

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY BRENDA DOWNES  
FOR JUDICIAL REVIEW**

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**GIRVAN J**

[1] In the judgment I addressed the question of the manner in which the OFMDFM dealt with the applicant's request for information under the Freedom of Information Act 2000 ("FOIA") and the way in which the respondent dealt with the provision of information and evidence to the court in the course of the judicial review application. As the judgment sought to make clear there were matters which emerged in relation to the way in which the matter was handled that led to the view that the case should be the subject of inquiry. The reference to an inquiry was intended to be a reference to an investigation and the court was not seeking to be prescriptive as to how that investigation should be carried out. If such an investigation is to be fair and meaningful it could not be conducted by any of the personnel involved in the handling of the case. The court's view that such investigation was necessary related to the manner of the handling of the judicial review proceedings and the pre-action letter rather than with the actual decision which was, of course, the subject of full analysis in the course of the judicial review. The Secretary of State has a right of appeal in relation to the court's substantive decision if he considers that the decision was wrong in law.

[2] In relation to the inadequacies and errors in the letter of 5 January 2006 the applicant has potential remedies of her own. Arguably she may pursue the issue of maladministration with the Commissioner for Complaints. More significantly she may have recourse to mechanisms laid down by the FOIA itself. Section 16 of the Act imposes a duty on public authorities to provide advice and assistance so far as it would be reasonable to expect the authority to do so to persons who have made requests for information. Under section 45 provision is made for the issue and periodic review of a code of practice providing guidance to public authorities as to the proper practices to be followed in connection with the discharge of public authorities' functions. Under section 46 the Lord Chancellor shall issue a code providing for the

keeping, managing and destruction of records. The Information Commissioner has a duty to promote the following of good practice by public authorities and to promote the observance of the requirements of the Act and codes. The Information Commissioner may with the consent of the public authority assess whether the authority is following good practice. Under section 50 a complainant may apply to the Commissioner for a decision whether in any specified respect a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. There may be a complaints procedure in the section 45 code of practice which the complainant may have to exhaust before recourse to the section 50 procedure. It will be a matter for the applicant to take advice as what further steps, if any, she may wish to pursue under the FOIA. This may include seeking further information from the NIO and OFMDFM in response to particular questions including some or all of the questions set out in the Schedule. The inaccuracies in the letter of 5 January 2006 were such that it would appear that something went seriously wrong with the procedure for dealing accurately and properly with the FOI request.

[3] The shortcomings in relation to the FOI letter are, however, only one aspect of the matter. The letter formed the background to the respondent's approach to the case thereafter. In my judgment I analysed in some detail the way in which the respondent approached the legal challenge to the decision to appoint the IVC and it is not necessary to repeat those matters. The papers and manner in which the respondent met the legal challenge raised serious issues as to whether there was an attempt to allow the court to be misled as to the true factual and legal situation. The letter, it is now accepted, was wrong to create the impression that the IVC was appointed as the best candidate on merit. It also evaded providing certain information and gave a false answer in relation to the question of consultation. Nothing was done to correct the false impression until after the conclusion of the argument and as a result of the court's direct intervention to clarify the situation. Of course, it is open to the applicant to pursue whatever legal rights or remedies she may have over and above any remedies open to her as referred to in the preceding paragraph. However, the court itself must ensure the integrity of the judicial review system and ensure public confidence in the independence of that system to investigate applications and grant relief when appropriate. This court exercising its judicial review functions is concerned with issues such as the regularity of procedure, the fairness of decisions, the legality of actions by public authorities and the reasonableness of governmental action. These matters go to the heart of proper administration. If the court is to perform its functions properly and if court decisions are to command respect it is imperative that its proceedings are conducted with conspicuous transparency, integrity, openness and fairness. Public authorities have a duty to ensure that the court can fulfil its functions properly. For this reason irregularities that affect its process should be properly investigated in a manner that can allay public concern and the concern of the court to ensure that its process is not

abused. Any possible attempted interference with or obstruction of the course of justice is a grave matter which demands a proper investigation.

[4] It is at common law an offence to pervert or obstruct the course of justice. The offence is concerned with the course of justice and not merely the ends of justice. It is committed when a person or persons act or embark on a course of conduct which has the tendency to and is intended to pervert or obstruct the course of justice. In R v Selvage and Morgan [1982] QB 372 it was held that in order to lay the charge a course of justice must have been embarked on in the sense that proceedings of some kind are in being or are imminent or investigations which could or might bring proceedings about are in progress. The conduct must be:

“conduct which relates to judicial proceedings, civil or criminal, whether or not they have been instituted but which are within the contemplation of the defendant whose conduct was designed to affect the outcome. That conduct includes giving false information to the police with the object of among other things putting them on a false trail.” (at pp379,399).

In R v Ratifigue [1993] QB 843 it was held that the answer to the question whether particular conduct had a tendency to pervert the course of justice could not depend on whether investigations of the matter which might become court proceedings had begun. Lord Taylor giving the judgment of the court said that if an intention to pervert the course of justice in relation to the matter was proved the conduct had the same quality whether performed before the matter was investigated or even discovered as it would have had at a later stage.

[5] The letter of 5 January 2006 was in response to a solicitor’s letter written in the context of a likely judicial review challenge. If incorrect and misleading information was deliberately given to put the applicant on a false trail then prima facie that conduct would appear to fall within the concept of perverting the course of justice. If, in the course of the substantive judicial review itself, there was a deliberate attempt to mislead the court the same would be true. The letter and the evidence provided by Mr Hamilton as approved by the Secretary of State had the tendency to mislead. The question which arises in this case is whether there was a deliberate attempt to mislead and if so by whom.

[6] At common law a contempt of court is an act or omission calculated to interfere with the due administration of justice. Conduct is calculated to prejudice the due administration of justice if there is a real risk that prejudice will result. (AG v Times Newspaper Ltd [1974] 273.). Sir John Donaldson in

AG v Newspaper Publishing PLC [1988] Ch 333 pointed out that in the course of a breach of a court order it is a matter for the parties to raise a complaint in court. In the case of other contempts (which cover “any conduct which involves an interference with the due administration of justice” ) these

“are in general considered to be matters for the Attorney General to raise. In doing so he acts not as a Government minister but as the guardian of the public interest in the due administration of justice.”

[7] The Attorney General thus has the function of protecting the due administration of justice. I consider the proper course for this court to take is to refer the papers to him to decide what, if any, steps should be taken in the matter in the light of all the circumstances and in the light of all the papers before the court and any documents to which neither the court nor the applicant has access. In the Schedule I set out what appear to me to be the key questions which need to be addressed in a rigorous and searching investigation into the matter. The applicant who was the recipient of the misleading and incorrect information will of course have an interest in the proper conduct of the investigation. This court itself retains an interest in ensuring that this matter is properly investigated. I leave open for argument the question of what further or other powers are vested in this court as the court which was at the receiving end of the evidence adduced by the Secretary of State.

#### Schedule

1. Who drafted the letter of 5 January 2006 (“the letter”)?
2. What information was supplied to the drafter of the letter?
3. Who supplied that information?
4. From what source did that information come?
5. Did the letter as sent incorporate all the supplied information?
6. If not who decided to omit certain information, what information was omitted and who authorised or required the omission of the information?
7. At what level within Government was the request for information considered?
8. How many drafts of the proposed letter were prepared?
9. Who prepared those drafts?
10. Who considered the drafts?
11. Who settled the final draft?
12. Do all the drafts continue to exist and if so where are they?
13. What are the normal practices to be followed in the preparation and approval of a FOI letter and in the retention of documents and drafts?
14. Were the normal practices followed in this case and, if not, why not?

15. What safeguards exist within the OFMDFM and NIO to ensure that a FOI letter contains correct information?
16. How did those safeguards fall down in the present case?
17. Who authorised answers indicating that no consultation took place?
18. Who authorised answers indicating that Mrs McDougall was the best candidate in terms of merit?
19. Who decided not to answer the question how Mrs McDougall became aware of the post?
20. To what records and documents was the drafter of the reply given access in preparing the response contained in the letter?
21. To what documents and records did the person who approved the letter have access when the letter was being considered?
22. Was the letter considered by the Secretary of State ("the SoS") before it was sent?
23. Did the SoS play a role in the settling of the document and, if so, what role?
24. Was the letter considered by Mr Hamilton before it was sent?
25. Was it considered by Mr Phillips?
26. Was it considered by Government lawyers before it was sent and if so were they given access to all the records relating to the appointment and were they fully briefed? If not, why no?
27. At what point did
  - (a) the SoS
  - (b) Mr Hamilton
  - (c) Mr Phillips
 become aware of the contents of the letter and become aware that the letter was inaccurate?
28. Before swearing his affidavit did Mr Hamilton consider the exhibits to the applicant's affidavit which included the letter?
29. Did he review the accuracy of the contents of the letter?
30. Why did he not correct the false impression which it is now accepted was created by the letter?
31. Did Mr Hamilton draw the attention of the SoS to the contents of the letter?
32. Did the SoS consider the terms of the letter before authorising Mr Hamilton to swear the affidavit?
33. If the SoS did not consider the terms of the letter before authorising Mr Hamilton to swear the affidavit what documents and material did the Secretary consider before so authorising the affidavit?
34. Did anyone in the NIO and/or OFMDFM and if so who review the papers and records to ensure that the correct factual situation was known to the Crown legal advisers before the hearing before Hart J and before the hearing in the Court of Appeal?
35. Was Mr Hamilton aware of the leave hearing and the appeal hearing and of the information that was being put before the courts?

36. When Mr Hamilton swore that merit was the sole criterion in relation to the appointment was he not aware that no exercise had been carried out to assess the comparative merit of Mrs McDougall and Mr X?
37. If the appointment was not the product of an exercise designed to ascertain who was the best qualified for the job on what basis did he assert that merit was the sole criterion?
38. To what material set out in Mr Phillips' affidavit did Mr Hamilton not have access when he swore his affidavit?
39. Of what material in Mr Phillips affidavit was Mr Hamilton unaware when he swore his affidavit?
40. By the time of the substantive hearing in the judicial review were any of the deponents aware that the letter contained incorrect information?
41. If they were, why were no steps taken to correct the errors and false impression created by the letter?
42. Before Mr Hamilton swore his affidavit did he prepare a statement to enable the affidavit to be drafted?
43. What material was provided to those engaged in drafting the affidavit?
44. How many drafts of the proposed affidavit were prepared?
45. Are these drafts still in existence and if so are they still available?
46. What changes were made to the drafts before the affidavit was finalised?
47. Did the SoS make or suggest or require any changes to the draft of the affidavit before it was finally sworn? If so what changes did he make or suggest or require?
48. Why was it decided that Mr Phillips swear the final affidavit and who made that decision?
49. Was Mr Hamilton a party to that decision?
50. Did he participate in any discussion relating to the decision to file a final affidavit?
51. Was Mr Hamilton involved in the decision to appeal against the decision that he should submit to cross-examination?
52. Was the SoS involved in the decision to appeal the order for cross-examination?
52. When the appeal was brought to the cross-examination order was Mr Hamilton or the Secretary of State aware that the letter contained incorrect and misleading information?
53. Was the decision to file the affidavit of Mr Phillips made after the order for cross-examination?
54. Were minutes kept of the meeting at which it was decided that Mr Phillips should swear the final affidavit and are they available?
55. How was it discovered that Mr Phillips had information of which Mr Hamilton "might not have been aware?"
56. Who discovered that Mr Phillips had such information?
57. Had Mr Phillips played any role in the letter of 5 January 2006 or in the judicial review proceedings previously? If so what role?
58. Had Mr Phillips seen Mr Hamilton's affidavit before it was sworn or before the application for cross-examination?

59. If he had did he record any concerns about its contents?
60. Did anyone express concerns in writing or orally about the contents of the affidavit before it was filed? If in writing, in what documents and where are those documents? To whom were such concerns expressed?
61. Did anyone express any written or verbal concerns about the contents of the letter before it was sent? If in writing, in what documents and where are those documents? To whom were such concerns expressed?
62. Did anyone express any verbal or written concerns about the contents of the letter before the hearing before Hart J or before the Court of Appeal hearing on the question of leave? If in writing, in what documents and where are those documents? To whom were such concerns expressed?
63. Did anyone express any verbal or written concerns about the contents of the affidavit of Mr Hamilton before the application to cross-examine Mr Hamilton? If in writing, in what documents and where are those documents? To whom were such concerns expressed?
64. If any concerns in relation to any of the foregoing matters were expressed how were those concerns dealt with?
65. If any such concerns were expressed by anyone were those concerns brought to the attention of the SoS and, if so, how did he deal with them?
66. Was there any information in Mr Phillips' affidavit of which the SoS was not aware and, if so, what information?
67. If the SoS was aware of all the information contained in Mr Phillips' affidavit why did he not bring that to the attention of Mr Hamilton before the affidavit was sworn?