

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

**IN THE MATTER OF AN APPLICATION BY JOHN JOSEPH DUFFY  
FOR JUDICIAL REVIEW**

**Before Kerr LCJ, Nicholson LJ and Campbell LJ**

**NICHOLSON LJ**

[1] This is an appeal by the Secretary of State for Northern Ireland against the judgment and order of Morgan J (the judge) dated 19 May 2006 whereby he made an order quashing the appointment of David Burrows to the Parades Commission for Northern Ireland. The grounds of appeal, as set out in a Notice of Appeal dated 23 May 2006, were:

- (i) The judge erred in holding that the Secretary of State's officials were under an obligation "... to consider whether it was necessary to target those groups within the Nationalist community which opposed the perspective of the Loyal Orders."
- (ii) The judge erred in concluding that "... the appointment process was unlawful in that the Secretary of State's officials failed to take into account a material consideration as a result of which he failed to secure as far as was practicable that membership of the Commission was representative of the community in Northern Ireland."

[2] The respondent to the appeal who is a member of the group known as the "Garvaghy Road Residents' Coalition" contended by Notice dated 24 May 2006 that the decision of Morgan J should be affirmed on grounds other than those set out in his judgment, namely:

- (i) The judge erred in holding that the decision of the Secretary of State to encourage applicants from the Loyal Orders to apply for posts within the Parades Commission whilst not encouraging applicants from Nationalist residents' groups or indeed any Nationalist community

group to apply for posts was not discriminatory or unlawful by virtue of Section 76 of the Northern Ireland Act 1998.

- (ii) The judge erred in his approach to the determination of whether there was discrimination on the grounds of religious belief and/or political opinion ....
- (iii) The judge erred in holding that the perceived and/or actual conflict of interest of prominent members of the Loyal Orders was not such as to render them unable to contribute materially to the work of the Commission.
- (iv) The judge erred in concluding that before the court could interfere with the Secretary of State's discretion it would be necessary to demonstrate that the appointees would be unable to contribute materially to the work of the Commission.
- (v) The judge further erred in concluding that the appointees would be able to contribute materially to the work of the Commission.
- (vi) The judge erred in holding that, given the Parades Commission's functions provided for under the Public Processions (Northern Ireland) Act 1998, ("the 1998 Act"), the Secretary of State was not precluded from appointing as Commissioners prominent members of the Loyal Orders.
- (vii) The judge erred in holding that (the Secretary of State) had not failed to correctly apply the guidance issued by the Office of the Commissioner for Public Appointments in appointing two persons with both a real and perceived conflict of interest.

[3] The background to the establishment of the Parades Commission is set out in the North Report published in January 1997. This report was commissioned by the then Secretary of State to review the current arrangements for handling public processions and open-air public meetings and associated public order issues in Northern Ireland and to make recommendations. These recommendations led to the passing of the 1998 Act.

It stated in Chapter 1 at 1.1:

"The dispute in the summer of 1996 between the Loyal Orders and Nationalist resident groups, which required major intervention by the police under the public order legislation, brought Northern Ireland close to anarchy. Controversy surrounding a parade on Sunday 7 July by the

members of the Orange Order from Drumcree Parish Church down the Garvaghy Road on the outskirts of Portadown, which was opposed by Nationalist residents, led to widespread serious public disorder over the following week, first among Unionists and then among Nationalists. There were major costs to Northern Ireland:

- two deaths and a significant number of injuries,
- polarisation between the two parts of the community,
- damage to the relationship between the police and the community,
- public expenditure costs which would appear to be in excess of £30 million,
- losses to trade, tourism and inward investment.”

At 1.3 it stated:

“For over 25 years Northern Ireland society was preoccupied with violence. Once the cease-fires were announced there was vast relief and sincere hopefulness that a new future lay in front of us. The parades and protest issue quickly uncovered the widespread anger, deep divisions and political anxieties lying beneath the surface.”

[4] As the judge stated at para. 2 of his judgment the North Report:

“Recommended the creation of an independent body that would:

- (a) allow interested parties to put their views forward about proposed parades;
- (b) encourage them to settle difficulties locally, and where that proved impossible,
- (c) itself come to a view on what, if any, conditions should be imposed on contentious parades after an appropriately transparent process of examination of all the relevant issues against the background of reformed legal provisions.”

He quoted further from the report at para. 3 of his judgment:

“Many people have said to us that the composition of the Parades Commission will be of critical importance to its success. We agree. The Parades Commission will need widespread acceptance, self-confidence and an ability in its members to work together.”

The report went on to state:

“The Parades Commission would need to have a geographical spread and both cross-community and gender balance.”

[5] The judge set out sections 2 and 8 of the 1998 Act at para. 4 of his judgment and it is unnecessary to set them out again. He stated:

“It is clear from these functions that the Commission has an adjudicative role.”

This task has been shown to be the most difficult which the Commission has undertaken. There have been a number of judicial reviews of their decisions.

[6] Schedule 1, para. 2(3) of the 1998 Act provides:

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

[7] The annual reports of the Parades Commission for 2003-2004 and 2004-2005 (required to be submitted to the Secretary of State by virtue of Schedule 1(13) of the 1998 Act) reveal that there were 231 contentious parades in 2003/2004 on which the Parades Commission had to adjudicate. 50 of these were notified weekly by Portadown LOL No. 1 District in relation to the Garvaghy Road. All of these were restricted as to their route. In 2004/2005 there were 229 contentious parades on which the Parades Commission had to adjudicate. 50 of these were notified weekly by Portadown LOL NO. 1 District in relation to the Garvaghy Road. All were restricted as to the route.

[8] When the appointment of Parades Commissioners for 2006 came up for consideration the Office of the Commissioner for Public Appointments (OCPA) in accordance with whose guidelines such appointments were made, considered that some degree of continuity of Board membership was desirable. From a document made available to the court late in the hearing, it

is apparent that it had been agreed that up to two members of the Commission would remain for one year. But at some later stage it was decided that none should be re-appointed. Advertisements were published in the press and there was a press release. The document, which was sent to the Secretary of State, stated that the press release would clarify that this was a routine replacement of Board members. The document enclosed draft letters to community leaders for approval by the Secretary of State. The community leaders comprised the leaders of the four main political parties and the leaders of the four main churches in Northern Ireland. But for the first time the leaders of the Loyal Orders were included, namely the leader of the Apprentice Boys of Derry, the Grand Master of the Grand Orange Lodge of Ireland and the Sovereign Grand Master of the Royal Black Institution. It was stated on behalf of the Secretary of State that this was on the initiative of a middle management official of the Northern Ireland Office without the knowledge or approval of more senior officials.

[9] The wording of the draft letters which were approved by the Secretary of State read "... The competition to appoint successors [to the members of the Parades Commission] will be advertised in the press from 26 July. I am writing to ask you to encourage anyone you consider appropriate to apply.

Peter Hain MP, Secretary of State for Northern Ireland

[10] In my opinion a letter from the Secretary of State inviting applications is much more significant than an advertisement in the press or a press release addressed to the public in general. If the letter to the leaders of the Loyal Orders had contained a limitation by reference to persons other than those involved in contentious parades in my view it would have been difficult to criticise the singling out of these "community leaders". No consideration need then have been given to the question of balancing the recruitment process by including letters of encouragement to leaders of residents' groups within the nationalist community who opposed the parades. In the ordinary course of events those with a real and perceived conflict of interests would not expect to be encouraged to apply, let alone to be appointed to adjudicate on such controversial disputes in which they had an obvious interest in the outcome: see, for example, the Brendan MacConnaith sworn on 26 April 2006.

[11] The judge criticised the Secretary of State's officials but it seems to me to be apparent from the available evidence that it was government policy to encourage the loyal orders to put forward applicants for appointment. Let me make it clear that this was a matter for the Secretary of State to decide. But it was not proper to encourage those who had a real and perceived interest in the outcome of contentious parades to apply.

When the decision was taken to encourage those who were bound to vote in favour of such parades to apply there was an obligation not merely to consider whether residents within the Nationalist community affected by contentious parades should be encouraged to apply but there was an obligation to encourage them to apply, so that the Secretary of State would have an opportunity to achieve a balance. I respectfully disagree with the view of Morgan J that it was only necessary to consider whether to target Nationalist groups opposed to the viewpoint of the Loyal Orders. If that had been the only duty, the failure to do so may not have been enough to justify quashing the appointment of Mr Burrows. As a result of the selection process there was no representative of Nationalists living in areas affected by contentious parades who reached the appointable pool. In my view this was inevitable. But the fundamental flaw in the decision-making process was to seek applications for membership of the Parades Commission from those who were active participants in contentious parades and who could not be expected to be impartial in adjudicating on them.

The responsibility for the choice of the Loyal Orders, the terms of the letter to them and the consequences thereof must rest with the Secretary of State.

[12] The two persons appointed to the Commission from the Loyal Orders were both members of Portadown LOL No. 1 according to the unchallenged affidavit evidence. I have already referred at paragraph [6] to the contentious parades applied for by that Lodge. Mr Donald Mackay was a member of the Royal Black and Orange Institution and a member of Portadown ex-servicemen's Orange Lodge as well. He informed the Panel of NIO civil servants and the independent assessor from OCPA that he was keen to ensure that their perspective was reflected in the Parades Commission's deliberations. The Panel's written assessment of Mr Mackay which was provided to the Secretary of State in answer to the printed question: 'Any areas of real/perceived conflict of interest? No/Yes'. Yes was stroked out. Their comments illustrate their understanding of conflict of interest.

"No conflict of interest considered. He declared his membership of the DUP and of Loyal Orders (Orange and Black), would be keen to ensure their perspectives were reflected on PS". All the members of the Panel signed this assessment. After appointment to the Commission he stated that he would be marching down the Garvaghy Road this year. Mr David Burrows was a District Officer of Portadown LOL No. 1 for over 10 years, stepping down from being a District Officer for personal reasons after 12 July 2005 when he was District Master but remaining a member of the Lodge. In a press statement by the Grand Orange Lodge of Ireland issued on 1 July 2002 he was stated to be Deputy District Master of the Portadown Orangemen and quoted as saying: "The Garvaghy Road dispute has come to symbolise the

victimisation of Northern Ireland's Unionist community". He was also quoted as saying:

"We're hearing a lot of conciliatory noises from the Sinn Fein leadership at the moment about the need to convince Unionists about Nationalist commitment to the peace process. If they mean what they say they should use their influence to ensure the Garvagh Road Residents Coalition allows our church parade and abandons its bigoted and intransigent opposition which has blighted the Portadown district and Northern Ireland as a whole for too long."

Again, in their assessment forms for Mr Burrows the panel in answer to the printed question. Any areas of real/perceived conflict of interest? stroked out 'Yes' and left 'No' as the answer. The column headed 'comment' which immediately follows was left blank. Again this assessment form was sent to the Secretary of State, signed by all the members of the panel.

The irresistible inference, it appears to me, is that for the period during which the Parades Commission has been in existence Mr Mackay and Mr Burrows have been parties to the weekly application of Portadown LOL No. 1 to parade along the Garvagh Road, notwithstanding the attendant problems. It also seems to me to be an unavoidable inference that they, as Portadown Orangemen and in view of their utterances, would vote in favour of any contentious route.

I do not propose to deal with the arguments addressed by counsel for the respondent as to the contribution which they would make to the work of the Commission.

[13] I share the view of the majority of the court who agreed with the judge when he stated at paragraph [16] of his judgment: "The decision of the panel members that no perceived conflict of interest issues arose in relation to these applications is in my view inexplicable. It causes one to doubt whether the panel members properly understood the nature of the task on which they were engaged." Mr McCloskey QC on behalf of the Secretary of State when opening the appeal, manfully sought to stand over the 'No' answers. In reply his junior counsel, Mr Maguire was forced to concede that the answers should have been 'Yes'.

[14] The press release issued by the Government stated that appointments had been made in accordance with OCPA guidelines. Under the heading 'Probity' these guidelines state at 2.09 "The problem most likely to arise is that of actual or perceived conflict of interest. Therefore as early as possible in the recruitment process, all candidates must be asked to disclose information or

personal connections which, if they were to be appointed, could be misconstrued or cause embarrassment to the appointing authority. Departments in consultation with the bodies themselves, are best placed to judge what might constitute a conflict of interest. If it appears that a possible conflict might exist or arise in the future, this must be fully explored with the candidate to establish whether it is sufficiently significant to prevent the individual from carrying out the duties of the post. The discussions and subsequent decision must be fully documented and the department must be able to justify its decision publicly if necessary.

At 2.10 of the OCPA guidelines reference is made to membership of some societies or organisations. I quote "In some instances such membership may be cited as creating an obvious conflict of interest, but it must not be an automatic bar to appointment. It must be established whether there is a genuine conflict of interest and if it would hamper the individual in carrying out the requirements of the post." At 3.06 it is stated: "Ministers must be consulted very early in the planning stage. In particular, it is important that they agree the selection criteria and the way the process is to be conducted. As to selection it is stated at 3.28: "..... The requirements are governed primarily by the need to maintain the principles of appointment on merit and equal opportunities and to ensure diversity within boards". Under the heading "Integrity" it is stated: "Holders of public office should not place themselves under any .... Obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties."

In a document entitled "Probity and Conflict of Interests - A Guide for Candidates - OCPA set out:

"If I declare a conflict, does this mean I will not be considered for appointment?"

The answer given is:-

"No, each case will be considered individually. If you are short-listed for interview the Panel will explore with you how far the conflict might affect your ability to contribute effectively and impartially on the Board and how this might be handled. If you were to be appointed, for example, it may be possible to arrange for you to step out of meetings where an issue is discussed, in which you have an interest. However, if following the discussion with you the Panel believes that the conflict is too great and would call into question the probity of the Board or the appointment, they can withdraw your application from the competition."



Areas where conflict could arise are indicated in the Guidelines; for example, relationships with other organisations which could lead to perceived or real split loyalties and membership of some organisations.

[15] Unfortunately the Panel did not perceive any conflict of interest and therefore did not pursue or record anything which would indicate that a conflict of interest could be resolved. That they were asked the same questions as other applicants was to be expected but in the case of Mr Mackay and Mr Burrows it would have been necessary to discover what their attitude to applications by Portadown LOL No. 1 for parades down the Garvaghy Road would be if the evidence was that it was not in the public interest to permit them, what their attitude to other contentions parades would be and whether their relationship with Portadown LOL No. 1 would lead to split loyalties. It is apparent that none of these questions were asked. If the conflict of interest had been appreciated, it is difficult to see how Mr Mackay and Mr Burrows would have been recommended. If their names had not gone forward to the Secretary of State it follows that the appointments would not have been made.

[16] It should have been apparent to the Secretary of State who received the Assessment Forms that conflict of interest had not been explored by the panel. Mr Maguire on behalf of the Secretary of State in reply contended before the court that the Secretary of State, recognising the conflict of interest, sent the Director of Policing and Security to speak to each of the candidates selected as members of the Commission and asked them each to confirm that, if appointed, they would while on the Commission act objectively and work as a corporate team. They all answered in the affirmative. I am of the opinion that this question did not adequately explore the conflict of interest of Mr Mackay and Mr Burrows and that the Secretary of State should not have placed reliance on it as resolving their conflict of interest, knowing as he did or should have done that the panel had not explored it.

[17] I accept the appellant's argument that appointments to the Commission belong to the category of decisions where the threshold for judicial intervention is high. A large area of discretion is available to the decision-maker particularly because of the substantial political content of the decision.

Whether one adopts the language of Kerr J (as he then was) in Re Williamson's Application or of Carswell LCJ in the Court of Appeal [2002] NI 281 it is the court's function only to ascertain whether the decider has taken into account the correct considerations and made his decision within the proper parameters by correct application of the law.

It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision. If there are matters so obviously material to a decision that anything short of direct consideration of them by a minister would not be in accordance with the intention of the Act they would constitute relevant considerations to be taken into account.

[18] I am satisfied that the decision of the Secretary of State was flawed from the start of the selection process because it was decided to write to leaders of the Loyal Orders inviting applicants regardless of any conflict of interest. This was an act of positive discrimination. In order to redress this and establish balance, it would have been necessary to write to leaders of Nationalist community groups inviting applicants from those affected by the contentious parades.

The OCPA guidelines were not followed. There was a breach of Section 76(1) of the Northern Ireland Act 1998 which OCPA states, must be complied with in Northern Ireland. There was a breach of Section 76(1) of the Northern Ireland Act 1998 which, OCPA state, must be complied with in Northern Ireland. This sub-section provides that it shall be unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate against a person or class of persons on the ground of religious belief or political opinion. By writing only to leaders of the Loyal Orders in the manner described at paragraph [10] of this judgment there was discrimination against Nationalist community groups affected by contentious parades. This was a matter so obviously material to the decision which was taken to appoint Mr Mackay and Mr Burrows that failure to take it into consideration was not in accordance with the intention of the 1998 Act. I respectfully differ from the majority of the court and from Morgan J on that issue.

[19] As a result two persons from Portadown LOL No. 1 were appointed. They represented a comparatively small percentage of the Protestant section of the community. (Chapter 3 of the North Report makes this clear). As a result the Secretary of State was unable to comply with paragraph 2(3) of Schedule 1 of the 1998 Act whereby he was required to exercise his powers of appointment so as to secure that as far as was practicable the membership of the Commission was representative of the community in Northern Ireland.

In the context of appointments to the Parades Commission the choice of two active participants in contentious parades upset the balance to such an extent as to render the membership of the Commission unrepresentative of the community. I cannot accept the proposition that if one appoints four Protestants and two Catholics regardless of what they represent, one is securing as far as is practicable a Commission which is representative of the

community in Northern Ireland. I recognise that I may well be differing from the views expressed in Re Armstrong (per Kerr J, as he then was) and in Re White (per Carswell J as he then was).

[20] Accordingly I would quash the decision to appoint Mr Burrows as a member of the Commission.