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Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **9/11/2006**

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 JUDICIAL REVIEW

GIRVAN J

Introduction

[1] In this application the applicant seeks an order of certiorari quashing the appointment of the Interim Victims Commissioner ("the IVC") and or alternatively, a declaration that her appointment by the Secretary of State was illegal. The application is based on five grounds. Firstly, it is contended that the Secretary of State did not have legal authority to make the challenged appointment. Secondly, it is alleged that 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. Thirdly, the Secretary of State made the appointment for an improper purpose, namely for a political purpose in response to a demand for "confidence building measures" by the Democratic Unionist Party ("the DUP"). Fourthly, the applicants claimed to have a legitimate expectation that any such 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. Finally, the case is made that the involvement of the DUP in the process leading to the appointment of the IVC and the failure to involve any other political party was contrary to Section 76 of the Northern Ireland Act 1998.

[2] The five grounds referred represent the final pleaded case made by the applicant. Initially Hart J at the leave stage granted leave only on the legitimate expectation ground. On appeal the Court of Appeal on 22 May 2006 granted leave on the additional grounds referred to above save the last ground which was added by leave of this court on an application by the applicant subsequent to the Court of Appeal judgment.

[3] Mrs Bertha McDougall was appointed as the IVC on 24 October 2005. She is the widow of a part-time member of the RUC who was shot dead in January 1981 while on duty in Belfast. The applicant is a widow of John Downes who was killed by a plastic bullet fired by an RUC Reserve Constable on 12 August 1984. Both have thus suffered grievously as a result of the Troubles.

[4] The applicant in her affidavit referred to the circumstances of her husband's death. This occurred just over a year after they married. She has one child of the marriage. An RUC officer who was charged with his murder was acquitted. The applicant feels aggrieved that she was not informed or consulted by the prosecution in relation to the criminal proceedings or the prosecution in general. As a victim of the Troubles she welcomed the government victim strategy for people affected by the Troubles or who had had relatives and friends injured or killed throughout that period. She welcomed the concept of a Victims Commissioner as a move towards recognising the impact of the legacy of the Troubles provided that the Commissioner is independent and representative of the views of all victims and is fairly appointed. She feels aggrieved that she only learned of the appointment of the IVC through the media and did not know that such an appointment could be made. It appears to her that Mrs McDougall could not be seen as independent and impartial as she appears to be aligned with party politics.

The Issues Relating to Victims Interests

[5] Issues relating to reconciliation and to the victims of violence were touched on in the Good Friday Agreement in April 1998. In Section 6 of the Agreement dealing with Rights, Safeguards and Equality of Opportunity under the subheading Reconciliation and Victims of Violence paragraph 11 and 12 recorded:

> "11. The participants believe that it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation. They look forward to the results of the work of the Northern Ireland Victims Commission.
>
> 12. It is recognised that victims have a right to remember as well as to contribute to a changed society. The achievement of a peaceful and just society would be the true memorial to the victims of violence. The participants particularly recognise that young people from areas affected by the Troubles face particular difficulties and will

> support the development of special community based initiatives based on international best practice. The provision of services that are supportive and sensitive to the needs of victims will also be a critical element and that support will need to be channelled through both statutory and community based voluntary organisations facilitating locally based self-help and support networks. This will require the allocation of sufficient resources including statutory funding as necessary to meet the needs of victims and to provide for community based support programmes."

[6] In April 1998 Sir Kenneth Bloomfield the designated Commissioner for Victims published his report "We Will Remember Them". The intention of establishing a Commission to look at possible ways to recognise the pain and suffering felt by victims of violence arising from the Troubles of the last 30 years including those who had died or been injured in the service of the community was announced by the Secretary of State in Belfast on 24 October 1997. Sir Kenneth's terms of reference were to lead the Commission and to examine the feasibility of providing greater recognition for those who have victims in the last 30 years as a consequence of the events in Northern Ireland recognising that the events had also had appalling repercussions on many people outside Northern Ireland. The report, the product of painstaking and sensitive investigation, contained a wide range of recommendations relating to helping victims to deal with the trauma they had suffered and the practical difficulties faced by them. One of the recommendations was that in the longer term the interests of victims should be made the concern of a Standing Commission or Protector or Ombudsman for Victims.

[7] The Government accepted the report and this led to the creation of the Victims Liaison Unit in the Northern Ireland Office whose remit was to progress work in that area. In the Office of First Minister and Deputy First Minister ("OFMDFM") a Victims Unit was established to raise awareness of and coordinate activity affecting victims across the devolved administration. This latter unit replaced the Victims Liaison Unit.

[8] In August 2001 a consultation paper on a victims' strategy was published by the devolved administration and the Ministers with joint responsibility for victims Dennis Haughey MLA and Dermot Nesbitt MLA. This reflected the Northern Ireland Executive's Programme for Government which included a commitment to cross departmental strategy which would be put in place during 2001-2002 to meet the needs of victims through effective, high quality help and services. The Ministerial Foreword to the Consultation Paper stated that the consultation would be valuable in developing a strategy.

One of the specific matters raised in the consultation process was the question whether a Victims Commissioner should be established. While there was no clear view about what the Commissioner would do it is envisaged that he or she would in some way provide a voice for victims and act as a watchdog over the implementation of policy or service delivery. The cost of a Commissioner would have to be met from Government funds which would leave less money for service provision and help. Question 12 in the consultation paper posed the questions whether a Victims Commissioner should be appointed and, if so, what role and remit he should have.

[9] In April 2002 the Victims Unit published a paper called "Reshape Rebuild Achieve" which set out how the Northern Ireland administration would deliver practical help and services to those who suffered most over 30 years of violence. In relation to the question of a Victims Commissioner paragraph 318 stated:

> "One of the specific questions asked in the consultation paper is whether a Victims Commissioner should be established. Again, a wide range of responses was received to this question with a diverse range of opinions being expressed. As some respondents pointed out if this strategy is implemented properly and efficient structures put in place, then any perceived need for a Commissioner should be eroded. Some respondents felt that the appointment of a Commissioner would be a positive move as such a person could provide a voice for victims, while others felt that no clear role existed and that the money to fund a Commissioner could be better spent on providing services. There was also a range of views as to whether a Commissioner should be victim or should come from Northern Ireland. Given that clear view emerged during the consultation as to whether a Commissioner should be appointed and, having considered the matter carefully, we are not convinced of the need for a Commissioner at this stage and do not intend to proceed in this area, although the situation will be reviewed in due course."

[10] In March 2005 the Secretary of State announced proposals for a Victims and Survivors Commissioner and published a consultation paper "Services for Victims and Survivors" concerning the next phase of the victim strategy and the establishment of a Commissioner for Victims and Survivors. Paragraph 59 et seq deal with the proposal to establish a Commissioner for

Victims and Survivors. It was envisaged that the Commissioner would have a key role in promoting the interests of victims and survivors and ensuring that they have access to services appropriate to the needs. What was needed was a model that ensured practical help to victims and survivors and would provide leadership and focus for this area of work. Response to the consultation paper on the topic of a Victims Commissioner showed a divergence of views on the need for such a post. Some felt that he or she should be appointed on a dedicated long-term basis, should not be a civil servant and should come from grass roots level. Others question the need for a Commissioner given that all the required structures were in place. The consultation period ended in March 2005 and the Government was satisfied that the need for the appointment of a Commissioner was established and concluded that legislation should be introduced to establish the post.

The Respondents' Evidence

[11] According to the affidavit of Mr Clarke, the head of the Victims Unit, on 11 July 2005 officials met with the Secretary of State to discuss issues relating to the past including the appointment of a Commissioner. The Secretary of State noted that the appointment could take up to 18 months. He was keen to demonstrate commitment to build confidence that the Government was serious about addressing the needs of victims of survivors and he asked officials to give consideration to the appointment of an Interim Commissioner. In paragraph 14 of his affidavit Mr Clarke states:

> "Following further consideration, in September 2005 the Secretary of State decided in principle on the appointment of an Interim Commissioner for a period of a year while in parallel taking steps to bring forward the legislation mooted in paragraph 13. It was intended that the Interim Commissioner would focus, in particular, on reviewing arrangements for service delivery, coordination of services across departments and agencies, reviewing current funding arrangements in relation to services and grants paid to victims and survivors groups and individuals and consideration of the modalities of establishing a victims and survivors forum. The thinking was that all of this work could be usefully and constructively carried out in the public interest in advance of a permanent appointment."

The announcement of the appointment of an IVC was made on 24 October 2005. Mr Clarke points out that there was no statement or representation in any of the Government publications including the consultation paper that the

Government would consult with the public or any section of the public or any group or any individuals on the appointment of a Victim Commissioner or Interim Victims Commissioner. There was no intention to represent that any such consultation would be undertaken and no such representation was made at any time.

[12] Following the Court of Appeal decision widening the permitted grounds of challenge to the impugned appointment Mr Hamilton, the Head of the Northern Ireland Civil Service, swore an affidavit recording that he had personal knowledge of the decision making process. He stated in paragraph 1 of his affidavit that where he records in the affidavit the Secretary of State's views about the appointment they were based on information supplied by him. The Secretary of State had seen and approved the contents of his affidavit. In paragraph 6 of his affidavit Mr Hamilton stated that the central reason for the Secretary of State's decision was that he was keen to demonstrate governmental commitment in the area and wanted to build confidence that the Government was serious about addressing the needs of victims and survivors. The Secretary of State did not wish to wait 12 to 18 months before a Commissioner for Victims and Survivors could be placed on a statutory basis but he wanted to take immediate action to give a role to an Interim Commissioner in the period leading up to the statutory appointment of the Commissioner. In reaching that view the Secretary of State was making a judgment as to which course of action would best serve the public interest. He was also conscious that this issue was important in raising the confidence of Unionists in relation to the wider political process.

[13] The remit of the Interim Commissioner was to review current arrangements for service delivery, to review current funding arrangements, to consider the modalities of establishing a victims and survivors forum and to provide a report on his or her findings.

[14] It was considered that speed was of the essence in the making of the appointment and that it would not be necessary to go through a full formal process of appointment in relation to it since the appointment was essentially advisory in nature. While a more formal process of appointment would have gained in terms of transparency, speed was necessary and would prevent the process being divisive. At short notice it might not be easy to find suitable candidates. In a confidential paper addressed to the Secretary of State and the relevant minister Mr Clarke set out in paragraph 5 the criteria proposed for the appointment:

> "List of Potential Candidates
>
> 5. We can discuss this at the proposed meeting with officials, but in general it is thought that someone from an academic or professional

> background may be best suited to the role. In particular, we would be seeking someone who would:
>
> 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."

In paragraph 14 of his affidavit Mr Hamilton translates the criteria into criteria that the person "should" have the various criteria. Whether there is a difference between the use of the word "would" in Mr Clarke's paper and "should" in Mr Hamilton's affidavit is a matter to which I shall have to return. According to Mr Hamilton's affidavit the Secretary of State was content with the qualities indicated but considered that the search should not be confined to those with an academic or professional background. Initially the process which officials had in mind was that they would draw up a list of potential candidates which would then be the subject of soundings with local political parties followed by the checking of availability of candidates to take up early appointment. The Secretary of State approved this approach. A list of candidates was accordingly drawn up by senior officials. This consisted of 16 names. It included one name put forward by the DUP but that person almost immediately withdrew his/her name and the DUP then provided Mrs McDougall's name. Mr Hamilton's affidavit does not deal with the question of how it came about that the DUP had put forward a name in the first place or how it came about that they then provided the alternative name. Both those matters are a matter of some significance. Mr Hamilton selected two candidates whose names should be forwarded to the Secretary of State for discussion. One was Mrs McDougall. According to a Note for the Record prepared by Mr Hamilton dealing with the appointment of the Interim Commissioner under "Shortlist" Mr Hamilton 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 ie 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 advise 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 advise 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."

The criterion on cross community support was viewed by Mr Hamilton as not simple to satisfy. It was clear that it would be difficult to find persons who would be acceptable to all sides of the community. Mr Hamilton noted that the appointment would be warmly welcomed within the broad Unionist community particularly by the DUP but was likely to be criticised by the Nationalist community, particularly Sinn Fein. However Mr Hamilton in his affidavit said he was satisfied that "she was an individual who had the qualities to secure sufficient cross community support and acceptance." In paragraph 30 Mr Hamilton stated that in the view of the Secretary of State and of Mr Hamilton and Mr Phillips, having regard to her track record and general approach she would be able to establish credibility and sufficient acceptance across the community. Mr Hamilton asserted that while it was the case that Mrs McDougall's name was fed into the process by the DUP his recommendation was based exclusively on Mrs McDougall's personal merits for the appointment given the range of the criteria and her qualities and experience. "Merit was the sole criterion applied" he asserts in paragraph 32. He stated that the DUP provided a curriculum vitae for Mrs McDougall and when this was examined it was demonstrated that she was a candidate of

considerable strength and ability. Her name was placed on the list with other persons whose names had been generated internally. In paragraph 34 of his affidavit he stated:

> "In considering the appointment, the Secretary of State was mindful that Mrs McDougall's name had been put forward by the DUP. I have confirmed with him that he gave careful consideration to the possibility of a different candidate and would not have appointed Mrs McDougall had he not been persuaded by the information and advice submitted to him that she genuinely satisfied the criteria that had been devised for the appointment."

[15] In paragraph 16 of his affidavit Mr Hamilton stated that the process officials had in mind was that they would draw up the list and that that which would be the subject of soundings of the local political parties and that the Secretary of State approved that approach. He did not address the issue why the Secretary of State did not pursue that approach. The affidavit was approved by the Secretary of State and he could have indicated his reasons for changing his approach. Neither the deponent nor the Secretary of Stae took the opportunity to explain this change of approach.

[16] The applicant sought leave to cross-examine Mr Hamilton on his affidavit and to have the Secretary of State called as a witness. I acceded to the application to cross-examine Mr Hamilton largely because I considered that his use of the "mindful" in paragraph 34 of his affidavit was ambiguous, a view with which the Court of Appeal agreed and a view which has been reinforced by subsequent events.

[17] Following the lodging of the appeal against my ruling and before the hearing in the Court of Appeal a further affidavit was lodged on behalf of the Secretary of State sworn by Mr Phillips now the Permanent Secretary of the Northern Ireland Office and at the material time Political Director of the NIO. In paragraph 2 of his affidavit Mr Phillips stated that it was apparent to him that there were certain aspects of the background of the impugned appointment of which Mr Hamilton may not have been personally aware and which should properly have been outlined in his affidavit. As in the case of Mr Hamilton he stated that he was authorised by the Secretary of State to make the affidavit. Mr Phillips' affidavit thus recognises that Mr Hamilton's affidavit failed to set out the full and accurate picture relating to the appointment. There is no explanation given by Mr Phillips, Mr Hamilton or the Secretary of State as to why the evidence given previously came to be so worded as to fall significantly short of being a full and accurate picture of the true course of events.

[18] Before turning to the contents of the affidavit a number of points must be made. Firstly, Mr Hamilton in his affidavit swore that he had personal knowledge of the decision-making process. Such an averment is a clear representation that he was purporting to provide a clear and accurate picture of the decision-making process to which he was fully privy. His statement was unqualified and clear. Secondly, he purports to record the Secretary of State's views about the appointment. The affidavit was filed on behalf of the Secretary of State and purports to reflect accurately the Secretary of State's knowledge and views about the appointment. The Secretary of State was clearly privy to the whole reasoning process leading to the appointment since he was the real decision maker in the matter. Thirdly, the affidavit stated that the Secretary of State had seen and approved the contents of the affidavit. The Secretary of State, accordingly, is to be presumed to have read and sanctioned the affidavit. It is thus surprising to read in Mr Phillips' affidavit that Mr Hamilton "may not" have appreciated all the background as set out in Mr Phillips' affidavit which, as Mr Phillips stated, should have been outlined in the affidavit. In view of the clear centrality of Mr Hamilton's role in the process in the interviewing and appointment of Mrs McDougall and in the preparation of the submissions to the Secretary of State it seems unlikely that Mr Hamilton did not have personal knowledge of the matters set out in Mr Phillips' affidavit. The centrality of Mr Hamilton's role is borne out by the fact that the Secretary of State put him forward as the proper person to explain the factual background to the appointment. If Mr Hamilton had not had direct involvement in all matters leading up to the decision one would have expected that he would have made himself aware of the factual picture before swearing that he had personal knowledge of the decision-making process. If he had not, he should have done so. One would have expected the Secretary of State who read and sanctioned the affidavit to have taken steps to ensure that it fully and accurately explained the situation. Mr Phillips, of course, was careful in his choice of words "may not have had personal knowledge". It is implicit in this statement that Mr Phillips did not check with Mr Hamilton what his actual state of knowledge was but it is somewhat difficult to understand how he came to swear his affidavit without any discussion with Mr Hamilton to find out what in fact Mr Hamilton's actual state of mind was when he swore his affidavit.

[19] In his affidavit Mr Phillips asserts that there were certain political aspects of the background to the impugned decision in which in his capacity as the Northern Ireland Political Director he was directly involved. He refers to the recurrent feature of the political process known as "building confidence". Following the Assembly elections in November 2003 Ministers began a process of trying to engage all the political parties including the DUP in dialogue aimed at restoring Government. One of the "confidence building measures" consistently advocated by the DUP from mid 2004 was the appointment of a Victims Commissioner in Northern Ireland. Bearing in

mind that the DUP had previously exhibited an intense interest in the subject of victims generally and in the establishment of a Victim's Commissioner in particular the DUP were informed of the Secretary of State's intention in principle to establish the post of Victims Commissioner. This was announced in a Parliamentary written statement on 1 March 2005 the publication of the consultation paper. After considering the advice of OFMDFM and the NIO the Secretary of State at the end of July 2005 decided in favour of an interim appointment without a formal public appointment process. Mr Phillips said it was open to the Secretary of State to take informal soundings from the main Northern Ireland parties on potential candidates but "he did not opt to do so." The way Mr Phillips expresses himself in paragraph 17 on this point is striking. Mr Hamilton had indicated in his affidavit that the Secretary of State had earlier agreed with the view that informal sounding should be taken from all the political parties. At some stage he must have made an actual decision to abandon what he had earlier regarded as a more inclusive way of taking views. It is thus misleading to say that "he did not opt to" take informal views. The fact is that the Secretary of State, notwithstanding earlier advice and agreement, deliberately decided not to consult the other parties. In paragraphs 18 and 20 of his affidavit Mr Phillips sets out the position thus:

> "[18] The Secretary of State did decide, however, that given the continuing interest by the DUP in the establishment of a Victims Commissioner and the background outlined above, if they wished to informally propose a particular individual for the interim appointment he would consider their recommendation. This was duly conveyed to the DUP. The Secretary of State's expectation was that, having regard to the background outlined above and the other evidence, the DUP would be likely to propose a candidate for appointment to the post of Interim Victims Commissioner. This expectation was duly fulfilled as described in paragraph 17 of Mr Hamilton's affidavit, together with the letter dated 27 September 2005 exhibited at paragraph 9 of the accompanying documents.
>
> [20] Accordingly, the views and representations of the DUP and the possible establishment of a Victims Commissioner and Interim Victims Commissioner and their suggestions regarding a suitable candidate for the interim appointment constituted factors taken into account by the Secretary of State in making the impugned appointment. However, this was simply one of the factors in the decision to appoint Bertha

> McDougall. The Secretary of State also considered carefully her ability to command sufficient cross community support and her individual merits generally. The Secretary of State in considering the appointment of Mrs McDougall was of the clear view that her considerable personal qualities together with a constructive outlook and relevant background and experience made her a strong candidate in her own right. Both Mr Hamilton and I had been of the same opinion and we had advised the Secretary of the State accordingly."

Mr Phillips concluded his affidavit resolutely rejecting the ground of challenge that the impugned appointment was activated by some improper motive on the part of the Secretary of State was rejected. The Secretary of State was acting on what he considered to be the public interest at all material times. He was making a political judgment about what he judged to be in the public interest.

The applicant's challenge on the issue of candour

[20] At the outset to his submissions Mr Treacy QC made an attack on the respondent alleging that he had failed to comply with his duty of candour. He alleged that from the outset the respondent attempted to conceal the truth about the process of appointment. He referred to correspondence set out prior to commencement of the judicial review proceedings and he referred in particular to a letter of 5 January 2006 from OFMDFM which he contended gave misleading and evasive answers to a request for information about the process. The respondent at the leave stage in the judicial review application argued that there was no sustainable evidential basis for the ground of improper motive (that is the politically motivated basis of the decision to create the post and to appoint Mrs McDougall as the IVC as a nominee of the DUP). This argument sought to cover up the material which showed the political motivation and, had the Court of Appeal rejected the appeal, the role which the Secretary of State invited the DUP to play would never have emerged. Mr Hamilton's affidavit lodged after the Court of Appeal gave leave on extended grounds was incomplete, misleading and evasive. Mr Phillips' affidavit was sworn, it was argued, as a result of the order for cross-examination. Only then did the facts emerge showing the centrality of the role of the DUP and the Secretary of State's desire to engage them in the political process and his use of the appointment to that end. Mr Phillip's affidavit made it quite clear that the main, if not the only, motivating factor for establishing the post of Interim Victim Commissioner was to satisfy the DUP's call for action in this area. Mr Hamilton's affidavit had downplayed the centrality of the Secretary of State's confidence building thinking to the point of effectively saying that the Secretary of State was merely conscious of

it. Mr Phillips makes clear that the DUP was actively approached to suggest a candidate for the post. That did not clearly emerge from the affidavit of Mr Hamilton. While Mr Hamilton said that the Secretary of State was "mindful" of the fact that Mrs McDougall had been recommended by the DUP Mr Phillips affidavit shows that the factors taken into account by the Secretary of State were that Mrs McDougall had been suggested as a suitable candidate by the DUP and that the early appointment of a Victims Commissioner would be favourably regarded by the DUP and the step would build confidence of the DUP in the political process. Mr Treacy contended that in assessing the evidence offered by the Secretary of the State the court should approach the evidence in the light of the lack of candour.

[21] The duty of good faith and candour lying in a party in relation to both the bringing and defending of a judicial review application is well established. The duty imposed on public bodies and not least on central government is a very high one. That this should be so is obvious. Citizens seeking to investigate or challenge governmental decision-making start off at a serious disadvantage in that frequently they are left to speculate as to how a decision was reached. As has been said, the Executive holds the cards. If the Executive were free to cover up or withhold material or present it in a partial or partisan way the citizen's proper recourse to the court and his right to a fair hearing would be frustrated. Such a practice would engender cynicism and lack of trust in the organs of the State and be deeply damaging of the democratic process, based as it is upon trust between the governed and the government, a point underlined in the Ministerial Code published by the Cabinet Office in July 2005 which in paragraph 1 stresses the overarching duty of ministers to comply with the law, to uphold the administration of justice and to protect the integrity of public life. The Code also requires ministers to be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest which should be decided in accordance with the relevant statutes and the Freedom of Information Act 2000. In Quark Fishing Limited v Secretary of State for Foreign Affairs [2002] EWCA 149 Laws LJ put it thus at paragraph 50:

> "There is a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. The question here is whether in the evidence put forward on his behalf the Secretary of State has given a true and comprehensive account of the way the relevant decisions in this case were arrived at. If the court has not been given a true and comprehensive account but has had to tease the truth out of late discovery it may

> be appropriate to draw inferences against the Secretary of State upon points which remain obscure."

A breach of the duty of candour and the failure by the Executive to give a true and comprehensive account strikes at the heart of a central tenet of public law that the court as the guardian of the legal rights of the citizen should be able to rely on the integrity of the executive arm of government to accurately, fairly and dispassionately explain its decisions and actions.

[22] Mr McCloskey QC on behalf of the respondent frankly accepted that the evidence should not have emerged in the way in which it did. However, he argued that while Mr Treacy had made an attack on the candour of the respondents in presenting the evidence the applicant had not shown any legal consequences flowing from that since the court now knows the full case. Mr Treacy's points, however, raise important issues in relation to this case and also on a wider front. If there has been a significant breach of the duty of candour it poses the question as to why this occurred and why the decision-makers considered it necessary to be less than open and frank in presenting their evidence and in dealing with pre-action inquiries. As noted the lack of candour has the consequence referred to by Laws LJ in Quark Fishing. The court must address the issue of candour as it may impact on how the court approaches the totality of the evidence ultimately adduced. If the court finds a lack of candour, even if it did not ultimately make a difference to the outcome, it has a wider duty to ventilate the issue to ensure that the obligation imposed on the Executive to be full and frank is reinforced for the future.

[23] In Fordham on Judicial Review 4th Edition at para. 10.4 states:

> "The general absence of orders of disclosure in judicial review is largely sustained by the fact that the court feels able to trust public authorities to approach judicial review in a spirit of candour. It is not surprising that the courts have both praised defendants for frank disclosure and expressed troubled disappointment should have transpire that a public authority has fallen short of the expected duty of openness."

The words "troubled disappointment" fails to meet the strength of the trenchant criticism that on occasions courts feel compelled to make. For example Lord Lowry in R v IRC (ex parte Continental Shipping) [1996] STC 813 lamented:

> "the excessive degree of reticence of the Revenue in the case and then the uncommunicative intransigence in correspondence which admittedly without knowing all facts I found difficult to reconcile with the reasonable attitude which ought to characterise a government department in its dealings with the public."

In R v Home Secretary (ex parte Bugdaycay) [1987] AC 514 Lord Bridge, referred to the Home Office's:

> "obscurely drafted affidavit … at worse self-contradictory, at best ambiguous and which does not condescend to particularity."

The words of Lord Lowry and Lord Bridge in those different cases appear to be singularly apt when applied in the present case. Unlike Lord Lowry whose criticism was made tentative by his lack of full knowledge of all the facts, this court does have much fuller access to the factual situation.

[24] It must be recorded that the court was very conscious that it was being called on to pass a judgment on matters which could reflect on those involved in the decision making process, those who made and sanctioned affidavits and those who wrote letters on behalf of the Secretary of State. I was anxious to ensure fairness to all concerned and I suggested that in the light of the criticisms clearly spelt out in the applicant's skeleton argument the respondent might wish to consider the question whether he should file an affidavit or provide further explanatory evidence to the court . I also indicated to the respondents that in the interest of fairness and justice the respondent's deponents might wish to be called to go into the witness box to give such evidence as they wished to dispel any criticisms. After the conclusion of the argument I re-listed the matter to indicate that the provisional view which I had reached on the issue of candour was that there had been a lack of candour and that the letter of 5 January 2006 (to which I refer in greater detail below) was misleading and contained false information. I again indicated that the court was anxious to ensure fairness and that it would be willing to permit the respondent to adduce any further material he considered appropriate to dispel my provisional views. After taking instructions counsel in a further written submission indicated that the respondent did not wish to avail of the opportunity. The written submission recorded that the respondent unequivocally accepted that the letter of 5 January 2006 should not have conveyed the impression that the appointee was the best candidate on merit. It was submitted that it was unnecessary and inappropriate for the court to make any finding in its judgment about "the best candidate" issue.

[25] Mr Treacy argued that in considering the question of candour it was necessary to see the whole matter in the light of the way it unfolded from the commencement of the pre-proceedings correspondence to the end of the process. In line with this court's admonition to practitioners in Re Cunningham [2005] NIJB 224 to seek to deal with impugned decisions and actions initially in correspondence the applicant's solicitors by letter 28 November 2005 raised a number of questions of relevance to the appointment of the IVC and in respect of which the applicant was entitled to an answer. In question (d) the question posed was how Mrs McDougall became aware or was made aware of the vacancy of the post and if she was approached by whom that was done. The letter also asked about the nature and extent of any consultation exercise carried out in the actual appointment of the IVC. In relation to the question how Mrs McDougall came to be aware of the post the answer given in this letter of 5 January 2006 was:

> "because the post is an "interim" position for the purpose of having the post holder carry out some advance preparatory work as early as possible a list of potential candidates was prepared by senior officials from the Office of the First Minister and Deputy First Minister and the Northern Ireland Office. *Mrs McDougall was considered by ministers as the best candidate for the interim position.*" (Italics added).

It is noted that the draft of the letter simply evaded answering the question how she became aware of the post or how she got unto the list. On the question about the consultation on the need for an IVC the answer given was that as it was an interim post with a specific focus on particular areas:

> *"No consultation was considered necessary and none took place."* (italics added)

On the question of the appointment process for the actual appointment the answer given was:

> "*No consultation took place on this issue*. Based on the criteria set out at (f) above senior officials within the Office of the First Minister and Deputy First Minister and the Northern Ireland Office drew up a list of potential candidates for the post. After further detailed consideration of these candidates against the criteria at (f) officials produced a short list of two persons whom they considered most suitable for the post. *Mrs McDougall was considered the most suitable*

> *candidate* and had discussions with senior officials from both the above departments. Subsequently it was recommended to the Secretary of State that Mrs McDougall be appointed as Interim Victims Commissioner." (italics added)

[26] I am satisfied that the information supplied in the letter of 5 January 2006 was evasive, misleading and in certain respects clearly wrong. Since the letter was clearly carefully drafted having regard to the highly political nature of the issues I am forced to the conclusion that this was no mere drafting error. The Office of First Minister and Deputy First Minister clearly avoided answering the question how Mrs McDougall came to be aware of the vacancy and gave a wholly misleading impression that Mrs McDougall's name was put on the list by senior officials thereby impliedly suggesting that this was done internally. It was incorrect to state that no consultation took place about the actual appointment of the Interim Commissioner. The reality is that the Secretary of State did consult the DUP. The Secretary of State did in fact invite them twice to informally propose a particular individual whom he would consider. This was clearly a form of consultation on any proper understanding of the term. The impression that the appointee was the best candidate on merit was false as the further written submission lodged on behalf of the Secretary of State frankly conceded.

[27] Under section 1 of the Freedom of Information Acts 2000:

> "Any person making a request for information to a public authority is entitled –
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him."

There are exceptions to this duty but the OFMDFM did not seek to rely on any of the exceptions. The duty lying on the relevant department was thus to provide the information honestly and correctly. For some reason it was decided within government that incorrect and misleading information would be supplied. It may be the case that the writer of the letter acted conscientiously in passing on the information that was supplied to him to pass on. Questions, however, arise as to the source of the incorrect information that was sent out in the letter of 5 January 2006; as to who decided to provide that information in that form; and as to who decided to effectively withhold the correct information that the DUP was consulted,

played a role and had nominated Mrs McDougall at the request of the Secretary of State. When the matter was mentioned before me when I indicated my provisional views I raised the question as to how it came about that the incorrect information came to be sent out in the letter. The respondent did not explain that and the additional submissions left that question unanswered.

[28] The evasive and misleading nature of the information in that correspondence forms the background to the case which led to the respondent contending at the leave stage that there was no evidence to justify the applicant's ground of challenge based on alleged improper political considerations. The instructions given to counsel were obviously misleading. The respondent attempted to compound the inaccurate information supplied in the letter of 5 January 2006 by presenting opposition to the grounds of this review challenge on the basis that there was "no sustainable evidential basis" for the allegation of political motivation. At the hearing of the interlocutory appeal before the Court of Appeal the respondent sought to rely on the letter of 5 January 2006, counsel for the respondent stating that Northern Ireland Office officials had drawn up a list of potential candidates who were the subject of detailed consideration (see para [13] of the judgment of Kerr LCJ in the Court of Appeal). Thus, on instructions, counsel on behalf of the Secretary of State were making to the Court of Appeal a case based on the misleading information contained in the letter of 5th January. Had the letter of 5th January 2006 contained the correct information leave would undoubtedly have been given at the leave stage on the issues that are now before the court. The incorrect information thus did mislead the court at the initial leave stage. Since within the NIO and OFMDFM the true factual situation was known it must be concluded that it was decided that the correct information should not be placed before the court. This exercise which was successful before the lower court was repeated again in the Court of Appeal. Had the Court of Appeal not allowed the appeal the respondent would have successfully frustrated the applicant's legal challenge by the withholding from the court of material evidence. This case, thus, raises very serious issues which should be the subject of immediate and searching inquiry at a high level.

[29] Having failed to properly and fairly deal with the matters referred to in the letter of 5th January 2006 the respondent then filed the affidavit from Mr Hamilton which, as has been already been shown was a less than full explanation of what actually happened and sought to minimise the political considerations and to stress the proposition that the appointment was entirely merits based ("merit was the sole criterion applied.") The down playing of the importance of the DUP's nomination to a factor of which the Minister was merely "mindful" put a spin on the true situation which was misleading. The inference to be drawn in the circumstances is that the respondent was attempting to divert attention from the true course of events.

[30] In the circumstances I accept that Mr Treacy's contentions that there was a significant lack of candour. In consequence the court must approach the totality of the evidential basis of the respondent with considerable caution and parse the words used by the deponents with considerable care. While the normal approach is that in a judicial review application the affidavits of public officers will be interpreted in bonam partem that principle is based on the assumption that candour, openness and frankness are to be expected of public officials. If the trust of the court is broken then, as Laws LJ has pointed out in Quark, the court may have to draw inferences against the decision maker on points which remain obscure.

[31] Before concluding this aspect of the case it is timely to forcefully remind parties of their duties of candour in relation to the provision of information to the court. The affidavits of all parties should be drafted in clear unambiguous language. The language must not deliberately or unintentionally obscure areas of central relevance and draftsmen should look carefully at the wording used in any draft to ensure that it does not contain any ambiguity or is economical with the truth of the situation. There can be no place in affidavits in judicial review applications for what in modern parlance is called "spin". Public bodies and central government agencies in particular are involved in the provision of fair and just public administration and must present their cases dispassionately and in the public interest. Justice lies at the heart of public interest and can only be served by openness in assisting the court to arrive at a proper and just decision. The judicial restraints on matters such as discovery and cross-examination would not long survive if lack of frankness and openness were to become commonplace in judicial review applications.

The legal authority of the Secretary of State to make the appointment

[32] Mr Treacy contended that the Secretary of State had no statutory or other power to make the appointment and that the respondent has late in the day sought to found his legal entitlement to make this appointment on the Royal Prerogative. While under the Royal Prerogative the Crown may appoint and dismiss minister, government officials, officers and men of the forces and the appointment and dismissal of judges and civil servants this does not include appointments such as the one at issue in the present case. The Royal Prerogative is a much attenuated remnant of the Crown's powers. Numerous statutes have expressly restricted it and even where statute merely overlaps it the doctrine is that the Royal Prerogative goes into abeyance. Prerogative powers may be atrophied by mere disuse.

[33] As a further argument Mr Treacy argued that one of the differences between the actions of the Secretary of State in making the appointment and the action of a private citizen in making a similar appointment was that the

substantial expenditure involved would come from the public purse. The salary of the IVC is £62,500 and the estimated cost of the office £276,000 per annum. It was contended that the money expended on the IVC and her office has not been shown to be approved in the appropriate manner. In the absence of funding the Secretary of State had no authority to make the appointment.

[34] Mr McCloskey relied on the Royal Prerogative as a legal basis for the appointment. As a matter of constitutional doctrine all functions of government belong to the Crown. While the Crown cannot act under the prerogative if to do so would be incompatible with statute patently there was no such incompatibility in the present instance. Counsel argued that the appointment of commissioners under the Royal Prerogative to carry out similar functions regularly occurs throughout the public service. He cited, by way of example, Sir Kenneth Bloomfield's appointment as the Commissioner to prepare the report into victims under the Good Friday Agreement. Sir Christopher Patten was appointed to head the inquiry into the policing service in Northern Ireland. Sir George Baine was appointed by the DFP to investigate the legal professions. Such appointments were the stuff of governance. Appointees are paid out of the public funds and only government could make a publically funded appointment. While this area will fall within a statutory framework in the future there is no legislation currently in force and thus the Royal Prerogative remains exercisable there being no suggestion of the matter of making such appointments having falling into desuetude.

[35] Counsel for both parties drew the court's attention to the Commissioner for Public Appointments (Northern Ireland) Order 1995. This deals with the powers of the Commissioners for Public Appointment for Northern Ireland. The order was itself made pursuant to letters patent under the Royal Prerogative and the Commissioner for Public Appointments in a person appointed by the Secretary of State. The functions of the Commissioner for Public Appointments include the maintenance of the principle of selection on merit in relation to public appointments. A public appointment is defined as meaning any appointment not being an extension of an existing appointment by re-appointment or otherwise made by a department to a public body listed in Part II of Schedule I to the Commissioner for Complaints Act (Northern Ireland) 1969 or in Part I of the Schedule to the Order itself but excluding any public body listed in Part II of that Schedule. The appointment of the IVC did not fall within the remit of the Commissioner because, as the Commissioner of Public Appointments pointed out in correspondence the post is not included within the statutory definition. Mr McCloskey pointed to the Order and to the appointment of the Commissioner for Public Appointments as evidence of a clear practice of resort to the Royal Prerogative in the field on public appointments.

[36] Mr Treacy also referred to the Ministerial Code published by the Cabinet Office in July 2005. He refers to para. 1.5 which provided that the Code should be read against a background of the overarching duty on ministers to comply with the law, to uphold the administration of justice and to protect the integrity of public life. In sub-paragraph (d) it is stated that ministers should be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest which should be decided in accordance with the relevant statutes and the Freedom of Information Act 2000. In paragraph 2.6 of the Ministerial Code it is stated:

> "Subject to the above paragraphs and to the constitution of the body to which the appointment is made, public (non-civil service) appointments are the responsibility of the minister concerned who should appoint the person *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." (Italics added).

Counsel also referred to the principles of personal conduct of those in public life established by the Committee on Standards in Public Life. Under the heading "Objectivity" it is stressed that in carrying out public business including making public appointments, awarding contracts or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

[37] The Code of Practice for Ministerial Appointments to Public Bodies established by the Commissioner for Public Appointments for Northern Ireland recorded that the Commissioner's remit is restricted to ministerial appointments within the bodies listed but there were many other public appointments in the wider sphere all of which fall outside the Commissioner's remit. These included appointments to advisory bodies and tribunals. The Northern Ireland departments agreed, however, to apply the Code of Practice of the appointments so far as is practicable and with due regard to proportionality. In the context of the guiding principles it is stated 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, experiences and qualities match the needs of the public body in question." (Italics added).

Under the heading of "Merit and Diversity" it is pointed out in paragraph 2.4 that appointment on merit is the overriding principle within the appointments process. In line with the Nolan Committee's original recommendations criteria for selection can take account of the need to make appointments which include a balance of skills and experience. Nonetheless, departments must guard against positive discrimination and political activity cannot be used as a criterion for selection unless there is a statutory requirement to do so. Under the heading "Openness and Transparency" in paragraph 2.16 it is pointed out that the workings of the appointment system must be clearly visible. All stages to the process including relevant conversations must be documented and the information should be readily available for audit. Under the heading of "Proportionality" it is pointed out that proportionality arguments must not be used to circumvent proper procedures. All deviations from the process set out in the Code of Practice must be fully recorded and departments are advised to consult OCPANI in advance of any significant departure.

[38] Mr Treacy also referred to a statement published by the Commons Public Administration Select Committee which considered the question of the width of the Royal Prerogative. The paper helpfully brings together details of significant aspects of the Prerogative and gives an overview of the mechanism for the control of the prerogative referring in particular to limitations on the prerogative by Parliament and judicial intervention. It concluded by pointing out that it remains impossible to define the exact limits of the prerogative. Mr Treacy argued that it is significant that in the list of areas in the sphere of domestic matters subject to the Royal Prerogative it included the appointment and regulation of the Civil Service and the appointment of QC's but no appointments to other non-statutory offices created by the Crown.

[39] It is clear that over the years the Executive has appointed individuals to positions in the nature of the office in issue in this case, a clear example being the Commissioner for Public Appointments himself. 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.

[40] The exercise of the prerogative powers is subject to judicial review in appropriate cases. It is subject to any statutory limitation. An interesting question which was raised in the argument is whether the Executive can by its practices, conduct and representations qualify the width and arbitrariness of the power. That there remains what has been described as a residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown (Dicey's Law of the Constitution) is somewhat anomalous in modern society where the concept of arbitrariness is alien to the commonly accepted features of the rule of law. For example, though not directly relevant here, convention case law repeatedly condemns arbitrariness as inconsistent with the convention rights being alien to the concept of legal certainty, a principle more fully established in the civil law system. Mr McCloskey argued that in the case of appointments falling outwith the remit of the Commission of Public Appointments the exercise of the Royal Prerogative in making appointments is constitutionally unrestrained. The question arises whether, absent a statutory provision, the Executive is bound by any restraining considerations. In view of the conclusion I have reached on other grounds it is unnecessary for me to come to a final conclusion on this question. But in case this case goes further I venture to express my conclusion recognising that the point is one which may require more extensive research and argument. 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. In CCSU v Ministers for the Civil Service [1985] 1AC 374 it was the national security considerations which prevented the relevant employees from relying on a legitimate expectation of consultation on which they otherwise could have relied. Had national security considerations not been in play the case recognised that the exercise of the

Royal Prerogative could be reviewed on grounds of breach of legitimate expectation, the legitimate expectation thus qualifying the otherwise arbitrary powers of the Executive. It would be in my view a legitimate and logical development of the law to hold the Government to its public assurances as to how it proposes to exercise its prerogative powers of appointment.

[41] I now turn to the question whether the appointment was an unlawful exercise of the Royal Prerogative in the absence of approval for the funding of the post. The applicant has not established that the respondent was acting unlawfully on this ground. Within the approved departmental estimates of the OFMDFM funding was approved for a programme on victims (see the provisions of the Budget (No. 2) (Northern Ireland) Order 2005 and the Budget (Northern Ireland) Order 2006). Funds were available under the approved estimate to meet the costs of the IVC who was being appointed to carry out functions in the context of the victims policy. While the expenditure may well have raised issues which would be subject to scrutiny and possible criticisms by the relevant parliamentary committee the incurring of the expenditure would not be unlawful or render the appointment itself ultra vires or unlawful.

[42] For reasons to which I will come I am satisfied that the appointment powers in this case were not carried out with regard to the principle of merit which, as the Ministerial Code make clear in the case of public appointments, means choosing the person considered to be *best qualified* for the position. (see para. 2.6 of the Code). In the ordinary employment field the principle of merit always refers to a process whereby the appointer seeks to appoint the *best* candidate. The Secretary of State decided to make an appointment disregarding the principle and thus went outside the constraints that the Executive had imposed on itself in relation to the exercise of the Royal Prerogative powers of appointment.

[43] Nowhere in their affidavits do Mr Phillips or Mr Hamilton assert that Mrs McDougall was the best qualified person for the job. Mr Hamilton's note for the record records that he was of the view that the two candidates met all the criteria and would be by far the strongest in respect of the criteria. Taking that statement at face value, no effort was made to compare Mr X and Mrs McDougall or to weigh up their respective merits in an attempt to identify the objectively better of the two strongest candidates. What emerges from Mr Hamilton's note for the record is that there were internal discussions within the NIO and OFMDMF before Mr Phillips and Mr Hamilton met with Mrs McDougall to explore her availability. That meeting appears to have occurred after a view had been formed that she was the *preferred* candidate. What transpired at the meeting, according to Mr Hamilton, satisfied them of her appointability and qualities. At no time did they interview Mr X or seek views from him. Against that background it is clear that the exercise which they carried out was not an exercise designed to the appointment of the better

of the two leading candidates but to decide to proceed with Mrs McDougall as a good candidate (but not necessarily the better of the two and thus the best in the pool). Why Mrs McDougall was singled out could only have been because she was nominated by the DUP. As we have seen in paragraph 34 Mr Hamilton states that the Secretary of State was "mindful" of her nomination by the DUP and that he had given careful consideration to the possibility of a different candidate and would not have appointed Mrs McDougall had he not been persuaded by the information and advice submitted to him that she genuinely satisfied the criteria devised. What this carefully worded paragraph does not say is that the Secretary of State was satisfied that she was the best candidate or the better of the two strongest candidates. The Secretary of State was not merely "mindful" of the fact that her name had been put forward by the DUP. The inference must be drawn is that this was the decisive factor that diverted the respondent away from what was the proper exercise namely to decide which of the two strongest candidates was the better candidate and the best of the pool uninfluenced by the question of whether Mrs McDougall was nominated by a political party.

[44] Mr McCloskey initially argued that Mr Hamilton's note and affidavit should be read in bonam partem and that it should not be assumed that Mrs McDougall was not the better of the two leading candidates. For reasons already given I am not able to read the affidavit in that way. Had the Secretary of State actually applied the proper merit principle (that is determining the best person for the position on merit) Mr Hamilton would have said so. His guarded, shrouded and carefully crafted language avoided saying that. In this regard his affidavit is significantly different from what was asserted in the letter of 5 January 2006 which stated that "she was considered to be the best candidate for the interim position". The matter is now, in any event, clear in the light of the respondent's most recent unequivocal concession that the letter of 5 January should not have conveyed the impression that the appointee was the best candidate on merit. The fact that counsel on instructions had mounted the argument that the court should not assume that the appointee was not the best candidate (and thus hold against the applicant on that point under the onus of proof rule applicable in a judicial review) merely underlines the fact that almost to the end the respondent was seeking to rely on ambiguous and misleading affidavits and was unwilling to openly set the record straight. Mr Hamilton's affidavit is so worded as to give the impression, without saying so in terms, that the appointee was the best candidate ("merit was the sole criterion"). The subsequent evidence and the concession made on behalf of the respondent shows that the statement that merit was the sole criterion applied was misleading. The wording led counsel to feel able to effectively mount that very argument. Had the court succumbed to counsel's in bonam partem argument on that point the court would have been persuaded to reach the wrong conclusion on that issue, a result which would have been brought about by the ambiguous wording of the affidavit.

[45] My analysis set out in the preceding paragraphs is relevant when we come to consider the argument that the Secretary of State breached Section 76 of the Northern Ireland Act 1998. Section 76 provides so far as material:

> "(1) It shall be unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to incite another person to discriminate, against a person or class a person on 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 sub-section (3) grant an injunction restraining the defendant from committing, causing or permitting further contraventions of the section."

[46] Mr McCloskey sought to argue that Section 76 taken as a whole excludes judicial review because the section contains a distinct set of remedies in sub-section (2) onwards. He called in aid the decision in Re Neill [2006] NICA 5 both at first instance and in the Court of Appeal in which the court had concluded that the special mechanisms under Section 75 for investigations into alleged breaches of a duty to have "due regard to the principle of equality of opportunity" excluded any other remedy. In Re Duffy [2006] NICA at first instance before Morgan J the court accepted that a judicial review remedy arose under Section 76(1). The Court of Appeal tentatively agreed with that proposition.

[47] The predecessor of Section 76 of the 1998 Act was Section 19 of the Northern Ireland Constitution Act 1973 which provided that the obligation not to discriminate was a duty owed to any person adversely affected by a breach and any breach was actionable. In Re O'Neill [1995] NI 274 Kerr J (as he then was) did not query that a judicial review challenge could arise under Section 19. In Purvis v Magherafelt District Council [1978] NI 26 Murray J granted declaratory relief in the context of an alleged breach of the Section 19 duty not to discriminate. The 1998 Act must be seen in the context of the Good Friday Agreement which recorded the British Government's commitment to "the strengthening of anti-discrimination legislation". It cannot have been the intention of Parliament to weaken the remedies by removing judicial review.

[48] Mr McCloskey argued that a litigant relying on Section 76 must establish victim status, a relevant comparator, differential treatment that was motivated by the victim's religious belief or political opinion and a consequential detriment. He contends that the applicant could not be considered a victim of discrimination or discriminatory treatment. If there is any Section 76 victim it is one of the unspecified parties which was not consulted.

[49] In Re O'Neill [1995] NI 274 Kerr J concluded that a decision taken on the ground of the religious belief of the person who made it would amount to discrimination under Section 19 if its effect was that a person adversely affected by it was thereby treated less favourably than another would have been treated in the same circumstances. For a breach of Section 19 to have occurred the deciding authority must have had the option to treat one group or person as favourably as it would have another in the same circumstances but it had declined or failed to do so on the ground of religious belief or political opinion. In Purvis v Magherafelt District Council [1978] NI 16 Murray J (as he then was) concluded that a plaintiff does not have to prove that the discriminatory action was taken on the ground of *his* religious belief or *his* political opinion. The belief or opinion could be that of some third party provided the plaintiff is adversely affected by the relevant discrimination.

[50] It is true that the applicant could not assert a claim for damages or injunctive relief under Section 76 as she is not the direct victim of any act of discrimination. However, central to the case is the proposition that the Secretary of State carried out the appointment process in an unlawfully discriminatory manner by deciding in favour of Mrs McDougall on a political ground (ie because she was nominated by the DUP and the Secretary of State considered it would be politically advantageous to appoint her in preference to another candidate not because she was the established better candidate between the two but because she was a good candidate who had been nominated by the DUP). Counsel did not seriously take issue with the proposition that if the Secretary of State publicly announced a policy whereby to persuade the DUP into government in all future public appointments DUP nominees would be given preference such a policy could be challenged by judicial review by reliance on section 76. An applicant in such a case could not be precluded from seeking judicial review by recourse to the argument that until actual discrimination happens there is no victim As a victim of the troubles the applicant in this case has standing and a legitimate interest in the proper implementation of the victims policy properly and lawfully conceived and implemented. As a victim of the troubles with such an interest she is affected by unlawfully discriminatory practices in the implementation of victims' policy. I conclude that she can rely on a breach by the Secretary of State of the Section 76 duties in this judicial review application.

Improper Motive

[51] 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.

[52] There is nothing to indicate that the DUP was expecting or demanding that their nominee should be appointed if she was not the best of the candidates. Doubtless the DUP was anxious to advance the interests of victims and doubtless they considered that their nominee was a strong candidate. The DUP would presumably say that they did not expect or demand that the Secretary of State should disregard the principle of merit in the choice of the IVC. The elected political leaders of the party would be bound to subscribe to the standards set out in the Members' Code of Conduct which demands of MPs full acceptance of the merit principle. The fact is that the Secretary of State decided to disregard the accepted merit norms applicable to public appointments in order to secure the appointment of the DUP's nominee who ex hypothesi might not have been the *best* candidate, simply because she was the DUP's candidate. The merit principle is based on a rational and sensible principle, namely that the successful candidate should be the person best able to do the job and give best value for money. The proper purpose for the appointment of the IVC who was being funded from public moneys was the purpose of appointing the person best able to advance the interests of victims, albeit on an interim basis. Inasmuch as the respondent failed to appreciate that point and allowed the political nomination to circumvent proper inquiry into the relative merits of the candidates he was not making the appointment for the proper purpose. The rationale behind the respondent's actions was that by making an appointment disregarding the relative merits of the candidates the interests of political confidence would be advanced. This approach presupposed a belief that in some way the DUP would be impressed by an action which disregarded established norms of appointment and disregarded the merit principle to which ministers and MPs are committed by the relevant Codes of Conduct. The respondent's rationale was not a legitimate or proper one.

Cross-Community Support

[53] The applicant's case is that 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. It clearly was a criterion of the job that the appointee would "command cross-community support". Mr Hamilton's affidavit records the criterion as "should command cross-community support". While the move from "could" to "should" might be open to the interpretation that he considered the criterion as meaning something different from the requirement "to be able to command cross-community support" there is probably no real or intended difference in Mr Hamilton's wording. The requirement was such that the appointer would have to consider whether the person proposed to be appointed would have support across the community. The dictionary definition of "support" is "strengthen a person by assistance or backing, stand by, back up." In the context of Northern Ireland "cross-community" means in effect throughout the community and thus both religious and political communities of Northern Ireland. Mr Hamilton was no doubt correct in his affidavit in indicating that in the context of the victim issues in Northern Ireland that was going to present a difficulty but it was a difficultly to be grappled with and thus required a careful effort to maximise the attempt to find a person who did generate backing from the two communities and avoid making an appointment of somebody whose appointment would cause division or dissension. 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.

[54] When we turn to Mr Hamilton's affidavit it is to be noted that in paragraph 23, having recognised the difficulty of finding a person acceptable to all sides of the community, he stated that the issue had to be approached by scrutinising carefully the individual and making "a considered judgment of degree." The question whether an individual had support throughout the community was a question that involved not simply looking at the qualities of the individual but considering how the community as a whole with all its divisions would view the appointment and whether across the community there would be sufficient backing and assistance for the appointee. 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. This 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.

[55] The conclusion I have reached on this issue is that the decision-makers failed to properly address what was involved in establishing that the appointee would command cross-community support. They failed to look for the evidence to show that the appointee would generate that support. It was known as a fact that the appointment would generate criticism in one section of the community and would therefore be likely to be divisive. Notwithstanding that, by a nuanced change of language, they repackaged the concept of cross-community support to mean something different from its primary main meaning. Accordingly, I accept the argument that 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.

Legitimate Expectation

[56] Mr McCloskey argued that the evidence failed to establish the existence of a clear unequivocal and unqualified statement, representation or promise that there would be consultation about the establishment of the post of IVC or in relation to the actual appointment. Mr Treacy argued that the Government had by its representations made clear that if there was going to be consultation on victim issues the consultation would be fair consultation. The statement to Parliament by Mr Murphy MP the then Secretary of State on 1 March 2005 indicated that any process for dealing with victims issues could not be designed in isolation or imposed. There would need to be broadly based consultation with other individuals and groups across the community to put their views.

[57] In his statement to Parliament on 1 March 2005 the then Secretary of State stated that:

> "Government has the ultimate responsibility for ensuring that an appropriate mechanism is found for dealing with the past to the satisfaction of all sections of the community. But I recognise too that, for some, the Government's role in past events is itself seen as an issue and it is hard for some sections of the community to see us as a genuinely neutral party. Neither does the Government have an monopoly of wisdom, and I recognised the major contribution that many practitioners and other bodies are already making in this field.
>
> These considerations have led me to conclude that any process for dealing with the past in Northern Ireland cannot be designed in isolation or imposed by Government there will need to be broadly based consultation that allows individuals and groups across the community to put their views on what form any process might take and that consultation process would need broad cross-community support if the ideas it generates are to be constructively received."

[58] The statement that a consultation process would need broad community support if the ideas it generates are to be constructively received is a statement of an obvious political reality in the context of the issue of victims in Northern Ireland. The actual process that was followed in the present instance, with a partial consultation involving only one political party, was not apt to generate cross-community support. That, however, is a different point from whether the applicant had a legitimate expectation that she would be consulted or that there would be a consultation process before the establishment of an interim commissionership or the appointment of an IVC. I conclude that the applicant has failed to establish the basis for a legitimate expectation on which she could rely in the present context and I accordingly accede to the thrust of Mr McCloskey's argument on this point.

Conclusions

[59] The appointment of Mrs McDougall

(a) breached section 76 of the Northern Ireland Act 1998;

(b) being in breach of the accepted merit norms applicable to public appointments and in breach of the Ministerial Code of Practice in the circumstances the appointment, was in breach of the power of appointment under the Royal Prerogative;

(c) was motivated by an improper purpose, being motivated by a political purpose (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

(d) failed to take account of the fact that there was no evidential basis for concluding that the appointee would command cross-community support.

[60] The relevant government departments initially provided partial, misleading and incorrect information as to the manner of the appointment, failing to disclose the true nature of the limited consultation which took place with one political party; implying that no consultation took place when it had taken place; and giving the false impression that the appointment was made on the basis that the appointee was the best candidate in terms of merit when in fact the ordinary principles applicable to an appointment solely on merit were disregarded. The true basis of the appointment did not emerge from the letter of 5 January 2006 under the Freedom of Information Act. The respondent opposed the grant of leave to apply for judicial review of the appointment by reliance on the case made out in the misleading letter and failed to reveal to the court the true factual situation prevailing. The court at first instance was accordingly misled and refused leave on an incorrect basis. When the applicant appealed the respondent sought to persuade the Court of Appeal to refuse the appeal by reliance on the same flawed material. When leave was granted the respondent put forward Mr Hamilton as the person with knowledge of the true circumstances relating to the appointment. His affidavit which was seen and sanctioned by the Secretary of State was ambiguous and failed to disclose all the relevant material pertaining to the appointment. When the court ordered the cross-examination of the deponent the respondent sought to appeal against that decision and to rely on an affidavit which it is now conceded was unsatisfactory and failed to disclose all the material circumstances of the appointment. Before the appeal came on for hearing the respondent filed an affidavit from Mr Phillips which purported to set out the full factual situation. No effort was made to explain how Mr Hamilton's affidavit came to be formulated in a way which was ambiguous and incomplete and implicitly Mr Phillips did not ascertain what aspects of the case as set out in his affidavit actually fell outside the knowledge of Mr Hamilton. No explanation was provided as to how the Secretary of State came to approve and sanction the swearing and filing of an affidavit which Mr Phillips acknowledged was incomplete. Had leave been refused by the Court of Appeal to apply for judicial review the true evidential

position would not have come to light and the interest of justice would have been frustrated. Had the respondent succeeded in resisting the cross examination of Mr Hamilton the respondent would have been relying on an affidavit which it is now conceded was incomplete and unsatisfactory. This likewise would have frustrated the interests of justice. In adopting the course that was followed starting with the letter 0f 5th January 2006 and continuing up until the filing of Mr Phillips' affidavit and the concession made to the court that the letter was misleading the respondent failed in his duty of candour to the court.

[61] Nothing in this judgment should be taken as in any way reflecting on Mrs McDougall, on her competence, integrity or quality of workmanship during her tenure of office . She was in no way privy to the inner workings of government in relation to the manner of her actual appointment. She has no doubt carried out her functions competently, conscientiously and to the best of her ability. Similarly it should be recorded that there is no evidence that the DUP expected or demanded that their nominee should be given preference in disregard of the ordinary merit principle. Neither the IVC nor the DUP were parties to this application. It will be necessary to hear further argument on the appropriate relief to be granted in the light of this ruling. In view of the impact of any order on Mrs McDougall's rights and interest she should be given notice of her entitlement to appear and be heard on the issue of the appropriate relief. Subject to hearing argument on the point, it would appear that any costs incurred by her in such an appearance should be defrayed by the respondent.