efforts were then made to resolve the technical issues, which were unsuccessful. Mr Wilson also then spoke to the applicant by telephone.

[80] The fulcrum of the applicant's case on this issue is her contention that – rather than making arrangements to ensure that she could participate in the consideration of the adjournment application – the legal assessor simply informed her that the matter was proceeding. That analysis is not shared or accepted by the respondent.

[81] It was not easy to reach a firm conclusion on this aspect of the case because of the relative paucity of information about the precise content of the telephone call between Mr Wilson and the applicant. On balance, however, I prefer his evidence on this aspect of the case for a number of reasons. Firstly, it is more detailed than that provided by the applicant. Secondly, as an experienced legal professional acting with the responsibility of advising the Commissioner, I am confident that Mr Wilson would have appreciated the significance of the details being exchanged on the telephone call and would have been conscious to make an appropriate note of those matters, particularly since these were required to be passed on to the Assistant Commissioner. They have been viewed as significant enough to be set out in his affidavit in these proceedings. Thirdly, albeit this is perhaps not a matter of major significance, it is relevant to note that in the applicant's initial evidence about this telephone call she made a mistake about the identity of the person to whom she had spoken (Mr Smyth, rather than Mr Wilson). Fourthly, the burden of proof in these proceedings ultimately rests on the applicant.

[82] There is in any event not a major conflict of evidence between the two accounts: rather, it seems to me that there is a difference of emphasis or perspective. It is common case that Mr Wilson told the applicant that the Assistant Commissioner had considered her application for an adjournment and had decided to proceed with the hearing, which was factually correct. Ms Bunting appears to have understood that to mean – or now emphasises her understanding to the effect – that the Commissioner would not revisit that decision or reopen the debate about it. However, an explanation of what had already happened is not inconsistent with the applicant having been provided with an opportunity to attend the hearing in the afternoon (either in person or remotely) in order to, if she wished, press her application for an adjournment further. In the event that those further representations in support of an adjournment were unsuccessful, she would have been free to withdraw from the hearing at that point.

[83] It might well be that this opportunity could have been made more clear to the applicant but I am entirely satisfied that Mr Wilson, on behalf of the Assistant Commissioner, was encouraging the applicant to participate in the hearing that afternoon and providing her with reassurance about arrangements which would be made for her to do so, should she choose to. In that context it would have been entirely open to her to participate but she chose not to do so. Had she done so, she could have made further submissions in support of the adjournment application if she so wished, including by reference to the fact that she had unsuccessfully tried to join the hearing earlier.

[84] It is also highly significant that Mr Wilson has averred that he passed on "the details of this call" to the Assistant Commissioner. I accept Ms Fee's submission that, in light of the role being performed by Mr Wilson and his experience in this role, he would have passed on all of the salient matters which had been mentioned to him by the applicant in the course of the telephone exchange: notably, the extent of her apprehension about Mr Golding and the fact that she did not at that stage have the papers in the case.

[85] It is also in my view implicit in the respondent's evidence that the Assistant Commissioner reconsidered his decision on the adjournment application at that point, after Mr Wilson had informed him of the details of the call. That is because Mr Wilson has averred that, further to his discussion with the applicant, he provided "advice" to the Assistant Commissioner that he should proceed with the hearing. That is entirely consistent with his role as a legal assessor and his description of that role earlier in his affidavit evidence. It was for Mr Wilson provide advice but, when he did so, it was for the Assistant Commissioner to make his own decision as to whether or not to follow that advice. That is also consistent with the text of the decision notice (at page 15) where the Assistant Commissioner refers to taking Mr Wilson's advice in this regard. When the Assistant Commissioner confirmed in his decision notice that he had taken Mr Wilson's advice, it is implicit that he addressed his mind to the possibility of rejecting the advice and belatedly acceding to the adjournment application.

[86] For these reasons, I have not been satisfied that it was unfair to the applicant for her not to be afforded the opportunity to advance her adjournment application orally. The technical difficulties which meant that she was not able to do so were not the fault of the Commissioner or his staff. The points which the applicant then made to Mr Wilson were considered by the Commissioner but did not alter his earlier view.

[87] I am fortified in this conclusion by three further matters. First, when the applicant sent her email of 1:18pm on 7 February she referred to being asked to attend the hearing "to discuss an adjournment, which I have already put in writing." This suggests that the key features that she wished to draw to the Commissioner's attention in support of her adjournment application had already been outlined in writing. Indeed, that is confirmed by the text of her email of the evening of 6 February 2023. That email made the case that the applicant should be permitted extra time to prepare for the hearing. It raised her concerns about being involved in the hearing "in which the complainant is somebody who caused me great consternation and anxiety in his actions", saying that she was "genuinely in fear of this man" and "not emotionally ready to face him never mind engage with him." That email also made the case that she was "still… not in possession of the documents." In truth, the matters which she now says were not properly communicated by Mr Wilson to the Assistant Commissioner had already been squarely raised in her written application. Second, no further new considerations which she would have wished to have raised have been identified in her evidence in these proceedings.

[88] Third, the matter plainly was reconsidered by the Assistant Commissioner on the morning of 8 February 2023 after formal pre-action correspondence had been sent on the applicant's behalf by Brentnall Legal. No additional points in support of the adjournment were raised in that correspondence; but there was a request for the hearing to be stayed. This was obviously a formal request of some legal significance. Notwithstanding that, the Assistant Commissioner clearly reconsidered matters again at that stage and determined that it was still not appropriate to halt the proceedings. The interim response sent on behalf of the Assistant Commissioner that day to the pre-action correspondence confirmed that he was satisfied that the applicant's request for an adjournment was properly considered the day before and that it was appropriate to continue the hearing.

[89] In summary, the applicant's points in relation to adjournment of the proceedings were properly before the Assistant Commissioner and carefully considered by him, even though (regrettably) the applicant was not able to engage with the Assistant Commissioner directly in order to supplement her written application, insofar as she actually wished to do so. Her discussion with Mr Wilson, the details of which he passed on to the Assistant Commissioner, was a further means by which her desire for an adjournment, and the basis upon which she sought an adjournment, were put before the Commissioner. In the circumstances of this case, I am satisfied to the high degree required that, even if the applicant had had the opportunity to speak to the Commissioner directly, the result would inevitably have

been the same. She was simply reiterating points which, in substance, the Commissioner had already considered and had lawfully considered were not sufficient to warrant an adjournment of the hearing in all of the circumstances.

The challenge to the disqualification

[90] Mr Mackell accepted in the course of submissions that, although the applicant challenged the ultimate sanction imposed upon her by the respondent, her challenge to that in these proceedings was wholly parasitic upon the two issues of procedural fairness addressed above.

Conclusion

[91] For the reasons given above, the application for judicial review must fail. I have some sympathy for the applicant because she made attempts to dial into the hearing on 7 February (for the limited purpose of making an adjournment application) and, in the event, she did not have the opportunity to address the Assistant Commissioner directly. The situation could probably have been dealt with more satisfactorily if it was made absolutely clear to the applicant that she was entitled to attend that afternoon to renew her adjournment application and if arrangements were made for her to do that via WebEx (if possible) or even by way of telephone communication with the Assistant Commissioner. However, whether the situation could have been handled better is not the test this court must apply. In my view, it was legally open to the Assistant Commissioner to refuse the application to adjourn. The substance of the hearing could have been dealt with in a procedurally fair way with the applicant appearing without the benefit of legal representation, as is often the case in adjudication hearings before the Commissioner. The decision not to participate in the hearing at all in those circumstances was a matter of her own choice (whether on the basis of legal advice or not).

[92] In the circumstances, I will grant the applicant leave to apply for judicial review but dismiss the application on the merits. For the reasons given above, I grant leave exceptionally – notwithstanding the availability of an adequate alternative remedy which should usually result in a refusal of leave to judicially review a decision of the Commissioner – simply for the purpose of addressing the merits of the case in the interests of saving time and costs. Had the applicant succeeded on either of her central grounds, further argument would have been required on the question of whether or not the court should nonetheless refuse relief on the basis that the applicant had not pursued the appeal provided by statute. In the event, that does not arise.

[93] I will hear the parties on the issue of costs but provisionally consider that the usual orders should follow, namely that the applicant should bear the respondent's costs of the application, such costs to be taxed in default of agreement, and such order not to be enforced without further order of the court; and that there should be taxation of the applicant's costs as a legally assisted person.

[94] Whether the applicant wishes to pursue her separate application for leave to appeal against the Assistant Commissioner's decision on the same, or further, grounds is a matter for her. In the event that she wishes to do so, it may be sensible for that to be dealt with by a judge of the High Court other than myself; but this judgment should obviously be brought to that judge's attention.