

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered:	19.05.06
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

APPLICATION OF JOHN JOSEPH DUFFY FOR JUDICIAL REVIEW

MORGAN J

[1] The applicant is a resident of Garvaghy Road Portadown and a member of the Garvaghy Road Residents Coalition. He challenges the decisions of the Secretary of State for Northern Ireland whereby he appointed Mr David Burrows and Mr David MacKay as members of the Parades Commission for Northern Ireland on 30 November 2005.

[2] The background to the establishment of the Parades Commission is not in dispute. Controversy surrounding a parade on Sunday 7 July 1996 by members of the Orange Order from Drumcree parish church down the Garvaghy Road on the outskirts of Portadown, which was opposed by nationalist residents, led to widespread serious public disorder over the following week, first among unionists and then among nationalists. As a result an independent review of parades and marches was established and it reported in 1997 (the North report). It recommended the creation of an independent body that would:

- (a) allow interested parties to put their views forward about proposed parades,
- (b) encourage them to settle difficulties locally, and where that proved impossible,
- (c) itself come to a view on what, if any, conditions should be imposed on contentious parades after an appropriately transparent process of examination of all the relevant issues against the background of reformed legal provisions.

[3] The North report recognised the importance of the composition of the commission and said:

"Many people have said to us that the composition of the Parades Commission will be of critical importance to its success. We agree. The Parades Commission will need widespread acceptance, self-confidence and an ability in its members to work together."

Following on from this report a Parades Commission was established on a non-statutory basis in March 1997.

[4] The following year Parliament passed the Public Processions (Northern Ireland) Act 1998. That established the Parades Commission for Northern Ireland in section 1. In section 2 it described the functions of the Commission:

" 2. - (1) It shall be the duty of the Commission-

(a) to promote greater understanding by the general public of issues concerning public processions;

(b) to promote and facilitate mediation as a means of resolving disputes concerning public processions;

(c) to keep itself generally informed as to the conduct of public processions and protest meetings;

(d) to keep under review, and make such recommendations as it thinks fit to the Secretary of State concerning, the operation of this Act.

(2) The Commission may in accordance with the following provisions of this Act-

(a) facilitate mediation between parties to particular disputes concerning proposed public processions and take such other steps as appear to the Commission to be appropriate for resolving such disputes;

(b) issue determinations in respect of particular proposed public processions."

Section 3 of the 1998 Act requires the Commission to issue a code of conduct providing guidance to persons organising a public procession and regulating the conduct of persons organising, taking part in or supporting such a procession. Section 5 of the Act requires the Commission to issue a set of guidelines as to the exercise by it of its functions under section 8 of the Act. Section 8 sets out the Commission's powers to impose conditions on public processions:

"8. - (1) The Commission may issue a determination in respect of a proposed public procession imposing on the persons organising or taking part in it such conditions as the Commission considers necessary.

(2) Without prejudice to the generality of subsection (1), the conditions imposed under that subsection may include conditions as to the route of the procession or prohibiting it from entering any place.

(3) Conditions imposed under subsection (1) may incorporate or be framed by reference to-

(a) the Code of Conduct; or

(b) any other document-

(i) prepared by the person or body organising the procession in question; and

(ii) approved by the Commission for the purposes of this section.

(4) The Commission may, in accordance with the procedural rules, amend or revoke any determination issued under this section.

(5) In considering in any particular case-

(a) whether to issue a determination under this section;

(b) whether to amend or revoke a determination issued under this section; or

(c) what conditions should be imposed by a determination (or amended determination) issued under this section,
the Commission shall have regard to the guidelines.

(6) The guidelines shall in particular (but without prejudice to the generality of section 5(1)) provide for the Commission to have regard to-

(a) any public disorder or damage to property which may result from the procession;

(b) any disruption to the life of the community which the procession may cause;

(c) any impact which the procession may have on relationships within the community;

(d) any failure of a person of a description specified in the guidelines to comply with the Code of Conduct (whether in relation to the procession in question or any related protest meeting or in relation to any previous procession or protest meeting); and

(e) the desirability of allowing a procession customarily held along a particular route to be held along that route."

It is clear from these functions that the Commission has an adjudicative role and indeed the respondent's affidavits indicate that the Parades Commission is listed as a Tribunal Non Departmental Public Body.

[5] Membership of the Parades Commission is provided for in schedule 1 of the 1998 Act and in particular at paragraph 2 thereof:

"2. - (1) The Commission shall consist of-

(a) a chairman; and

(b) not more than 6 other members,
appointed by the Secretary of State.

(2) The Secretary of State may by order vary the number for the time being specified in sub-paragraph (1)(b).

(3) The Secretary of State shall so exercise his powers of appointment under this paragraph as to secure that as far as is practicable the membership of the Commission is representative of the community in Northern Ireland. "

By virtue of paragraph 3 (4) of schedule 1 the Secretary of State may remove a person from office as a member or as chairman of the commission if satisfied that:

“(a) he has been convicted of a criminal offence;

(b) he has become bankrupt or made a composition or arrangement with his creditors;

(c) he has failed to comply with the terms of his appointment; or

(d) he is otherwise unable or unfit to discharge his functions.”

[6] In 2005 the terms of office of the then members of the Parades Commission were due to come to an end on 31 December 2005. During the early part of that year the Security Minister, Mr Woodward, had a meeting with some of the loyal orders in the context of the marching season. In cross-examination, for which I gave leave, the respondent's deponent stated that in the course of that meeting Mr Woodward had encouraged the loyal orders to give their support to the Parades Commission, to play a constructive part with the Commission and to consider putting people forward for the appointment competition which he knew was coming along later that year. The witness explained that it had been government policy for some time to encourage the loyal orders to engage with the Parades Commission as they were seen as a very critical body. Some weeks after that meeting a submission was prepared for the Secretary of State which set out among other things the appointment process which it was intended to follow. The submission noted the intention to place advertisements in all the main newspapers circulating in Northern Ireland including newspapers circulating in both the nationalist and unionist communities, the intention to issue a press release encouraging individuals to apply and the intention to write to political, community and church leaders to invite them to encourage applications from their communities. A list of the names and addresses of the political, community and church leaders were contained within the submission and they consisted of the leaders of the four main political parties, the leaders of the four main churches and the representatives of the

Apprentice Boys of Derry, the Grand Orange Lodge of Ireland and the Royal Black Institution. It was explained that the last three representatives had been added into the list by a middle management official of the Northern Ireland Office who had attended the earlier meeting with Mr Woodward. The submission did not ask the Secretary of State to approve the list and it appears that no other official considered whether or not the list was appropriate.

[7] 94 applications for membership were received. A panel of three persons was established to carry out a sift of the applications. The sifting panel identified 24 candidates who should be interviewed. From those candidates the panel placed five candidates in the highly recommended category and a further 12 in the recommended category. The Secretary of State was provided with details of all the suitable candidates together with the panel's assessment of them. He was asked to select persons for appointment from this pool.

[8] Each of the applicants for appointment was provided with a guide in respect of conflicts of interest. The guide defined conflicts of interest as follows:

"Public appointments require the highest standards of propriety, involving impartiality, integrity and objectivity, in relation to the stewardship of public funds and the oversight and management of all related activities. This means that any private, voluntary, charitable or political interest which might be material and relevant to the work of the body concerned, should be declared.

There is always the possibility for real or perceived conflicts of interest to arise. Both are a problem, as the perceived influence of a conflict may, on occasions, be as damaging as the existence of a real conflict.

It is important, therefore, that you consider your circumstances when applying for a public appointment and identify any potential conflicts of interest, whether real or perceived."

At a later stage the guide considers what happens if a conflict is declared and in particular whether this means that the applicant will not be considered:

"No-each case is considered individually. If you are shortlisted for interview, the panel will explore with you how far the conflict might affect your ability to

contribute effectively and impartially on the board and how this might be handled, if you were to be appointed."

[9] In the case of Mr Mackay he disclosed the following in the conflict of interest section:

"Member of the Democratic Unionist Party.

Member of the Orange Institution. I am a member of Portadown Ex Servicemen's Orange Lodge.

Member of the Royal Black Institution.

Personally being a member of the above organisations if successful would not in my opinion hinder my employment as a member of the Parades Commission. The reason I make this statement is that I firmly believe that I am well capable of carrying out my functions professionally and upholding the seven principles underpinning public life. I also believe that the Parades Commission need members with a diverse range of opinions, which not only reflect the views of the whole community in Northern Ireland but who can work together objectively as a cohesive team with fairness, dignity, tolerance and respect, and irrespective of any personal views held, always base their decisions impartially."

[10] In the case of Mr Burrows he reported the following in that section:

"I was a district officer of Portadown LOL No. 1 for over 10 years. After 12 July this year I stepped as a district officer for personal reasons.

If I was successful with application I would adhere to the chair for guidance in this matter. I don't see a problem as I'm an open-minded person and I can adjust to carry out my duties with dignity."

[11] In their panel assessment forms in relation to each of these candidates the panel answered no to the question "any area of real/perceived conflict of interest?" In the case of Mr Mackay they included a comment:

"No conflict of interest considered. He declared his membership of the DUP and of loyal orders (orange and black). Would be keen to ensure these perspectives were reflected on Parades Commission"

Each of these candidates was appointed to the Commission.

[12] In the replying affidavit sworn on his behalf the Secretary of State confirmed that there was a pool of 17 appointable candidates. He considered that the six candidates selected created a membership for the Commission which so far as practicable was representative of the community in Northern Ireland. He concluded that it would not have been right to have excluded either Mr Burrows or Mr Mackay from membership of the Commission by virtue of their association with the Orange or other loyal Orders. He considered that each would bring to the Commission a valuable insight to the Commission's deliberations. In the case of Mr Mackay his membership of a political party, which he had declared on his application form, was not viewed as debarring or disabling him from appointment. He confirmed that there was no representative of Catholics who live in the areas affected by contentious parades who reached the appointable pool. In those circumstances the Secretary of State could not, even if he had wished to, appoint someone from outside that pool.

[13] The applicant's extensive grounds of challenge were detailed in the Order 53 statement but in his written submissions Mr MacDonald QC who appeared with Ms Quinlivan B. L. for the applicant summarised the grounds of challenge as follows:

(a) The applicant challenges the decision of the Secretary of State to encourage applicants from the loyal orders to apply for posts within the Parades Commission and not to encourage applicants from nationalists residents groups or indeed any nationalist community groups to apply for posts. That decision is challenged not merely because it contributed to the establishment of a Parades Commission which was unrepresentative but also because the decision was discriminatory and unlawful by virtue of section 76 of the Northern Ireland act 1998.

(b) The applicant challenges the decision of the Secretary of State to appoint to the Parades Commission two persons who have a clear and demonstrable conflict of interest in relation to the issue of contentious parades, which the Parades Commission is charged with adjudicating upon. This decision is challenged not merely because it was part of the process which resulted in an unrepresentative Parades Commission but because:

(i) The Secretary of State should not have appointed persons who were partial or biased to an adjudicative role, as provided for under section 8 of the Public Processions (NI.) Act 1998.

(ii) The Secretary of State having sought to appoint persons in accordance with the guidance issued by the Office of the Commissioner for Public Appointments failed to correctly apply that guidance, in appointing two persons with a real or perceived conflict of interest.

(c) In circumstances where the Secretary of State saw fit to appoint to the Parades Commission members of the loyal orders, the applicant challenges the Secretary of State's failure to ensure that the Commission was sufficiently balanced.

[14] I turn first to the most fundamental issue raised by Mr MacDonald QC which is whether it was open to the Secretary of State to appoint Mr Burrows and Mr Mackay having regard to their background. On this point the applicant relies on four paragraphs in his grounding affidavit which set out some of that background:

"18. Mr David Burrows is a prominent member of the Orange Order Institution having been a district officer with Portadown LOL No. 1 for over 10 years. He has been district Master from October 2004 and whilst he resigned from his post last year, he resigned because of his involvement in a personal controversy and not because of any disagreement or dispute about the policy and approach of the Portadown LOL. He has retained his membership of the Orange Order in Portadown. Significantly, in terms of the position to which he has now been appointed, the Portadown LOL has refused to enter into unconditional negotiations with nationalist residents over the past 10 years and has been involved in one of the most controversial campaigns in favour of the right to march. The Orange order campaign to march down the Garvaghy Road, has been marked by extremes of violence, rioting, criminal activity and flouting of rulings of the parades commission to which he has now been appointed.

19. Mr Burrows' well-known opposition in principle to the re-routing of orange processions, his consistent refusal to engage in unconditional dialogue

with the Garvaghy Road residents and his own partisan involvement as a protagonist in one of the most contentious of all the parades disputes renders him, in my view, unable and unfit to discharge his functions as a commission member fairly and impartially, either in relation to orange processions on the Garvaghy Road or generally.

20. Donald MacKay is also a member of one of the Portadown Orange Order lodges. Significantly, after his appointment, Mr McKay publicly stated his intention to march in Drumcree next year. It is impossible to see how that statement can be reconciled with his role and function as a parades commissioner charged with determining, in an unbiased and impartial fashion, the question of whether the Drumcree parade should be permitted to march down the Garvaghy Road, or indeed any other controversial parade in which the Orange Order is involved.

21. Bearing in mind the functions of the commission and in particular its power to adjudicate on contentious parades, it was in my view wrong in principle to appoint 2 such partisan figures with a record of uncompromising opposition to the imposition of restrictions on orange processions. In so far as the Secretary of State could be regarded as being entitled to make such appointments, he applied that approach in a one-sided and discriminatory fashion in that he failed to balance those appointments by making similar appointments from the nationalist/republican side of the community to act as an effective counterweight to Mr Burrows and Mr McKay."

The applicant also referred to extracts from the North report which set out the views of the loyal orders and to the content of certain web sites promoted by the Orange Order. Although the respondent stated that it had not specifically taken into account the detail of the web sites the content of the sites demonstrating in particular the view of the Orange Order that traditional marches should be entitled to proceed without objection from residents would have been well known. It was submitted that this demonstrated that both Mr Burrows and Mr Mackay were committed to pursuing an orange agenda on the commission and that this was incompatible with the independent adjudicative function provided for in statute.

[15] For the respondent Mr McCloskey QC who appeared with Mr Maguire B. L. submitted that the guiding principle for the exercise of the Secretary of State's power of appointment was to be found in paragraph 2 (3) of schedule 1 of the 1998 Act set out above which required him to secure as far as was practicable that membership of the commission was representative of the community in Northern Ireland. He submitted that such a judgment was a matter of evaluation for the Secretary of State and that the court should be wary of trespassing upon an area that was specifically left by Parliament to him.

[16] I accept that a substantial element of the function of the Commission involves an adjudicative role. I consider that this is clear from the Commission's function of issuing determinations in respect of particular proposed public processions in section 2 of the 1998 Act and its function in relation to imposing conditions on public processions pursuant to section 8 of that Act. I also consider that it is clear that there is a substantial risk that Mr Burrows and Mr Mackay would face a perceived conflict of interest at least in relation to decisions made by the Parades Commission concerning Orange parades in Portadown. I consider that so much was recognised by the applicants themselves implicitly in their entries in relation to conflict of interest in their applications. I further consider that this was recognised by the Secretary of State. In a letter dated 16 January 2006 responding to a complaint by the applicant the Secretary of State dealt with the question of conflict of interest as follows:

"As to the question of any apparent conflict of interest, I am satisfied that membership of an Orange Lodge does not of itself amount to a conflict of interest when considering applications for parades. In addition, the Commission has taken its own independent legal advice to ensure its internal procedures are fair and impartial. On the basis of that advice they have concluded that, provided the interest is declared and taken into account in the Commission's decision making process, both Mr Burrows and Mr Mackay can discharge their duties as Commissioners."

The decision of the panel members that no perceived conflict of interest issues arose in relation to these applications is in my view inexplicable. It causes one to doubt whether the panel members properly understood the nature of the task on which they were engaged.

The legal obligation on the Secretary of State to secure as far as practicable that membership of the Commission was representative of the community in

Northern Ireland inevitably raised the possibility of perceived conflict of interest in respect of particular decisions. The provisions relating to procedure in schedule 1 of the 1998 Act recognised this by providing that the quorum for a meeting of the Commission should be three. There is no criticism of the view that the loyal orders represent the views of a section of the community on this difficult issue. Before the court would interfere with the wide statutory discretion given to the Secretary of State to appoint those representative of views within the community I consider that it would be necessary to demonstrate that the appointees would not be able to contribute materially to the work of the Commission by reason of the perceived conflict of interest. The guidance provided to applicants in respect of the approach that the respondent would take to a perceived conflict of interest did not impose any more stringent test. I do not consider that the criticisms made by the applicant approach the satisfaction of this test. In relation to each issue before them the Commission will have to determine how best to proceed having regard to any real or perceived conflict of interest in respect of any member. I reject the applicant's challenge on this ground.

[17] I now turn to the first ground of challenge namely the failure to encourage applicants from nationalist residents groups or indeed any nationalist community groups to apply for posts having regard to the encouragement given to applicants from the loyal orders. Mr MacDonald QC submitted that this failure represented a breach of the statutory obligation in paragraph 2 (3) of schedule 1 of the 1998 Act and further constituted an act of discrimination on the grounds of religious belief and political opinion contrary to section 76 of the Northern Ireland Act 1998. For the respondent Mr McCloskey QC submitted that there was no obligation within the appointment process to consider whether to approach such nationalist groups and that section 76 of the Northern Ireland Act 1998 did not give rise to a public law duty.

[18] It is in my view clear that the statutory discretion given to the Secretary of State to secure that as far as is practicable the membership of the Commission is representative of the community in Northern Ireland gives him a wide discretion in relation to the interests which he can take into account. Apart from the usual issues such as gender, race, religious belief and political opinion there may be other related or specific perspectives which the Secretary of State considers it proper to have represented on a body such as this. That demonstrates the diversity of interests which the Secretary of State is entitled to take into account and is consistent with Mr McCloskey's submissions that his decision is an evaluative judgment. But the notion of a body which is representative of the community in Northern Ireland encompasses not just diversity but also the concept of balance. That applies not just to the decision-making of the Secretary of State when he is presented with the appointable pool but also to the process by which the appointable pool is formed.

[19] The verbal and written encouragement given to the loyal orders to put forward applicants for appointment is a well recognised tool in discrimination law for the purpose of increasing the representation of underrepresented groups (see in particular Professor McColgan's work on Discrimination Law 2nd edn 148-157). There is no doubt that it was the intention of government to bring forward applications from the loyal orders because it was considered important to ensure that their perspective was heard within the Commission. For the reasons I have given earlier I consider that such an approach was entirely a matter for the Secretary of State. But the requirement of balance within the statutory duty at paragraph 2 (3) of schedule 1 of the 1998 Act imposed on those officials conducting the appointment process on behalf of the Secretary of State the obligation to consider whether it was necessary to target those groups within the nationalist community which opposed the perspective of the loyal orders. The existence of such groups would have been well known to the respondent. Although the affidavits of the respondent are silent on that issue the cross-examination of the deponent made it clear that no such consideration took place. I consider, therefore, that the appointment process was unlawful in that the Secretary of State's officials failed to take into account a material consideration as a result of which he failed to secure as far as was practicable that membership of the Commission was representative of the community in Northern Ireland.

[20] In light of my decision it is unnecessary for me to determine the issue in relation to section 76 of the Northern Ireland Act 1998 and I shall only touch briefly upon it. The section provides:

“ 76. - (1) It shall be unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to aid or incite another person to discriminate, against a person or class of person on the ground of religious belief or political opinion.

(2) An act which contravenes this section is actionable in Northern Ireland at the instance of any person adversely affected by it; and the court may-

(a) grant damages;

(b) subject to subsection (3), grant an injunction restraining the defendant from committing, causing or permitting further contraventions of this section.

(3) Without prejudice to any other power to grant an injunction, a court may grant an injunction under subsection (2) only if satisfied that the defendant-

(a) contravened this section on the occasion complained of and on more than one previous occasion; and

(b) is likely to contravene this section again unless restrained by an injunction.”

For the respondent Mr McCloskey QC contended that the express right of personal action provided by section 76 (2) excluded any public law duty in respect of section 76 (1). I do not accept that submission. I consider that section 76 (2) is designed to provide a remedy in damages and to control the exercise of injunctions in relation to personal actions. I do not consider that that is intended to remove the public law duties of public authorities which otherwise arise from section 76 (1).

[21] Mr MacDonald QC submitted that the respondent discriminated against nationalist residents groups on the ground of religious belief or political opinion. He relies on the definition of discrimination in section 98 (5) of the Northern Ireland Act 1998”:

“(5) For those purposes a person discriminates against another person or a class of persons if he treats that other person or that class less favourably in any circumstances than he treats or would treat other persons in those circumstances.”

I have two reservations about this submission. Firstly I have not concluded that there was any legal obligation on the Secretary of State to encourage nationalist groups in the same way as he encouraged the loyal orders. I consider that there was a legal obligation on those in charge of the process to consider whether to so encourage those groups. It may be that this would constitute discrimination within section 98 (5) of the 1998 Act but I would need further submissions on it.

Secondly I am not satisfied that any alleged discrimination was on the grounds of religious belief or political opinion. I consider that one should

approach this as a composite question in line with the decision of the House of Lords in *Shamoon v Chief Constable* [2003] UKHL 11. In this case the encouragement was given to those within the Protestant or Unionist community holding a particular perspective. Within that community the group was not defined by their religious belief or political opinion. The alleged disadvantaged group fall within the nationalist or republican or Roman Catholic community but similarly were not defined within that group by their religious belief or political opinion. Accordingly I do not consider that the targeting of a particular type of Protestant or unionist could be said to be on the grounds of religious belief or political opinion where that particular group are not defined by either of those matters.

[22] Mr Mackay has resigned from the Parades Commission. I have found no reason relating to Mr Burrows' skills experience or background which would prevent him being appointed to the Parades Commission. I have, however, found that the process was unlawful in that the requirement of balance was not considered during the appointment process in connection with his appointment. In those circumstances I consider that I should quash the decision to appoint Mr Burrows so that the Secretary of State may exercise his powers of appointment afresh to secure that as far as is practicable the membership of the Commission is representative of the community in Northern Ireland. I want to make it clear that this judgment should not operate as any prohibition on the reappointment of Mr Burrows should the Secretary of State so decide in the exercise of his powers under paragraph 2 (3) of schedule 1 of the 1998 Act.