Neutral Citation No: [2018] NIQB 62 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **KEE10690** ***Delivered:*** **27/07/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF LOCAL GOVERNMENT ACT (NORTHERN IRELAND) 2014 PART 9

AND IN THE MATTER OF THE NORTHERN IRELAND LOCAL GOVERNMENT CODE OF CONDUCT FOR COUNCILLORS

AND IN THE MATTER OF AN ADJUDICATION BY THE NORTHERN IRELAND LOCAL GOVERNMENT COMMISSIONER FOR STANDARDS

AND IN THE MATTER OF PATRICK BROWN AN APPLICATION FOR LEAVE TO APPEAL UNDER SECTION 59(13) OF THE LOCAL GOVERNMENT ACT (NORTHERN IRELAND) 2014

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KEEGAN J

Introduction

[1] This is an appeal brought under the Local Government Act (Northern Ireland) 2014 ("the Act"). It is brought by an Alliance Councillor, Patrick Brown, who was elected to Newry and Mourne District Council in 2014. The decision under appeal is that of the Local Government Commissioner for Standards Marie Anderson ("the Commissioner") of 10 May 2018. In this decision the Commissioner concluded that the conviction of the appellant on 10 July 2017 of driving with excess alcohol, contrary to Article 16(1)(a) of the Road Traffic Order (Northern Ireland) 1995 was misconduct which justified suspension from the council for a period of 6 months. On 22 May 2018 and upon consent of the parties, leave was granted and a stay on the suspension was put in place.

[2] Mr Kevin Denvir BL appeared on behalf of the appellant. Mr McGleenan QC and Mr McAteer BL appeared on behalf of the respondent. I am grateful to all counsel for their written and oral arguments.

Background

[3] The appellant has filed a comprehensive affidavit which is dated 17 May 2018. It highlights the nature of the application and the background to this case. This is summarised at paragraphs 6, 7 and 8 of the affidavit as follows:

> "I was elected as an Alliance Party member for Rowallane Ward in May 2014; I am in my first term as a local councillor. Upon my election, I signed a declaration of office on 3 June 2014 in which I agreed to observe the Northern Ireland Local Government Code of Conduct for Councillors.
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> On 10 July 2017 I was convicted on my own admission at Laganside Magistrates' Court, Belfast, of driving with excessive alcohol, contrary to Article 16(1)(a) of the Road Traffic (Northern Ireland) Order 1995 on a motor cycle at Ballynahatty Road, Belfast, on 5 March 2017. My reading was 83 milligrams in blood (the legal limit is set at 80 milligrams) I was fined £250 with an offender levy of £15; and disqualified for 12 months (later reduced to 9 following completion of a drink driving awareness course). At the material time I was not on council business, nor was I acting in a representative capacity as a councillor.
>
> I self-referred the circumstances above to the Office of the Local Government Commissioner for Standards by letter dated 4 November 2017. I refer to a copy of this letter in the bundle at pages 1-2. An investigation commenced against me (conducted by a Deputy Commissioner) this in turn led to an investigatory meeting on 1 February and the hearing of facts late on the afternoon of 17 April and a sanctions hearing on 26 April 2018. At the outset of the hearing, I accepted the finding of the investigation that there had been a breach of the Code on my part. I was aware I could have legal representation, but I represented myself for financial reasons. The Commissioner explained that notwithstanding my response to the investigation, she

> had to make a formal determination as to the facts, and whether there had been a breach of the Code of Conduct. She explained the process was:
>
> Stage 1 – Determination of Facts (after submissions from the Deputy Commissioner and myself).
>
> Stage 2 – Whether there has been a breach of the Code (after submissions).
>
> Stage 3 – Consideration of sanction (after submissions).
>
> The case against me was presented by the Deputy Commissioner."

[4] A replying affidavit has been sworn by Paul McFadden, the Deputy Commissioner of the Northern Ireland Local Government Commissioner for Standards ("the Deputy Commissioner"). This is dated 23 May 2018. At paragraph 6 of this affidavit the core of the following averment is made:

> "The respondent resists the appeal, for reasons that will be set out in legal submissions in due course. The majority of the relevant evidence is already set out in the affidavit evidence of the appellant."

However, the respondent refers to further evidence. In particular, he points out in this affidavit that the actual reading of alcohol in blood was 94 milligrams in 100 milligrams of blood. The affidavit also attaches the investigation undertaken by Mr McFadden, the transcript of proceedings before the Commissioner, Councillor Brown's complete Councillor Response Form, various items of correspondence and email. A copy of the media article from the Irish News dated 4 January 2018 is included and also correspondence between the Commissioner and Down District Council in January 2015 is referred to which the deponent says illustrates that consultation on the Commissioner's draft "Guidance on the Northern Ireland Local Government Code of Conduct for Councillors" took place.

The jurisdiction of the High Court in an appeal of this nature

[5] The Act expresses the jurisdiction of the High Court in the following terms at Section 59(13):

> "(13) A person who is censured, suspended or disqualified by the Commissioner as mentioned in subsection (3) may

appeal to the High Court if the High Court gives the person leave to do so.

(14) 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."

The issues on appeal

[6] I am grateful to counsel for the streamlining of this appeal and for their written arguments which were of high quality and which have assisted the court greatly. It is clear from a consideration of these arguments and the oral submissions that this case really comes down to a consideration of two core issues namely:

(i) Whether or not the conduct in question comes within the Code of Conduct for Councillors.

(ii) If the conduct does come within the Code whether or not the sanction was excessive.

The Code

[7] The Northern Ireland Local Government Code of Conduct for Councillors ("the Code") was approved by the Northern Ireland Assembly on 27 May 2014. It came into force on 1 April 2015. The purpose of it is explained in a number of paragraphs which follow:

"1.2 As a consequence of decisions taken by the Northern Ireland Executive on the future shape of local government, the 2014 Act contains a number of

provisions for the reforms of local government. These include a new ethical framework for local government in Northern Ireland, a key element of which is the introduction of a mandatory Code of Conduct for Councillors. Previously, councillors were guided by the non-mandatory Northern Ireland Code of Local Government Conduct which issued in 2013.

1.3 The 2014 Act –

- Provides for the introduction of a mandatory Northern Ireland Local Government Code of Conduct for Councillors.

- Imposes a requirement for councillors to observe the Code.

- Establishes mechanisms for the investigation and adjudication of written complaints that a councillor has failed, or may have failed, to comply with the Code.

1.4 The 2014 Act requires the department to consult councils and such associations and bodies representative of councils and council officers and such other persons as appear to it to be appropriate, for issuing or revising the Code.

1.5 The Northern Ireland public has the right to expect high standards of behaviour from councillors and the manner in which they should conduct themselves in undertaking their official duties and in maintaining working relationships with fellow councillors and council employees. As a councillor, you must meet those expectations by ensuring that your conduct complies with the Code. The Code details the principles and rules of conduct which you are required to observe when acting as a councillor and in conducting council business. Therefore, your behaviour will be judged against these standards of conduct.

1.6 To assist you in understanding your obligations under the Code, you should read the guidance available from:

- The Northern Ireland Commissioner for Complaints, on the application of the Code in the Complaints Procedure.

- The Department, on planning matters.

- The Equality Commissioner for Northern Ireland on Section 75 obligations. Information on where you can find this guidance and additional contact details are provided at Annex A."

[8] Paragraph 2 then explains how the Code applies as follows:

"2.7 You must observe the Code:

(a) Whenever you conduct the business, or are present at a meeting, of your council.

(b) Whenever you act, claim to act, or give the impression you are acting in the role of a councillor.

(c) Whenever you act, claim to act, or give the impression you are acting as a representative of your council.

2.8 You must also observe the Code if you are appointed or nominated to represent your council on another body unless:

(a) that body has its own Code of Conduct relating to its members, in which case you must observe that Code of Conduct; or

(b) compliance with the Code conflicts with any other lawful obligations to which that body may be subject (you must draw such conflict

to the attention of your council and to the other body as soon as it becomes apparent to you).

2.9 In addition to the circumstances stipulated in paragraphs 2.7 and 2.8, you must observe the Code at all times in relation to:

(a) Conduct which could reasonably be regarded as bringing your position as councillor or your council into disrepute (including such conduct that relates to your appointment to another body, even if that appointment did not arise from your position as a councillor).

(b) Conduct relating to the procuring, advocating or encouraging of any action contrary to the Code.

(c) Conduct relating to the improper use, or attempted use, of your position to confer on or secure for yourself, or any other person, an advantage or create or avoid for yourself, or any other person, a disadvantage.

(d) Conduct relating to the use, or authorisation of the use by others, of the resources of the council."

[9] The next Section refers to enforcement of the Code as follows:

"2.10 The 2014 Act gives the Northern Ireland Ombudsman, in his capacity as the Northern Ireland Commissioner for Complaints (the Commissioner) responsibility for the operation of the enforcing mechanisms of this Code. The 2014 Act extends the functions of the Commissioner's office to include the investigation of, an adjudication on, alleged failure to comply with the Code.

2.11 The Commissioner may investigate written complaints from any person, that a councillor (or former councillor) has failed, or may have failed, to comply with the Code. The Commissioner may also investigate cases of alleged failure to comply with the Code which come to his attention as a result of an investigation of a written complaint.

2.12 Where the Commissioner, having undertaken an investigation, determines that he should make an adjudication on the matters investigated, he will decide whether or not there has been a failure to comply with the Code. Where the Commissioner decides that there has been such a failure, he will decide whether no action should be taken or whether he should –

(a) censure the person found to have failed to comply with the Code;

(b) suspend, or partially suspend, the person from being a councillor for a period of up to one year; or

(c) disqualify the person for being, or becoming, a councillor for a period of up to 5 years."

[10] The other section of this Code which is relevant is Section 4 which relates to rules of general conduct:

"4.1 Councillors hold public office under the law and must act –

(a) lawfully;

(b) in accordance with the Code; and

(c) in accordance with the standing orders of your council.

4.2 You must not conduct yourself in a manner which could reasonably be regarded as bringing your position as a councillor, or your council, in to disrepute.

…

4.8 You must maintain and strengthen the public trust and confidence in the integrity of your council. You must promote and support the Code at all times and encourage other councillors to follow your example."

[11] Annex C to the Code sets out the position regarding sanctions which may be applied by the Commissioner as follows:

"Under Section 62(3) of the Local Government Act (Northern Ireland) 2014, where the Commissioner decides that a person has failed to comply with the Code, the Commissioner must decide whether no action should be taken or whether the nature of the failure is such that the Commissioner should –

(a) censure the person in such terms as the Commissioner thinks appropriate;

(b) suspend or partially suspend the person from being a councillor for such a period, and in the way, as the Commissioner thinks appropriate. However, that period should not exceed one year or, if shorter, the remainder of the person's term of office; or

(c) disqualify the person for being, or becoming (whether by election or otherwise) a councillor, for such period as the Commissioner thinks appropriate but not exceeding 5 years."

[12] There is guidance in place to complement the Code. This is entitled the Northern Ireland Local Government Code of Conduct Guidance for Councillors from the Northern Ireland Local Government Commissioner for Standards. In this case particular reference was made to the part of this guidance which refers to 'your obligations as a councillor'. This is contained in paragraph 4.5. Specifically, paragraph 4.5.1 explains paragraph 4.2 of the Code which refers to bringing your position or council in to disrepute. At 4.5.2 the guidance states as follows:

"This rule applies to you **at all times**, not just when you are acting in the role of councillor."

[13] Paragraph 4.5.3 is also relevant as it states as follows:

> "As a councillor, your actions and behaviour are subject to a higher level of expectation and scrutiny than those of other members of the public. Therefore, your actions – in either your public life or your private life – have the potential to adversely impact on your position as a councillor or your council. Dishonest and deceitful behaviour or conduct that results in a criminal conviction, such as a conviction for fraud or assault, even where such conduct occurs in your private life, could reasonably be regarded as bringing your position as councillor, or your council, in to disrepute."

The decision of the Commissioner

[14] The Commissioner sent a letter to Councillor Brown dated 10 May 2018 in which she refers to her written decision and advises the councillor of his right of appeal. The written decision is 13 pages long. In it the Commissioner refers to the salient points of background as follows:

- The Commissioner refers to the fact that this was a self-referral by Councillor Brown.

- The Commissioner refers to the investigation. She states that the Deputy Commissioner commenced an investigation and filed a report which was then considered.

- There was a preliminary review meeting held on 11 April 2018. At the review meeting the Commissioner issued a number of directions to the parties for further submissions in advance of the hearing. The respondent was in attendance at that meeting. The Commissioner notes that at the review meeting, the respondent accepted the content of the investigation report and also that he had breached paragraph 4.2 of the Code. In particular, he accepted that he had brought his role as councillor and the council in to disrepute.

[15] The Commissioner then refers to the evidence presented at the adjudication hearing. She states that:

> "Notwithstanding the respondent's acceptance of the investigation report and that he has failed to comply with paragraph 4.2 of the Code, the Commissioner alone must

> decide whether or not any person has failed to comply with the Code. The evidential test for findings of fact at an adjudication hearing is on the balance of probabilities.
>
> Although there was no express challenge to the presentation of facts on behalf of the Deputy Commissioner, the Deputy Commissioner must still satisfy the Commissioner on the balance of probabilities of the facts contended for (including evidence to assist the Commissioner in deciding on sanction)."

[16] The Commissioner then refers to her findings of fact. In this section of her ruling she states that she relied on the investigation report and supporting documentation, police and related witness statements relating to the incident, the response form submitted by the respondent and his supporting statement, and the submission by the respondent dated 11 April 2018 in relation to the passenger and character references. The Commissioner then made fourteen findings of fact which I set out as follows:

(i) The respondent is a member of the council.

(ii) He signed a declaration of office on 3 June 2014 in which he agreed to observe the Code.

(iii) The Code applied to the respondent.

(iv) The respondent had attended a celebration with Alliance Party colleagues on the evening of 4 March 2018 following the outcome of the Northern Ireland Assembly Elections on 2 March 2018.

(v) The respondent was not present in his capacity as a councillor.

(vi) On 5 March 2017 at 04:15am a police constable observed the respondent and a female pillion passenger on a motorcycle in the vicinity of Ballynahatty Road, Belfast.

(vii) The respondent was stopped by police and breathalysed and at 04:25am was then arrested for driving with excess alcohol in his breath and he was cautioned. He was then taken to Musgrave Street Police Station where following a further breath test he elected to give a blood sample.

(viii) On 12 June 2017 the respondent was charged with the offence of driving with excess alcohol in his blood and he was released on police bail to attend Belfast Magistrates' Court on 10 July 2017.

(ix) At Belfast Magistrates' Court on 10 July 2017 the respondent pleaded guilty and was convicted of driving a motor vehicle with excess alcohol in his blood, contrary to Article 16(1)(a) of the Road Traffic (Northern Ireland) Order 1995. He received a fine of £250 and an offender levy of £15. The respondent was disqualified from driving for one year with the option of a 3 month reduction following the completion of a drink driving awareness course. The respondent completed this course on 9 November 2017 and his period of disqualification was reduced to 9 months.

(x) The media had reported the respondent's conviction.

(xi) This was a first offence and the respondent has had no further offences.

(xii) The respondent was accompanied by a pillion passenger on 5 March 2017 who was a member of the Alliance Party and who had also attended the social event which had begun the previous evening.

(xiii) As a result of his conviction, the respondent attended a disciplinary hearing of the Alliance Party on 3 October 2017 and was given a temporary suspension of 3 months until 31 December 2017. By letter to the respondent dated 3 October 2017 communicating the party's sanction the Alliance Party President (Geraldine Mulvenna) strongly recommended that the respondent refer himself to the Commissioner so that a determination could be made as to whether there was a breach of the Code. In that letter, the party President stated that if the respondent did not decide to refer himself, it would be incumbent on others to do so in pursuance of paragraph 4.4 of the Code which states as follows:

> "You must report, either through your council's own reporting procedure or directly to the proper authority, any conduct by any other person which you believe involves, or is likely to involve criminal behaviour."

On 31 December 2017 the temporary suspension by the party was lifted.

(xiv) By letter of 4 November 2007, received on 6 November 2017, the respondent wrote to the Commissioner's Office (the self-referral) setting out the details of his conviction and confirming that he had contacted a number of drink driving charities to express an interest in supporting them and in a personal attempt to make right his wrongdoing. The respondent has since become a donor to Brake the UK's leading road safety charity.

[17] The Commissioner decided that there had been a breach of the Code for the following six reasons:

(i) The respondent was convicted on 10 July 2017 at Belfast Magistrates' Court of an offence, contrary to Article 16(1)(a) of the Road Traffic (Northern Ireland) Order 1995, of driving with excessive alcohol in his blood on 5 March 2017.

(ii) The respondent's conduct, which resulted in a criminal conviction had brought both his position as a councillor and his council in to disrepute, and the respondent had accepted the consequence of the failings in his conduct.

(iii) In concluding her decision on the failure to comply with the Code, the Commissioner has taken into account the guidance of the Code and in particular paragraph 4.5.3 which is contained above.

(iv) The Commissioner has also taken into account 4.5.4 of the guidance which states:

> "When considering whether such conduct is such that it could reasonably be regarded as bringing your position or your council in to disrepute, I will consider:
>
> - whether that conduct is likely to diminish the trust and confidence the public places in your position as councillor, or your council, or is likely to result in damage to the reputation of either; and
>
> - whether a member of the public – who knew all the relevant facts – would reasonably consider that conduct as having brought your position as councillor, or your council, in to disrepute."

(v) The Commissioner is satisfied that the conduct of the respondent which resulted in a criminal conviction with attendant media publicity is such that it is likely to diminish the trust and confidence that the public places in him as a councillor and his council. The Commissioner was referred by the Deputy Commissioner to media reports in this regard. The respondent has also accepted that his role as a councillor and the council was brought in to disrepute by his actions.

(vi) The Commissioner determined that a member of the public, knowing all of the relevant facts, would reasonably consider that the respondent's conduct was such that it brought his position as councillor, and his council, in to disrepute.

[18] After it was decided that the Code had been breached there was a further hearing in relation to sanction. By email of 25 April 2018 Councillor Brown confirmed he would not attend the adjourned hearing and would not be represented. However, submissions on sanction were received. The Deputy Commissioner submitted a skeleton argument together with a note of details of the telephone statement from the Chief Executive of the council concerning two contacts with the council in January 2018 in respect of the respondent's conviction. These documents were forwarded to the respondent on the same day by email and the respondent replied. The Commissioner explains the fact that the Deputy Commissioner provided some guidance in relation to sanction. The adjourned adjudication hearing took place on 26 April 2018.

[19] In her decision the Commissioner sets out the mitigating and aggravating factors as follows:

> **"Mitigating Factors**
>
> (i) Although there is no mandatory requirement in the 2014 Act for a councillor to refer his/her conduct for investigation (the self-referral) the respondent had referred himself to the Office for investigation and the Deputy Commissioner references co-operation with office.
>
> (ii) The respondent has a previous record of good service and compliance with the Code.
>
> (iii) There was an apology and a recognition of his failure to follow the Code.
>
> (iv) There has been co-operation in rectifying the effects of that failure by engaging with relevant road safety charities.
>
> (v) There has been no further instance of non-compliance.
>
> (vi) The positive character references submitted on behalf of the respondent."
>
> **Aggravating factors:**

(i) The serious nature of any drink driving offence.

(ii) The respondent's actions that brought himself and the council into disrepute.

(iii) The consequences that may have followed as a result of the respondent's decision to drive with excess alcohol in his blood including physical harm to himself, the endangerment of his pillion passenger and other road users.

(iv) A certain lack of candour insofar as the respondent had stated at interview with the Deputy Commissioner's staff that he had decided himself to refer the matter to the Commissioner's office, and that he had not been told by his party (as the Commissioner had factually determined to do so).

(v) A lack of insight as to the seriousness of the matters under consideration. Whilst accepting the respondent attended the adjudication on 17 April 2018 and accepting that he was not legally represented, and whilst he had broadly co-operated with the Deputy Commissioner's investigation, his demeanour on this date was disrespectful to the adjudication hearing process. The Commissioner made attempts to settle a time and date for the sanction hearing, but in response to an attempt to arrange an early morning hearing to facilitate his holiday arrangements, the respondent refused this suggestion."

[20] Taking all of the above into account the Commissioner concluded that a period of suspension was the appropriate sanction. In relation to the duration of the suspension the Commissioner referred to the Guidelines which state that suspension of less than one month is unlikely to have a proper effect. In her consideration the Commissioner also referenced the impact of suspension on the respondent and on the electorate in relation to him being able to conduct business on its behalf. However, she decided that in weighing the public interest against the particular private interests of the respondent, she was satisfied that suspension was an appropriate and proportionate sanction. The Commissioner specifically referred to the economic impact of any suspension and the fact that the respondent would not be paid his allowance during any period of suspension. The Commissioner noted that the

respondent had some employment at Queen's University, Belfast (up until August 2018).

[21] In the decision the Commissioner refers to a number of cases in the context of sanction namely, *Heesom v Public Services Ombudsman for Wales and the Welsh Minister* [2014] EWHC 1504 (Admin), the case of *Councillor McShane* a decision of Burgess J in Northern Ireland (which is currently under appeal), *Hathaway v Ethical Standards Officer* [2004] EWHC 1200 (Admin). *Sloam v Standards Board for England* [2005] EWCH 124 (Admin), another case of *Councillor Westerman* Tribunal Ref: APW/002/2003/3CT. In conclusion, she states that:

> "Taking into account all of the above the Commissioner considers a suspension period of 6 months is both appropriate and proportionate in this case. The suspension will commence on 14 May 2018."

Arguments of the Parties

[22] The appellant's arguments may be summarised as follows:

(i) Mr Denvir argued that the conduct in question was not captured by the Code. He stated that the Commissioner had therefore fallen into an error of law. He said that it was not within the Code because the drink driving essentially occurred during the private time of Councillor Brown. In this regard the appellant relied heavily on the decision of *Livingston v Adjudication Panel for England* [2006] EWHC 2533 (Admin).

(ii) Mr Denvir also referred to the fact that the Commissioner had placed undue reliance on the guidance and that this was not a binding document but rather the core of any adjudication should be a consideration of the Code which had been approved by the Assembly.

(iii) The appellant also argued that this was an appeal and so the court was not as constrained as in judicial review to a supervisory function.

(iv) Mr Denvir argued that the Commissioner had made errors in relation to her consideration of the evidence, in particular an over reliance on the issue of a pillion passenger and she had strayed into making findings which were really for the criminal court. He pointed out that the appellant had been punished in the criminal court and also had been subject to the media glare in relation to that.

(v) Finally, Mr Denvir argued that the sanction in this case was clearly excessive. He said that censure was enough in the circumstances of this case given that

the appellant had been punished by the criminal courts and also given the very high quality of the references that were put before the Commissioner from a cross-community party line. He also referred to the fact that there was a letter from the Chief Executive of the Council which did not in his submission point to particular disrepute being occasioned to the council by this action.

[23] Mr McGleenan on behalf of the respondent made the following points in summary:

(i) The Code refers to observance "at all times". Mr McGleenan said the wording of this was clear and should be given its ordinary and natural meaning. Regarding conduct which could reasonably be regarded as bringing the position of the councillor in to disrepute Mr McGleenan referred to the fact that that was in effect conduct likely to diminish trust in the position as a councillor.

(ii) Mr McGleenan relied on the fact that Councillor Brown accepted that his behaviour brought the council in to disrepute and also in the written submissions reference is made to the fact that it is not suggested that drink driving offences can never entail a breach of the Code.

(iii) He argued that all relevant matters had been taken into account and weighed by the decision maker and that she should be given considerable deference in relation to this.

(iv) Mr McGleenan relied on the case of *Heesom* in relation to the test to be applied by the court. Mr McGleenan was not wedded to the notion that this was a pure judicial review given that it is a statutory appeal. However, he said that the test on a statutory appeal following from *Heesom* was whether or not the decision was plainly wrong. He also referred to the fact that the statutory language borrowed from traditional administrative law concepts such as procedural impropriety and unreasonableness. Overall, he said that there had clearly been a breach of the Code given the nature of the criminal offence and also that in the circumstances the sanction was not excessive.

[24] After these submissions were made I asked both counsel to address what the powers of the court were in relation to a statutory appeal of this nature because the matter had not been addressed in the arguments originally presented. As this is a new jurisdiction it is also fairly untrodden territory. I am grateful to counsel for presenting supplementary arguments on this point. The arguments refer to the fact that the statute itself does not spell out the process in terms of the appellate function.
Mr McGleenan therefore referred me to the rules of the Court of Judicature (Northern Ireland) 1980 which provide the jurisdiction of the court when dealing with statutory appeals. In particular he took me to Order 55 and Order 59 Rule 10 sub-paragraphs 3 and 4. Mr McGleenan submitted that these provisions allow the court to provide a

remedy in the sense that the court may make an order, on such terms as the court thinks just, to ensure the determination on the merits of the real question and controversy between the parties.

[25] Upon request of the Court both parties also confirmed that there is no case law directly on point. Examples were given of the sanctions applied for drink driving in other professions. These cases are useful indicators of how seriously this type of offence is taken in relation to certain professions in that it can lead to significant suspensions or even the loss of a job. The appellant's additional submissions suggest some reform of the current system but as the respondent points out that is not a matter for this Court.

[26] In his additional submissions Mr Denvir also pointed to the fact that the Code is subject to review and that politicians were engaged with this prior to suspension of the Executive. He also accepted that the objective behind any sanction is; the preservation of public confidence; the public interest in good administration; upholding and improving the standard of conduct expected of councillors; the fostering of public confidence in the ethical standards regime introduced by the 2014 Act.

> "Thus any sanction imposed will be justified in the wider public interest and will be designed to prevent the particular Respondent from any future failures to comply with the Code, and to discourage similar conduct by others."

Consideration

[27] 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.

[28] The *Heesom* case involved a different piece of legislation and there is reference made in that case by Hickinbottom J to the CPR Rules which do not apply in this case. However, there is some useful guidance at paragraphs 43-53 in relation to the scope of an appeal of this nature. In that case the judge draws upon the decision of Laws LJ in *Subesh v Secretary of State for the Home Department*. He states that in respect of factual issues, the court must engage with the merits. However, this position is tempered by the comments in paragraph 45 as follows:

> "However, in doing so, the court is required to give due deference to the tribunal below, because:

(i) The tribunal has been assigned, by the elected legislature, the task of determining the relevant issues. In my view, although it is a more forceful point in respect of issues where the legislature is not providing an appeal, this is relevant even in an open ended appeal such as this.

(ii) It is a specialist tribunal, selected for its experience, expertise and training in the task (see *Sanders v Kingston No:1* [2005] EWHC 1145 (Admin)at 56 per Wilkie J and *Livingston v Adjudication Panel for England* [2006] EWHC 2533 at 41 per Collins J).

(iii) It has the advantage of having heard oral evidence (*Todd v Adams & Chope Trading As Trelawney Fishing Company* [2002] EWCA Civ 509 129 per Mance LJ as he then was, *Assicurazioni Generali SPA v Arab Insurance Group* [2002] EWCA Civ 1642 at 17 per Clarke LJ as he then was)."

[29] Paragraph 46 of the same decision then sets out various matters which again have been of assistance.

"Applying that general proposition, the courts have considered a wide spectrum of cases:

(i) Moving outside factual issues, if the issue is essentially one of statutory interpretation, the deference due may be limited.

(ii) If it is one of disputed primary fact which is dependent upon the assessment of oral testimony, the deference will be great.

(iii) The appeal court will be slow to impose its own view and will only do so if the tribunal below was plainly wrong.

(iv) Where the issue is essentially one of discretion, the court will only interfere if the tribunal was plainly wrong.

(v) Similarly, where an evaluative judgment has to be made on the primary facts, involving a number of different factors that have to be weighed together. In respect of such open textured issues Beatson J said in *Calver* at 46:

> 'The relevant legal principles in this area do not provide the panel of the court with bright lines … they lead to a process of balancing a number of issues.'"

[30] 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. I proceed on that basis.

[31] Applying this approach to the issues in this case the first question is whether or not the Code applied to the offence of drink driving. I have considered all of the arguments in relation to this. This is essentially a matter of interpretation of the relevant Code. My conclusions are as follows. Firstly, I reject the argument that the guidance cannot assist in this exercise. The guidance complements the Code and as such the decision maker is entitled to utilise it in determining whether matters fall within the Code. I agree with the respondent that the *Livingston* case predates this legislative code when the issue of public private divide was live. As such I cannot accept that this decision provides the outcome advocated by the appellant.

[32] It is also important to recognise that the Code was enacted in this jurisdiction for a reason. It reflects the fact that additional authority was given to local councils and the consequent high standards of public office required. It is quite clear in my view that the Code applies. The scope of it is explained in paragraph 4.2 which states that "at all times" a councillor must maintain high standards of office. The appellant accepted this before the Commissioner. He also accepted that on any reasonable view this behaviour would bring his position as a councillor under the spotlight and into disrepute.

[33] The guidance refers to matters which come within the Code including criminal convictions. I agree with the respondent that whilst not specifically mentioning drink driving it would be absurd if this type of conviction were excluded. I am satisfied that the respondent succeeds in defending this ground of appeal. The decision is not vitiated by any error of law and so I dismiss the first ground of appeal. In my view

the Commissioner was correct to find that the appellant breached Paragraph 4.2 of the Code of Conduct for Councillors.

[34] In relation to the second and third grounds of appeal under the legislation which are whether or not there was an unreasonable exercise of discretion or whether or not the decision was supported by facts, again I dismiss the appeal. Having examined the facts carefully it is clear to me that this decision was reasonably open to the decision maker having heard oral evidence and weighed up all the various factors including the advice she received. I cannot see that she erred in her analysis. Specifically I reject the arguments made by Mr Denvir that the Commissioner was wrong to take into account the position of the pillion passenger or that she strayed into matters which were purely the preserve of the criminal court. The Commissioner had to make her own decision on the facts and I do not see that she erred in relation to that.

[35] In my view the appellant's most realistic point was in relation to ground (e) as to whether or not the sanction was excessive. Both counsel submitted that I have power to adjust the sanction if I consider that it was excessive. In his appeal the appellant focussed almost exclusively on the question of whether the Commissioner was wrong to rule out censure as a sanction on the facts of this case. In determining this question I must first decide whether or not censure would meet the justice of this case. I have carefully considered this. In particular I have taken into account the references filed by a range of elected representatives who suggest that censure may be the proper course. I also take into account the fact that the appellant has been convicted and punished by a criminal court and that this was in public view. I am conscious of the double jeopardy point raised by Mr Denvir. However, criminal law and the Code have different objectives. The guidance specifically refers to censure being preserved for minor cases. This is a case of drink driving. Thankfully no one was injured on this occasion but this type of behaviour can have devastating consequences and is frowned upon by our society. This is not a minor matter. As such it is my view that the Commissioner was entirely correct to rule out censure. This case should make clear that immediate suspension is appropriate if an offence of this nature is committed.

[36] In fact the Commissioner considered whether the appellants conduct was sufficiently serious to merit disqualification. Having regard to 19(g) of the sanction guidelines and noting the aggravating and mitigating circumstances the Commissioner determined that although his actions had brought the council into disrepute, there was no evidence that the extent of the reputational damage was so serious as to warrant disqualification. Having decided against disqualification the Commissioner turned to suspension on the basis that the conduct was of a nature that:

(a) It is necessary to uphold public confidence in the standards regime and in local democracy.

(b) There is a need to reflect the severity of the matter.

(c) There is a need to make it understood that the conduct should not be repeated.

On the basis of the current framework it is clear that this was a case where suspension was the appropriate outcome. The Commissioner has not fallen into any error in this regard. This case should make clear that anyone convicted of a similar offence will face immediate suspension.

[37] Whilst the appellant did not initially pursue the issue of the length of suspension, I asked counsel to address me on that for completeness sake and as other cases are apt to arise. I am grateful to counsel for the additional submissions which include some examples of sanctions for drink driving across the public sphere. In this case the question is whether the length of suspension is excessive. Excessive essentially means higher than is necessary or reasonable. On the basis of the current framework the Commissioner was entitled to consider a suspension up to 12 months. The guidance states that a suspension of one month is not recommended as it would not have the desired effect. There is no other specific guidance in this area. Where a case lies within the range will inevitably depend upon the particular facts.

[38] I am conscious that the Commissioner reached her view having considered all of the material before her. In my view she took into account all relevant matters. She properly utilised the guidance. She also took into account the underlying objective to preserve public confidence in the ethical standards framework and the wider public interest. The appellant chose not to attend the sanctions hearing however I am satisfied that all points of mitigation were considered by the Commissioner. I also note that the Commissioner queried the appellant's appreciation of the seriousness of the matter. In reaching her conclusion the Commissioner conducted a careful analysis on the basis of the information she had. I have also had the benefit of submissions of counsel and legal argument. Following from this, I have to decide whether the length of sanction was excessive.

[39] In relation to the length of sentence, the Commissioner reached her view having heard the evidence and considered all of the facts. This is a discretionary exercise. I must be careful not to simply substitute my own view. I must decide whether the Commissioner was wrong. She can only have been wrong if she strayed outside the bounds of her discretion and imposed an excessive suspension. The length of suspension is mid-range. As such I do not consider that it is unreasonable or excessive. Therefore, I do not consider that I should interfere with the decision of the Commissioner on the basis of her application of the current provisions.

[40] Finally, I note that this Code may be subject to review. I stress that I reach my decision on the basis of the current framework which has been mandated. Going forward, it may be that the scheme will be refined and developed, however that will undoubtedly be after a period of consultation.

[41] Accordingly, the appeal must be dismissed.