Neutral Citation No [2008] NIQB 81 | *Ref:* **GIL7220**

Judgment: approved by the Court for handing down | *Delivered:* **7/8/08**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION BY MICHELLE WILLIAMSON FOR JUDICIAL REVIEW

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GILLEN J

Application

[1] In this matter the Applicant is the daughter of two people murdered in an IRA bombing in 1993. She seeks an Order under Section 18(2)(e) of the Judicature (NI) Act 1978 and Order 38 Rule 12(1) of the Rules of the Supreme Court (Northern Ireland) 1980 granting leave for the issue of a Writ of Subpoena ad Testificandum requiring the attendance of Dr Ian Paisley and Mr Martin McGuinness ("the Respondents") at the hearing of a judicial review in order to give oral evidence in relation to matters arising there from.

Background

[2] On 12 March 2008 I granted leave to the applicant to apply for judicial review to quash the appointment of four Commissioners Designate for Victims and Survivors announced by the First Minister to the Assembly in Northern Ireland on 28 January 2008. I also granted leave to apply for an Order of Mandamus directing the Office of the First Minister and Deputy First Minister("the OFMDFM") to appoint a single Victims Commissioner in accordance with the requirements of Article 4 of the Victims and Survivors (Northern Ireland) Order 2006 ("the 2006 Order").

[3] The grounds upon which the substantive application has been made are as follows. First that the First Minister and Deputy First Minister ("FMDFM") are required or authorised by Article 4 of the 2006 Order to appoint only one person to the office of Commissioner for Victims and Survivors. The post was advertised as a post for one person. Accordingly it is the applicant's case that there was no legal authority to appoint four Commissioners. Secondly it is the applicant's case that the FMDFM are required to make the appointments in accordance with the guidelines issued

by the OCPA (NI) including in particular the merit principle. Thirdly it is asserted that the appointment of the four Commissioners Designate appears on its face to reflect an inability on the part of the FMDFM to agree on the best candidate for the post and to represent the political compromise between them whereby two Unionist/Protestants and two Nationalist/Catholics should be appointed. Accordingly the OFMDFM failed to comply with the requirement to make an appointment on merit and made their decision on the grounds of religious belief and/or political opinion.

[4] Following the granting of leave, and correspondence between the Applicant and the Respondents, specific discovery was provided by the Respondents to the Applicant. The Respondents provided a schedule dealing with 23 categories of documents which the Applicant sought. The Respondents accompanied the schedule with an affidavit from Mr Edmond Rooney, a Deputy Secretary in the OFMDFM with current responsibility for victims' issues.

[5] It is the Applicant's case that Mr Rooney's affidavits and the documents discovered indicate that there must have been a considerable number of intensive meetings between the First Minister and Deputy First Minister. During these meetings they "deliberated long and hard", according to the DFM in his Ministerial statement, on the impugned appointments and the manner in which they should exercise their powers of appointment under the 2006 Order.

[6] The Applicant goes on to make the case that there are no contemporaneous documents recording the contents (as distinct from the outcome) of those deliberations and virtually none relating even to the circumstances of the discussions.

The Applicant's case

[7] It is the Applicant's case that the Respondents have failed to make candid disclosures of the relevant facts concerning their decision or the reasoning that lay behind them.

[8] It is argued that since the Respondents are not prepared voluntarily to comply with their obligations to make candid disclosure of the relevant facts and reasoning, the court should require them to do so by compelling their attendance to give oral evidence.

[9] The decision in question to appoint four Commissioners was subsequently related to the Northern Ireland Assembly. It is the contention of the Applicant that this statement was made several weeks after the decisions were made. It was not made on oath nor given in circumstances where the decision makers were subject to proper examination on all relevant issues.

[10] The Applicant draws attention to correspondence addressed to the OFMDFM emanating from Dr Marie Breen Smyth a candidate who was offered an appointment as one of the Commissioners Designate and who queried the rationale behind the decision not to offer her the job she had applied for. She had questioned ,inter alia , the reasoning behind the change from a choice of one Commissioner to four, the funding and resourcing of the new appointments , and the danger of conflict between the Commissioners. It is the Applicant's contention that such issues have been ignored and it is thus not clear whether or not Ministers had addressed their minds to the implication of the decisions.

[11] Mr McDonald QC, who appeared on behalf of the Applicant with Mr Donaghy, contended that this was a highly exceptional case where officials had been excluded from the relevant discussions between the two Ministers and where the Ministers/Respondents had not committed anything to writing in respect of their deliberations. Counsel submitted that a crucial issue in this case was whether or not a decision making process had been influenced by improper political considerations rather than assessments on merit. Further concerns raised include whether a decision has been taken to impose secrecy on the process with a deliberate avoidance of notes or records together with a deliberate veiling of any disagreement on the part of the Respondents.

[12] Further specific issues raised by the Applicant include how the Respondents rated the candidates individually and why they initially decided not to make an appointment and proceeded to re-advertise. Mr McDonald questioned whether the assertion by the Ministers that the new process was aimed to achieve a greater level of "representativeness" was a euphemism for appointments based not on merit but on political considerations?

[13] In essence counsel submitted that the Respondents, by refusing to provide any such records or notes in a case where leave had been granted, were stonewalling in a manner that was almost unique in judicial review cases involving government departments. Since this was a public law matter, and not a private lis between parties, the court as guardian of the legal rights of the citizens should enforce their attendance for oral examination in circumstances where there was an absence of any searching enquiry or close examination of the reasoning behind the decision of the Respondents.

[14] Counsel urged that weight was lent to this argument by the fact that Mr John Clarke a senior official in the OFMDFM as early as 11 July 2007, in the course of a lengthy reasoned document prepared for the Respondents, cautioned against the advisability of initiating a fresh public appointments

process or failing to make an appointment on the basis of the existing process.

[15] Mr McDonald reminded me of the need for candour and good faith in judicial review :see Re Downes Application [2006]NIQB 77 at para 21 and Belize v DOE [2004] UKPC 6.

[16] It was counsel's contention that there was ample authority for the court to make the Orders requested in the Judicature (NI) Act 1978 and Rule 38 of the Rules of the Supreme Court .

The Respondent's case

[16] Mr McCloskey QC, who appeared on behalf of the Respondents with Mr McMillen, submitted that on 28 January 2008 there was no basis for concern about the absence of records relied on by the Applicant. The Respondents had made a joint statement in public which, if afforded a detailed analysis, reveals clear reasoning why four candidates were preferred to one. Inter alia, the statement recorded that given the significant backlog of urgent work and the range of difficult challenges facing them, four people would have more capacity to engage directly with victims and survivors than a single Commissioner.

[17] Counsel asserted that from the prospectives of transparency and accessibility, the determination impugned in these proceedings was unique in that it was made jointly by the two senior figures of the new Government administration in Northern Ireland, and was publicly promulgated and explained. Moreover counsel submitted that it was the subject of critical questioning and scrutiny in the Assembly where due response was made by the decision makers.

[18] The process, including the initial stage that was conducted under Direct Rule, was overseen and certified by the Commissioner for Public Appointments.

[19] Mr McCloskey submitted that as a matter of law the court has no power to make the Orders sought on the basis that there is no provision in statute or the Rules of the Supreme Court Order 53 so empowering the court. In so far as the applicant relies specifically on Rules of the Supreme Court Order 38, Rule 12(1), he submitted that the confines of that Rule are trials of any action begun by Writ.

[20] Alternatively Mr McCloskey argued that if the court does have power to make such an Order it should only be exercised in highly exceptional circumstances of which this case is not one.

Conclusions

[21] I am indebted to counsel for their comprehensive skeleton arguments well augmented by skilful oral submissions.

[22] Is the Court Empowered in Judicial Review hearings to order the attendance of witnesses who have not sworn an affidavit ?

I am satisfied that this court does have power in exceptional circumstances to order a person to attend to give evidence even where that witness has not already sworn an affidavit in the proceedings for the following reasons .

Statutory and Regulatory Basis

[23] Section 18(2)(e) of the Judicature (NI) Act 1978 (the "1978"Act) sets out a widely based enabling provision to allow Rules to be provided to authorise and permit oral evidence to be required generally. It states

> "Without prejudice to the generality of subsection (1), the rules shall provide …that the Court may …. direct pleadings to be delivered or authorise evidence to be given where this appears to the Court to be necessary or desirable"

[24] Order 38 Rule 2(3) sets out a wide discretion which clearly derives from the 1978 Act:-

> "In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs . . ."

[25] Order 38 Rule 11(1) provides:-

> "At any stage in a cause or matter the court may order any person to attend any proceedings in the cause or matter and produce any document, to be specified or described in the Order, the production of which appears to the court to be necessary for the purpose of that proceeding."

[26] Whilst Order 38 Rule 1 is confined to actions begun by writ, no such restraint is placed on the subsequent sub rules including r 2(3) or r .11.The

discretion vested in the court is therefore a wide ranging one and in my view clearly permits the court to direct the attendance of witnesses in judicial review

[27] Judicial Review is of course governed specifically by Order 53 - constituting, as Mr McCloskey correctly coined it, the lex specialis. However, for example, Order 53(8)(1), dealing with applications for interlocutory relief makes clear that such applications can be subject to Order 38 r 2(3).I see no reason why substantive hearings cannot also be so subject.

[28] In interpreting these Rules, I believe Mr McDonald is correct to draw to my attention Order 1 Rule 1A(3) which exhorts the court to give effect to the overriding objective to deal with cases justly. I consider that where justice requires it courts should invoke the power to order witnesses to attend in compliance with these Rules.

[29] Accordingly I am satisfied that there is no Statutory or Regulatory reason why this court cannot make the Orders sought .

Authorities

[30] If support for this textual analysis of the Statute and Rules is sought it is provided in the following authorities:

[31] In R v London Borough of Islington ex p Erkul (No. 1) (unreported) 26 March 1996 Sir Louis Blom-Cooper QC (sitting as a Deputy Judge of the High Court) dealt with a case where the respondent local authority had refused to offer a man of Turkish origin housing for himself and his family. In order to factually determine whether the applicant had been offered accommodation close to his previous home during the course of a conversation between the applicant and a Housing Officer the court indicated that it would have issued a subpoena requiring an interpreter who was present to attend court to give oral evidence had he not sworn an affidavit. Dealing with the narrower point of calling a deponent Sir Louis Blom-Cooper said:

> "Since the modern practice in judicial review proceedings is to permit cross-examination only with leave of the court it seems to me only logical that compelling the witness to attend for cross-examination should be exclusively at the instance of the court. The question then arises: upon what criteria should the court decide to issue a subpoena? If it is right to order cross-examination of a deponent it would seem to follow that the court should be prepared to back its decision by ordering the deponent to attend as an oral witness."

[32] In R v Secretary of State for Transport, Port of Ipswich Authority and Associated British Ports ex p. Port of Felixstowe Limited (1997) COD 356, the applicant sought to subpoena two former directors of the relevant company. These directors did not wish to give evidence unless compelled to do so. The court expressed the view that their evidence "was likely to be crucial to the applicant's case and it was evidence which could not be derived from any other source". Accordingly the court issued subpoenas to compel their attendance notwithstanding the fact they were not deponents. Tucker J indicated that the subpoena should be issued forthwith since waiting for the swearing of affidavits would only increase costs and cause further delay.

Exceptional Circumstances

[33] These authorities underline, as indeed was conceded by Mr McDonald QC, that the power to subpoena witnesses who have not made affidavits should only be exercised in exceptional circumstances. This is self-evident in light of the fact that affidavit evidence is almost exclusively used in judicial review save where cross-examination is granted in those rare instances where the interests of justice so requires. The rarity of cross-examination in judicial review is referred to in text books e.g. Supperstone and Goudie, Judicial Review 3rd Edition paragraph 18.30.1 et seq, Fordham "Judicial Review Handbook" 4th Edition at paragraph 17.4.9 et seq and "Judicial Review in Northern Ireland" at paragraph 10.71 et seq.

[34] The authorities all point to the rarity of cross-examination being admitted in judicial review proceedings even in the case of deponents . In R (G) v London Borough of Ealing (2002) EWHC 250 Admin at paragraph (14) the court referred to:

> "Recourse to such powers (as) very much the exception. The vast, indeed overwhelming, bulk of judicial review cases will continue .. to be determined without oral evidence."

[35] In Northern Ireland, Carswell J provided guidance in Re McCann's Application, unreported, 13 May 1992 (QBD) in the following terms:

> "It is by now clearly established that the court had power to order the attendance of deponents who have sworn affidavits in an application for judicial review to attend for the purpose of cross-examination. In O'Reilly v Mackman (1983) 2 AC 237, 283 Lord Diplock said that the exercise of this jurisdiction should be governed by the same principle as in actions begun by originating summons, and should

> be allowed whenever the justice of the particular case so requires. He did however qualify the effect of his observations by indicating that by the nature of the issues that normally arise on judicial review cross-examination is rarely required. Recognised exceptions exist in respect of allegations of procedural fairness or breach of natural justice. Lord Diplock warned, however, that to allow cross-examination presents the Court with a temptation not always easily resisted, to substitute its own view of the facts or the merits of the decision (which are not a matter for consideration by the court in its exercise of it supervisory powers) for that of the decision-making body upon whom the exclusive jurisdiction to determine facts has been conferred by Parliament."

[36] Carswell J went on to outline some of the factors that may be relevant to the court's consideration which included:

> "(i) Whether certain factual matters are exclusively within the knowledge of the deponent;
>
> (ii) Whether the issue is one in respect of which the court will require to be satisfied through the investigation of oral evidence; and
>
> (iii) Whether the issue is such that the study of affidavits, however carefully and scrupulously prepared, will not be sufficient for the court to determine the matter."

The judge concluded that the party seeking cross-examination must make out a case that in the particular circumstances there is something specific which requires such further investigation

[37] The rationale behind this is that the court's role is still essentially one of review: see per Lord Steyn in R (Daley) v Secretary of State for the Home Department (2001) 2 AC 532 at paragraph 27. Instances involving questions of jurisdictional fact e.g. such as in R v Secretary of State for the Home Department ex p Khawaja (1984) AC 74 where the exercise of executive power depended upon a precedent fact being established by the respondent may present the kind of exceptional circumstances where it is transparently in the interests of justice to permit cross examination. Similarly disputes as to procedural fairness or bias or even cases involving fundamental rights e.g. R (Munjaz) v Merseycare NHS Trust (2004) QB 395 may lead to the court invoking the power to permit cross examination of deponents .

[38] Since it is only a rare instance where it will be in the interests of justice to require the attendance for cross-examination of a deponent it is clearly only an exceptional case where the presence of a non-deponent will be compelled on subpoena.

[39] Thus in R v Rourke (1891) 8 TLR 74 Lord Esher, MR, refusing an application to issue subpoenas for the attendance of witnesses to be orally examined in a paternity case where those witnesses had not given affidavit evidence, said:

> "The practice is, except in very exceptional cases, not to issue subpoenas except for the purpose of cross-examining those witnesses who have made affidavits."

Principle and pragmatism combine to persuade me that the approach thus formulated has great merit and I intend to apply it to this instance.

Text books/authorities

[40] The path of the authorities on the issue of compelling non deponents to attend a judicial review is traced in the Northern Ireland text book "Judicial Review in Northern Ireland" by Larkin and Scoffield first edition at paragraph 10.74 et seq and in an article by Parishil Patel in 1998 Judicial Review 17. The authors all come to the same conclusion at which I have arrived.

Are the circumstances in the instant matter such as to make this an exceptional case?

[41] I have come to the conclusion that this case is not one of the exceptional instances where the court should exercise its power to issue subpoenas requiring the attendance of the First Minister and Deputy First Minister. I have come to this conclusion for the following reasons.

[42] First this case does not at this stage involve issues of the genre outlined in paragraphs 35-37 of this judgment . The lines between the parties in this case have been clearly drawn. Mr McDonald asserts on behalf of the applicant that there is at least circumstantial evidence to suggest that there was a divergence between the Respondents on a range of issues including in particular the assessment of candidates and their acceptability. He asserts that it is incredible that neither Respondent made a single note or record during the process when decisions were being made on this matter. He contends that the postponement of the appointment is further evidence of lack of agreement in the absence of positive evidence as to how the Respondents' rated the candidates etc. The Respondents' case is that the statement of 28 January 2008 clearly outlined reasons for the decision to appoint four

commissioners relying on such matters as the significant backlog of urgent work, the range of difficult challenges that were faced and the need for a broad range of skills and knowledge to be exhibited by candidates. They also rely upon the role of the Commissioner for Public Appointments in overseeing and certifying this process.

[43] It is on the basis of such assertion and counter assertion contained in the affidavits that the court must make its determination on the facts presented. In the event that this court at the substantive hearing determines that there is substance in the assertions made by the Applicants it is open to the court to draw inferences adverse to the Respondents. This is far removed from issues such as the need for precedent facts to be established, fundamental rights or the need for further evidence to come to a conclusion which have founded successful applications for even deponents to be compelled to give evidence much less those who have not made affidavits. The courts are well experienced in deciding what is likely or unlikely and what circumstances are suitable for adverse inferences to be drawn.

[44] If such adverse inferences are drawn in this instance at the substantive hearing, together with the other evidence, the sanction of the court may be to grant to the Applicant the relief which she seeks. It is my view that this court cannot go outside the remedy sought by the Applicant set out in the originating motion. Extensive disclosure has already been made in this instance albeit the Applicant is still entitled to argue that it has been inadequate. The sanction against inadequate disclosure may well be an adverse finding against the Respondents at the full hearing and a granting of the remedy sought by the Applicant.

[45] Notwithstanding that this is a public law matter and not merely a lis between two parties I do not consider that the courts should embark upon a freestanding exercise outside the remedies sought by the Applicant in the Order 53 statement in order to compel the Respondents to explain why they claim not to have notes of alleged meetings . That issue may be required to be determined by the court on the basis of the affidavits filed at the substantive hearing depending on how the evidence and argument unfolds. However it is wholly inappropriate for me to make such a determination at this stage and any comment now on the issue might prove misplaced.

[46] Mr McDonald was unable to cite any authority where a court had gone further than granting remedies sought in the relief claimed. I did not find this surprising. In my view such authority as exists on this issue makes it patently clear that the sanctions of the court when adverse findings are made against the applicant are confined to the remedies sought in the application under Order 53.

[47] The authorities are rife with instances where the courts have not been slow to criticise respondents for lack of candour. In this jurisdiction In the Matter of an Application by Brenda Downes for Judicial Review Girvan J at paragraph 21-23 set out the duty of candour. He cited authorities such as Quark Fishing Limited v Secretary of State for Foreign Affairs (2002) EWCA 149, Lord Lowry in R v IRC (ex parte Continental Shipping) (1996) STC 813 and R v Home Secretary ex parte Bugdaycay (1987) AC 514 as instances where the courts have made trenchant criticisms of Government bodies or departments who have fallen short of a duty of candour. Fordham on "Judicial Review Handbook" 4th Edition at paragraph 10.4.6 sets out a number of other such authorities. Notwithstanding this, Mr McDonald was unable to cite me any instance, including any of these authorities , where the sanction resorted to by the court was to order the attendance of an official who had allegedly fallen short of the duty of candour where that official had not even made an affidavit.

[48] I am satisfied that this reflects the nature of the restraint on judges in judicial review to confine sanctions to the relief sought by an applicant on the face of the originating summons . It is not for the court to embark on an independent and unfettered appraisal of what it thinks is required by pubic policy in public law matters . It would be perilously easy for the court to step outside the substantive and procedural norms in judicial review and impose its own sanctions unrelated to the relief sought . A respondent, even in a public law case, should not be compelled to attend to explain the case he is making in circumstances where he has not filed an affidavit absent the exceptional circumstances outlined earlier in this judgment .

[49] In all the circumstances therefore I conclude that there is no basis for this court compelling the Respondents to attend to give oral evidence and I dismiss the application.