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

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY SINN FEIN
FOR JUDICIAL REVIEW**

WEATHERUP J

The application

[1] This is an application for Judicial Review of the findings of the International Monitoring Commission contained in its Report presented to Parliament on 20 April 2004 and further of a Direction given by the Secretary of State under Section 51B(2) of the Northern Ireland Act 1998 issued on 28 April 2004. By that Direction the Secretary of State recited that he was satisfied that Sinn Fein were not committed to non-violence and exclusively peaceful and democratic means and directed that the financial assistance payable under the Financial Assistance for Political Parties Act (Northern Ireland) 2000 to Sinn Fein for the period from 29 April 2004 to 28 April 2005 should not be payable. Mr M. Lavery QC and Ms Doherty appeared for the applicant and Mr McCloskey QC and Mr Maguire appeared for the Secretary of State.

The legislation providing for financial assistance for political parties

[2] Further to the signing of the Belfast Agreement (the Good Friday Agreement) the Northern Ireland Act 1998 made new provisions for the Government of Northern Ireland. The following provisions are relevant to this application.

- Section 30 provides for the exclusion of ministers from office. If the Assembly resolves that a minister or junior minister or a political party no longer enjoys the confidence the Assembly because they are not committed to non-violence and exclusively peaceful and democratic means or by the failure of a minister or junior minister to observe the other terms of the pledge of office, that minister or junior minister or members of that party shall be excluded from holding office for a period of twelve months.
- Section 30(6) provides that if the Secretary of State is of the opinion that the Assembly ought to consider such a resolution in relation to a minister or junior minister or political party he shall serve a notice on the Presiding Officer requiring him to move such a motion for such a resolution.
- Section 30(8) provides that a resolution shall not be passed without cross-community support.
- Schedule 4 contains the pledge of office that includes a commitment to non-violence and exclusively peaceful and democratic needs.
- Section 40 established the Northern Ireland Assembly Commission whose functions included the provision of services required for the Assembly's purposes.

[3] The Financial Assistance for Political Parties Act (Northern Ireland) 2000 provides for the making of payments to political parties.

- Section 1 as originally enacted provided that the Northern Ireland Assembly Commission may make payments to political parties "for the purpose of assisting members of the Assembly who are connected with such parties to perform their Assembly duties."
- By Section 2 the Commission was to lay before the Assembly a Scheme for the making of payments to political parties.

[4] The Northern Ireland Act 2000 makes provision for the suspension of devolved government in Northern Ireland.

- While Section 1 of the 2000 Act is in force the Northern Ireland Assembly is suspended.
- The Schedule to the 2000 Act sets out provisions applicable during suspension. Paragraph 8 of the Schedule provides that

during suspension the functions of the Commission are exercisable by the Secretary of State.

There were suspensions and restorations of the Assembly in 2000 and 2001 and the Assembly has been suspended since 14 October 2002.

[5] The Northern Ireland Assembly (Elections and Periods of Suspension) Act 2003 makes further provision for periods of suspension.

- Under Section 5 of the Act the Schedule to the Northern Ireland Act 2000 is amended to add paragraph 14 to provide that during suspension Section 1 of the Financial Assistance for Political Parties Act (Northern Ireland) 2000 shall refer to financial assistance for the purpose of “assisting them to engage in political discussions about a return to devolved government.”

The establishment of the International Monitoring Commission

[6] Further to the suspension of the Assembly there were discussions between the political parties and the British and Irish Governments. A Joint Declaration by the British and Irish Governments issued 10 April 2003 set out requirements for a normal peaceful and secure society and identified a key impediment to such a society in Northern Ireland as being continuing acts of manifestation of paramilitarism, sectarian violence and disorder. By Agreement between the British and Irish Governments issued 1 May 2003 it was proposed to establish a new independent body to monitor and report on the carrying out of commitments relating to the ending of paramilitary activity. The result was an International Agreement dated 25 November 2003 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland establishing the Independent Monitoring Commission which came into being on 7 January 2004.

[7] The terms of the International Agreement provided for the establishment of the IMC under international law and included the following.

- By Article 4 it was provided that in relation to the remaining threat from paramilitary groups the IMC shall monitor any continuing activity, including all criminal offences, assess the role of paramilitary leaderships in directing or preventing incidents, as well as trends in security incidents, and report its findings to the two Governments.
- By Article 6 the IMC may consider a claim by any party in the Assembly that a minister or another party is not committed to

non-violence and exclusively peaceful and democratic means and report its findings to the two Governments.

- By Article 7 it is provided that when reporting under Article 4 or Article 6 the IMC shall recommend any remedial action considered necessary and may also recommend what measures, if any, it considers might appropriately be taken by the Assembly, such measures being limited to those which the Assembly has power to take under legislation.

The legislation providing for the reduction of financial assistance for political parties

[8] The Northern Ireland (Monitoring Commission) Act 2003 makes provision in connection with the establishment under international law of the IMC and other provisions concerning sanctions against ministers and parties in the Assembly. The sanctions extend to exclusion from office, reduction in remuneration and reduction of financial assistance.

- Section 1 refers to the establishment of the IMC, the functions of which are stated to include monitoring activity by paramilitary groups.
- By Section 4 of the 2003 Act Section 30 of the 1998 Act is amended in relation to exclusion from ministerial office. The amendments include the power of the Secretary of State to serve notice on the Presiding Officer requiring him to move a resolution for exclusion and take into account any recommendation about steps the Assembly might consider taking which is contained in an IMC report.
- Section 30A is inserted in the 1998 Act to grant the Secretary of State powers in relation to exclusion from ministerial office. Section 30A applies where the IMC Report contains recommendations about steps the Assembly might consider taking and the taking of those steps requires the passing of a resolution in relation to a minister, junior minister or political party and the first motion for such a resolution does not attract cross-community support. In that event the Secretary of State may direct the exclusion of the minister or junior minister for not more than twelve months if satisfied that he is not committed to non-violence and exclusively peaceful and democratic means or has failed to observe any other terms of the pledge of office.
- Section 47A is inserted in the 1998 Act to provide for resolutions about reduction of remuneration. The Assembly may resolve that

a minister or junior minister or members of a political party are not committed to non-violence and exclusively peaceful and democratic means and that salaries shall be reduced accordingly. Section 47A(9) requires that such a resolution shall not be passed without cross-community support.

- Section 47B is inserted in the 1998 Act to provide that the Secretary of State has powers in relation to the reduction of remuneration. If an IMC Report recommends steps that require a resolution under Section 47A and the first motion does not attract cross-community support the Secretary of State may issue a direction for reduction in remuneration.
- Section 51A is inserted in the 1998 Act to provide for resolutions about reduction of financial assistance. The Assembly may resolve that the financial assistance payable under the Financial Assistance for Political Parties Act (Northern Ireland) 2000 be reduced. If the Secretary of State is of the opinion that the Assembly ought to consider such a resolution he shall serve a notice on the Presiding Officer requiring him to move a motion for such a resolution. By Section 51(8) such a resolution shall not be passed without cross-community support.
- Section 51B is inserted in the 1998 Act to provide for the Secretary of State's powers in relation to reduction of financial assistance. Where the IMC Report recommends steps the Assembly might consider taking by the passing of a resolution under Section 51A and the first motion does not attract cross-community support the Secretary of State may by direction provide for reduced financial assistance under the 2000 Act.

[9] The Northern Ireland Act 1998 and the Northern Ireland Act 2000 (Modification) Order 2004 provides for modifications during suspension of the Assembly. This includes modification of Section 51B of the 1998 Act and the terms of that section in operation at the date of the Secretary of State's Direction on 28 April 2004 were as follows -

“(1) This section applies if -

- (a) the Monitoring Commission has, or members of the Commission have under the agreement establishing it, made a report containing a recommendation about steps which are steps the Assembly might consider taking were Section 1 of the

Northern Ireland Act 2000 not in force; and

- (b) the taking of those steps where the Assembly would have required the passing by of a resolution under Section 51A(1), (2), or (3) in relation to a political party.

(2) Where this section applies in circumstances in which the taking of the steps concerned by the Assembly would have required the passing by it of a resolution under Section 51A(1), the Secretary of State may by direction provide that the whole or a specified part of any financial assistance payable for a specified period under the Financial Assistance for Political Parties Act (Northern Ireland) 2000 to the political party concerned shall not be payable (subject to sub-section 5).

(5) The Secretary of State may exercise the power under sub-section (2)..... only if he is satisfied that the political party concerned -

- (a) is not committed to non-violence and exclusively peaceful and democratic means; or
- (b) is not committed to such of its members as might become ministers or junior ministers observing the other terms of the pledge of office."

[10] The Financial Assistance for Political Parties (Amendment) Scheme 2004 was made by the Secretary of State on 23 April 2004 in exercise of the powers conferred on him by Section 2 of the Financial Assistance for Political Parties Act (Northern Ireland) 2000. A schedule to the Scheme provides that a claim for financial assistance for the purpose of assisting them to engage in political discussions about a return to devolved government shall be made to the finance office. The financial assistance payable in a financial year to each political party shall be £48,000 where that party has two or more members and £3,000 in respect of each member which that party has.

[11] The Northern Ireland (Monitoring Commission) Act 2003 (Immunities and Privileges) Order 2003 Article 4 provides that except in

so far as in any particular case any privilege or immunity is waived the IMC should have immunity from suit and legal process.

The IMC Report

[12] The first report of the IMC was presented to the two governments on 20 April 2004. The Report was submitted under Articles 4 and 7 of the International Agreement establishing the IMC by which Article 4 directs the IMC to look at the continuing activities of parliamentary groups and Article 7 provides for recommendations on remedial action and measures considered appropriate to be taken by the Assembly. The Report included the following –

- It is not acceptable for any political party, and in particular for the leadership, to express commitment to democratic politics and the rule of law if they do not live up to those statements and do all in their power to ensure that those they are in a position to influence do the same (p7).
- Article 4 encompasses the activities of paramilitary groups in the widest sense. We deal not only with terrorism and sectarian violence but with all other forms of criminality that these groups commit (p8).
- The Provisional Irish Republican Army (PIRA) is a well funded organisation deriving a substantial income from smuggling and other criminal activities (p13); PIRA was maintaining its capacity to undertake acts of violence or to participate in a terrorist campaign; the incidences of paramilitary shootings were indicative of effective direction by the leadership; decisions were taken at a senior level to restrict such attacks during Assembly elections or the visit of President Clinton; PIRA was engaged in the use of serious violence which was believed to be under the control of its most senior leadership whose members must therefore bear responsibility for it (p14).
- The IMC was convinced that the leadership of the paramilitary groups was directing rather than seeking to prevent the activities referred to and raised two general questions, the first being the relationship between the leadership of paramilitary groups and that of political parties and the second being how to hold to account leaders of paramilitary groups engaged in continuing violence and other criminal activity (p34).

- On the first question the IMC considered that two parties that would be represented in a restored Assembly had links to paramilitary groups namely Sinn Fein and the Progressive Unionist Party; it was difficult to be precise about the relationship between Sinn Fein and PIRA. The position was summarised as follows –

“- Some members, including some senior members, of Sinn Fein are also members, including, in some cases, senior members of PIRA.

- Sinn Fein, particularly through their senior members, is in a position to exercise considerable influence on PIRA’s major policy decisions, even if it is not in a position actually to determine what policies or operational strategies PIRA will adopt. We believe the decisions of the Republican movement as a whole about these matters lie more with the leadership of PIRA than with Sinn Fein.

- Within PIRA some decisions follow a process of consultation with the membership initiated by the leadership.”

- The IMC went on to emphasise that while there might not have been a PIRA ceasefire in the first place without influence of the leadership of Sinn Fein by the same token it was stated that Sinn Fein must bear its responsibility for the continuation by PIRA of illegal paramilitary activity and must recognise the implications of being in that position (pages 34 and 35).

[13] The IMC recommended that “the Secretary of State should consider taking action in respect of the salary of Assembly members and/or the funding of Assembly parties so as to impose an appropriate financial measure in respect of Sinn Fein and the Progressive Unionist Party.” Further recommendations included politicians exerting every possible influence to bring about a cessation of paramilitary activity, which included not only public calls for such cessation but also included encouraging individuals to take a stand personally and collectively against paramilitaries and to co-operate with criminal justice agencies to that end.

The Secretary of State's response to the IMC Report.

[14] The Secretary of State made a statement to the House of Commons on the IMC Report on 20 April 2004. He indicated that both governments accepted the Commission's conclusions and recommendations. Further it was stated that he was persuaded that it would be right to remove for a period the entitlement to the block financial assistance paid to Assembly parties in respect of both Sinn Fein and the Progressive Unionist Party and he proposed to do that from Wednesday 28 April 2004. However it was stated that in line with the legal requirement to act fairly he would take into account any representations he might receive by the following Tuesday from the two parties concerned before reaching a final decision.

[15] By letter dated 21 April 2004 to Mr Gerry Adams MP leader of Sinn Fein, the Secretary of State invited representations in writing by mid-day on Tuesday before reaching a final decision on removal of entitlement to the block financial assistance fed to Sinn Fein. By reply dated 26 April 2004 Mr Adams rejected the standing of the IMC and rejected its Report. Further it was stated that the removal of the block financial assistance from Sinn Fein was discriminatory and that neither the Secretary of State nor the government had any right to penalise political parties or elected political representatives in Ireland. In general it was asserted that Sinn Fein had not breached the Good Friday Agreement but had fulfilled all responsibilities and obligations under the Agreement and would continue to do so. In addition representatives of Sinn Fein met the Secretary of State on 26 April 2004 in connection with the IMC Report. By letter dated 28 April 2004 to Mr Adams the Secretary of State indicated that he had that day made a Direction reducing the financial assistance payable to Sinn Fein.

[16] The Direction was given by the Secretary of State under Section 51B (2) of the Northern Ireland Act 1998 and provided that the financial assistance payable under the Financial Assistance for Political Parties Act (Northern Ireland) 2000 to the Progressive Unionist Party and Sinn Fein for the period from 29 April 2004 until 28 April 2005 should not be payable.

The applicant's grounds for Judicial Review

[17] The applicant's grounds for Judicial Review of the IMC Report are as follows –

- (i) IMC activity should as far as practicable be consistent with and not obstruct the implementation of the Good Friday

Agreement and the acts examined by the IMC must be acts of “political violence.”

- (ii) The IMC mis-directed itself in making recommendations in relation to Sinn Fein under Articles 4 and 7 of the international agreement.
- (iii) The IMC is not an independent body.
- (iv) IMC procedures were unfair with its information untested, unpublished and mistaken.
- (v) The IMC could not reasonably have concluded that Sinn Fein should bear any responsibility for PIRA activity.

The grounds for Judicial Review of the Direction of the Secretary of State are as follows –

- (i) The Secretary of State could not reasonably have concluded that Sinn Fein was not committed to non-violence and exclusively peaceful and democratic means.
- (ii) The Secretary of State was exercising his statutory powers for the ulterior purpose of accommodating political sensitivities which were based on expediency rather than principle.
- (iii) Procedural unfairness.
- (iv) The decision was in breach of Article 6 of the European Convention on Human Rights.
- (v) The decision was in breach of Article 1 of the First Protocol to the European Convention on Human Rights.

The affidavit evidence

[18] The affidavit of Conor Murphy, a Sinn Fein member of the Assembly, in support of the application stated that Sinn Fein is a completely independent political party with its own constitution. The party has no constitutional link with the IRA. Sinn Fein is committed to non-violence and exclusively peaceful means and is committed to such of its members as might become ministers or junior ministers observing the terms of the pledge of office. Sinn Fein has also endorsed the Mitchell Principles (para13). It is stated not to be within Sinn Fein’s power to being paramilitary activity to an end, that it is committed to exclusively peaceful and democratic means and is not aware of any decision that could be construed as diluting Sinn Fein’s commitment to

the peace process (para14). Reference is made to statements in support of that position by Sinn Fein President Gerry Adams and to the British Government's recognition of Sinn Fein's commitment as recently as 28 October 2003.

[19] Nicholas Perry, Director of Policy and Security in the Northern Ireland Office, made an affidavit on behalf of the Secretary of State. He stated that the Secretary of State gave very considerable weight to the IMC's Report and recommendations but that the government had made its own assessment; it was the Secretary of State's view that the IMC Report provided a firm foundation for his conclusion that Sinn Fein was not committed to non-violent and exclusively peaceful and democratic means and that he was satisfied that it was appropriate to take action in the form of making the Direction made (para10).

[20] By affidavit Lord Alderdice, a Commissioner appointed to the IMC, stated the independence of the IMC and referred to statements of the IMC that none of the Commissioners would have accepted appointment or continued in office if the IMC was not independent, nor would the IMC continue if it was felt that the governments' were denying access to the information needed. The views expressed were those of the IMC alone, reached after careful consideration of the material received (para6).

THE CHALLENGE TO THE IMC

(i) The powers of inquiry of the IMC in relation to criminality

[21] Should the IMC limit its inquiry to "political violence" or do its powers extend to consideration of all criminal activity? The applicant contended that the IMC was in error in completing the Report in having regard to all criminal activity associated with the paramilitary groups rather than concerning themselves with political violence, described by the applicant as violence for political purposes. Similarly it was contended that the Secretary of State was in error in adopting the Report and approach of the IMC. The applicant referred to the terms of the Good Friday Agreement and to the declaration of support made by the participants in the multi-party negotiations which at paragraph 4 reaffirmed their total and absolute commitment "to exclusively democratic and peaceful means of resolving differences on political issues, and their opposition to any use or threat of force by others for *any political purpose*, both in regard to this agreement or otherwise" (italics added).

[22] The International Agreement establishing the IMC recalled the Agreement on Monitoring and Compliance of 1 May 2003 which in turn referred to the Joint Declaration by the British and Irish Governments. The latter addressed the requirements of peace and stability and the key impediment was stated to be “manifestations of *paramilitarism, sectarian violence and disorder*” (para3), under the heading “Paramilitarism” reference was made to “ongoing paramilitary activity, sectarian violence and *criminality* masquerading as a political cause” (para12) and the call was made for “immediate, full and permanent cessation of all *paramilitary activity* (para13). The Agreement on Monitoring and Compliance proposed the new independent body that would monitor and report on the carrying out of the commitments relating to the ending of paramilitary activity and set out terms of reference for the IMC that included at paragraph 1 “any continuing paramilitary involvement in attacks on the security forces, murders, sectarian attacks, involving the riots, and *other criminal offences.*” The International Agreement at Article 4 dealing with the monitoring of continuing activity by paramilitary groups repeated the reference to attacks on security forces, murders, sectarian attacks, involvement in riots “and any *criminal offences*” (all italics added).

[23] The framework set out above is not limited to a consideration of violence as a means of furthering a political end. It concerns all the criminal activity of paramilitary groups. Article 4 of the International Agreement makes clear that the monitoring function of the IMC extends to any continuing activity by paramilitary groups and includes all criminal activity. Article 4 of the Good Friday Agreement does state the opposition of the parties to and use or threat of force for any political purpose, but that does not represent a comprehensive statement of the ambition of the Good Friday Agreement. That agreement, by its concerns for stable and democratic institutions, human rights, reconciliation, victims, security, policing and justice, seeks to achieve a peaceful environment. The annex setting out the agreement between the two governments reaffirms their total commitment to the principles of democracy and non violence which are stated to have been fundamental to the multi-party talks. The pledge of office of Ministers is set out in the Good Friday Agreement as containing a commitment to non violence and exclusively peaceful and democratic means. The agreement as a whole is not limited to addressing violence for political ends.

[24] The Northern Ireland Act 1998 as originally enacted, in implementing the Agreement, adopted the same wording for the non violence commitment, in providing for sanctions against Ministers and political parties on a resolution of the Assembly. In relation to the power of the Secretary of State to serve a notice requiring a motion for an Assembly resolution the Secretary of State was required to take into

account whether the Minister or the political party “has ceased to be involved in any acts of violence or of preparation for violence”(Section 30 (7)).

[25] The amendments to the 1998 Act introduced by the Northern Ireland (Monitoring Commission) Act 2003 refer to action by the Assembly and the Secretary of State in relation to exclusion from ministerial office and reduction in remuneration and reduction in financial assistance for political parties. Where the Secretary of State serves a notice requiring an Assembly resolution in relation to reduction of remuneration or financial assistance he must take into account the matters set out in Section 30(7), namely whether the Minister or political party has ceased to be involved in any acts of violence or of preparation for violence.

[26] In any event the Assembly and the Secretary of State may apply sanctions where there is an absence of commitment “to non-violence and exclusively peaceful and democratic means.” The applicant contends that this phrase must be read as a whole and “peaceful and democratic means” relates to the political context and so “non-violence” must also be related to the political context. Section 51B (5) of the 1998 Act requires the Secretary of State to be satisfied that “the political party” concerned is not committed to non-violence and exclusively peaceful and democratic means. Had this requirement been limited to a commitment to non-violence as a means of furthering political ends then that could have been stated. However, given the scope of paramilitary activity that is described as the target of the International Agreement establishing the IMC, and given that the 2003 Act is making provision in connection with the establishment of the IMC, it is apparent from the scope of paramilitary activity that is to be monitored by the IMC that the sanctions against political parties are not, and were not intended to be, limited to violence as a means of furthering political ends. Further, given the scope of the Good Friday Agreement and the terms of the 1998 Act and the terms of the amendments introduced to facilitate the operation of the IMC, it is apparent that the broad remit of the IMC extending to all paramilitary activity is not inconsistent with the Good Friday Agreement. Further it is apparent that section 51B (5) is concerned with the position of the “political party” and not that of an individual member of the political party. Accordingly I am unable to accept the restricted interpretation contended for by the applicant to the effect that the IMC is limited to a consideration of “political violence.”

(ii) The powers of inquiry of the IMC in relation to political parties

[27] Is the IMC Report under Article 4 of the International Agreement, in dealing with a threat from paramilitary groups, competent to address the position of political parties and to make recommendations in relation to financial sanctions on political parties? The applicant contended that the position of political parties must be addressed under Article 6 of the International Agreement and as the IMC did not purport to exercise any powers under Article 6 it was not competent to make any findings against Sinn Fein or to make any recommendations in relation to financial sanctions against Sinn Fein. The applicant contended that any recommendations under Article 7 contained in the IMC Report ought to have been concerned with the paramilitary groups and not the political parties.

[28] The International Agreement provides for two different types of inquiry that might be undertaken. Article 4 deals with the threat from paramilitary groups and provides for monitoring, assessing and reporting. Article 6 concerns claims by a party in the Assembly that another party in the Assembly is not committed to non-violence and exclusively peaceful and democratic means. In the present case there was no claim made by an Assembly party against another Assembly party and Article 6 was not invoked. Accordingly the IMC proceeded under Article 4 in relation to the threat from paramilitary groups. The monitoring of paramilitary activity and the assessing of the leaderships must involve consideration of the full reach of paramilitary activity and paramilitary leaderships. There is nothing to preclude the IMC from monitoring that activity and assessing those leaderships where the reach extends into other organisations. The inclusion of Article 6 in the International Treaty does not diminish the scope of Article 4 if the monitoring of paramilitary activity and the assessment of paramilitary leaderships reaches into an Assembly party. Article 7 of the International Agreement provides that when reporting under Article 4 or under Article 6 the IMC shall recommend any necessary remedial action and may recommend appropriate Assembly measures. There is nothing in Article 7 to prevent the recommendation of appropriate Assembly measures against an Assembly party further to a report under Article 4. I do not accept the submission that the International Agreement precludes consideration of political parties under Article 4.

[29] The applicant made a further complaint about the validity of the IMC recommendations, namely that the wording of the IMC Report was that the Secretary of State "should consider taking action" in respect of the salary of Assembly members and/or the funding of Assembly parties. The applicant referred to Section 51B (1) of the 1998 Act which

applies if the IMC has made a report “containing a recommendation about steps” that the Assembly might consider taking were it not suspended. Accordingly the applicant contended that a recommendation that the Secretary of State “should consider taking action” was invalid as the statutory approach under the 1998 Act required an IMC recommendation of action and not just that action should be considered.

[30] Article 7 of the International Agreement provides that the IMC may recommend what measures, if any, “it considers might appropriately be taken”. The IMC recommended that the Secretary of State should consider taking action and their approach accords with the wording of the International Agreement. Further, the recommendation in the Report accords with the wording of the 1998 Act in that it proposes a course of action, namely consideration of certain steps. I am satisfied that that constitutes a valid recommendation for the purposes of Article 7 of the International Agreement and Article 51B of the 1998 Act.

(iii) The independence of the IMC

[31] The applicant contends that the IMC is not an independent body. It was agreed that the IMC would be established with four commissioners, two nominated by the British Government, one nominated by the Irish Government and one nominated by the United States Government. The British Government nominated John Grieve former Assistant Commissioner of the Metropolitan Police and Lord Alderdice former leader of the Alliance Party. The Irish Government nominated Joseph Brosnan former Secretary of the Irish Department of Justice. The United States Government nominated Dick Kerr former Deputy Director General of Central Intelligence. At paragraph 10 of a statement issued on 9 March 2004 by the IMC reference was made to the independence of the IMC and it was stated –

“We wish to make clear now, for the avoidance of any doubt, that we are an independent commission. None of us would have accepted appointment as a Commissioner or would continue in office if that were not the case. Nor would we continue if we felt that the Governments were denying us access to the information we need. All the views we express will be ours and ours alone, reached after careful consideration of the material we have received”.

[32] Lord Alderdice in his affidavit reaffirms the above statement. No grounds in Judicial Review have been established on which to maintain the challenge to the independence of the IMC.

(iv) Procedural Unfairness

[33] The applicant contended that the IMC Report was procedurally unfair, based on untested and unpublished information from unidentified sources and based on incorrect information. It is in the nature of the IMC monitoring of continuing activity by paramilitary groups that it receives intelligence information. Section 2 of the 2003 Act imposes on the IMC a duty to avoid prejudicial effects. It is required not to do anything in carrying out its functions which might prejudice national security, put at risk the safety or life of any person or have a prejudicial effect on any present or future legal proceedings. Further, by the 2003 Order the IMC is granted immunity from suit and legal process. That is the context of the IMC duty of procedural fairness in carrying out its statutory functions in relation to the monitoring and assessment of paramilitary groups.

[34] That is also the context of such monitoring and assessment as reaches into political parties. Whether procedural fairness has been achieved will depend on the circumstances of the case. When the information provided to the IMC in the course of its monitoring and assessment is intelligence based there will be public interest concerns relating to the disclosure of information. In that context, as in all cases, the requirements of procedural fairness will depend on the legal framework of the decision making. In the present case the applicant met the IMC in January 2004 and March 2004. At these meetings representatives of the applicant outlined their objections to the operation of the IMC as being outside the terms of the Good Friday Agreement. The opportunity was available to examine and make representations on the inquiries being undertaken by the IMC. However the applicant did not avail of that opportunity but elected to voice its opposition to the operation of the IMC. The procedures that would have been applied if the applicant had engaged with the IMC have not been established. The applicant cannot maintain a challenge to the procedural fairness of the IMC methods of monitoring and assessment, in so far as those methods touched the applicant, when the applicant failed to avail of the opportunity to address the IMC approach. Accordingly the applicant has not established that the procedures were unfair.

[35] The IMC report did contain a mistake. It listed a particular murder in March 2003 as being a paramilitary incident. Further enquiry established that the murder should not have been attributed to a paramilitary group. Lord Alderdice in his affidavit states that the conclusions and recommendations contained in the IMC report would not have been different had the IMC reached a different conclusion on the mistaken incident prior to the publication of its Report. However

this episode does illustrate that mistakes may be made. The extent to which the IMC may be able to disclose the basis on which, or the gist of the information on which, it may make adverse findings against a political party will vary from case to case and may allow a political party to address the accuracy of the information. This complaint of procedural unfairness cannot be sustained if the political party fails to engage in the exercise.

(v) The connection between PIRA and Sinn Fein outlined in the IMC Report.

[36] Was there a basis on which the IMC was entitled to propose that Sinn Fein had responsibility for the activities of PIRA? The applicant contended that it was necessary to establish some credible link between the applicant as a political party and the activities of PIRA. Accordingly it was submitted that it would have been necessary to establish that the applicant had control over those activities or their perpetrators and could have prevented them or at the very least that they condoned the activities. It was submitted that, on the contrary, Sinn Fein had restated its commitment to non-violence and exclusively peaceful and democratic means.

[37] The IMC conclusions were that there were some common members and senior members of Sinn Fein and PIRA, that Sinn Fein was in a position to exercise considerable influence on PIRA's major policy decisions, that there might not have been a PIRA ceasefire in the first place without influence from the leadership of Sinn Fein and by the same token Sinn Fein must bear its responsibility for the continuation by PIRA of illegal paramilitary activity. The applicant contrasted the above statements with those applied to the Progressive Unionist Party and its links with the leadership of the UVF and the RHC. While being satisfied that the Progressive Unionist Party had exerted a positive influence in achieving the Loyalist ceasefires the IMC stated that "we believe it has not sufficiently discharged its responsibilities to exert all possible influence to prevent illegal activities on the part of the UVF and RHC." The IMC conclusions and recommendations indicated that political parties should not be associated with illegal activity of any kind, including that by paramilitary groups, that Sinn Fein had links with PIRA and that all politicians must exert every possible influence to bring about a cessation of paramilitary activity, which included not only public calls for such a cessation but also included encouraging individuals to take a stand personally and collectively against paramilitaries.

[38] It is apparent from the Report that the IMC considered that Sinn Fein as a political party has considerable influence on PIRA; that Sinn

Fein bore some responsibility for the continuation by PIRA of illegal paramilitary activity by the failure of the leadership of Sinn Fein to exert sufficient influence on PIRA; that public statements of commitment to non-violence and exclusively peaceful and democratic means did not amount to the exercise of sufficient influence and that what was required were public calls for the cessation of paramilitary activity and the encouragement of individuals to take a stand personally and collectively against paramilitaries. This summary of the IMC conclusion is apparent from the Report and has been expressed by the IMC in different words and more directly in relation to the Progressive Unionist Party and the activities of the UVF and RHC.

[39] The IMC in submitting a Report under Article 4 of the International Agreement is not required to assess the commitment of a political party to non-violence and exclusively peaceful and democratic means. It is required to report its finding in relation to the monitoring of any continuing activity by paramilitary groups and to assess whether the leadership of such organisations are directing such incidents or seeking to prevent them and further to assess trends in security incidents. The recommendation for sanctions against a political party will be made by the IMC in the knowledge that the Secretary of State, during the suspension of the Assembly, if he is to act on the recommendation, must be satisfied of the statutory grounds that include the political party not being committed to non violence and exclusively peaceful and democratic means, but it is a matter for the Secretary of State to reach that conclusion and not the IMC. The conclusion reached by the IMC that Sinn Fein was not exercising available influence on PIRA is within the range of conclusions that the IMC was entitled to reach. In Judicial Review proceedings it is not for the Court to accept or reject that conclusion but rather to establish whether it is a rational decision made within the IMC remit and taking account of relevant considerations and leaving out of account irrelevant considerations. It has not been established that there is any such grounds for setting aside that conclusion.

[40] The IMC finding against the applicant concerns a failure of the leadership to exercise sufficient influence over PIRA. It is not a finding that the applicant is controlling events or is actively encouraging the activity or that it has power to stop the activities but that it has not exerted the influence that the IMC believes it has. This is not inconsistent with the finding that it did exercise considerable influence on a previous occasion. The applicant has not established any of the stated grounds for Judicial Review of the approach of the IMC.

THE CHALLENGE TO THE SECRETARY OF STATE

(i) The approach of the Secretary of State

[41] The applicant contended that there was no basis on which the Secretary of State could reasonably have concluded that the applicant was not committed to non-violence and exclusively peaceful and democratic means. It is clear that in declaring himself so satisfied the Secretary of State relied on the IMC Report. I have rejected the applicant's contention that the IMC Report should have limited its inquiry to political violence and accordingly I am satisfied that the Secretary of State was entitled to have regard to the IMC Report in relation to all criminal activity by paramilitary groups. Further I have rejected the applicant's contention that the recommendation in the IMC Report that the Secretary of State "should consider taking action" is other than in accordance with Section 51B of the 1998 Act.

[42] The applicant submitted that the Secretary of State could not be "satisfied" that the applicant was not committed to non-violence and exclusively peaceful and democratic means, taking into account that Sinn Fein is not the IRA; Sinn Fein is publically committed to peaceful and democratic means; the IMC concluded that there might not have been an IRA ceasefire in the first place without influence from the leadership of Sinn Fein; the IMC could not be precise about what links may exist between Sinn Fein and the IRA; the IMC also could not be precise about the IRA's decision making processes; the IMC concluded that Sinn Fein may not be in a position to determine what policies or operational strategies the IRA will adopt; the IMC concluded that decisions of the Republican movement as a whole about these matters lie with the membership of the IRA rather than with Sinn Fein; the Secretary of State could not be satisfied that Sinn Fein was not using its influence for the benefit of the police process; the Secretary of State could not be satisfied that Sinn Fein was not using its influence in accordance with its commitment to non-violence and exclusively peaceful and democratic means.

[43] As outlined above the import of the IMC Report focussed on the exercise of insufficient influence by the applicant on PIRA. There was found to be cross membership between PIRA and Sinn Fein at senior levels in both organisations. Sinn Fein had demonstrated a past capacity to exercise influence and by reason of the continuing PIRA activity Sinn Fein had been taken not to be exercising the level of influence it was believed to have. That was stated in the Report to require public calls for the cessation of paramilitary activity and the encouragement of individuals to take a stand personally and collectively against

paramilitaries. The IMC Report was the basis on which the Secretary of State was satisfied that the applicant was not committed to exclusively peaceful and democratic means. The Secretary of State's approach therefore amounted to the conclusion that the commitment to non violence and exclusively peaceful and democratic means required positive action to further those goals and that positive influence was possible and had not been exercised. The applicant contended that the Secretary of State had taken a quantum leap from a finding of the exercise of insufficient influence to being satisfied there was not a commitment to non violence. The Secretary of State's conclusion that an absence of exercise of available influence amounted to a lack of the necessary commitment was one that the Secretary of State was entitled to reach. In the light of the IMC Report the Secretary of State was entitled to be satisfied for the purposes of Section 51B. Further, the applicant had the opportunity to address the contents of the IMC Report and in the absence of any examination of the contents by, or explanation from, the applicant the Secretary of State was entitled to be satisfied for the purposes of Section 51B.

(ii) Improper purpose

[44] The applicant contended that the Secretary of State was not exercising his statutory powers for proper purposes. There is no basis for that contention and Mr Lavery QC for the applicant was correct not to press the point.

(iii) Procedural fairness

[45] The IMC Report was published and available to the applicant and it was the basis of the Secretary of State's decision. The proposed Direction was notified to the applicant and the opportunity was afforded to make representations in respect of the proposed Direction. The applicant availed of that opportunity in correspondence and by meeting with the Secretary of State. However the applicant did not seek to address the contents of the IMC Report, which the Secretary of State had indicated he had adopted, but rather restated their opposition to the IMC and restated their commitment to non violence and exclusively peaceful and democratic means. That approach did not deal with the finding by the IMC and the Secretary of State that such a statement was not sufficient to amount to the necessary commitment when Sinn Fein were also found to have the influence to do more. There was the opportunity to address the essential basis for the proposed action of the Secretary of State but the applicant failed to avail of that opportunity.

(iv) Article 6 of the European Convention

[46] The applicant contended that the Direction of the Secretary of State was in breach of the right to a fair hearing under Article 6 of the European Convention which provides -

“In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

[47] It is necessary to establish that there is a contestation involving the determination of the applicant’s civil rights. Article 6 applies to “civil” rights and has been held not to include political rights. Disputes relating to the arrangements for the exercise of political rights are also outside the scope of Article 6. Similarly, disputes relating to arrangements for the exercise of political rights that involve economic interests are outside the scope of Article 6. In Pierre Bloch v France [1998] 26 EHRR 202 the applicant was elected to the National Assembly but had to forfeit his seat after being declared to have exceeded the maximum amount of campaign expenditure. It was held that Article 6 did not apply. The right to stand for election was a political right and not a “civil” right and disputes relating to arrangements for the exercise of that right, such as those concerning the candidate’s obligation to limit election expenditure also lay outside Article 6. Further the candidate was required to pay to the Treasury a sum equal to the amount of the excess election expenditure and accordingly the applicant’s pecuniary interests were also at stake. The ECHR concluded at paragraph 51 -

“This economic aspect of the proceedings in issue does not, however, make them ‘civil’ ones within the meaning of Article 6(1). The impossibility of securing reimbursement of campaign expenditure where the ceiling has been found to have been exceeded and the obligation to pay the Treasury a sum equivalent to the excess are corollaries of the obligation to limit election expenditure; like that obligation, they form part of the arrangements for the exercise of the right in question. Besides, proceedings do not become “civil” merely because they also raise an economic issue.”

[48] The financial assistance in the present case was intended to assist political parties to engage in political discussions about a return to devolved government. The arrangements for financial assistance were clearly made for political purposes, namely to assist the restoration of devolved government. Equally clearly there are pecuniary interests at stake which form part of the arrangements for the exercise of the right of political parties to engage in negotiations to establish a form of government. The financial assistance is conditional on the party acting in accordance with non violence and exclusively peaceful and democratic means. The dispute concerns arrangements for the exercise of political rights and accordingly the dispute is not a “civil” matter and is outside the scope of Article 6.

(v) Article 1 of the First Protocol to the European Convention

[49] The applicant contended that the reduction in financial assistance was a breach of the right to property under Article 1 of the First Protocol of the European Convention which provides -

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

[50] Article 1 of the First Protocol comprises three distinct rules. The first rule states the principle of peaceful enjoyment of property. The second rule covers deprivation of possessions and subjects it to certain conditions. The third rule recognises that States are entitled to control the use of property in accordance with the general interest. The Article concerns rights in respect of “possessions” and “does no more than enshrine the right of everyone to the peaceful enjoyment of ‘his possessions’, and consequently it applies only to a person’s existing possessions and does not guarantee the right to acquire possessions ...”. *Marcx v Belgium* [1979] 2 EHRR 330 paragraph 50. In order to rely on Article 1 of the First Protocol an applicant needs to establish that he enjoys some right or interest as a matter of domestic law, which may be

regarded as a property right from the Convention perspective. *Lester and Pannick* Human Rights Law and Practice 2nd Edition paragraph 4.19.4.

[51] Protection is accorded to “possessions” which are represented by existing possessions and those to which an applicant has a legitimate expectation of effective enjoyment of the property, but does not apply to property in which an applicant has no present interest. The applicant claimed entitlement to the financial assistance for political parties under the statutory scheme and the respondent denied any present entitlement under the statutory scheme.

[52] The applicant relied on Stretch v United Kingdom [2004] 38 EHRR 12 which concerned the grant of a building lease with an option for renewal, and while negotiating the renewal the lessee was informed that the grant of the option had been invalid. The ECHR held that there had been a violation of Article 1 of the First Protocol. The applicant had a “possession” as he had at least a legitimate expectation of obtaining effective enjoyment of the property by exercising the option to renew, and this was to be regarded for the purposes of Article 1 of the First Protocol as attached to the property rights granted under the lease.

[53] The present applicant was entitled to financial assistance of £120,000 for the year commencing 1 April 2004. The applicant chose to claim a proportion of the assistance at the end of each month, and with the Secretary of State’s Direction taking effect on 29 April 2004 the last payment of assistance was in April 2004. The applicant had possession of the entitlement to financial assistance for the political party on 1 April 2004, having satisfied the condition for payment. The respondent contended that in the context of the statutory scheme the applicant had no entitlement to the financial assistance where the Secretary of State was satisfied that the political party was not committed to non-violence and exclusively peaceful and democratic means, and as that condition has not been satisfied there was no entitlement to the payment. Prior to the intervention of the Secretary of State the applicant was entitled to the financial assistance and it was a possession for the purposes of Article 1 of the First Protocol. The reduction in payment of the financial assistance was an interference with the possession and must be justified under Article 1 of the First Protocol.

[54] In Stretch v United Kingdom, at paragraph 37, the ECHR restated the well established case law on justification in terms that an interference must strike a “fair balance” between the demands of the general interest of the community and the requirements of the individual’s fundamental rights, the concern to achieve this balance being reflected in the structure of Article 1 as a whole. There must

therefore be a reasonable relationship of proportionality between the means employed and the aims pursued.

[55] Deprivation of the financial assistance must be in the public interest. The present deprivation was made in the interests of securing compliance with the commitment to non violence and exclusively peaceful and democratic means. That is a legitimate aim in the public interest. The basis of the deprivation is “prescribed by law” in the statutory provisions. The application of proportionality under the Article requires a fair balance whereby the applicant does not bear an “individual and excessive burden.” The provision of financial assistance is a benefit for political parties that has been introduced for the specific purpose of furthering political progress; it is conditional on certain standards being achieved by the political parties and it has been judged that the standards have not been met by the applicant; the removal of the financial assistance is for the limited period of one year; the applicant is not inhibited in its fundraising for political purposes; the sanction has been applied to another political party for similar reasons and is capable of being applied to any political party that does not attain the standard required; there is no individual or excessive burden on the applicant.

[56] For the reasons set out above I have not been satisfied on any of the applicant’s grounds for Judicial Review and the application is dismissed.