Neutral Citation Number: [2020] EWHC 1894 (Admin)

Case No: CO/1836/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2020

Before :

Lord Justice Fulford
(Vice-President Court of Appeal (Criminal Division))
and
Mrs Justice Whipple

- -

Between :

The Queen **(on the application of Gary Warner)**	**Claimant**
- and -	
Secretary of State for Justice	**Defendant**
- and –	
Criminal Cases Review Commission	**Interested Party**

- -
- -

Mr Matthew Stanbury (instructed by **Swain & Co Solicitors**) for the **Claimant**
Mr Jason Pobjoy and Mr Warren Fitt (instructed by **Government Legal Department**) for the **Defendant**
Mr Philip Rule (instructed by **Criminal Cases Review Commission**) for the **Interested Party**

Hearing date: 23 June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Lord Justice Fulford and Mrs Justice Whipple:

1. This is the judgment of the Court to which we have both contributed.

2. The Claimant is a serving prisoner having been convicted of conspiracy to rob at Mold Crown Court on 21 September 2011 and sentenced to 16 years' imprisonment. He complains that the decision of the Criminal Cases Review Commission ("CCRC") dated 25 April 2019 not to refer his case to the Court of Appeal (Criminal Division) was tainted by bias or the appearance of bias. By this claim, the Claimant alleges a lack of independence of the CCRC from its sponsoring government department, the Ministry of Justice ("MoJ"), for which the Defendant, the Secretary of State for Justice ("SoS") is responsible.

3. The claim is advanced on the basis that it is analogous with *R (Brooke and others) v Parole Board, the Lord Chancellor and Secretary of State for Justice*, decided by the Divisional Court at first instance at [2007] EWHC 2036 (Admin) ("*Brooke DC*") and by the Court of Appeal at [2008] EWCA Civ 29 ("*Brooke CA*"). In that case it was held that the Parole Board could not sufficiently demonstrate its objective independence from Government, given aspects of its constitution and functioning over which the SoS retained control. The relevance of *Brooke* to this case is a disputed issue to which we shall return. At this stage it is sufficient to note that in *Brooke*, the challenge to the Parole Board's independence was brought by four Claimants who had received adverse decisions from the Parole Board, those individual decisions providing the vehicle for the challenge to the Board's independence; declarations of unlawfulness were made in three of the four cases.

4. This claim was intimated by pre-action correspondence in November 2018. It was issued on 8 May 2019. Between these events, on 7 February 2019, MoJ had published a "Tailored Review" of the CCRC. The mainstay of the Claimant's challenge at the point of issue was that the Tailored Review contained certain "directives" (as the Claimant described them) about the way the CCRC should operate which would undermine the CCRC's independence if implemented. Further, the Claimant complained that the CCRC was insufficiently independent, because of the lack of security of tenure for Commissioners and the misuse by the SoS of his role as sponsor.

5. Permission for judicial review was granted on renewal by Dingemans LJ and Whipple J on 19 December 2019.

6. By the time the matter came on for hearing on 23 June 2020, the CCRC had considered the Tailored Review and had rejected some of its recommendations and accepted others. Further, MoJ had put in place a procedure, acknowledged by all to be acceptable, for terminating the appointment of Commissioners and by that means had met one of the Claimant's initial complaints. Accordingly, the scope of the claim had narrowed.

7. Before us, the Claimant still maintained his two central grounds of challenge, first that the Commissioners lacked security of tenure, and secondly that the SoS had misused his role as sponsor. Within these two overlapping grounds, the Claimant's main arguments centred on: (i) the recasting of the Commissioner role from a 5 year salaried appointment to a 3 year fee paid appointment; (ii) the reservation of decisions about reappointment of Commissioners to the SoS; and (iii) the reshaping of the CCRC's Board by reducing the number of Commissioners on the Board.

8. We are grateful to all counsel and their instructing solicitors for the excellent written materials provided to us in advance of hearing and their careful and focussed submissions at the hearing.

The CCRC

9. Before considering the grounds, it is necessary to examine the statutory provisions establishing the CCRC and the role played by the CCRC in the wider system of criminal justice. Section 8 of the Criminal Appeal Act ("CAA") 1995 provides (as relevant):

> "(1) There shall be a body corporate to be known as the Criminal Cases Review Commission.
>
> (2) The Commission shall not be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown; and the Commission's property shall not be regarded as property of, or held on behalf of, the Crown.
>
> (3) The Commission shall consist of not fewer than eleven members.
>
> (4) The members of the Commission shall be appointed by Her Majesty on the recommendation of the Prime Minister.
>
> (5) At least one third of the members of the Commission shall be persons who are legally qualified…
>
> (7) Schedule 1 (further provisions with respect to the Commission) shall have effect".

10. Schedule 1 to the CAA 1995 provides (as relevant):

> "1. Her Majesty shall, on the recommendation of the Prime Minister, appoint one of the members of the Commission to be the chairman of the Commission.
>
> 2. (1) Subject to the following provisions of this paragraph, a person shall hold and vacate office as a member of the Commission, or as chairman of the Commission, in accordance with the terms of his appointment.
>
> (2) An appointment as a member of the Commission may be full-time or part-time.
>
> (3) The appointment of a person as a member of the Commission, or as chairman of the Commission, shall be for a fixed period of not longer than five years.
>
> (4) Subject to sub-paragraph (5), a person whose term of appointment as a member of the Commission, or as chairman of the Commission, expires shall be eligible for re-appointment.
>
> (5) No person may hold office as a member of the Commission for a continuous period which is longer than ten years.

…

6. (1) The arrangements for the procedure of the Commission (including the quorum for meetings) shall be such as the Commission may determine.

(2) The arrangements may provide for the discharge, under the general direction of the Commission, of any function of the Commission—

(a) in the case of a function specified in sub-paragraph (3), by a committee consisting of not fewer than three members of the Commission, and

(b) in any other case, by any committee of, or by one or more of the members or employees of, the Commission.

(3) The functions referred to in sub-paragraph (2)(a) are—

(a) making a reference to a court under any of sections 9 to 12,

(b) reporting to the Court of Appeal under section 15(4),

(c) giving to the Secretary of State a statement under section 16(1)(b),

(ca) giving to the Minister in charge of the Department of Justice in Northern Ireland a statement under section 16(2A)(b), and

(d) requiring the appointment of an investigating officer under section 19".

11. These provisions serve to emphasise a number of fundamental features of the CCRC's constitution and operation. The first, and most important of those, is that the CCRC should be independent of Government. This is manifest from:

a) s. 8(2), which states in terms that the Commission is not a servant or agent of the Crown and its property is not Crown property.

b) s. 8(4), which provides for Commissioners to be appointed by Her Majesty on the advice of the Prime Minister.

c) Para 6(1) of Sch 1, which confers on the CCRC a power to determine its own processes and procedures.

12. Secondly, the statute outlines the CCRC's functions. They are:

a) making a reference to a court under any of sections 9 to 12, which reference operates as an appeal to that court and has the effect of reopening that case for review by that court (this applies to cases dealt with on indictment and summarily, in England, Wales and Northern Ireland),

b) reporting to the Court of Appeal under section 15(4), which is where the Court of Appeal has directed the CCRC to investigate a matter,

c) giving to the Secretary of State a statement under section 16(1)(b), which occurs after the SoS has referred a matter to the CCRC for a recommendation whether to exercise the prerogative of mercy, and

d) giving to the Minister in charge of the Department of Justice in Northern Ireland a statement under section 16(2A)(b), which similarly occurs after the Minister has referred a matter to the CCRC for a recommendation whether to exercise the prerogative of mercy.

13. Each function involves the exercise of judgment by an expert panel of Commissioners, whose job is to decide whether to make the reference and if so on what grounds, alternatively what to report following any investigation, or what to recommend in any statement. The most familiar of the CCRC's functions is that of referring cases to the Court of Appeal; by s 13 of the CAA 1995, the CCRC does so where it considers there is a "real possibility" that the conviction, verdict, finding or sentence would not be upheld, or if exceptional circumstances justify making the reference. Plainly, the role of the CCRC is not to act as a judge or tribunal. The CCRC does not itself make a decision as to whether to quash a conviction or alter a sentence imposed. It is not a "quasi-judicial body" in the same way as, for example, the Parole Board has been described. But its role goes beyond mere investigation. It is responsible for making decisions about whether to refer, what to report and whether to recommend the use of the prerogative of mercy. These are decisions requiring judgement and expertise, often following extensive factual and evidential investigation and analysis.

14. The statutory framework reflects the recommendations of the Runciman Commission, established in 1991 to consider various miscarriages of justice. It reported in July 1993. The Commission recommended the establishment of an independent authority to consider allegations that a miscarriage of justice had occurred. The authority would launch a further investigation where one was called for; if that investigation was a police investigation, the authority would supervise it and have the power to direct the police to particular lines of enquiry; where the investigation revealed reasons for supposing a miscarriage of justice might have occurred, the authority would refer the matter to the Court of Appeal. Where there were no grounds for a reference, the authority would give reasons for its conclusion. (Cm 2263, The Royal Commission on Criminal Justice chaired by Viscount Runciman of Doxford CBE FRA, Report published on 6 July 1993, at Chapter 11, para 12.)

15. The vital role of the CCRC as an independent body at the heart of the criminal justice system has been recognised on many occasions since it was established in 1995. As examples, we cite Lord Bingham in *R v CCRC ex p Pearson* [2000] 1 Cr App Rep 141, who noted that "*the exercise of the power to refer accordingly depends on the judgment of the Commission, and it cannot be too strongly emphasised that this is a judgment entrusted to the Commission and to no one else".* We also cite Lord Judge, who as Lord Chief Justice gave evidence to the Select Committee on the Constitution on 15 December 2010 and said that the CCRC was a body "*whose independence is all part and parcel of the weft of an independent judiciary*".

16. We also note with approval the evidence of Helen Pitcher, who became Chair of the CCRC with effect from 1 November 2018. She stated in a witness statement prepared for this judicial review dated 21 April 2020 that "*independence and integrity are elements that are fundamental to our operation".*

17. The CCRC is constituted as a "Non-Departmental Public Body" ("NDPB"), sometimes referred to as an "Arm's Length Body" or "ALB". It is separate from but funded by its sponsor department, MoJ. The relationship is set out in a "Framework Document", the current version is dated September 2019 and was produced following discussion between Ms Pitcher and MoJ. We understand the general principles reflected in the arrangements to be long-established, although the details may change from time to time. The focus of the Framework Document is on corporate governance and accountability for the use of public money.

18. Alison Wedge is the Head of MoJ's Arm's Length Bodies Centre of Expertise ("ALB CoE"). That is a body which sits within the Chief Financial Officer Group within MoJ and has a stewardship role for ALBs across the department, in her own words, "*leading on ALB assurance, partnership capability and driving forward the department's strategy when working with public bodies*". Ms Wedge is employed by MoJ as a deputy director and she reports to the Permanent Secretary. Ms Wedge filed a witness statement for this judicial review dated 6 March 2020, in which she refers to the CCRC being "operationally independent" of MoJ. That same phrase was used by Mr Pobjoy, counsel for MoJ, during the course of his submissions. Certainly, the CCRC is operationally independent of Government. But in our judgment, following our review of the statute and the Framework Document and based on our understanding of the role occupied by the CCRC within the wider criminal justice system, the CCRC is much more than merely "operationally" independent; it is constitutionally independent from Government too, and must be seen to be so, if the public is to have confidence in its decisions.

The Tailored Review

19. The Framework Document provided that the CCRC will undergo a "tailored review" once during the lifetime of every Parliament. Tailored reviews are standard for NDPBs and are the subject of guidance published by the Cabinet Office. That guidance states that the purpose of a tailored review is "*to provide a robust challenge to and assurance on the continuing need for individual organisations*". The focus of the review is on the CCRC's performance in terms of efficiency and effectiveness, as well as the governance arrangements in place.

20. A tailored review of the CCRC took place in 2017/18 with the final report being published, as we have said, on 7 February 2019. The Senior Responsible Officer for that review was Ms Wedge. The review team gathered evidence from various sources. A Challenge Panel was established to assess and challenge the review team's findings and recommendations; Ms Wedge was on that Challenge Panel also.

21. The Tailored Review made a number of recommendations. At the time of issue of this claim, the CCRC had not responded to the Tailored Review. The challenge as it was originally put complained of the apparent expectation on the part of the authors of the Tailored Review, that the various "recommendations" in it would be implemented and given that expectation they were in reality directives. It was noted that the foreword by

the Minister referred to "*timely implementation*" of the recommendations and that the Chair of CCRC was to be "*held accountable for the implementation of the recommendations*". Further, the Claimant relied on a statement made by Ms Wedge at a board meeting of the CCRC at which at number of Commissioners were present on 27 February 2018, at which the Tailored Review was discussed while still in draft; Ms Wedge had said in response to a question about whether the CCRC was obliged to comply with the recommendations in the Tailored Review, that "*the SoS recommends the appointment of Commissioners to [Her Majesty] and that similarly he could recommend removal. However, [Ms Wedge] hoped that there would be no need for such a situation to arise*". In her witness statement, Ms Wedge describes this as a remark in the heat of the moment which was never pursued and which incorrectly suggested that the SoS could consider removing a Commissioner who opposed the review's recommendations; she accepted that there was no proper basis for what she said (see [73] and [74] of Ms Wedge's witness statement).

22. Thus, at first blush, there does appear to have been some merit in the Claimant's description of the Tailored Review as containing a series of "directives". However, the subsequent history does not support that contention, because on 1 April 2020, after permission was granted in this judicial review, Ms Pitcher wrote to the SoS responding to the Tailored Review. Her summary stated that "*we have accepted some recommendations; others have been partially accepted whilst others were rejected wholly*". She said that many of the recommendations which were accepted reflected feedback provided by the staff of CCRC or work already underway at the CCRC. She gave reasons for rejecting some of the recommendations.

23. So, the CCRC did feel able to reject or accept the recommendations made in the Tailored Review. The rejection of some recommendations has not been met by any resistance or adverse comment by the SoS or his department (according to Ms Pitcher).

24. It is now clear that the Tailored Review did contain recommendations, not directives, to the CCRC. The language used in the Tailored Review, suggesting that implementation was expected by the Minister and was required of the Chair, appears to have been misplaced. Ms Wedge accepts that she was incorrect to have suggested that any Commissioner who disagreed could be sacked. In its evidence for this judicial review, the Defendant has been at pains to emphasise in that evidence that the Tailored Review contained recommendations only, and it was for the CCRC to accept or reject them, as it considered appropriate and as in fact occurred (eg Ms Wedge at [69]). In the face of that evidence and evidence from Ms Pitcher, the Claimant has quite understandably chosen to focus on other aspects of his claim.

25. Before leaving the Tailored Review, we wish to note in terms two recommendations which were rejected by the CCRC.

    i) It was suggested that the CCRC should no longer review cases dealt with summarily in the Magistrates' Court. The CCRC rejected this on the basis that there were numerous examples of referrals and meritorious applications falling within this category of case. As Ms Pitcher wrote, *"a miscarriage is a miscarriage, regardless of the Court in which it occurred.*"

    ii) It was suggested that responsibility for the final decision in some cases (type 1 and type 2 cases, which are the smaller cases) should be moved away from

> Commissioners to Case Review Managers ("CRMs", who are civil servants, not all of whom are legally trained or qualified). The CCRC rejected this recommendation on the basis that it could cause additional work (type 2 cases) and lacked strong evidence or rationale (type 1 cases).

26. These were recommendations which touched on the scope of the CCRC's casework and operations. Their inclusion in the Tailored Review demonstrates the breadth of that review; their rejection serves to emphasise the importance of the CCRC acting with integrity and independence at all times. We consider both of these recommendations to have been potentially damaging to the work and standing of the CCRC. It comes as no surprise to us that they were rejected by the CCRC.

Absence of Bias

27. The common law rule of procedural fairness requires an absence of apparent bias. The leading authority is *Porter v Magill* [2002] 2 AC 357. Lord Hope held that the test is whether a fair minded and informed observer would conclude that there was a real possibility of bias ([100]-[103]). The common law rule must yield to express statutory enactment, but in this case no one suggests that the statute contains any provision which runs contrary to the common law rule.

28. *Brooke* concerned the application of the common law rule explained in *Porter v Magill* to the Parole Board's constitution and relationship with the SoS. In that case, article 5(4) of the Convention was also engaged on the facts, which it is not in this case; but the Convention rule was held to 'march together' with the common law (see *Brooke DC*, per Hughes LJ and Treacy J, at [20] and [21]) so that the existence of an additional duty under the Convention did not alter the analysis; this was confirmed in *Brooke CA* at [20]. The claimants argued that the Parole Board failed to satisfy the common law test of procedural fairness, for a number of reasons including the facts that the Parole Board's members were appointed by the SoS, they lacked appropriate security of tenure, and that MoJ as sponsoring department had too much contact with and control over the Parole Board. MoJ / SoS resisted the challenge on the basis that the Parole Board retained, they said, its essential independence in relation to individual cases.

29. In a passage with which we concur, respectfully, the Divisional Court emphasised that its role on judicial review was to determine whether the present position was lawful:

> "[28]. … If lawful, it matters not that some might contend that it should be better organised, or differently constituted, or housed elsewhere within the public sector, nor that other improvements might be made such as by extending its powers, or in its ability to manage the presentation of evidence."

The Court's attention was on matters of legality, and not policy. We adopt the same approach in this case.

30. The Divisional Court addressed a number of aspects of the relationship between the SoS and the Parole Board. Not all of those aspects are relevant to the issues which arise in this case (in that category fall these aspects: (i) the appointment of members which in the Parole Board's case was undertaken by the SoS, which is not of course the case with the CCRC; (ii) the inclusion of chief and assistant probation officers on the Parole Board, employed by NOMS which was itself a service within MoJ, again, not a feature

of the working of the CCRC; (iii) the SoS's power by statute to make rules of procedure for the Board which finds no analogy so far as the CCRC is concerned; and (iv) the power by statute to give directions to the Board as to matters to be taken into account in discharging its functions, which is not replicated in the CCRC's founding statute). Other aspects examined by the Court are relevant to this case, namely (i) tenure of members, (ii) funding and (ii) sponsorship by MoJ.

31. In addressing the tenure of Parole Board members, the Divisional Court noted that members were appointed for an initial period of 3 years, with renewal for a second 3-year term routinely made where the member seeks it ([36]). Appointments could be terminated on grounds specified in the terms of appointment, including for the reason that he or she had "*failed satisfactorily to perform his/her duties"* (this was the "paragraph (a) reason"). The Court concluded that *"At 3 + 3 years the term of appointment is short".* It addressed the justification for this short term in the following way:

> "[39]. The explanation offered by the Department for the term standing at 3 + 3 years is twofold. First, it is said that the legislative changes in the Board's work are likely to result in a greater incidence of oral hearings and thus in a different balance between lay and qualified members. The short term is said to give greater flexibility in appointment. That may be so, but the term has remained the same for years, as has invariable renewal. Secondly, it is said that the short term may help to appoint further black and minority ethnic members, in the interests of diversity. That laudable aspiration applies to all tribunals and does not stand in the way of a longer term of office, whilst the practice of invariable renewal tends to suggest that it is not the reason. No evidence has been presented showing the consideration of such factors, nor that they were raised with the Board as reasons for keeping the term short. Both explanations seem likely to owe more to ex post facto rationalisation than to evidence-based prospective consideration of them as reasons not to make a change in term which would otherwise have been made."

32. The Court stated at [41] that:

> "… the importance of security of tenure to the independence of a member of a court is not to be under-estimated. … [T]he Parole Board, makes large numbers of decisions on, frequently, highly sensitive issues. …"

33. The Court went on:

> "[42]. We conclude that the period of appointment in this case is near the low borderline of what is capable of providing the necessary guarantee of independence, but would if taken alone pass the test. However, when coupled with the power to remove under paragraph (a) without any procedure for the determination of the merits, the provisions for tenure fail the test of independence …".

34. The Court decided that the arrangements for funding the Parole Board by MoJ were not in themselves inconsistent with independence, but that in one respect, funding had been used to influence the Board, namely in the pressure applied to the Board not to interview prisoners (see [49], [59] and [60]) and in this respect the exercise of budgetary control had not been consistent with the objective appearance of the independence of the Parole

Board from the Executive (the Executive also being a party to the Parole Board's decisions).

35. The Court decided that the role of MoJ as sponsoring department was inconsistent with the objective appearance of the Board's independence in various respects. First, there was a "Comprehensive Review" of the Parole Board which recommended that there should be "*greater engagement of the Board in wider criminal justice policy development*" which the Court considered to be "quite inappropriate" for an independent body ([55]). Secondly, the Minister's announcement of an intention to appoint two members who were victims of crime or associated with organisations supporting victims was "*designed to alter the outcome of cases before the Board*" and lacked the appearance on independence ([62]).

36. For all those reasons, the Divisional Court held that the present arrangements for the Parole Board did not sufficiently demonstrate independence from the SoS (at [64]).

37. Three of the four claimants were granted relief in the form of a declaration that the Parole Board lacked independence. In two of those cases, where the Parole Board's decisions lay in the past, the Court was unable to detect any basis for thinking the decision would have been different, no quashing order was granted. The third was yet to have his Parole Board review. The case of the fourth claimant was adjourned to allow different arguments under the Convention to be advanced.

38. The SoS appealed to the Court of Appeal (Lord Phillips CJ, Dyson and Toulson LJJ) who dismissed the appeal. The CA held that the SoS and MoJ had failed adequately to address the need for the Parole Board to be and to be seen to be free of influence in relation to the performance of its judicial functions ([79]). The CA added little on funding, agreeing that the restriction on funding intended to dissuade the Board from interviewing prisoners amounted to interference in the manner in which the Parole Board performed its functions ([80]). On tenure, the CA applied an objective test, having regard to how the SoS acted in practice. It found that:

> "[85]. … In practice the board itself made recommendations in respect of re-appointments and the minister had never been known to reject such a recommendation. Nor was there any known instance of the minister exercising his power to terminate an appointment on the ground of failure on the part of a member to perform his or her duties satisfactorily. …
>
> …
>
> [87]. Membership of the Parole Board involves, for almost all members, only part time employment and this will last a maximum of six years. … In the circumstances of this case we can see nothing objectionable in the fact that the tenure of members of the board is relatively short. The only relevant issue is whether the desire to be reappointed for a second term of three years might incline, or appear to incline, board members to have regard to the perceived wishes of the Secretary of State when making decisions. This danger will not arise provided that the minister continues to respect the recommendations of the board with regard to re-appointments."

39. In relation to sponsorship, the CA emphasised that the Parole Board should be and be seen to be free of executive interference or influence. The findings of the DC that the SoS had interfered inappropriately were upheld. The CA said this:

> "[92]. … We consider, however, that the intervention of the sponsoring minister and his department in relation to the exercise of the functions of the Parole Board has gone beyond those necessary or appropriate to the sponsoring relationship and that the sponsoring arrangements have contributed to the perception that the board is not independent."

40. Specifically, on the facts of that case, the CA considered that the Parole Board should be manifestly independent from NOMS, a body within MoJ with which the Parole Board had to work closely in the course of discharging its functions. The Court invited further review, concentrating on the areas identified ([99]).

41. We have considered *Brooke* in detail because we consider the decisions of the DC and the CA to be highly relevant to the matters now raised before us. We acknowledge, of course, that *Brooke* concerned the Parole Board, a body exercising judicial functions, whereas this case concerns a different body, the CCRC, which does not exercise judicial functions and is nothing like a court or tribunal. We also recognise, of course, that some of the specific issues examined in *Brooke* are not replicated on the facts here, so, for example, NOMS plays no part in the decisions made by the CCRC but that body's involvement with the Parole Board was at the forefront of the CA's thinking in *Brooke.* But there are similarities as well. The Parole Board, like the CCRC, is a NDPB whose sponsoring department is MoJ. The Parole Board, like the CCRC, must be and be seen to be independent of the Executive. The Court's approach in this case, as in *Brooke*, must be to examine the various ways in which it is said that the body lacks independence, and apply the *Porter v Magill* test of what the fair minded and informed observer would conclude. Finally, the grounds advanced in this case mirror some of the arguments advanced, with success, in *Brooke.* It is to those grounds we now turn.

Ground 1: insufficient security of tenure

42. The claimant argues that a 3-year fee paid role with a lack of security in terms of re-appointment provides insufficient security of tenure.

Recasting the role of Commissioner

43. From 1997 until 2012, the Commissioner role was salaried with holiday, sick pay and a pension. In 2012 the pension component was removed. Most Commissioners were engaged full time or almost full time.

44. Until 2017, generally Commissioners were appointed for an initial period of 5 years, with the possibility of appointment for another 5 years.

45. In 2015, the SoS proposed a reduction in the term from 5 to 3 years, with the possibility of extension for another 3 years. This change was opposed by the Commission. At that stage, the Board comprised all appointed Commissioners together with the Chief Executive, the Director of Casework, the Director of Finance and 3 non-executive directors. We were shown various Board minutes where the change was resisted because it was thought disadvantageous to the CCRC, given the complexity of the work.

The SoS pressed ahead in 2016 and 2017 with recruitment exercises for the shorter period on the basis that Commissioners would be fee paid.

46. In 2017, the Board (still comprising all Commissioners) was advised that MoJ would no longer approve re-appointments as a matter of course; this too led to concerns being voiced that this was not in the best interests of the CCRC because Commissioners might depart before the end of their term to seek employment elsewhere, for security because they could not be sure they would be reappointed.

47. The Tailored Review was due for completion in February 2018 but there were delays. The Commissioners were not shown a draft but they were given an overview of the emerging findings some time in the spring of 2018. It was against this background that Ms Wedge attended a Board meeting on 27 February 2018 and made the comment she now recognises to have been in error (see [24] above).

48. The (then) Chair, Richard Foster, wrote to an official at MoJ on 28 June 2018 to register the significant concerns of the Board about the proposed changes to terms and conditions. MoJ was proposing to launch a further recruitment round on the disputed basis of looking for fee paid Commissioners who would serve a term of 3 years only, subject to reappointment. Mr Foster's particular concern was that the reduction in Commissioner days, which would be the consequence of recruitment on this basis, was directly related to two recommendations contained within the Review which involved moving more work to staff and away from Commissioners, which changes were opposed by his Board. He was concerned that his Board would be presented with a fait accompli.

49. Nonetheless, MoJ continued with its recruitment exercise as planned. In a Ministerial submission dated 19 July 2018, which we will come to later on a different point, officials briefed the Minister that the appointment of six new Commissioners should be on the basis of a minimum of 52 days per year on a three year tenure. This was to offer flexibility in working arrangements while attracting the widest possible pool of candidates, particularly those who might be looking for a shorter-term commitment. It was also said that:

> "These working patterns will also support simpler governance arrangements and the increased movement of work from Commissioners to staff, which are very likely to feature as recommendations in the forthcoming TR report".

This was of course to confirm the very point that Mr Foster had been concerned about, namely that MoJ was reducing Commissioner days in anticipation of changes proposed in the Tailored Review, yet to be published.

50. At a meeting in July 2018, the Board expressed concern at the reduction in term to 3 years, considering it "crucial" to the CCRC's independence to retain a 5-year appointment term.

51. Mr Foster wrote to the Minister (Edward Argar MP) on 25 September 2018. Mr Foster set out the Board's concerns about the terms and conditions of employment being offered in the latest recruitment round. He referred to the emerging findings in the Tailored Review, noting that the Commissioners had yet to see the report or have the opportunity to discuss the findings or the evidence base with officials. He was

concerned that changes to tenure and days worked would adversely affect Commissioner ability to exercise independent judgment in casework matters. And he said this:

> "Underlying these particular concerns is a more general worry my Board has that the relationship we have with your department is not as it should be and needs to be reset."

He invited a "positive and direct dialogue" with officials and with the Minister.

52. The Minister replied on 25 October 2018. He noted the concern of Commissioners. He said that he had decided to support the new approach on grounds that it would provide flexibility, attract the widest possible pool of candidates and would not compromise the CCRC's role. He noted that Ms Pitcher would take up post in November and said that she would be sent a copy of the draft Review, following which officials would work with her to meet the concerns about the relationship with MoJ. The Minister did not engage with the serious points made by Mr Foster in his letter.

53. Ms Wedge explains the reasons for moving to a fee paid model of remuneration in her statement. Her explanation is in terms markedly similar to those given by the Minister in the letter just referred to, namely that the change was designed to bring about efficiencies and provide greater flexibility; the reduction in term was aimed at offering greater flexibility in working arrangements while attracting the widest possible pool of candidates, particularly those who might be looking for a shorter term commitment.

54. Ms Pitcher, the current chair, is supportive of fee paid appointments for a 3- year term. She says that these appointments attract more candidates of high calibre and have led to greater diversity in terms of age, ethnicity and professional backgrounds. It also means that Commissioners are likely to have other paid positions which is an additional safeguard of independence of decision-making. She suggests that the model promotes more agile working, allowing the CCRC to increase working days to meet business needs and precisely match Commissioner resource to the flow of cases.

55. The Court in *Brooke DC* was faced with similar explanations from MoJ for recruiting members for 3-year terms only. The Court rejected those reasons, describing them as ex post facto justification. The Court was particularly sceptical of the proposition that shorter terms of appointment might achieve greater ethnic diversity (see [39]). But we are persuaded by the evidence of Ms Pitcher that the position before us is different. We accept that things have moved on since *Brooke* which was decided in 2007. Many people, including lawyers, now choose to have portfolio careers encompassing a number of different appointments and characterised by flexibility of working requirements, for both worker and employer. We accept the possibility that shorter, more flexible appointments might draw a larger pool of candidates. It is reasonable to suggest that a wider pool will reflect greater diversity. Ms Pitcher says the new strategy has been effective in increasing diversity and maintaining high calibre of appointments. These are matters within her knowledge on which she is entitled to comment. We accept her evidence.

56. We have concluded that there is no legal reason to object to appointing Commissioners for 3 years on a fee paid basis. The statute permits as much, at paragraph 2 of Schedule 1, where the maximum term of any individual appointment is set at 5 years, and where

it is specified in terms that appointments can be full time or part time. Quite how to structure the appointments of Commissioners, within those broad permissions in the statute, is a matter of policy for the CCRC working with the Public Appointments Team within the ALB CoE, applying best practice at the time. These changes do not undermine the CCRC's independence.

Reservation of re-appointment to the Minister

57. In *Brooke CA*, in the context of a discussion about security of tenure, the Court considered the submission by the SoS that although re-appointment lay with him, he had never rejected a recommendation made by the Parole Board (by its Chair or persons authorised to act on its behalf, presumably). Satisfied with 3-year appointments, the Court identified the following relevant issue at [87] (emphasis added):

> "whether the desire to be appointed for a second term of three years might incline, or appear to incline, board members to have regard to the perceived wishes of the Secretary of State when making decisions. **The danger will not arise provided that the minister continues to respect the recommendations of the board with regard to re-appointments**".

58. Re-appointment of CCRC Commissioners is permitted by the statute, up to a maximum total term of 10 years (paragraph 2 of Schedule 1 to the 1995 Act). The Governance Code, the current version of which is dated December 2016, applies to reappointments, just as much as it does to appointments. It sets out eight principles which include, as would be expected, general best practice principles for recruitment in the public sector such as integrity, merit, openness and fairness. Paragraphs 3.4 and 3.5 of the Governance Code address reappointments specifically, and state that there is no automatic presumption of reappointment and each case is to be considered on its own merits "*taking account of a number of factors including, but not restricted to, the diversity of the current board and its balance of skills and experience*". The power to reappoint lies with the Minister and is on the condition that "*no reappointment or extension [should be] made without a satisfactory performance appraisal, evidence of which must be made available to the Commissioner on request".* The re-appointment process, like the appointment process, is subject to oversight by the independent Commissioner for Public Appointments.

59. Thus, it is for the Minister to reappoint and re-appointment is not automatic. This is a variation from the system considered by the Court in *Brooke* where re-appointment was a matter of course.

60. CCRC Commissioners are informed when appointed that there is no automatic presumption of re-appointment and that re-appointment will depend on satisfactory appraisal of performance by the Chair of the CCRC as well as the needs of the CCRC in terms of skill set, and at the discretion of the Minister.

61. Ms Wedge's evidence is that the SoS invariably has regard to and respects the recommendations of the Chair with regard to re-appointments; there is only one occasion where reappointment has been refused, and in that case the SoS did "have regard to" the recommendation of the Chair of the CCRC. Ms Wedge is here referring to the decision not to extend the appointment of an individual to whom we shall refer as X. We shall consider his case separately below. Suffice to say that in principle we

consider that a system of re-appointments based on the principles in the Governance Code is permissible for CCRC Commissioners, even those who are appointed for short terms of only 3 years on a fee paid basis. A Commissioner coming to the end of an initial term will have no guarantee of re-appointment, but that Commissioner will have discussed the position with the Chair, will know whether re-appointment is likely to be recommended by the Chair (and if not, why not), and will know that the Minister will have regard to the Chair's recommendation in reaching a decision, guided by the principles set out in the Governance Code. This provides sufficient security of tenure for the individual Commissioner.

62. Details relating to X were contained in a confidential annex to Ms Wedge's witness statement. There is no need for us to identify him in this judgment. X had served one term as a Commissioner and requested re-appointment in July 2018. The Chair of the CCRC, Mr Foster, emailed Ms Wedge (who, it appears, took day to day responsibility for matters such as re-appointment) enclosing extracts from X's most recent appraisal, noting mixed views on X's performance, and recommending a temporary extension of X's tenure, on the basis that X should then be invited to put himself forward for the imminent recruitment round, which would allow the Chair's successor (Ms Pitcher, as it turned out) time to take a view on the CCRC's needs going forward.

63. A submission dated 19 July 2018 was prepared by the ALB CoE for the Minister (Edward Argar, again). The name of the author is redacted on the document. But the document was cleared by Ms Wedge and was copied to her when sent. This was the submission seeking a final decision on the proposed recruitment of up to six new commissioners on 3-year fee-paid terms. The issue of extension of X's term was addressed in that same submission. The Chair's recommendation of a temporary extension of X's tenure and the mixed views on his performance were noted. The submission continued (emphasis added):

> "Given the concerns about performance (and a lack of any more recent information about whether they have been addressed) and the fact that we are aiming to conclude the new campaign by early December in any event, we suggested that you do not agree to either a re-appointment or short extension but instead invite [X] to apply for the forthcoming campaign …
>
> **We are also aware that [X] has been amongst the cadre of Commissioners seeking to resist further changes to governance/working arrangements.** We consider that refusing the re-appointment request will provide the new Chair of the Commission with the opportunity to assess X's skills and strengths afresh against the job description and criteria for the new campaign as well as against a fresh applicant field. Opening the vacancy resulting from the end of [X's] tenure will also provide an opportunity to seek to improve the diversity of the commissioners, something which the CCRC is committed to doing."

64. This is a troubling passage. At the hearing, Mr Pobjoy, counsel for the SoS, accepted that the highlighted passage was, in his words, "not appropriate" for inclusion in the ministerial submission. Ms Wedge's evidence skirts around this passage, so it was not until the hearing that the SoS acknowledged the problem in any way. Any fair minded and informed observer reading this submission would conclude that the Minister was being invited to reject the Chair's recommendation that X's tenure should be extended, albeit only temporarily, for a number of reasons including because X did not support

MoJ's proposed changes. It was not appropriate for the Minister to be advised in this way, or for the Minister to have regard to the fact that X had previously resisted changes suggested by MoJ when considering his temporary re-appointment. This was political interference. It was inconsistent with the Governance Code.

65. The Minister did not extend X's tenure, despite the Chair's recommendation that he should be extended temporarily. Ms Wedge says this was because at the time it was anticipated that the new recruitment campaign would be concluded within a couple of months. This rather misses the point. The Chair had recommended extension pending that recruitment campaign.

66. Commissioner X's story is important because it shows how MoJ approached the issue of re-appointment of Commissioners in practice. That is the acid test, as *Brooke* emphasised. That said, Commissioner X's case is an isolated incident. We are told that on all other occasions the Chair's recommendations have been followed (Ms Wedge at [100]). We therefore conclude that the problem is not systemic, the re-appointment system is intrinsically sound so long as it is implemented according to the standards set out in the Governance Code. It was not properly implemented on this one occasion. We will return to the significance of that later in this judgment.

67. Standing back, we conclude that the tenure arrangements are not tainted by bias or the appearance of bias. They should command public confidence. Ground 1 fails.

Ground 2: Misuse of the Sponsorship Role

68. The focus of the Claimant's argument is on the way in which the Board of the CCRC has been reshaped. Before the Tailored Review, all Commissioners sat on the board together with three executives and three non-executive directors ("NEDS"). The Tailored Review suggested a reduction to three Commissioners (the Chair plus two Commissioners selected on a rotation), three executives (the Chief Executive plus two members of the senior management team), and three NEDs.

69. On 26 March 2019, the board met to discuss (amongst other things) this aspect of the Tailored Review. The new Chair, Ms Pitcher, was by now in post and was in favour of some trimming of the size of the board, the minutes noting her as saying:

> "all members agreed that the Board was too big and unwieldy and by not implementing a smaller Board they risked harming their credibility with the MoJ".

70. In the event, the Board accepted the recommendations with two changes: instead of a total of three Commissioners including the Chair on the Board, they decided to have four Commissioners including the Chair on the Board, alongside three executives and three NEDs; and instead of a rotation, Commissioners were invited to apply and were appointed by the Chair to the role of "Non-Independent Executive Director" by reference to a job description the Chair had drawn up for that role. Alongside that change in the shape of the Board, the Commissioners decided to reintroduce the "Body Corporate" referred to in the statute and comprising all the Commissioners from time to time; that now operates according to agreed terms of reference with an instrument of delegation by which the Body Corporate delegates certain functions to the Board.

71. Ms Pitcher's evidence is that she supported the reshaping of the Board. She thought that the inclusion of all Commissioners, alongside executive members and NEDs, meant the Board was too large to be effective, and gave rise to potential conflicts of interests when Commissioners became involved in discussions about their own role. She also thought that monthly Board meetings were unnecessary. These were points she made in her application and interview for the post of Chair. As she says at [22] of her statement:

> "… I was personally committed to implementing changes irrespective of the Tailored Review recommendations".

72. She also says that in her opinion the Board is now functioning more effectively as a result of the changes, which she considered necessary as a matter of her own professional judgment.

73. In light of that evidence, we are satisfied that the reshaping of the Board was a proper endeavour, undertaken for good governance reasons and consistent with best practice. The resulting reduction in the size of the Board, accompanied by the re-establishment of the Body Corporate, does not give rise to concerns that the CCRC lacks independence from MoJ.

74. Ground 2 is dismissed.

Conclusion

75. There is plainly room for reasonable people to disagree on the best way in which to ensure the independence, and appearance of independence, of the CCRC. It is clear that the former Chair of CCRC had concerns, as did a number of Commissioners in post in 2016-19, about the changes proposed by the Tailored Review and associated changes to the terms and conditions of Commissioners.

76. It is significant that the incoming Chair of the CCRC, Ms Pitcher, had a different viewpoint on some of these matters. In particular, she broadly supported the recasting of the Commissioner role and the reshaping of the Board. Under her Chairmanship, the Board has implemented or supported changes in those areas.

77. We have concluded that those changes amount to legitimate policy choices about how the CCRC should be constituted. We do not consider them to represent an unlawful diminution of the CCRC's independence or integrity.

78. Further, the fact that Ms Pitcher, acting on behalf of the CCRC (and its Board, however constituted) rejected a number of the recommendations in the Tailored Review confirms that they were, in the end, just recommendations and not directives.

79. It is for those reasons that we have dismissed grounds 1 and 2. Our conclusion is that the current arrangements for the CCRC do achieve sufficient objective independence.

80. However, this judicial review has brought to light some unsatisfactory aspects of the relationship between the CCRC (by its Chair and Commissioners) and the ALB CoE (for MoJ), at least in the period immediately prior to Ms Pitcher taking up the chair of the CCRC. From 2016 onwards, the Chair and a number of Commissioners had

expressed concerns about the nature and extent of the changes being proposed by MoJ and their potential impact on the ability of the CCRC to perform its statutory functions. Those were genuine concerns which should have been taken seriously by MoJ. We have not been shown evidence of the ALB CoE or MoJ seeking to engage in a constructive dialogue about these changes. The Tailored Review may have been the intended vehicle for this discussion to take place, but it was a very long time in its completion. It was not discussed in draft with the Commission until after Ms Pitcher came into post at the end of 2018; it was not published until February of 2019 (although it had been due for publication a year earlier). Meanwhile, MoJ pressed ahead with changes to the terms of newly recruited Commissioners in mid-2018, advising the Minister that these changes were justified by recommendations which officials anticipated would appear in the Tailored Review in due course. In February 2018, a Commissioner asked Ms Wedge what would happen if implementation of the recommendations was resisted and she told him (wrongly) that Commissioners could in those circumstances lose their jobs. The Chair, Mr Foster, wrote to MoJ in June 2018 expressing concerns about the recruitment exercise, but MoJ pressed ahead on the new basis anyway. Then, in around July 2018, Commissioner X was not reappointed, even temporarily, against the Chair's recommendation that he should be and on the basis of advice from officials which we now know to have been flawed, which referred to his resistance to these changes. The Chair's attempts to explain the Board's concerns to the Minister on 25 September 2018 fell on stony ground.

81. The relationship between the CCRC and MoJ (whether the ALB CoE or more widely) was very poor during this period, even dysfunctional. The poverty of this relationship undoubtedly tested the CCRC's ability to remain independent of MoJ, and to be seen to be so. It is no surprise that a judicial review was issued in 2018, seeking the Court's review of these and related matters.

82. The most troubling issue during this period is the way in which Commissioner X's re-appointment was handled. To avoid any recurrence, we invite the Commissioner for Public Appointments to verify the process in relation to the reappointment of CCRC Commissioners, specifically, and to satisfy him or herself that that process is understood and implemented properly by MoJ (or its ALB CoE, as relevant). We also invite the Commissioner to consider whether any further guidance is needed on the specific issue of re-appointments, which are in the Minister's hands, to ensure that Ministers – and officials who advise Ministers – are quite clear about what is appropriate to take into account in that process, and what is not.

83. Otherwise, the events of 2016-2018 outlined above must now recede into history. The advent of the new Chair, in the persona of Ms Pitcher, appears to have provided the opportunity for the "reset" invited by Mr Foster when he wrote to the Minister in September 2018. With that normalised relationship, the jeopardy of political interference by MoJ in the CCRC's workings is much diminished. The fair-minded and informed observer, knowing the facts as they currently stand, would not conclude that there was a real possibility that the CCRC was biased by its association with MoJ.

84. This claim was never about the Claimant's individual circumstances. But it follows from our rejection of the Claimant's challenge on grounds 1 and 2 that we also reject the challenge to the CCRC's decision in the Claimant's own case.

85. We dismiss this application for judicial review.