

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

Delivered: 24/3/2006

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY BRENDA DOWNES FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW AND IN THE MATTER OF
THE APPOINTMENT OF AN INTERIM COMMISSIONER FOR VICTIMS
AND SURVIVORS ANNOUNCED ON 24 OCTOBER 2005

HART J

[1] On 24 October 2005 the Secretary for State for Northern Ireland announced that Mrs Bertha McDougall had been appointed as Interim Commissioner for Victims and Survivors of the Troubles. The press release which is exhibited to this application describes Mrs McDougall's background as follows:

"Mrs McDougall is a police widow who lives in Belfast her husband Lindsay a Civil Servant and Part-Time RUC Reservist was shot dead in January 1981 whilst on duty in Belfast.

She is chairman of the victims' group Forgotten Families, which was set up to lobby on behalf of pre-1982 widows. She is also a member of the Phoenix Energy for Children Charitable Trust.

Mrs McDougall was a school teacher and taught in Fenn Street Primary School, Belfast, for many years before a [sic] being seconded to the Education for Mutual Understanding initiative. Laterly [sic] she worked with the Council for the Curriculum Examinations and Assessment.

She is not a member of any political party."

[2] This application is brought by Mrs Brenda Downes and seeks various forms of relief by way of judicial review. Mrs Downes is the widow of John Downes who was killed by a plastic bullet fired by an RUC reserve constable on 12 August 1984. She was left with an 18 month old daughter when her husband died.

[3] At paragraph 10 of her affidavit in support of this application she says:

"I welcome the concept of a Victims' Commissioner and I believe this would be a move towards recognising the impact on the legacy of the troubles. I would expect a Victims' Commissioner to be independent and to a representative for the views of all the victims. I would not have confidence in any one who has any associations with any political party. In addition, such an appointment needs to be fair in order to achieve equality."

And at paragraph 12 and 13 she says:

"The appointment of the interim victims' commissioner came as a shock and a disappointment to me. I only became aware of the appointment through the media and I then discussed it with representatives of RFJ [Relatives for Justice] who were also surprised and disappointed by this appointment. I had not realised that the appointment of an interim victims' commissioner was a possibility at all and I did not know that such an appointment could be made.

It appears to me that this was a political appointment as it does not appear to have cross-community support and was made without any consultation. As a result I do not have confidence in the Interim Victims' Commissioner. From the reports I have seen it appears to me that the interim victims' commissioner could not be seen to be independent or impartial and she appears to be aligned with party politics in Northern Ireland, namely the DUP. Therefore I would not wish to meet with her in her capacity as the Interim Victims Commissioner."

[4] I have had the benefit of extensive written submissions by Mr Treacy QC on behalf of the applicant and Mr McCloskey QC on behalf of the

proposed respondent, the Secretary of State for Northern Ireland. I remind myself that as this is an application for leave to apply for judicial review the applicant has to satisfy the court that there is an arguable ground for judicial review having a realistic prospect of success.

[5] The grounds upon which the relief is sought are set out at paragraph 3 of the Order 53 statement, although those at sub-paragraphs (e) to (k) repeat the basic points made at (c) about the appointment being made without consultation.

[6] The first ground upon which relief is sought is that there is no legal basis for the appointment. The Secretary of State's position is set out in the following extract from a letter to the applicant's solicitors from the Office of the First Minister and Deputy First Minister (OFMDFM) dated 5 January 2006:

"In March 2005, the Secretary of State announced consultation on the next phase of policy in relation to services for Victims and Survivors of the Troubles in Northern Ireland and on the establishment of a Commissioner for Victims and Survivors. The Secretary of State's Ministerial Statement made it clear that a Commissioner would be appointed.

On 11 July 2005, officials met with the Secretary of State to discuss issues relating to the Past including the appointment of a Commissioner. Ministers noted that the process of appointment through the public appointments process would require legislation and it could take up to a year/18 months. Ministers were keen to demonstrate commitment and to build confidence that Government was serious about addressing the needs of Victims and Survivors and given this timetable asked officials to bring forward advice about an appointment of an Interim Commissioner.

Subsequently, in September Ministers agreed to the appointment of an Interim Commissioner for a period of a year while in parallel taking steps to bring forward legislation to establish a Commissioner on a long-term basis. The Interim Commissioner would focus in particular on reviewing arrangements for service delivery and co-ordination of services across departments and agencies, a review of how well current funding arrangements in relation to services

and grants paid to Victims and Survivors groups and individuals are addressing need and consideration of the modalities of establishing a Victims and Survivors Forum."

[7] On behalf of the Secretary of State Mr Mc Closkey contends that the appointment was made under the Prerogative and that there was no legal impediment of any kind to making an interim appointment of this nature. The Interim Commissioner is plainly a non-statutory post and one whose role is to prepare the way for a permanent Commissioner. No statutory or other power has been referred to by Mr Treacy in his written or oral submissions which would suggest that the Secretary of State does not have the power to make an appointment with such a limited and preparatory role prior to the enactment of legislation. In the absence of any authority or principle to which the applicant can point which would suggest that there is an arguable case that the Secretary of State's powers to make such an interim appointment are limited in any way I consider that the applicant has failed to establish an arguable case and I refuse leave in relation to this ground.

[8] At paragraph 3(c) of the Order 53 statement a number of grounds are advanced and I propose at this stage to deal with the points raised at (ii) and (iii) which relate to the need for cross-community support and credibility and actual or perceived independence. There is no evidence whatever to support the suggestion that Mrs McDougall is someone who could not command cross-community support, lacks credibility and is neither, nor can be perceived to be, independent. I have already set out her qualifications as contained in the press release and nowhere does the applicant advance any reasoned argument to say that Mrs McDougall's history renders her unfit for the role to which she has been appointed on an interim basis. It is noteworthy that the applicant refers to the views of only one political representative, Mrs Lewsley MLA of the SDLP. When her press release is examined one finds in it criticism of the manner in which Mrs McDougall was appointed, but no criticism of Mrs McDougall's capacity to perform these tasks. Indeed Mrs Lewsley expressly stated, "The SDLP is not saying that Bertha McDougall cannot do the job" and "finally, the SDLP wishes to stress that this is in no way a complaint against herself, but rather against the procedures followed". The press release went on to state that the SDLP looked forward to working constructively with Mrs McDougall. To mount an arguable case that Mrs McDougall cannot perform the role which she has been given requires more than a bald and unsupported assertion on the part of the applicant which is plainly at variance with the facts. I refuse leave on this ground also.

[9] At 3(d) of the Order 53 statement reference is made to the alleged non-transparency of the appointment and that it was not overseen by the Commissioner for Public Appointments in Northern Ireland. I consider that

there is no evidence to support either of these assertions. As the letter from the Commissioner for Public Appointments for Northern Ireland of 11 January to the applicant's solicitors makes clear, Mrs McDougall's post is a temporary one and outside the remit of the Commissioner. That being the case, and as there is no statutory requirement that the post should be advertised, I can see no basis upon which this ground can be sustained and I refuse leave in respect of it also. A related submission is that this appointment of Mrs McDougall was made for what is alleged to be an improper motive. There is no evidence for this either. Allegations of this sort require more than the assertion of the applicant alone. So far as the choice of Mrs McDougall is concerned, there is nothing whatever to suggest that she is not suited for this position and the Secretary of State has stated the reason for the appointment of an Interim Victims Commissioner in the passage from the letter from OFMDFM cited at [6] above. This is a perfectly rational policy and one which does not provide any support for an argument that the Secretary of State was activated by an improper motive.

[10] The remaining ground upon which the applicant seeks relief is set out in a number of different formulations in the Order 53 statement, but is essentially that advanced at 3(g) as follows:

"The applicant had a legitimate expectation that any appointment to such a post would be subject to advance consultation due to the practice that had arisen of extensive consultation on victims issues generally and the need for a victims' commissioner specifically."

[11] However, the decision had already been made to appoint a Victims' Commissioner and that was part of the decision of the Secretary of State as can be seen from the statement he made to the House on 1 March 2005. It cannot therefore be argued that the applicant had a legitimate expectation of consultation as to the need for a Victims' Commissioner because that has already been determined prior to the appointment of Mrs McDougall as Interim Commissioner. Can it be argued that there was any legitimate expectation of consultation upon the appointment of an Interim Victims Commissioner? There is nothing in the evidence relied upon by the applicant to suggest that she had a legitimate expectation that consultation would take place about the necessity for a preparatory and limited role such as that which is to be carried out by Mrs McDougall. Mr McCloskey relied upon the statement of principle contained in R v Secretary of State, ex parte Emery [1998] 4 All ER at page 374 where Roch LJ stated:

"For a legitimate expectation which has consequences to which effect will be given in public law to arise, the decision-maker must have made some express

promise, undertaking or representation to the person or group of persons who seek to rely upon the legitimate expectation."

In the present case there is no evidence that the Secretary of State or his predecessors have made any promise, undertaking or representation that the applicant relied upon so far as the appointment of an Interim Commissioner concerned.

[12] However, Mr Treacy also relies upon the practice of consultation which has undoubtedly been a feature of the Government's consideration of this difficult issue over a substantial period of time. He referred to R v Devon County Council, ex parte Baker [1995] 1 All ER 73 where it was stated by Simon Brown LJ at p. 89 that:

"The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held to it. The authority is bound by its assurance, whether expressly given by a promise or implied by way of established practice."

He points to the practice of Government of consulting widely on what is undoubtedly an issue on which there are a great many different, and indeed sharply conflicting, views.

[13] It may well be that for the applicant's case to succeed it will be necessary to expand the category of legitimate expectation as it has hitherto been defined, and she may face an uphill struggle in this respect. Nevertheless, the practice of widespread, and indeed repeated, consultation with victims' groups in Northern Ireland is well established. I consider that the applicant has, perhaps only narrowly, surmounted the hurdle required for leave for judicial review and I therefore grant leave in relation to the single ground set forth in the Order 53 statement at 3(g). I refuse leave to apply for judicial review in relation to all the other grounds set forth in the Order 53 statement.

[14] In the Order 53 statement an urgent hearing is requested, however this application was not lodged until three days before the expiry of the three month period provided for in Order 53. Whilst I do not consider it appropriate to refuse the application on the grounds of delay, the absence of consultation point was one that could perfectly well have been formulated in the context of an application made much earlier and I do not consider it

appropriate to give any direction as to the urgency with which this matter should be dealt with, or to grant the interim relief sought.