

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

APPLICATION OF JOHN JOSEPH DUFFY FOR JUDICIAL REVIEW

MORGAN J

[1] The applicant in this case is a resident of Garvaghy Road, Portadown. On 26 January 2006 he instituted proceedings challenging the decision of the Secretary of State for Northern Ireland made on 30 November 2005 to appoint David Burrows and David McKay as members of the parades commission for Northern Ireland. Leave was granted by Mr Justice Girvan on 30 January 2006. On 27 March 2006 the respondent lodged a replying affidavit. On 7 April 2006 the applicant issued a summons seeking discovery of the following specific documents being documents howsoever described and whenever made arising out of or connected with the following matters:

- (a) The decision not to appoint any of three former commissioners to the parades commission;
- (b) The decision that the only community leaders to be contacted with a view to encouraging their membership to apply for appointment to the parades commission where the Loyal Orders;
- (c) The decision to amend the short listing criteria after applications were received;
- (d) The pre-sift stage of the process and its impact upon the eventual shortlisting;
- (e) The application forms of the successful candidates;
- (f) The questions asked at interview;
- (g) The composite assessment forms completed at interview in relation to the successful candidates;

- (h) The classification of each of the applicants at each stage of the selection process; and
- (i) The decision not to call in referees.

In the course of his submissions Mr Macdonald QC who appeared with Miss Quinlivan BL for the applicant applied to amend the summons to include at paragraph (g) the individual assessment forms completed at interview and to add a request for the minutes of a meeting on 23 November 2005 at which the Secretary of State considered the application forms and the panel's assessment of them. He also indicated that he did not intend to proceed with the request for documents relating to (a). Mr McCloskey QC who appeared with Mr Maguire B. L. for the respondent did not object to the amendment. I am grateful to both counsel for their helpful submissions.

[2] The legal principles applicable in relation to the determination of a discovery application in a judicial review hearing were not materially in dispute. The respondent relied on three decisions of the Court of Appeal, namely, Re McGuigan's Application (1994) NI 43, Re Rooney's Application (1995) NI 398 and Re Belfast Telegraph Newspapers Application (2001) NICA 20. The court's power to make a discovery order derives from Order 24 Rule 3 but under Rule 9 the court is to refuse to make an order if satisfied (the onus being on the party from whom discovery sought) that discovery is not necessary either for disposing fairly of the matter or for saving costs. In judicial review proceedings discovery is restricted both in respect of the occasions on which it will be ordered and the extent to which discovery is to be made. It is essential to examine carefully the issues which arise in any particular application for judicial review, to ascertain whether discovery is necessary for the resolution of some issue arising in the application. Unless there is some prima facie case for suggesting that the evidence relied on by the deciding authority is in some respects incorrect or inadequate it is improper to allow discovery of documents, the only purpose of which would be to act as a challenge to the accuracy of the affidavit evidence.

[3] It is also agreed that there is a duty of candour on the part of respondent authorities which was most recently described by Lord Walker in Belize Alliance v DOE (2004) UK PC 6 at paragraph 86:

"It is now clear that proceedings for judicial review should not be conducted in the same manner as hard fought commercial litigation. A respondent authority owes a duty to the court to co-operate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been

disclosed) the reasoning behind the decision challenged in the judicial review proceedings."

It is, therefore, apparent that any rule suggesting that discovery is not necessary for disposing fairly of the cause where the applicant is unable to positively identify material which suggests that the respondent has acted improperly in making the impugned decision must be read subject to the obligation of candour. The duty of candour requires that a true and comprehensive account of the way the relevant decision in the case is arrived at is disclosed. (see R(Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA CIV 1409 at paragraph 50)

[4] It is in my view clear from the authorities that the duty of candour arises in relation to facts and reasons which are relevant to the application. This requires the court to identify the issue or issues in respect of which the request for documents arises. The principle criticisms in respect of the appointment of Mr Burrows and Mr McKay are set out in paragraphs 18 to 21 of the applicant's grounding affidavit:

"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 contends that these paragraphs demonstrate that the Secretary of State has not exercised his powers of appointment in order to secure that the membership of the commission is representative of the community in Northern Ireland. He also contends that the appointment of these two individuals gives rise to a real or perceived conflict of interest in relation to the work of the commission.

[5] In a replying affidavit sworn on behalf of the respondent Carol Moore stated that invitations to apply to the commission were placed in all the main newspapers circulating in Northern Ireland and that the Secretary of State wrote to the heads of the four main political parties and the four largest churches. He also wrote to representatives of the Orange Order, the Royal Black Institution and the Apprentice Boys. She described how the

appointment process was designed to be carried out consistently with the guidance issued by the office of the Commissioner for Public Appointments. Upon receipt of the applications the panel members agreed to undertake a sifting task in which particular regard was paid to the circumstances in which candidates had gained their experience and had developed the required competences. A pre-sift was carried out by three NIO officials. As a result of this process the panel identified 24 candidates who should be interviewed. Of these candidates 17 were considered appointable. The Secretary of State was provided with details of all the suitable candidates together with the panel's assessment of them. He had a meeting on 23 November 2005 in which he discussed how best to give effect to the obligation to ensure as far as practicable that the new commission would be representative of the community in Northern Ireland as well as the issue of whether any of the persons to be appointed would find themselves in a conflict of interest situation. The affidavit stated the Secretary of State's view that the candidates selected created a membership for the commission which as far as practicable was representative of the community in Northern Ireland and that each of them would act fairly, objectively and appropriately in carrying out their responsibilities.

[6] The applicant contends that the replying affidavit gives rise to further grounds of challenge relating to the decision to contact Loyal Orders only as part of the community consultation exercise, the introduction of new criteria at the pre-sift stage and the role of the NIO officials thereafter.

[7] For the applicant Mr Macdonald QC contended that the replying affidavit was insufficient in a number of respects:

(a) There was no explanation as to why the only three community leaders contacted were representatives of the Orange Order, the Royal Black institution and the Apprentice Boys. This was relevant to the issue of whether it had already been determined to create a commission in which members would have a perceived conflict of interest.

(b) He submitted that there was no explanation as to why the pre-sift criteria were introduced rather than relying only on the published criteria.

(c) He criticised the failure to identify the NIO officials and the results of their consideration. He submitted that the respondent should have indicated how Mr Burrows and Mr McKay fared in that assessment.

(d) He submitted that the respondent had not disclosed what the application forms of the applicants for the post had contained in respect of potential conflicts of interest. There was no disclosure of the assessment made of any real or potential conflict of interest having regard to their backgrounds.

(e) There was no explanation as to how the Secretary of State resolved issues relating to the obvious conflict of interest and the need to ensure balance.

Accordingly he contended that the applicant was entitled to the discovery sought.

[8] For the respondent Mr McCloskey QC submitted that the context of this application was the obligation imposed upon the Secretary of State by paragraph 2 (3) of schedule 1 to the Public Processions (Northern Ireland) Act 1998 which provides:

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

He submitted that the replying affidavit had fully set out the procedure which the appointments process had followed. Any criticisms of that process could be pursued in the substantive hearing. The task which the statute set for the Secretary of State was one which required an exercise of judgment. The replying affidavit had repeatedly set out how the Secretary of State had exercised that judgment.

[9] I consider that the authorities to which I have referred above impose upon the respondent in a case of this nature the obligation to set out not just the conclusions which he has reached in relation to any issue but also his reasons for coming to that conclusion. Having regard to the matters in issue in this case I consider that the duty of candour attaches to the following matters:

(a) The decision that the only community leaders to be contacted with a view to encouraging their membership to apply for appointment to the parades commission where the loyal orders;

(b) The assessment of the extent to which the appointment of Mr Burrows and Mr McKay gave rise to any real or perceived conflict of interest by either the panel members or the Secretary of State. If the panel members had considered the two individuals unsuitable because of conflict of interest issues they would not have reached the appointable pool;

(c) The judgment, having regard to any such real or perceived conflict of interest, as to whether the membership of the commission was representative of the community in Northern Ireland.

I am satisfied that there has not been disclosure of the reasons for (a), there has not been disclosure of the decision making process including the reasons for (b) and there has not been disclosure of the reasons for (c). I intend to invite the applicant to amend the summons to facilitate an order for discovery of any documents containing or recording the reasons for (a) and (c) and any documents containing or recording the assessment in (b).

I consider that the adoption of the pre-sift criteria has been sufficiently explained within the respondent's affidavit and I further consider that the identification of the NIO officials or the disclosure of their assessments is not necessary for fairly disposing of this matter having regard to the fact that the sifting panel considered all of the relevant material itself.

[10] I now turn to the documents set out in the summons.

(A) The documents in relation to former commissioners are no longer relevant.

(B) Discovery will be ordered of any document recording the decision that the only community leaders to be contacted with a view to encouraging their membership to apply for appointment to the parades commission were the loyal orders or the reasons for that decision. This would fall within the suggested amendment to the summons.

(C) For the reasons given I do not consider that an order should be made in respect of the decision to amend the shortlisting criteria.

(D) I do not consider that discovery of material relating to the pre-sift stage is necessary at this stage.

(E) In my view no case has been made for disclosure generally of the application forms of the successful candidates. I can well see that some of the information in the application forms might become relevant to the issues in respect of which the duty of candour arises. That is an issue to which I can return once this order has been made and disclosure has been achieved. At that stage it will be necessary to consider whether any further disclosure is necessary as well as whether any question of cross examination of deponents is appropriate. I consider that the same applies to the documents at (f), (g) and (h).

(I) I do not consider that the applicant has made a case in relation to the decision not to call in referees.

In relation to the minutes of the meeting of 23 November 2005 the order will require disclosure of any record of the assessment of the extent to which the appointment of Mr Burrows and Mr McKay gave rise to any real or perceived

conflict of interest issues. That also is encompassed in the suggested amendment to the application. I will keep under review whether any further discovery in respect of that meeting should be ordered.