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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Downes' Application (Brenda) [2009] NICA 26

AN APPLICATION FOR JUDICIAL REVIEW BY BRENDA DOWNES

Before Kerr LCJ, Higgins LJ and Morgan J

KERR LCJ

Introduction

[1] This is an appeal from the judgment of Girvan J whereby he granted judicial review of the decision of the then Secretary of State for Northern Ireland, the Right Honourable Peter Hain MP, appointing Mrs Bertha McDougall as the Interim Victims Commissioner. The lawfulness of the decision to appoint Mrs McDougall was challenged on five separate grounds that are set out in the first paragraph of Girvan J's judgment of 9 November 2006.

[2] The judge made an order declaring that the Secretary of State's appointment of Mrs McDougall was unlawful for the following reasons: -

1. It was in breach of section 76 of the Northern Ireland Act 1998;

2. It was in breach of "the accepted merit norms applicable to public appointments and in breach of the Ministerial Code of Practice [and] in the circumstances the appointment was in breach of the power of appointment under the Royal Prerogative";

3. The appointment was motivated by "an improper political purpose, namely, (so called confidence building) which could not be legitimately pursued at the expense of complying with the proper

norms of public appointments where merit is the overriding consideration"; and

4. It failed to take account of the fact that there was "no evidential basis for concluding that the appointee would command cross-community support".

[3] The Secretary of State has appealed that decision on a number of grounds and a respondent's notice was served under Order 59 of the Rules of the Supreme Court (Northern Ireland) 1980 in which further challenges to certain of the findings of the judge were raised. The respondent was also permitted, somewhat unusually, to include additional grounds in the Order 53 statement before the hearing of the appeal and fresh evidence was adduced by both sides with the leave of the court. In the event, therefore, no fewer than eight separate issues arise on the appeal, although many overlap or are aspects of the same ground of challenge. They may be summarised as follows: -

1. The legal authority (prerogative power) to make appointment (and the manner of the exercise of this power);
2. Whether a relevant factor (cross community support) was taken into account in the decision-making process;
3. Whether there was an improper motive in the making of the appointment;
4. Was there a legitimate expectation of advance consultation before the appointment was made;
5. Did the appointment involve a failure to observe the requirements of section 76 of the Northern Ireland Act 1976;
6. Was the appointment made in bad faith and did it constitute an abuse of power;
7. Was the decision irrational;
8. Whether there was a breach of the duty of candour on the part of the Secretary of State.

The legal authority to make the order

[4] As originally framed, the Order 53 statement asserted that the Secretary of State did not have lawful authority to make the challenged appointment. It was argued before Girvan J that there was no statutory or other legal power to appoint Mrs McDougall as interim commissioner. The judge accepted the argument made on behalf of the Secretary of State that the appointment fell within the realm of governance of the Executive and that such an appointment could therefore be made in the exercise of the Royal Prerogative. He said this at paragraph [39] of his judgment: -

> "I accept Mr McCloskey's argument that this is a matter which belongs to the domain of

> governance. Only the Executive can make an appointment of someone such as the IVC to be funded out of public funds. The appointment to public office of persons who are not civil servants and outwith the ordinary structure of the civil service has been widespread and common over the years and has been unquestioned. Mr Treacy has not persuaded me that no such power exists."

[5] That finding was not challenged by the respondent on the hearing of the appeal and we do not propose to say anything further on the question, therefore. The burden of the challenge made to the lawfulness of the appointment focussed on the manner in which it had been made, rather than the source of the power to make it. This had several aspects which we will consider in turn.

Constraints on the exercise of the Royal Prerogative

[6] In paragraphs [40] to [44] of his judgment Girvan J examined the restrictions on the exercise of the prerogative that occur through operation of law and those that can be imposed, for instance, by the enactment of legislation. Mr McCloskey QC (who appeared with Mr Maguire QC for the appellant) described this excursus as impermissible because it lay outside "the boundaries of the authorised ground of challenge". While there may have been some merit in this argument based on the Order 53 statement as originally framed, we consider that the amended grounds that appear in paragraphs 3 (f) to (h) are sufficiently widely drawn to accommodate a challenge to the use of the prerogative in this instance.

[7] Discussing the theoretical constraints that apply to the use of prerogative powers by government ministers, the judge said this at paragraph [41] of his judgment: -

> "The principles of non-discriminatory appointments and the leaving out of account of political opinion, religion, sex and other characteristics which are now the subject of anti-discrimination law are so soundly established that they have come to represent norms that must inform public appointments and which do in fact inform public appointments having regard to the various codes referred to. Paragraph 2.6 of the Ministerial Code makes clear that Ministers must appoint persons to be considered to be the best qualified for the position. Ministers are required to have regard to public accountability,

> requirements of the law and the Commissioner's Code relating to public appointments. Merit, independence, scrutiny, openness and transparency are among the overriding principles to which the Executive is wedded under the Codes. By wedding itself to these principles and by its practices the Executive effectively has qualified the otherwise arbitrary width of the powers of appointment to public office. The Crown may by its disuse of powers show an abandonment of a particular prerogative power. Likewise I consider that the Crown may in appropriate cases by its words and conduct make it clear that it will restrict its otherwise arbitrary powers for the future and exercise those powers subject to certain clear principles of restraint."

[8] The ministerial code to which the judge referred in this passage was the *Code of Ethics and Procedural Guidance for Ministers* issued by the Cabinet Office in July 2005. Paragraph 2.6 of this Code provides: -

> "… public (non-Civil Service) appointments are the responsibility of the Minister concerned, who should appoint the person(s) he or she considers to be best qualified for the position. In doing so, the Minister should have regard to public accountability, the requirements of the law and to *The Commissioner for Public Appointments' Code of Practice for Ministerial Appointments to Public Bodies*. The process by which such appointments are made should conform to the principles in the Code - Ministerial responsibility, merit, independent scrutiny, equal opportunities, probity, openness and transparency, and proportionality - and to the procedures set out in detail in the Code."

[9] Two Codes of Practice for Ministerial Appointments to Public Bodies were established by the Commissioners for Public Appointments in Northern Ireland and Great Britain and published in August 2005. Neither applies directly to the appointment in question in these proceedings. As Mr McCloskey pointed out, under the Commissioner for Public Appointments (Northern Ireland) Order 1995, as amended by the Commissioner for Public Appointments (Amendment) Order (Northern Ireland) 2001, the Commissioner exercises a statutory jurisdiction over certain defined public appointments but this was not one of them. Likewise the equivalent Order in England and Wales, the Public Appointments Order in Council 2002, did not

cover the appointment of Mrs McDougall as it did not come within the definition of public body in article 1 (1) of the Order which specifies those bodies listed in the Schedule or any body which a minister in the Cabinet Office, by instrument in writing, specifies as a public body for the purposes of the Order as being the bodies over which the Commissioner has jurisdiction. This post is not among those included in the Schedule nor has it been specified by a minister in the manner stipulated.

[10] It is clear, however, that the Ministerial Code enjoins ministers to have regard to the Commissioner's Code in making such an appointment. One of the principles enshrined in the latter Code is that "all public appointments should be governed by the overriding principle of selection based on merit, by the well-informed choice of individuals who, through their abilities, experience and qualities, match the needs of the public body in question." Paragraph 2.4 of the Code provides that appointment on merit should be the overriding principle within the appointments process and that, although criteria for selection may take account of the need to appoint boards which include a balance of skills and experience, departments must guard against positive discrimination and political activity should not be used as a criterion for selection, unless there was a statutory requirement to do so. It was therefore argued by the respondent that the minister was in effect required to make the appointment to this position by selecting the most meritorious candidate and eschewing any political consideration.

[11] Mr McCloskey countered this argument by suggesting that the merit principle had no freestanding existence as a principle of law. This principle did not apply to the appointment of Mrs McDougall. But even if the Code applied to her appointment, he submitted that it had been complied with in the appointment process. Merit principle in the context of the Code meant the selection of a person with suitable qualities to fill the post. It did not require that the most qualified person, identified as such after a competitive process, be appointed. Ministerial discretion and choice were not eliminated by the terms of the Code.

[12] It appears to us to be clear that the Secretary of State, in making this appointment, was *not bound to comply with* the terms of the Code of Practice but it is equally clear that he was obliged to take the requirements of the Code into account in deciding whether to make the appointment. To this extent, therefore, there was a constraint on the exercise of the Royal Prerogative in this instance. The nature of the constraint is an issue on which debate may be had but its existence, in our opinion, is indisputable. We consider that the minister was required to have regard to the terms of the Code before he made the appointment and should at least have sought to comply with them.

[13] In advancing the argument that the exercise of the Royal Prerogative by the minister on this occasion was not constrained by the terms of the

ministerial code (or, indeed, by anything else), Mr McCloskey referred us to its genesis. Its origins can be traced to a document entitled, "Questions of Procedure for Ministers" issued by the then Prime Minister, the Rt Hon Clement Atlee MP, to all incoming Ministers, in 1945. It has undergone various amendments and modifications since then. The latest of these was in 1997 when it was issued in its present form. Mr McCloskey characterised the code as "personal guidance issued by the Prime Minister to … Ministers on how he expects them to act and arrange their affairs with a view to upholding high standards of public life in undertaking their official duties". He pointed out that it was a non-statutory instrument. It was not, he said, a rule book. Rather, it had the character of guidance to ministers on certain aspects of ministerial practice and conduct and it outlined how ministers were expected to discharge their responsibilities to Parliament. On that account, counsel argued that the ministerial code could not operate to attenuate the prerogative power of appointment to public office.

[14] This argument appears to us to confuse dilution of the power with the manner in which it is to be exercised. The extent of the power remains unchanged by the requirement that the minister should observe certain standards in exercising it. No circumscription of its ambit is contemplated by the agreement of ministers to subscribe to the precepts that the Code enjoins them to observe. It is well settled that the exercise of prerogative power is subject to judicial review on established principles – see, for instance, *R (on the application of Bancoult) v Secretary of State For Foreign and Commonwealth Affairs* [2008] UKHL 61 (a case involving prerogative legislation). The failure to take account of relevant considerations is obviously one of these. In this case we are satisfied that the minister was obliged to have regard to the requirements of the Code in deciding whether to make the appointment. What remains to be discussed on this question, however, is the manner in which the minister was required to take it into account and whether in fact he did so.

[15] On the requirement to make appointments on merit both Codes use broadly similar language. They provide that: -

> "• the overriding principle remains appointment on merit and no candidate can be recommended to ministers unless they have been judged as suitable against the established selection criteria;
>
> • ministers will wish to balance boards in terms of diversity of skills and experience as set out in the role description and person specification at the commencement of the process;
>
> • under **no** circumstances, however, should a candidate who has been judged unsuitable for an

appointment be recommended in order to achieve that balance on a board."

[16] We do not consider that this inevitably requires a strict merit ranking order. Rather, these passages suggest that a broader judgment is available to the appointing minister to choose an appointee who satisfies the established selection criteria without necessarily scoring highest in the application of those criteria. Thus, a number of candidates may be deemed to have surmounted the selection criteria hurdle and can all be presented to the minister as appointable contenders. He may then have recourse to the considerations set out in the second bullet point above. In the Northern Irish context, this is especially important. We consider that the Secretary of State must have the opportunity in appropriate circumstances to choose an appointable candidate who might not be, in strict merit order terms, the most able but who is sufficiently competent to fulfil the role and whose appointment is believed to best achieve other desirable objectives such as balancing boards in terms of diversity of skills and experience.

[17] These considerations may also legitimately be present in the mind of a minister making an appointment which is not subject to the Public Appointments Code but to whose provisions he is required to have regard. Put simply, he may – and should – take into account that this Code does not demand that the best candidate must inevitably be appointed. Girvan J (in paragraph [41] of his judgment, quoted above) concluded that the minister was obliged to appoint the person identified as the best. We cannot agree with that conclusion. But while the Secretary of State may bear in mind that the Code does not require that the best possible candidate must invariably be identified and appointed, it clearly contemplates that this will take place unless the countervailing factors of balancing boards in order to achieve diversity of skills and experience obtain. We do not consider that these are the only grounds on which the Secretary of State may choose a candidate who has not been shown to be the best but it is at least relevant to his consideration of the Code of Practice that its central imperative appears to be that the best candidate should be chosen unless it is necessary to select a suitably qualified candidate other than the best in order to achieve a balance of suitably skilled and experienced members of a particular board.

The background to the appointment

[18] The Belfast Agreement of April 1988, commonly known as 'the Good Friday Agreement' recognised the need to acknowledge the suffering of victims as a necessary element of reconciliation. A report prepared by Sir Kenneth Bloomfield, *"We will remember them"* led to the creation of a Victims Liaison Unit. It was to take forward work on how the anguish of victims might be recognised. A Victims Unit was also established within the office of the First and deputy First Ministers (OFMDFM). In August 2001 a

consultation paper on a victims strategy was published which set out the Northern Ireland Executive's commitment to put in place during 2001/2 a cross departmental strategy to meet the needs of victims. The consultation paper prompted 117 responses. In August 2003 the Minister with responsibility for victims published a leaflet which was designed to "pave the way for the next phase of the victims' policy". In March 2005 another consultation paper was published which dealt with the next stage of the victims' strategy and announced that a Commissioner for Victims and Survivors would be appointed. No mention was made of the appointment of an interim commissioner. During the consultation period which followed 80 responses were received.

[19] On 11 July 2005 officials met the Secretary of State to discuss the appointment of a Commissioner. At that meeting it was noted that legislation to establish this post might take between 12 and 18 months. According to an affidavit from the head of the Victims Unit in OFMDFM, John Clarke, the Secretary of State indicated that he was keen to demonstrate commitment and to build confidence that government was serious about addressing the needs of victims and survivors and asked officials to give consideration to the appointment of an Interim Commissioner. Subsequently, in September 2005 the Secretary of State decided in principle to appoint an interim commissioner for a period of a year while at the same time bringing forward the legislation for a permanent appointment. The avowed intention was that the IVC would focus on reviewing arrangements for services across departments and agencies, current funding arrangements for services and grants paid to victims and survivors groups and would consider how a victims and survivors forum might be established. It was considered that this work could be usefully carried out in advance of a permanent appointment.

[20] Sir Nigel Hamilton, who was then the head of the Northern Ireland Civil Service, provided an affidavit on 12 June 2006 which expanded on the background to the appointment of the interim commissioner that had already been given by Mr Clarke. Sir Nigel confirmed that that the central reason for making the appointment of an IVC was to demonstrate government's commitment in relation to victims and survivors. The Secretary of State did not wish to have to wait 12 to 18 months before a permanent appointment could be made. According to Sir Nigel, in reaching that view the Secretary of State made a judgment as to which course of action would best serve the public interest. He was also alive to the fact that the issue "was important in raising the confidence of Unionists in relation to the wider political process".

[21] Sir Nigel explained that it had been decided that the appointment should be made promptly since, otherwise, the momentum that it was designed to stimulate would be lost. On that account, he said, a full formal appointment process was deemed unnecessary, although it was acknowledged that this would have been more transparent. In a confidential memorandum to the

Secretary of State, Mr Clarke had described the criteria which the successful appointee "would" be expected to fulfil. In his affidavit, Sir Nigel stated that the appointee "should" meet these requirements and Girvan J appears to have attached some significance to the use of the different terminology. We do not consider that this is of substantial importance.

[22] It was expected that the appointee would or should: -

> "i. have an established record in dealing with conflict situations either within Northern Ireland or elsewhere;
>
> ii. have the capacity and interpersonal skills to work with the diverse range of groups and organisations in the victims sector;
>
> iii. have the necessary analytical skills to organise and prepare a report on his or her findings and be able to
>
> iv. command cross community support."

[23] It had initially been considered that the person to be appointed should have an academic or professional background but, according to Sir Nigel, the Secretary of State did not consider that this was required. At first it was proposed that a list of potential candidates be drawn up which would then be the subject of soundings with local political parties and the Secretary of State approved this approach. A list of candidates was accordingly drawn up consisting of 16 names. It included one name that had been put forward by the Democratic Unionist Party (DUP) but that person almost immediately signalled that he or she did not wish to be considered. The DUP then provided Mrs McDougall's name. Sir Nigel selected two candidates whose names should be forwarded to the Secretary of State for discussion. One was Mrs McDougall. In a 'Note for the Record' that Sir Nigel prepared at about this time, he stated: -

> "Following my personal consideration of each candidate, I was of the view that the following two candidates met all the criteria and would be, by far, the strongest in respect of those criteria *i.e.* [Mr X] and Mrs Bertha McDougall.
>
> I had also discussed with NIO/OFMDFM colleagues the possibility that if Mrs McDougall was appointed [Mr X] might be approached to see if he would be available on a part-time basis to

> offer advice on the trauma issues, particularly since that is required under the terms of reference of the Interim Commissioner.
>
> Following discussion with the Secretary of State, Jonathan Phillips and I met with Mrs McDougall to explore her availability. During this discussion, she was at pains to point out that she is not, never has been, a member of any political party (including the DUP) and sees the need for the Commissioner to be seen as independent of any such political affiliation. I subsequently advised the Secretary of State that in our view Mrs McDougall had the range of experience, knowledge and ability to undertake this role satisfactorily. I also advised that while her associations with RUC widows and trusteeship of the RUC GC Foundation would mean that her appointment might attract some criticism from Nationalists, we were of the view that her personal dispositions seemed to us likely to enable her to handle such criticism sensitively."

[24] Sir Nigel averred that his recommendation was based exclusively on Mrs McDougall's personal merits. Merit was, he said, the sole criterion applied. The Secretary of State had known that her name had been "fed into the process" by the DUP and that, in considering the appointment, the Secretary of State was "mindful" of that fact. It transpired that the choice of the word 'mindful' had been suggested by senior counsel for the Secretary of State, replacing the originally proposed formulation of 'the Secretary of State had in mind'. The statement that merit was the only criterion had also been suggested by senior counsel. In a report on the case subsequently prepared by Peter Scott QC, he expressed the view that neither phrase was entirely apt to describe a factor which had in fact influenced the Secretary of State's decision, but neither the original nor the modified version was intended to be deliberately evasive or ambiguous.

[25] Although it is not strictly germane to the issues that we must decide, we should record our agreement with these views. Indeed, use of the phrase, 'merit was the only criterion' was self evidently inapt since a number of criteria had been identified which the successful candidate was expected to be able to fulfil. Sir Nigel had referred to those in his affidavit and we are satisfied that the statement, 'merit was the only criterion' must be understood against that background. From a consideration of all the material, including Mr Scott's report, it appears to us that a better and more accurate way of reflecting the actual process would have been to say that merit, in the sense of

satisfying the criteria deemed to be necessary, was the sole standard applied. The use of the formulation suggested by senior counsel contributed to the trial judge's view that Sir Nigel had been less than candid in his affidavit. With the benefit of the Scott report, this conclusion may be considered to be no longer warranted, although the appellant has not expressly sought to challenge the judge's findings on the lack of candour arguments. We shall return to this subject later in this judgment.

[26] On the requirement that the candidate should command cross community support, Sir Nigel said this: -

> "23. … one of the criteria for the appointment of an [IVC] related to the ability of the person appointed to enjoy cross community support. In the context of the appointment process for the [IVC], this criterion was viewed by me as one which was not simple to satisfy as it was clear that it would be difficult to find a person who would be acceptable to all sides of the community. Part of the reason for this was that the victims issue has tended to create divisions of opinion which mirror those of society itself and that a person who might be acceptable to one side might not be so to the other or to other elements of society. Consequently this issue had to be approached by scrutinising carefully the individual and making a considered judgment of degree.
>
> 24. In the case of Mrs McDougall, while I acknowledged in my submission to the Secretary of State at the end of the process that her appointment might be the subject of criticism by nationalists, I was satisfied that she was an individual who had the qualities to secure sufficient cross community support and acceptance.
>
> 25. When I spoke with her on 4 October 2005 she outlined her experience in the education sector and made it clear that she had personally been involved in the development of education for mutual understanding in schools which I knew, from my previous role as Permanent Secretary in the Department of Education, involved significant elements concerned with the understanding of divisions in society and the need to recognise and

accommodate different cultural traditions and backgrounds.

26. In my discussions with Mrs McDougall she also represented to me that:

- she had self-belief and conviction in her approach to issues relating to victims;
- she had not, or never had been, a member of any political party (including the DUP);
- she saw the need for the Interim Commissioner to be independent of any political group;
- she was quite prepared to meet with representatives of all political parties and those from a very broad constituency who would seek to lobby her.

I was satisfied about her attributes and intentions in each of these reports.

27. I was also impressed by the fact that Mrs McDougall, having herself been a victim following the tragic loss of her husband many years ago, had a personal empathy with, and understanding of, the very difficult and sensitive issues surrounding victims generally, from all quarters.

28. In these circumstances, the judgment of Mr Phillips and me who had met Mrs McDougall on 4 October 2005 was that she was a person who had demonstrated that she could cross the community divide and have sufficient appeal to all sections of the community and that in addition she had considerable personal qualities, together with a constructive outlook and relevant background and experience.

29. The Secretary of State in considering the appointment of Mrs McDougall on the basis of the submission made to him was also of the same view.

30. It is therefore incorrect to say that the issue of cross community support was not considered. Rather, this factor was actively and carefully

> considered and, in the view of the Secretary of State and the two senior officials involved in speaking with Mrs McDougall, it was adjudged, having regard to her track record and general approach, that she would be able to establish credibility and sufficient acceptance across the communities."

[27] An application was made on behalf of the respondent to cross examine Sir Nigel Hamilton and Girvan J acceded to that application. An appeal was lodged against the judge's order but before that could be heard, Sir Jonathan Phillips provided an affidavit. He was then the political director of the Northern Ireland Office. He is now the permanent secretary. In introductory remarks, setting the background to his affidavit, Sir Jonathan explained that while his officials were preparing instructions to deal with a request for discovery by the respondent's solicitors, it became apparent to him that "there were certain aspects of the background to the impugned appointment of which [Sir Nigel] Hamilton may not have had personal knowledge". Sir Nigel had not been directly involved in the events which led to the inclusion of Mrs. McDougall's name in the list of candidates. There were what Sir Jonathan described as "certain political aspects" of the background to the impugned appointment in which he and his staff were directly engaged but which did not involve Sir Nigel. A recurring theme of exchanges between the Secretary of State and political parties was the request by the latter that the government should implement certain 'confidence-building measures'. An example of this was the repeated request by the DUP from mid-2004 for the appointment of a Victims' Commissioner.

[28] Sir Jonathan Phillips explained that, following elections for the Northern Ireland Assembly in 2003, government ministers began a process of trying to engage all the political parties, including the DUP, in dialogue aimed at restoring devolved government to Northern Ireland. In late 2004, there were intensive discussions with the Northern Ireland political parties, particularly the DUP and Sinn Fein. In the course of these discussions the parties made various requests and proposals. It is clear that the government was anxious to bring the DUP 'on board' and on account of its interest in the subject, the DUP was informed of the Secretary of State's intention, in principle to create a post of Victims Commissioner. This, it seems to us, set the background for the appointment of Mrs McDougall.

[29] After Mr Hain succeeded the Rt Hon Paul Murphy as Secretary of State for Northern Ireland in May 2005, he was anxious to draw all the parties into the political process. In the case of the DUP, he wanted to see what could be done to build confidence that the concerns of the Unionist community, of which that party was the majority political representative, were being met. Mr Hain believed that the appointment of an IVC would assist this process

and Sir Jonathan explained that this was a factor that the Secretary of State had in mind throughout the appointment process.

[30] It is clear that the Secretary of State was receiving advice from OFMDFM *and* NIO at the critical time leading up to the appointment. Sir Jonathan refers to this in his affidavit as "parallel advice". The focus of the advice from OFMDFM was on the various options for the appointment procedure, whereas NIO was concentrating on "the legacy of the past", by which one might understand that its principal concern was how to overcome that legacy and to encourage the parties towards an agreed form of devolved government. This, then, was the setting in which the decision was taken to opt for the appointment of an IVC without any formal procedures. It is clear that a conscious decision was made not to take soundings from political parties generally, although that had been mooted earlier. Instead, the Secretary of State gave instructions that DUP should be invited to nominate a candidate which they duly did.

[31] Sir Jonathan Phillips asserted that, although the influence that Mrs McDougall's appointment might have on the stance of the DUP was a factor in her selection, this was not the only consideration that motivated the Secretary of State to appoint her. He was, said Sir Jonathan, of the clear view that her considerable personal qualities, constructive outlook and relevant background and experience made her a strong candidate in her own right. Sir Jonathan's first affidavit contains an interesting sentence in its final paragraph. He said, "throughout the events described … successive Northern Ireland Secretaries of State made a series of political judgments about what they adjudged to be in the public interest of the population of Northern Ireland at various times". It is quite clear from this statement (notwithstanding its somewhat Delphic nature) and from Sir Jonathan's description of the events leading up to the appointment that political considerations played a noteworthy part in the choice of Mrs McDougall.

[32] It is also clear that, in the delicate choreography of events that has been such a feature of recent political negotiations in Northern Ireland, it was deemed unwise to reveal the full extent of the exchanges that had taken place between the Secretary of State and the DUP. There can now be no doubt that those exchanges and the appointment of their nominee were designed to influence the DUP to become more involved in the discussions that would lead to a political settlement. The question which arises is whether these considerations invalidated the appointment for the reasons found by Girvan J.

[33] Before addressing that question, however, we can deal briefly with the anterior issue of whether the Secretary of State had regard to the requirements of the Commissioner's Code in deciding whether to make the appointment. As we have held (at paragraphs [10] – [12] above), the Secretary of State was bound to take the provisions of the Code into account. He was not required

to adhere to them but it was necessary that he bear in mind that, while the Code does not require that the best possible candidate must invariably be appointed, it clearly contemplates that this will take place unless other legitimate factors prevail. We consider that all the available evidence points unmistakably to the conclusion that the Secretary of State did not have regard to the provisions of the Code at any time during his deliberations. On that account, his decision to appoint Mrs McDougall cannot be allowed to stand.

Cross community support

[34] The challenge under this heading was formulated in the Order 53 statement in this way: -

> "In making the appointment the Secretary of State failed to take account of a relevant consideration namely that there was no evidence that the appointee would command cross-community support."

[35] The origin of this particular challenge was the criterion that the appointee would or should command community support. As expressed in the appointment criteria, this particular requirement did not stipulate that the appointee should be able to command that support at the time of her appointment. Indeed, as Sir Nigel Hamilton observed in his affidavit, such a requirement would not be easy to fulfil. There must be few individuals in Northern Ireland who, at the moment of appointment to such a post, would instantly command the support of the various sections of the community. Girvan J held, however, that the effect of the criterion was to require "the appointer … to consider whether the person proposed to be appointed would have support across the community". This implies that the person appointed would be able to command cross community support at the moment of appointment. Such a criterion would in our judgment set an ambitious – if not indeed unachievable – objective.

[36] It appears to us that what was required of the Secretary of State in this context was that he give proper consideration (in the sense of considering all relevant factors and disregarding irrelevant matters) to the question whether Mrs McDougall was capable of commanding cross-community support. This included, in our view, the capacity to win such support even if it was not present at the time of her appointment. The averments of Sir Nigel Hamilton on this issue are of critical importance. These have been set out in paragraph [25] above.

[37] From these averments, it is quite clear that Mrs McDougall's ability to command community support was assessed on a prospective rather than an existing basis. In our opinion, this was the only realistic basis on which it

could be judged. Girvan J adopted a different approach to the question, however, for he said at paragraph [53]: -

> "In his note to the Secretary of State and Angela Smyth MP under 'presentational issues' Mr Hamilton recorded that the appointment of Mrs McDougall would be warmly welcomed within the Unionist community particularly by the DUP but was likely to be criticised by the Nationalist community particularly by Sinn Fein. This was tantamount to saying that the appointment was going to be divisive. It is difficulty to understand how it could sensibly be said that the candidate to be nominated "would command cross-community support" unless the decision maker was reinterpreting that phrase to mean something different from its obvious meaning."

[38] We are unable to agree with this analysis. It does not appear to us that the unsurprising forecast that Mrs McDougall's appointment would be welcomed by the Unionist community and criticised by the Nationalist community can be regarded as an acknowledgment that the appointment would be divisive. This particular passage from Sir Nigel's submission to the ministers must not be isolated from its overall context. This surely is that, while Mrs McDougall's appointment would not command universal acclaim initially, because of her personal qualities, she had the potential to overcome early opposition. And, indeed, it appears that she achieved that. As a matter of history, it is now clear that Mrs McDougall engaged with a wide spectrum of community groups during her time as Interim Commissioner, with apparent success and widespread acceptance by those with whom she was in contact.

[39] Girvan J was further critical of the statements in paragraph 23 of the affidavit. At paragraph [54] of his judgment he said: -

> "… Criterion (iv) (cross community support) was not to be conflated with Criterion (ii) (inter personal skills). In paragraph 23 Mr Hamilton shows that the decision makers were concentrating on the individual's qualities without a proper additional focus on the wider community perception or the likelihood of the nominee receiving cross-community support in reality."

[40] This approach fails to recognise the relevance of Mrs McDougall's personal qualities to an assessment as to whether she would – in time – be

able to command cross-community support. It was precisely because she was considered to have inter-personal skills (as well as other attributes) that it was concluded that she would be able to command the necessary acceptance throughout the community. The "individual's qualities" were not to be left out of account in deciding whether she would command that support. On the contrary, they were centrally relevant to that issue.

[41] The same approach to this question (*i.e.* that the appointee would have to instantly deliver cross-community support at the moment of appointment) is also apparent from the later passages of paragraph [54] of the judgment: -

> "This [the concentration on personal attributes at the expense of focus on the likelihood of support] is borne out in paragraph 24 where Mr Hamilton acknowledged that the appointment "might be subject to criticism". Here Mr Hamilton has subtly changed the words "is likely to be criticised by Nationalists" to the seemingly more attenuated words "might be the subject of criticism." This is an example of the shifting use of language in the affidavit. He goes on to say "I was satisfied she was an individual who had the *qualities* to secure *sufficient* cross-community support and acceptance." Here the deponent is concentrating on personal qualities and leaving out of account the question whether she would *actually* generate cross-community support. The introduction of the word "*sufficient*" is also of significance since it appears to have been an intentional watering-down of the criterion to something below the straightforward concept of "cross-community support" plain and simple. In paragraph 30 the deponent concluded that having regard to her track record and general approach she "would be able to establish credibility and sufficient acceptance across the communities." The question in this criterion was not whether she *would* establish credibility (which might incidentally be referring to a process taking time) but whether on her appointment she could command cross-community support. The use of the words "sufficient acceptance" (the deponent now dropping the word "support" altogether) points to something substantially less clear cut than actual support."

[42] We cannot, with respect, agree with the judge's suggestion that Sir Nigel was deliberately diluting the effect of the criterion or that he had 'subtly' changed the language describing the anticipated opposition from nationalists, if by that the judge meant to convey that Sir Nigel was attempting to mislead. It is to be remembered that the submission to ministers in which the words 'likely to be criticised by Nationalists' appeared had been exhibited to Sir Nigel's affidavit. If he had wished to mislead, it seems to us highly unlikely that he would have openly provided the material on which the contrast could be made.

[43] It is, in any event, entirely clear from this passage of the judgment that the judge had concluded that this particular criterion could only be fulfilled if, at the time of her appointment, Mrs McDougall commanded cross-community support. For the reasons that we have given, we do not agree with that conclusion. The actual criterion stipulates that the appointee should "*be able to* command cross community support". It was not required – nor could it realistically be expected – that she would command cross community support instantly. In our judgment, this issue was correctly considered by the Secretary of State and by those advising him. We consider that there was ample evidence that Mrs McDougall could, in due course, command cross-community support. There was therefore sufficient foundation for the conclusions of Sir Nigel Hamilton and Sir Jonathan Phillips to that effect and, consequently, adequate material on which the Secretary of State could conclude that the criterion was fulfilled. We reject the respondent's argument on this ground.

Improper motive

[44] The motive in appointing Mrs McDougall which the respondent claims was improper was that of responding to a demand for confidence building measures by DUP. It was submitted by the appellant that it was incumbent on the respondent to show that this was in fact a consideration that actuated the Secretary of State. We are satisfied that this has been demonstrated. As we said in paragraph [31] above, the appointment of Mrs McDougall was clearly designed to influence the DUP to become more involved in discussions that might lead to a political settlement. While there may be a subtle distinction to be drawn between responding to a demand for confidence building and seeking to persuade a political party to become more closely involved in negotiations, this is of no significance in the present debate. What is clear is that Mrs McDougall was not appointed solely on the basis of her ability to do the job.

[45] It would appear that this was the reason that Girvan J decided that the Secretary of State had acted from an improper motive. He concluded that, since only the best candidate (established after a correctly conducted competition) could properly be appointed, allowing political considerations

(which were by definition extraneous to that exercise) to intrude inevitably rendered the appointment process invalid.

[46] At paragraph [51] the judge said: -

> "On the issue whether the Secretary of State made the appointment for an improper motive (namely for political purposes in response to a demand for confidence building measures by the DUP) the conclusion is reached that the Secretary of State was motivated by political considerations to decide not to carry out a proper procedure to identify the best candidate. This leads to the conclusion that he acted for an improper motive."

[47] The essential underpinning of this conclusion is that the Secretary of State was obliged to carry out an appointments exercise which had as its exclusive purpose the identification of the best candidate in terms of strict merit. For the reasons that we have given, we do not agree with that view. It was open to the Secretary of State to undertake an exercise which would select a number of candidates who would fulfil the appointment criteria and who were, on that account, appointable. He could then have – quite legitimately – allowed other considerations to influence his choice, *provided* he had regard to the central imperative of the Code that appointment should be based solely on merit, unless there were reasons such as have been adumbrated in the Code to warrant a departure from that principle.

[48] We wish to be clear about the nature of the Secretary of State's obligation here. It was to *have regard to* the Code's requirements. One of these was that appointment should, if possible, be on merit. The Code itself recognised, however, that in certain circumstances, absolute merit order did not inevitably and invariably dictate the choice of candidate. Where it was necessary to balance boards, an appointable candidate could be chosen although not the absolute best. Even if the Code had bound the Secretary of State, therefore, this exceptional dispensation would have been available to him. This was an aspect of the Code that the Secretary of State should have been conscious of while complying with his duty to have regard to it. In simple terms, in choosing to make an appointment that was not necessarily in strict order of merit, the Secretary of State was entitled to take into account that the Code permitted exceptions to be made, albeit in limited circumstances. He was not, of course, bound to confine himself to those circumstances since he was not bound to comply with the terms of the Code. He could appoint a person who was not necessarily the best candidate for reasons other than the balancing of boards. But the fact that, even within the strict terms of the Code, a departure from the strict merit principle was possible would have been relevant when the Secretary of State came to

contemplate a departure from that principle in a context where the Code did not apply.

[49] Of course, for such an exercise to be legitimate, it must be authentic. An appointments competition must not be a masquerade for the choice of a candidate whose selection does not depend on her ability to do the job but solely for the effect that it will have on those whom the appointing body wishes to influence. But the various factors that may lead to the selection of a particular candidate cannot be consigned to hermetically sealed compartments. The decision to appoint someone who is able to do the job can co-exist with a selection that is designed to advance another aim. Provided the wish to appoint in order to secure a political advantage is not allowed to predominate over the need to choose a meritorious candidate, there is nothing objectionable in choosing a candidate whose selection will, incidentally, achieve a desired political objective.

[50] We do not consider that it has been established that this appointment process was a masquerade. It is clear that the Secretary of State had a political objective in mind when he chose Mrs McDougall. But it has not been shown that this was allowed to prevail over the need to ensure that she was a candidate who could fulfil the criteria and was appointable. The Secretary of State was not obliged to set up an appointments process whose sole purpose was to identify the best possible candidate. He was entitled to choose someone who was fit for the job but whose appointment would also assist in persuading the DUP to re-engage in the discussions that would lead to a political settlement. We do not consider, therefore, that the intention of the Secretary of State that this objective be assisted by the appointment of Mrs McDougall constituted an improper motive.

Legitimate expectation of advance consultation

[51] The learned judge rejected the claim that there was a legitimate expectation on the part of the respondent that there should be consultation about the appointment of an Interim Victims Commissioner. We consider that he was correct to do so. There had been an extensive consultation exercise in relation to the question of whether a victims commissioner should be established. But no consultation had been proposed – much less promised – in relation to the appointment of an interim commissioner. This ground of challenge is clearly not viable.

Section 76

[52] Section 76 of the Northern Ireland Act 1998 provides: -

> "(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".

[53] Much of Girvan J's discussion of the effect of this provision centred on the question whether a claimed breach of the section was justiciable by way of judicial review challenge. For reasons that we will give presently, we do not consider it necessary to embark on an elaborate examination of that issue. As the judge pointed out, in *Re Duffy's application* [2006] NIQB 31, Morgan J held that a public law duty enforceable by judicial review arose under section 76 (1) and this court in the appeal from that decision tentatively expressed agreement with it – see [2006] NICA 28 (1) at paragraph [22].

[54] Girvan J's conclusion that there had been a breach of section 76 was linked to his decision that the Secretary of State has acted from an improper motive. At paragraph [51] of his judgment he said: -

> "On the issue whether the Secretary of State made the appointment for an improper motive (namely for political purposes in response to a demand for confidence building measures by the DUP) the conclusion is reached that the Secretary of State was motivated by political considerations to decide not to carry out a proper procedure to identify the best candidate. This leads to the conclusion that he acted for an improper motive. The political consideration which the Secretary of State considered trumped the need to make the appointment fairly having regard to the proper understanding of the merit principle could not justify committing an act of discrimination rendered unlawful under Section 76. Even apart from Section 76 the appointment would have been

in fundamental breach of all the relevant Codes relating to the making of public appointments."

[55] But the argument that there was a breach of the section does not necessarily depend on the appointment having been made for an improper motive (in the sense of it being for a reason that may not lawfully be taken into account). It is possible for a decision to be taken having regard to relevant factors which is nevertheless impermissibly discriminatory in section 76 terms. Whether the Secretary of State's decision fell foul of section 76 requires to be carefully considered, however, with particular regard to the setting in which it was made.

[56] The question whether discrimination under section 76 has taken place must focus not only on whether it has been shown that a person or class of persons has been discriminated against but also on the nature of the act alleged to constitute discrimination. As to the first of these, Lord Hoffmann said in *Regina –v- Secretary of State for Work and Pensions, ex parte Carson and Reynolds* [2005] UKHL 37, "Discrimination means a failure to treat like cases alike. There is obviously no discrimination when the cases are relevantly different …" To like effect is Lord Nicholls' comment in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2002] NI 174 that whether discrimination has been established is ultimately to be determined by asking if the claimant received less favourable treatment than others.

[57] Whether discrimination has occurred is conventionally addressed by examining the treatment that an actual comparator received or that which a notional comparator would have been accorded and relating this to the treatment meted out to the person alleging discrimination. In this case, Girvan J did not explicitly identify a comparator, although one may suppose that he had in mind the political parties other than the DUP who were not consulted about possible nominees for the post. But here one must concentrate on the act of discrimination alleged. It appears to us that the actual discrimination alleged is the appointment of Mrs McDougall, rather than the decision to consult only the DUP of all the political parties who might have expected to be involved in discussion about the appointment. A failure to consult some political parties while giving privileged access to one party on the issue of an appointment such as this could involve a breach of section 76 but the appointment of Mrs McDougall, although consequent on the consultation of the DUP, is not in our judgment an act of discrimination under section 76. Put simply, the failure to consult other political parties may have involved discrimination but the appointment of Mrs McDougall did not. She was not aligned to any political party and there is no discernible advantage to the DUP from her actual appointment (as opposed to being consulted about it). There is likewise no corresponding disadvantage to any of the other political parties by the appointment of Mrs McDougall. We do not consider therefore that breach of section 76 has been established.

Bad faith and abuse of power

[58] The arguments under this heading were inextricably linked to the case made by the respondent that the Secretary of State had made the appointment from an improper motive and were premised on the claim that he knew that he did not possess legal authority to make the appointment for that purpose. The arguments further depend on the proposition that the Secretary of State sought to disguise the true reason for the appointment of Mrs McDougall by representing that she was chosen solely on merit.

[59] These arguments unquestionably drew sustenance from the initial reluctance of the Secretary of State and the civil servants involved in the appointments process to vouchsafe that political considerations played a part in the selection of Mrs McDougall. As we have said, however, in the subtle political negotiations that the Secretary of State had to engage, this reticence is perhaps understandable. Be that as it may, since we have decided that the Secretary of State was entitled to have regard to the influence that Mrs McDougall's appointment might have on the stance of the DUP, the claim that he acted in bad faith or in abuse of his power must inevitably fail.

Irrationality

[60] This argument can also be dealt with briefly. Given that it was open to the Secretary of State to take into account the effect that the appointment of Mrs McDougall might have on the willingness of the DUP to re-engage in discussions about further progress in the political negotiations which had stalled, it cannot logically be argued that it was irrational for the Secretary of State to have decided to appoint her. On the contrary, in light of his objective on that issue, the decision to appoint her was both logical and rational.

Lack of candour

[61] We were informed by Mr McCloskey that, on instructions from the appellant, he did not intend to present any argument on this issue. We therefore do not propose to say anything about the matter beyond this. In retrospect, it is unfortunate that the material necessary to inform Girvan J sufficiently of all the issues on which he was required to adjudicate emerged in the somewhat piecemeal fashion that it did. This may explain why the learned judge formed a critical view of the manner in which the disclosure of that information took place. The way in which the material was put before the court, the role played by each of the participants in providing that material and the chronology of events that led to its disclosure have now been painstakingly and comprehensively reviewed in the report of Peter Scott QC. We consider that, with the benefit of that report, a rather more benevolent view about the manner in which the material was disclosed is now warranted.

Conclusions

[62] We have concluded that none of the grounds which underpinned the declarations made by the learned judge has been sustained by the respondent. We will therefore allow the appeal against the making of those declarations. We have decided, however, that the Secretary of State failed to take into account a relevant consideration, namely the requirement that he have regard to the Commissioner's Code in making the appointment. Because of that failure, the appointment of Mrs McDougall was not lawfully made and we will make a declaration to that effect.