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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Williamson's Application (Michelle) No. 6 [2009] NIQB 63

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

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GILLEN J

Applications

[1] Two applications for judicial review require to be determined by this court. Michelle Williamson is the applicant in each instance ("the applicant") and the respondents are the First Minister and deputy First Minster ("FM/DFM"). The applicant is a victim of the past events in Northern Ireland, her parents having been murdered in a terrorist bombing in 1993. She supports the general principle of a Victims Commission but has concerns about the present process as evidenced by the contents of these Judicial Reviews.

[2] In the first judicial review (JR1) the applicant challenges the decision of FM/DFM to appoint four Commissioners designate for victims and survivors announced in the Northern Ireland Assembly (NIA) on 28 January 2008 in light of the Victims and Survivors (Northern Ireland) Order 2006 ("the 2006 Order") which provided for a single commissioner to be appointed.

[3] The second judicial review (JR2) is a challenge by the applicant to the decision of the FM/DFM to appoint the four Commissioners designate to the Victims Commission on 28 May 2008 pursuant to the provisions of the Commission for Victims and Survivors Act (Northern Ireland) 2008 ("the 2008 Act").

[4] The relief sought in JR1 is:

(a) An order of certiorari to quash the decision made on 28 January 2008.

(b) Declarations that

- the decision was not made in furtherance of the purposes of the 2006 Order.
- the said decision is unlawful, ultra vires and of no force or effect.
- the appointments were made in breach of the applicable guidelines for public appointments.
- the decision was made in breach of Section 76 of Northern Ireland Act 1998("the 1998 Act"
- the decision and appointments were actuated by improper political considerations.

[5] The full grounds of the challenge to the decision are set out in the amended statement filed pursuant to Order 53, Rule 3(2)(a) of the Rules of the Supreme Court (Northern Ireland) 1980. However Mr McDonald QC who appeared on behalf of the applicant with Mr Donaghy, helpful conflated those grounds into three essential points set out in his well organised skeleton argument as follows:

(a) The FM/DFM did not have any statutory or other legal authority either to decline to appoint a single commissioner under the 2006 Order or to appoint instead four Commissioners Designate.

(b) The decisions made by the FM/DFM during the appointment process under the 2006 Order

- repeatedly to defer the appointment of a single Victims' Commissioner,
- to conduct a second round of applications, and
- to appoint four Commissioners Designate instead of one Commissioner

were all actuated by improper political considerations and in breach of Section 76 of the 1998 Act, being made on the grounds of religious belief and/or political opinion.

(c) The FM/DFM failed during the appointment process under the 2006 Order to comply with the requirements to make an appointment of a Victims Commissioner on merit in accordance with the applicable guidelines for public appointments, viz. the Code of Practice for Ministerial Appointments to Public Bodies (the Code).

[6] The relief sought in JR2 is:

(a) An order of certiorari to quash the decision made on 28 May 2008 appointing four Commissioners to the Victims' Commission under the 2008 Act.

(b) Declarations that

- the decision was unlawful, ultra vires and of no force or effect.
- the appointments were made in breach of the applicable guidelines for public appointments.
- the decision was made in breach of Section 76 of the 1998 Act.
- the appointments were pre-determined and made in circumstances where the FM/DFM unlawfully fettered their discretion.

[7] Once again Mr McDonald had helpfully conflated the grounds set out in full in the amended statement filed under Order 53, Rule 3(2)(a) of the Rules of the Supreme Court in his skeleton argument. The ground relied on was that the appointments under the 2008 Act were pre-determined by the FM/DFM in accordance with their flawed decisions under the original 2006 Order on the same unlawful grounds and therefore were made in circumstance where the FM/DFM failed to exercise any discretion under the 2008 Act. Alternatively they had unlawfully fettered their discretion and had failed to conduct any proper process under the new Act.

Factual background

[8] In the wake of the commencement the 2006 Order in January 2007 which provided inter alia for the appointment of a single Victims' and Survivors' Commissioner, an advertisement for the post of Commissioner under that Order was placed in various newspapers and an initial meeting of a selection panel met on 8 February 2007. There were 46 applicants and 14 were interviewed. On 20 March 2007 the interviews were completed and 6 candidates were considered to have met all criteria. The assessor of the Office of the Commissioner for Public Appointments (OCPA) on the selection panel indicated that the process as of that date had been properly carried out.

[9] In May 2007 the respondents were briefed by officials and asked to consider which of the candidates they wished to appoint. At this stage they were provided with pen pictures of the six candidates and were told that the six had met all of the essential criteria for appointment. The candidates were not ranked or scored.

[10] There then followed in the ensuing months a number of announcements by the respondents to the Northern Ireland Assembly that they hoped to make the announcement of the appointment before the summer recess.

[11] On 15 July 2007 the FM/DFM sought advice on the option of stopping the current appointment process and instead commencing a fresh one in light of the new political arrangements since the advent of the power sharing

executive, the original arrangements having been set in train by Ministers under Direct Rule from Westminster.

[12] In July 2007 there was a submission to the respondents from John Clarke of the Victims Unit advising the respondents against the option of commencing a new competition. On 20 July 2007 the FM/DFM indicated to Mr Clarke that, notwithstanding his advice, they wished to continue to explore the option of a new competition. A meeting with the Commissioner for Public Appointments occurred on 11 September 2007. Advice was received from Senior Counsel on 28 September 2007. On 3 October 2007 the FM/DFM met with the accounting officer of Office of the FM/DFM to seek his views on the reopening of the appointment process. A further meeting on 5 October 2007 with the Commissioner for Public Appointments occurred. On that date the FM/DFM decided to extend the appointment process for the new stage in the process now being developed.

[13] On 8 October 2007 a joint statement was made by the FM/DFM announcing their decision and indicating the reasons for it.

[14] On 12 October 2007 fresh advertisements were placed in local and national newspapers papers for the post of Commissioner with a closing date of 7 November 2007. Interviews were held between 23 November and 3 December 2007 with the new selection panel.

[15] An Appointment Process Validation Certificate was issued by the independent assessor at the end of this interview process. There were in all eight candidates who were deemed to be appropriate. Five of these came from the "original" appointment process and three were added following the extended process.

[16] Presentations to the FM/DFM occurred between 11-19 December 2007. Following the presentations discussions occurred between the Ministers. These began on 19 December 2007, were reconvened on 21 December 2007, 28 December 2007 and 8 January 2008. On 8 January 2008 the FM/DFM indicated they were minded to appoint four persons.

[17] Legal advice was then obtained by the FM/DFM as to whether this could be done and the Ministers met with the Commissioner for Public Appointments on 11 January 2008. The Commissioner expressed herself as content with the approach proposed. On 17 January 2008 the four preferred candidates were written to in order to enquire if they would be willing in principle to be appointed. They indicated that they would. One candidate had reservations and Ministers identified a suitable person as a replacement.

[18] On 28 January 2008 the FM and DFM announced their decision to the Assembly.

[19] A Commission for Victims and Survivors Bill was introduced in the Assembly on 31 March 2008. It sought to establish a Commission which would have the same role and functions as that of the Commissioner for Victims and Survivors under the 2006 Order.

[20] On Tuesday 27 May 2008 the Speaker of the Northern Ireland Assembly announced that the Commission for Victims and Survivors Bill had received Royal Assent on Friday 23 May 2008 and that it would be known as the Commission for Victims and Survivors Act (Northern Ireland) 2008. A memorandum of 28 May 2008 of a meeting of the FM and DFM together with a number of civil servants noted, inter alia, as follows:

> "1. Officials asked if FM and DFM were now content to appoint the four individuals, identified as the "Commissioners designate" to members of the Commission for Victims and Survivors.
>
> 2. FM and dFM confirmed that now the legislation is in operation, they wished to proceed with these appointments.
>
> 3. Following further discussions, PPSs provided a draft decision note. FM and dFM agreed that the note fully and accurately reflected their reasons for making these appointments and asked that the note be issued to officials as soon as possible."

[21] A memorandum of 30 May 2008 prepared by Mr Jack set out that the FM and DFM had confirmed that they wished to proceed with the appointments to the Commission for Victims and Survivors and noted, inter alia, as follows:

> "The Victims and Survivors Order (NI) 2006(*this presumably ought to have referred to the 2008 Act)* gives the First Minister and deputy First Minister discretion as regards the number of members to be appointed to the Commission. Ministers have decided to appoint four Members, as they feel that this number will be necessary to meet the needs of victims and survivors in the initial period of four years for which these appointments are made".

[22] The memorandum goes on to record the names of the persons who are appointed as being those who were appointed as Commissioners designate on 28 January 2008, that each of them had been through the merit based appointments process and had been identified as possessing the necessary

competences to successfully fulfil a role in the Commission. The strengths of each one of the proposed members of the Commission were then outlined in some detail.

[23] The formal process of appointment of the four preferred candidates to the Commission occurred by means of a letter of 30 May 2008 in which each was offered the appointment. Each replied accepting appointment.

The statutory background

The 2006 Order

[24] The 2006 Order makes the following provisions relevant to the issues in these judicial reviews.

[25] Article 2(2) defines the Commissioner as meaning the Commissioner for Victims and Survivors for Northern Ireland.

[26] Article 4(1) and (2) provides that there shall be an officer known as the Commissioner for Victims and Survivors for Northern Ireland appointed by the First Minister and deputy First Minister acting jointly.

[27] Article 5 provides that the principal aim of the Commissioner in exercising his functions under the Order is to promote the interests of victims and survivor.

[28] Article 6 outlines the duties of the Commissioner in the following terms:

> "6.-(1) The Commissioner shall promote an awareness of matters relating to the interests of victims and survivors and of the need to safeguard those interests.
>
> (2) The Commissioner shall keep under review the adequacy and effectiveness of law and practice affecting the interests of victims and survivors.
>
> (3) The Commissioner shall keep under review the adequacy and effectiveness of services provided for victims and survivors by persons or bodies.
>
> (4) The Commissioner shall advise the Secretary of State, the Executive Committee of the Assembly and any body or person providing services for victims and survivors on matters concerning the interests of victims and survivors –

(a) as soon as reasonably practicable after receipt of a request for advice;

(b) on other such occasions as the Commissioner thinks appropriate.

(5) The Commissioner shall take reasonable steps to ensure that the views of victims and survivors are sought concerning the exercise by the Commissioner of his functions.

(6) The Commissioner shall make arrangements for a forum for consultation and discussion with the victims and survivors."

[29] Article 7 makes provision for the general powers of the Commissioner in the following terms:

"7.-(1) The Commissioner may undertake, commission or provide financial or other assistance for research or educational activities concerning the interests of victims and survivors or the exercise of his function.

(2) The Commissioner may, after consultation with such bodies or persons as he thinks fit, issue guidance on best practice in relation to any matter concerning the interests of victims and survivors.

(3) The Commissioner may –

(a) compile information concerning the interests of victims and survivors;

(b) provide advice or information on any matter concerning the interests of victims and survivors;

(c) publish any matter concerning the interests of victims and survivors, including –

(i) the outcome of any research or activities mentioned in paragraph (1);

(ii) any advice provided by the Commissioner.

(4) The Commissioner may make representations or recommendations to any person or body concerning the interests of victims and survivors."

[30] Article 8 makes provision for work programmes to be carried out by the Commissioner which may be directed, prepared and submitted to the First Minister and deputy First Minister.

[31] The status of the Commissioner is provided for in the schedule to the Order. In particular the Commissioner is to be a corporation sole and the appointment is to be for a term of four years.

The 2008 Act

[32] The 2008 Act contains the following provisions which are relevant to these judicial reviews.

[33] The explanatory notes to the Act record at paragraph 4:

> "Following a public appointments process, the First Minister and Deputy First Minister on 28 January 2008 announced to the Assembly the appointment of four Commissioners Designate for victims and survivors, in effect a commission. The establishment of the commission requires amendment of the Victims and Survivors (Northern Ireland) Order 2006.
>
> 5. The Commission for Victims and Survivors (Northern Ireland) Act 2008 replaces the Commissioner for victims and survivors with a commission."

[34] The Victims and Survivors (Northern Ireland) Order 2006 was amended so that Articles 4(1) to (3) of that Order now read:

> "4.-(1) There shall be a body corporate to be known as the Commission for Victims and Survivors for Northern Ireland."

[35] Schedule 1 of the 2008 Act indicated that the "Commission shall consist of such members as are appointed by the First Minister and deputy First Minister acting jointly."

[36] Paragraph 9 of Schedule 1 of the Act provides that the Commission by Standing Orders may make such provision as it thinks fit to regulate its own proceedings.

[37] The Commission has the functions of the Commissioner under the 2006 Order.

The 1998 Act

[38] Where relevant the Northern Ireland Act 1998 provides as follows:

> "76(1) It shall be unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to aid or incite another person to discriminate, against a person or class of person on the ground of religious belief or political opinion."

[39] Section 98(5) of the Act provides that a person discriminates against another person or class of persons if he treats that other person or that class less favourably in any circumstances than he treats or would treat other persons in those circumstances.

[40] Section 23 of the 1998 Act provides as follows:

> "23.-(1) The Executive power in Northern Ireland shall continue to be vested in Her Majesty.
>
> (2) As respects transferred matters, the prerogative and other executive powers of Her Majesty in relation to Northern Ireland shall, subject to sub-section (3), be exercisable on Her Majesty's behalf by any Minister or Northern Ireland department.
>
> (3) As respects the Northern Ireland Civil Service and the Commissioner for Public Appointments for Northern Ireland, the prerogative and other executive powers of Her Majesty in relation to Northern Ireland shall be exercisable on Her Majesty's behalf by the First Minister and deputy First Minister acting jointly.
>
> (4) The First Minister and deputy First Minister acting jointly may by prerogative order under sub-section (3) direct that such of the powers mentioned in that sub-section as are specified in the order shall be exercisable on Her Majesty's behalf by a Northern

> Ireland Minister or Northern Ireland department so specified."

Issues to be determined

Did the FM/DFM have statutory or legal authority to appoint four Commissioners Designate for victims and survivors on 28 January 2008?

[41] It is the respondents' case that the four Commissioners designate were not appointed to any statutory position under the 2006 Order and that the role they were to play was different and separate to that of the statutory commissioner envisaged under the 2006 Order.

[42] It was Mr Maguire's contention that their role involved no more than advancing a range of work to be covered in a work plan, such work to be preparatory to the later appointment, if the Assembly legislated for it, of a commission. Counsel relied upon the powers vested in the Executive in Northern Ireland by Section 23 of the 1998 Act and the use of the prerogative power to make appointment to a non-statutory position. Alternatively he relied upon the concept of the "third source" of power by which Government can carry out its ordinary business.

[43] I am satisfied that if Parliament has conferred on the Executive statutory powers to do a particular act, that act can only thereafter be done under the statutory power so conferred: any pre-existing prerogative power to do the same act are pro tanto excluded (per Lord Browne-Wilkinson in R v Home Sec. ex p. Fire Brigade's Union (1995) 2 AC at p. 552F ("the Fire Brigade case").

[44] This proposition derives from the principles set out in Attorney-General v De Keyser's Royal Hotel Limited (1920) AC 508. That case has achieved academic prominence. The factual circumstances were that the Crown had sought to take possession of property under the right of its prerogative simpliciter at a time when such possession was governed under the terms of the Defence Act 1842. Lord Atkinson said at p. 17:

> "It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd …. I

> should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance."

[45] In the Fire Brigade case, the Home Office had introduced a non-statutory tariff scheme for the award of criminal injuries which rendered it impossible to introduce the statutory enactment proposed for compensation for victims of violent crime in the Criminal Justice Act 1988 albeit that Act had not yet been introduced. At p. 552D Lord Browne-Wilkinson said:

> "… It would be most surprising if, at the present day, prerogative powers could be validly exercised by the Executive so as to frustrate the will of Parliament expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme even though the old scheme has been abandoned. It is not for the Executive … to state as it did in the White Paper (paragraph 38) that the provisions in the Act of 1988 'will accordingly be repealed when a suitable legislative opportunity occurs'. It is for Parliament, not the Executive, to repeal legislation. The constitutional history of this country is a history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body. The prerogative powers of the Crown remain in existence to the extent that Parliament has not expressly or by implication extinguished them."

[46] Girvan LJ visited this matter in the first instance hearing of Re Brenda Downes for Judicial Review (2006) NIQB 77 (Downe's case) which dealt with legality of the appointment of the Interim Victims Commissioner (IVC) and the legal power to make the appointment under the exercise of the Royal Prerogative. Girvan LJ said at paragraph 39 of his judgment:

> "I accept Mr McCloskey's argument that this is a matter which belongs to the domain of governance. Only the Executive can make an appointment of someone such as the IVC to be funded out of public funds. The appointment to public office of persons

> who are not civil servants and outwith the ordinary structure of the Civil Service has been widespread and common over the years and has been unquestioned. Mr Treacy has not persuaded me that no such power exists."

[47] The nature of prerogative powers was not conceptually challenged by Mr McDonald in this matter. His submission was that the prerogative powers cannot be exercised in a context where Parliament has already legislated. Ministers cannot exercise prerogative powers to in effect repeal existing legislation and introduce legislation radically different from which Parliament has approved.

[48] The issue before me was the manner in which the prerogative was exercised rather than the source of the power to make it. Did the FM/DFM in effect refuse to appoint a single commissioner and instead appoint four Commissioners designate in a manner inconsistent with and in defiance of the intention of the 2006 Order?

[49] Mr Maguire contended that even if the prerogative powers of the Executive could not be invoked in this instance, reliance could be placed on what, in addition to statute and prerogative power, is sometimes referred to as "the third source" of power by which Government can carry out its ordinary business. The doctrine was explained in R v Secretary of State for Health ex parte "C" (2000) 1 FLR 627 concerning the legality of a non-statutory list of sexual offenders maintained by the Secretary of State for Health. The court in that case held that the Secretary of State, as representative of the Crown, enjoyed non-statutory powers analogous to those of a natural person, not confined to those conferred by statute or to her traditional prerogative powers. Hale LJ said at paragraph 16:

> "The Crown is not a creature of statute and in one respect at least is clearly different from a local authority. The Crown has prerogative powers. But what does this mean? Professor Sir William Wade, in Wade and Forsyth Administrative Law …. 7th Edn 1994 at pp. 248-249, draws a clear distinction between prerogative and other powers:
>
> > '"Prerogative" power is properly speaking, legal power which appertains to the Crown but not to its subjects. Blackstone explained a correct use of the term .. Although the courts may use the term "prerogative" in this sense, they have fallen into the habit of describing

> as 'prerogative' every power of the Crown which is non-statutory, without distinguishing between powers which are unique to the Crown, such as the power of pardon, from powers which the Crown shares equally with its subjects because of its legal personality, such as the power to make contracts, employ servants and convey land'.
>
> There is no suggestion of a specific prerogative power in this case but Halsbury's Laws of England, VOL. 8(2), at note 62 para. 101, confirms that 'at common law the Crown, as a corporation possessing legal personality, has the capacities of a natural person and thus the same liberties as the individual. It was on this ground that Richards J declined to hold that the index was unlawful."

[50] In Shrewsbury and Atcham Borough Council v Secretary of State for Communities and Local Government (2008) EWCA Civ 148 (the Shrewsbury case), a similar issue arose in the context of proposals by the Secretary of State for Communities and Local Government to replace two-tier local Government in some parts of the country with unitary authorities. The existence of the third source powers as outlined by Hale LJ was accepted by the court. Carnwath LJ expressed reservations about the extent of the common law powers of the Crown indicating they were confined to the modest initial purpose of achieving incidental powers whereas Richards LJ took a broader view of those powers. However the existence of a third source power was clearly approved. Richards LJ said at paragraph 73:

> "The complex process of government includes a vast amount of work in relation to the formulation of policy, drafting new legislation and preparing for its implementation. Carnwath LJ states that it is not necessary to invoke a 'third source' of power for such work, which is simply 'a necessary and incidental part of the ordinary business of government' (para. 49). To my mind however it is still necessary to explain the basis on which that ordinary business of government is conducted and the simple and satisfactory explanation is that it depends heavily on the 'third source' of powers, i.e. powers that have not been conferred by statute and are not prerogative powers in the narrow sense but are normal powers (or capacities and freedoms) of a corporation with

> legal personality. The context is a special one, but the powers are the same."

[51] Mr McDonald relied on the restrictive approach adopted by Carnwath LJ to the subject of the third source submitting that the appointment of 4 Commissioners designate in place of a single commissioner could not be termed a modest or incidental purpose That interesting debate between Carnwath LJ and Richards LJ does not need to be determined by me in this case. Suffice to say that I am satisfied that the power of the Executive to appoint four Commissioners Designate, subject to the restrictions mentioned above, is exercisable as prerogative power or, in the alternative if I am wrong in this, by virtue of the third source provided such appointment can be characterised as preparatory work or necessary interim measures prior to the legislature deciding whether or not it was willing to amend or change the existing legislation. The real issue is whether or not Mr McDonald's argument is correct that in this instance the Executive exercised power which was contrary to the 2006 legislation and in effect constituted a repeal of it before the introduction of the 2008 Act. I have no doubt that if Mr McDonald is correct in that factual submission, the respondents, whether acting under the aegis of the prerogative or the third source had acted unlawfully. They cannot cross into territory reserved for statute.

Conclusion on this issue

[52] I have come to the conclusion that the respondents did have legal authority to decline to appoint a single commissioner. There is no obligation on the respondents to implement the provisions of the 2006 Order within any prescribed time limit provided of course that they do not act in defiance of the legislation by making appointments contrary to the contents of the legislation. Delaying the appointment of a single commissioner per se whilst time is taken to consider whether or not future legislation will be introduced to amend or change the original order – and taking purely preparatory steps in the interim – is not a breach of statute nor in any way unlawful. Appointing 4 Commissioners designate with all the powers and duties of the single commissioner would of course have been unlawful. I do not consider on the facts before me that that is what has been done in this instance by the appointment of the four Commissioners Designate.

[53] Ministers are entitled as a matter of political judgment and policy decision to propose an amendment of existing legislation. In this instance as a matter of policy they had evinced a wish to amend the 2006 Order by the 2008 Act so as to substitute the appointment of a single commissioner by joint commission. It is for the legislature to decide if in the event that is acceptable. Such a policy decision is not an area into which the courts should readily tread provided Ministers act within the law and not in a manner that

constitutes a repeal of the 2006 Order. On the facts before me I reject Mr McDonald's submission that this is precisely what happened.

[54] I was not persuaded that the actions of the respondents in appointing four Commissioners Designate prior to the introduction of the 2008 Act in effect constituted a repeal of the 2006 Order or was in defiance of the terms of that order. The fact of the matter is that Ministers must be entitled to take steps preparatory to the introduction of new legislation so long as such steps do not contradict the legislation then in force. Good government would grind to a halt if proposals for change had to be unflinchingly eschewed and preparatory work on them ignored until the new legislation was introduced. The FM/DFM clearly recognised that the change from a unitary commissioner to a joint commission did require legislative steps and they did not deviate from deference to that principle. That did not preclude them openly and transparently taking interim steps armed as they were with the approval of the Commissioner of Public appointments and the opinion of Senior counsel, to appoint 4 Commissioners Designate to commence preparing a work programme for the future. This was far removed from investing them with any or all of the powers or duties of a single commissioner under the existing legislation or the anticipated change thereto (see paragraph 56 et seq below).

[55] This is well illustrated by the affidavit of Mr Edmund Rooney, the Deputy Secretary in the Office of the FM/DFM with responsibility for victims' issues. At paragraph 39 et seq, he avers:

> "On 8 January 2008 the First Minister and Deputy First Minister informed officials that they were minded to appoint four people, who they believed would collectively do the best job for victims and survivors. They acknowledged that this would require an amendment to the legislation. They asked officials to seek advice as to whether it would possible to appoint four people from the current competition. They emphasised that the posts that the four would be filling would not differ in content from the commissioner role as set out in the legislation. They were also clear that the four individuals would be required to act collectively. The reasoning of the First Minister and deputy First Minister is set out in the record of a debate of the Assembly that was held on 28 January …
>
> 40. Oral legal advice was received (in respect of which I do not waive privilege) as to the legal issues that may arise from the proposed course of action and

a meeting between Ministers and the legal advisor was held on the morning of 8 January.

41. On 10 January officials contacted OCPANI to set up an urgent meeting between the First Minister and deputy First Minister and the Commissioner. Further on that date officials confirmed that the First Minister and deputy First Minister had seen and read the submission of 14 December referred to above. It was confirmed that any announcement on the appointment of Commissioner would be made to the Assembly in the first instance.

42. A meeting with the Commissioner and Ministers took place on 11 January. Ministers discussed their intention to appoint four Commissioners. The Commissioner agreed to reflect on the issue and to contact officials with her views on whether this would be appropriate in the context of the public appointments process. Later that day OCPANI confirmed that the Commissioner was content with this approach, provided it was clear that all the prospective appointees had met all the criteria as advised (including the cross-community element) and that the reason for appointing four Commissioners was that they would collectively do the best job for victims and not that it would resolve any cross community confidence.

43. On 11 January the First Minister and deputy First Minister notified John McMillen of the outcome of the appointment process. The note states that the First Minister and deputy First Minister would like to appoint four Commissioners. It also states that an amendment would be required to the Victims and Survivors (Northern Ireland) Order 2006 to allow for the appointment of four rather than one Commissioner.

….

47. On 22 January a joint First Minister and deputy First Minister meeting was held to discuss the steps required to make the announcement on the outcome of the process on 28 January. During this meeting there was discussion about the need to bear in mind

> at all times that the Commissioners Designate would not be Commissioners and that there would not be a Commission until the legislation had been amended. It was stated specifically that they should not be referred to as Commissioners and that Ministers should be careful not to be seen to pre-empt the will of the Assembly."

[56] I consider that this is clear evidence that the respondents had not only taken legal advice and the opinion of the OCPANI in the matter, but that they were at pains to make clear their recognition of the need to avoid pre-empting the will of the Assembly and thus of the legislature. That of course did not deprive them of the right to make a judgment or form a political opinion as to the benefit of advocating a legislative change or of taking interim measures.

[57] My conviction that they acted lawfully in this regard is underlined by a consideration of the powers and duties actually exercised by the four Commissioners Designate. There were manifest differences between the role that they were to play pending the introduction of the new legislation and the statutory role envisaged for a single Commissioner.

[58] The duties of the Commissioner, as set out in paragraph [28] of this judgment by me are six fold. The powers of the Commissioner, as set out in paragraph [29] of this judgment by me, are also several in nature. Article 8 makes provision for work programmes to be carried out by the Commissioner which may be directed, prepared and submitted to the First Minister and deputy First Minister.

[59] In the event it seems clear that the only task that the Commissioners Designate were to carry out was to consider an agreed work programme i.e. they were asked to prepare a work programme as an act of preparation in the event of new legislation being passed. Working on such a work programme is not the same as actually carrying it out. The Commissioners designate had no statutory rights whatsoever and indeed would not have been capable of exercising any of the powers or carrying out any of the duties under Articles 6 and 7 of the 2006 Order. Even the work programme with which they were tasked could not have operated under Article 8 because that process could only commence after the appointment of a Commissioner. Thereafter the First Minister and deputy First Minister acting jointly would modify any such work programme after a consultation with the Commissioner, approve any such work programme etc. Given the absence of the Commissioners designate exercising or being requested to exercise any of the powers or duties under Articles 6 and 7 and recognising the very limited scope of the work programme they were to produce in comparison to the minutiae contained in Article 8, I do not consider that steps had been taken to repeal in

effect the 2006 Order and to introduce the 2008 Act before it had even been passed by the Assembly.

[60] Inter alia, Mr McDonald relied heavily upon the contents of the Ministerial Statement of 28 January 2008 which the deputy First Minister and First Minister made to the Northern Ireland Assembly upon the appointment of the Commissioners designate. I commence by stating that it seems to me that those statements resonate with the acceptance that a future Commission will need to be established by legislation. For example, the First Minister said:

> "We anticipate that the Commission will have the same functions as the post of Victims' Commissioner described in the Victims' and Survivors' (Northern Ireland) Order 2006. It is our intention to make formal appointments in due course but we must first introduce the necessary legislation to create the Victims' and Survivors Commission that I have described today. …. I want to make it clear that, in the interim, there is much important work for the four Commissioners Designate to carry out. We want them to sit down together and get to grips with setting out an agreed work programme for the new Commission. That would be a crucial first step as we move towards a better service for those touched by the events of our troubled past. It is envisaged that the work plan will cover all the issues that impact on victims and survivors, including a review of victim services, legislation and the setting up of a victims' and survivors' forum."

[61] The Deputy First Minister said:

> "It is the intention that the Commissioners Designate represent the interests of victims and survivors and, specifically, develop a work programme and agree it with us. We envisage that the programme will cover issues such as examining all law and practice affecting victims and survivors, keeping under review the adequacy and effectiveness of services, and providing advice on the issues."

[62] I consider that such extracts are far removed from the detailed duties and powers set out in the 2006 legislation and represent neither an attempt to defy the provisions of the 2006 Order nor a de facto repeal of its contents in

advance of the 2008 Act being implemented. These were simply transitional or preparatory measures pending the introduction of new legislation.

[63] I therefore conclude that the FM/DFM did have legal authority to decline to appoint a single commissioner on the original order and to appoint four Commissioners Designate in the circumstances set out. For my own part I consider that they were invoking the powers of the prerogative retained under s.23 of the 1998 Act or, if I am wrong in that regard, acting under the third source powers making preparation for the possible introduction of amending legislation. Good governance cannot be halted entirely whilst the legislature determines the future.

Were the decisions made by the FM/DFM during the appointment process under the 2006 Order to defer the appointment of a single victims Commissioner, to conduct a second round of applications and to appoint four Commissioners Designate all actuated by improper political considerations, religious belief, political opinion and a breach of Section 76 of the Northern Ireland Act 1998? Did the FM/DFM fail to comply with a requirement to make an appointment of a Victims' Commissioner on merit in accordance with the applicable guidelines for public appointments, viz, the Code of Practice for Ministerial Appointments to Public Bodies ("the Code of Practice")?

[64] Mr McDonald submitted that overarching this issue, and indeed the entire process before the court, was a breach of the duty of good faith and candour on the part of the respondents. He advanced this submission on the strength of the following points:

- the respondents had declined to disclose or explain the material facts and reasoning behind their decisions in circumstances where they were the only people in a position to do so in the absence of notes made by them or the presence of officials at their discussions .
- as a matter of law they were bound to disclose the details of their deliberations to the extent necessary to enable the court to determine whether their decisions were arrived at lawfully. The preference for secrecy and joint ministerial decision-making should be subordinate to the rule of law. He stressed the failure of the Ministers to commit minutes to writing in respect of their deliberations, officials were kept effectively in the dark about their reasons behind the decisions, and assertions to the contrary by civil servants were ignored e.g. the views of Mr Clarke about the decision to introduce a new competition
- In such circumstances counsel encouraged the court to draw the appropriate adverse inferences of lack of candour against the respondents.

- the Ministers were not exempt from the relevant principles of public law governing ministerial decision-making (including the applicable codes of practice) or relevant statutory provisions, such as those prohibiting discrimination under s76 to the 1998 Act.
- these themes had been raised in the course of two previous decisions by me. On 7 August 2008. I had refused an interlocutory application by the applicant requiring the attendance of the respondents at the hearing of the judicial reviews in order to give oral evidence (a decision unsuccessfully appealed) .Secondly on 20 March 2009 I had refused an application by the applicant under the Rules of the Supreme Court (Northern Ireland) 1980 Order 53 Rule 8 and Order 26 Rule 1 obliging the respondents to answer interrogatories. Counsel contended that I should revisit these conclusions at this hearing in light of the matters raised in the bullet points above.

[65] The principle of candour is well summarised in Downe's case at first instance by Girvan LJ at paragraph [21]:

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

be in the public interest which should be decided in accordance with the relevant statutes and the Freedom of Information Act 2000. In Quark Fishing Limited v Secretary of State for Foreign Affairs (2002) EWCA 149 Laws LJ put it thus at paragraph 50:

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

[66] Mr McDonald's unflinching approach to this matter – including the bold assertion that the First Minister and deputy First Minister had both lied to and misled the Northern Ireland Assembly – fundamentally misunderstands the nature of the new constitutional arrangements and the joint decision-making process that courses through the provisions of the Good Friday Agreement and the Northern Ireland Act 1998. The concepts of a joint entity and joint power sharing are the lynchpins of the new dispensation and the intent of the legislation. It is the key to their success. The intention of Parliament is to facilitate consensus Government under the umbrella of a multi-party model. It was not the intention of Parliament as evidenced by the 1998 Act to lay down any prescriptive method by which the joint concept of the FM/DFM should proceed. The process of joint decision-making which will command public trust and confidence is a fragile flower which requires careful tending. Sharing of power by leaders who straddle the political divide albeit with potentially diametrically opposed standpoints is never going to be easy to sustain. It will be singularly unhelpful, and in my view constitutionally inapposite, for the courts to prescribe methods as to the manner of securing this unity of decision absent clear evidence of unlawful acts or breach of public law by the participants. The courts must be wary to frustrate neither the legislative intent nor the public interest in ensuring that the new constitutional arrangements are given an opportunity to succeed.

[67] In Re Northern Ireland Human Rights Commission (2002) NI2 36 the Northern Ireland courts held that a statutory body with a duty to keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights did not have any power to intervene in judicial proceedings. The Law Lords, with one dissent, reversed this decision holding that the duties and powers expressly conferred on the Human Rights Commission carried with them the incidental capacity to make submissions as an intervener if so permitted or invited by the courts or tribunals. Whilst those facts may not be relevant to this case, in a dissenting judgment Lord Hobhouse captured the notion of how important political judgment is in the present regime when he stressed that the Belfast Agreement, which promised that the Commission would be created, was:

> "an intensely political act where, after very difficult negotiations and a referendum campaign, agreement was fully obtained for a document which then fell to be given effect to in an act of Parliament …. It must have been a political judgment how pro-active and interventionist a commission would be acceptable to the people of Ulster as a whole …. I consider that the Lord Chief Justice and the majority of the Court of Appeal correctly understood the intent of the Belfast Agreement and the implementing legislation and their place in the constitutional framework of the province."

[68] I believe that matters such as the present case require a generous and purposive approach to the interpretation of the statutory and regulatory provisions bearing in mind the values which the constitutional provisions are intended to embody. Lord Bingham in Robinson v Secretary of State for Northern Ireland (2002) NI 390 at paragraph 11/12 indicated that ordinary constitutional practice in Britain does not follow pre-determined mechanistic rules; "where constitutional arrangements retain scope for the exercise of political judgment they permit a flexible approach to differing and unpredictable events in a way which the application of strict rules would preclude".

[69] Hence a rigid or inflexible approach should not be adopted to matters such as that currently before the court. I do not find it unlawful or improper that from time to time decisions of the First Minister and deputy First Minister may be arrived at by joint meetings of the Ministers without officials present or documentation being made of the almost inevitably painstaking, and at times perhaps even tortuous or rancorous, evolution of agreement which in the initial stages may seem unlikely. Eschewing confrontation and embracing compromise on what might initially be diametrically opposed positions may not be helped by the presence of note taking officials and other

constraining influences. This is a new model of governance and old procedural straight jackets may have to be modified so long as the parties have acted within the rule of law and the terms set down by Parliament. The absence of documentation, note taking or presence of officials in sensitive discussions between Ministers does not lead to the drawing of an adverse inference of unlawfulness, discrimination or of political considerations having infected the process unlawfully.

[70] I find no evidence to sustain Mr McDonald's argument that the protracted delay before the Ministers announced their view that legislation for a joint Commission rather than a single Commissioner should be introduced smacked of improper consideration, discrimination or improper political manoeuvrings. Such delay merely recognises the obvious fact that the evolution of an agreed policy can take time. Neither do I find suspicious the absence of any record of any change of mind on the part of Ministers or how such change if it occurred came about as being suspicious in the new political context. Ministers are perfectly entitled in my view to change policy and to encourage the Assembly to introduce amending legislation as a consequence of the inevitable ebb and flow of ministerial exchange and compromise provided they remain answerable to the Assembly and the supremacy of the legislature in the final analysis remains intact. That such a process will take time and preparation seems to me consistent with the legislative intention. At the end of the process the Ministers are accountable to the Assembly where they are likely to be questioned and scrutinised. I discern no basis for Mr McDonald's contention that there has been any breach of candour in the lengthy deferral of the appointment, the decision to conduct a second round of applications and to appoint the four Commissioners Designate. It is pure speculation to assert they have been actuated by improper political considerations or any breach of Section 76 of the Northern Ireland Act 1998 on the grounds of religious belief and/or political opinion. I pause to observe that whilst there were no minutes of the meetings between the First Minister and deputy First Minister, the wealth of discovery made on all other aspects betrayed not a scintilla of evidence to substantiate Mr McDonald's submissions in this regard.

[71] I find no basis for the suggestion that the selection of 2 Protestants and 2 Catholics as Commissioners designate somehow per se led to a clear inference that they had been selected on the basis of their perceived religious and/or political affiliation in breach of Section 76 of the 1998 Act. Once again there was not a shred of evidence other than the bald assertion of the point to substantiate this assertion. A statement of the DFM in January 2008 expressly disclaimed any suggestion of a lack of agreement on the part of the two Ministers or that the appointments had been made to have particular appeal to one section of the community or the other. On the contrary the assertion was that four Commissioners Designate were to act as equals and represent the interests of all victims and survivors without fear or favour.

That theme was reiterated in the first affidavit of Mr Rooney at paragraph 49(vi) sworn on 16 April 2008. I see no evidence to contradict what they have said.

Accordingly I find no basis for the allegation of lack of candour in this matter.

The role of the Commissioner for Public Appointments for Northern Ireland (CPANI).

[72] The background to this Commissioner is found in the Commissioner for Public Appointments (Northern Ireland) Order 1995, as amended by the Commissioner for Public Appointments (Amendment) Order (Northern Ireland) 2001. This gives the Commissioner a statutory jurisdiction over certain defined public appointments and defines the Commissioner as the person appointed for the time being by the First Minister and deputy First Minister acting jointly as the Commissioner for Public Appointments for Northern Ireland. Under Article 4(2) the Commissioner shall prescribe and publish a code of practice on the interpretation and application by departments of the principle of selection on merit for public appointments. The Code itself was published in August 2005.

The role of The Code of Practice for Ministerial Appointments to Public Bodies

[73] The guiding principle in paragraph 2.4 of the Code is that "all public appointments should be governed by the overriding principle of selection based on merit, by the well informed choice of individuals who through their abilities, experiences and qualities match the needs of the public body in question." Original recommendations of selection can take account of the need to make appointments which include a balance of skills and experience. Nonetheless, departments must guard against positive discrimination and political activity cannot be used as a criterion for selection unless there is a statutory requirement to do so. Under the heading "Openness and Transparency" in paragraph 2.16, it is pointed out that the workings of the appointment system must be clearly visible. All stages to the process including relevant conversations must be documented and the information should be readily available for audit. Under the heading of "Proportionality" it is pointed out that proportionality arguments must not be used to circumvent proper procedures. All deviations from the process set out in the Code of Practice must be fully recorded and departments are advised to consult the Office of the CPANI in advance of any significant departure. Paragraph 1.7 does make clear that occasionally situations may arise which are not covered within the Code of Practice and if that happens the CPANI must be informed. Any significant proposed departure from the prescribed process must be discussed with the CPANI and the outcome of the discussion duly recorded.

[74] In this instance, after the first stage of the process had identified appointable candidates, the Ministers wished to stop the process largely because the Ministers felt the need for a new trawl under the new political arrangements. Accordingly a second stage was introduced of further appointable candidates and the Ministers wished to have four appointments rather than one. Complying with paragraph 1.7 the Commissioner was contacted and approved the four Commissioners Designate subject of course to the legislation eventually being changed. The sanction of the Commissioner was therefore obtained consistently with the Code.

[75] Paragraph 2.3 of the Code makes it clear that the ultimate responsibility for appointments rests with Ministers. Paragraph 2.6 stresses that independent scrutiny is a mandatory element of every competition. No appointment may be made unless an Independent Assessor has been involved in the process. Mr Maguire asserted that there is nothing in this section that indicates that the Independent Assessor must be involved at the ministerial selection stage. Similarly he argued that the need for relevant conversations to be documented and information to be readily available for audit pursuant to paragraph 2.16 does not involve the stage of ministerial selection since this is not a stage of the process.

[76] The Code in Chapter 3 sets out the appointments process with three stages namely that of planning, preparation and selection. It was Mr Maguire's submission that the Independent Assessor is not involved in the ministerial selection part of the procedure. He submitted that the planning had been executed by the direct rule Ministers and not the devolved system. The preparation stage in terms of publicity/advertising etc. had all been carried out in compliance with the Code.

[77] Turning to the final stage namely the ministerial selection Mr Maguire addressed initially as background the role of the independent assessor. The Independent Assessors had been involved in the short listing and interviewing as set out in 3.32, had an overview of the earlier stages of the process and were directly involved in the shortlisting and interviewing. Paragraph 3.33 of the Code makes clear that no appointment can be recommended to Ministers unless the candidate has been scrutinised by the Selection Panel. This was the case in this instance. A Selection Panel had documented interviews and conversations that had taken place.

[78] So far as the ministerial submission itself is concerned this is dealt with at paragraph 3.37. It seems obvious that this is the culmination of the process. Paragraph 3.37 makes clear that there are two approaches to the ministerial submission. On the one hand there is a merit order in which the Panel provides a list of candidates in merit order based on scores for performance at interview. On the other hand there is the less strictly defined approach where

the panel scores candidates at interview against an agreed pass mark. Those candidates found to be above the line are recommended to a Minister but they are not ranked in order nor are the interview scores necessarily given. Candidates may be divided into suitable and highly recommended if the panel believes such a distinction is warranted. In this case the direct rule Ministers had agreed that the suitable/unsuitable model and not the merits based order was to be preferred. I was satisfied that Mr Maguire was right in asserting that once the selection panel had produced the ministerial submission, and the Ministers were provided with a list of appointable candidates who had met the pass mark, it was not necessary to give the markings to the Ministers in this suitable/unsuitable approach. In fact the Ministers were given names of appointable candidates and a small amount of information concerning them but no rankings.

[79] Accordingly at the stage of the final ministerial decision, the candidates submitted to them were all suitable. I was therefore satisfied that there was no requirement on the part of the Ministers to mark or rank candidates in order to comply with the Code as submitted by Mr McDonald.

[80] Paragraph 3.40 of the Code declares that "if a Minister wishes to set aside any of the provisions of this Code, the Department is advised to consult the Commissioner as early as possible." Mr Maguire submitted that this was an unequivocal indication that there was no legal obligation on the Minister to comply with the Code and there was scope to set it aside if necessary. The Commissioner could then of course decide to comment publicly on that decision or require the Department to make it clear that the required procedure had not been followed. The Code of Practice is therefore a guide albeit there is an expectation that the guide should be complied with and legal consequences may flow if no reasons are given for such a breach. (See paragraph 82 et seq of this judgment).

[81] It is to be observed at this stage that on 4 April 2007 Mr Gamble from the Office of the First Minister and Deputy First Minister recorded in a memorandum that the appointment process was nearing completion and included the following paragraph:

> "This is a regulated appointment falling within the remit of the (OCPANI). The process of drawing up a list of those deemed suitable for appointment is outlined below. The independent assessor appointed by OCPANI has certified that the process to date has been carried out in accordance with the OCPANI Code of Practice and has signed a certificate to that effect."

[82] The Ministers were then invited to proceed to consider the list of the names judged suitable for appointment as Commissioner noting that the legislation provides for the appointment to be made by the First Minister and deputy First Minister acting jointly.

The legal significance of the Code of Practice

[83] The Code of Practice is an area of policy guidance. Its legal relevance and implication depend on its character and context. I consider that there is in this instance a duty –

- to interpret it correctly (or at least reasonably); and
- to depart from it only for good reason (see Fordham "Judicial Review Handbook" 5th Edn at paragraph 6.2).

[84] In R (On the application of Munjaz) v Mersey Care NHS Trust (2006) 4 All ER 736(Munjaz) the issue that arose was the lawfulness of a Trust placing Mr Munjaz in seclusion in a high security hospital. A Trust, in the treatment of him, had not adhered to a Code of Practice under Section 118 of the Mental Health Act. Dealing with the legal effect of the Code under Section 118 of the Act Lord Bingham of Cornhill said at paragraph 21:

> "It is in my view plain that the Code does not have the binding effect which a statutory provision or a statutory instrument would have. It is what it purports to be, guidance and not instruction. But the matters relied on by Mr Munjaz show that the guidance should be given great weight. It is not instruction, but it is much more than mere advice which an addressee is free to follow or not as it chooses. It is guidance which any hospital should consider with great care, and from it should depart only if it has cogent reasons for doing so. Where, which is not this case, the guidance addresses a matter covered by s. 118(2), any departure would call for even stronger reasons. In reviewing any challenge to a departure from the Code, the courts should scrutinise the reasons given by the hospital for departure with the intensity which the importance and sensitivity of the subject matter requires."

[85] The Code itself clearly contains internal indications that it is no more than a guideline. Paragraph 1.5 of the Code describes its aim as being "a clear and concise guide to the steps" departments must follow. The Commissioner can grant exceptions (paragraph 2.20), the process can be tailored to a department's needs (paragraph 3.6), the influence of the Minister at the

planning stage is accepted (paragraphs 3.4 and 3.5) and changes can be agreed with the Commissioner (paragraph 3.40) -- all indicating that this Code is not intended to be legally enforceable. Ministers are of course accountable to the Assembly if they breach that OCPA Code and that is probably where the ultimate sanction lies.

[86] Nonetheless I consider that that the approach advocated by Lord Bingham in the Munjaz case should be adopted to this Code. Whilst the Code was not made under a prerogative order and did not receive Parliamentary approval it does deal with the highly sensitive area of public appointments by Ministers and whilst a breach would not amount to illegality per se, I am satisfied that Ministers are obliged to take requirements of the Code into account where they are relevant and that the Code should only be departed from if there are cogent reasons for so doing. Indeed the respondent through their civil servants have accepted that the code is mandatory and the departments should comply with it fully (see letter of 21 March 2008 from John McMillen of the Office of the FM/DFM).

[87] I have to ask therefore whether or not there has been a breach of this Code. I do not find that there has been a breach of the Code. I am satisfied that all the stages up until the ministerial selection complied fully with all the detailed contents of the Code. Independent assessment is present at every point up until the ministerial selection. It is clear to me that the approach adopted was a suitable/unsuitable concept which was resolutely followed to a point where the Ministers were given a submission with the names of appointable candidates together with some information on each. There was no need to provide rankings or indeed for Ministers to provide a ranking once a positive decision had been taken not to use a merit order approach instead of the suitable/unsuitable approach. Hence the candidates were not ranked in order but simply submitted as having been scored against an agreed pass mark. Following the admonitions in paragraph 3.37(b) of the Code, some supporting background information was given highlighting skills or experience which would prove particularly valuable to the Board. It is highly significant in my view that the Commissioner had approved the first stage up to April 2007 by way of an appointment process validation certificate signed by her on 27 March 2007 and again provided similar validation at the second stage.

[88] I find nothing in the Code which specifically imposes the obligations of the Code on the ministerial selection itself. For the reasons I have outlined in paragraphs 65 - 69, I can well understand why that stage would have been omitted from, for example, the obligations under paragraph 2.16 particularly where it would have obliged the First and deputy First Minister to document relevant conversations and make the information of their discussions readily available for audit. This is where the degree of proportionality has been built

into the process and why the practice sets out the minimum measure that departments are required to implement and not the Ministers themselves.

[89] If I am wrong about this, and that there was an obligation under the Code for Ministers to make all stages of their conversations and their decisions visible, including documentation of relevant conversations I am satisfied that there were cogent reasons for departing from it under the provisions of paragraph 1.7 and 3.40 in instances such as this, again for the reasons which I have set out in paragraphs 65-69 of this judgment. The Commissioner for Public Appointments was fully involved with this process and has clearly lent her imprimatur to the procedures invoked. If she had considered there had been an unjustifiable departure from the Code she had all the remedies available to her under paragraph 3.40. It is clear that far from considering that the Ministers were unjustifiably in breach of the Code, she fully approved of the process.

[90] Accordingly I am not satisfied that the applicant has made out the grounds of challenge now under consideration.

Consultation

[91] It was the applicant's case that the 2008 Act was passed without necessary public consultation. Mr McDonald drew attention to the confidential memorandum from the Private Secretaries of the First Minister and deputy First Minister to John McMillen of 11 January 2008 (incorrectly dated 11 January 2007) which recorded the outcome of the Commissioners for Victims and Survivors appointments process in the following terms:

> "The First Minister and Deputy First Minister have considered the assessments from the interview panel and heard presentations from all the candidates deemed appointable.
>
> They would like to appoint four Commissioners to work for victims and survivors. They have identified individuals with skills and expertise who they believe collectively would do the best job for victims.
>
> They are aware that an amendment will be required to the Victims and Survivors (Northern Ireland) Order 2006 to allow the appointment of four rather than one Commissioners.
>
> They have indicated that they are prepared to take the necessary amending legislation through the Assembly

> as a matter of urgency, after the necessary public consultation."

[92] In the event no public consultation took place. The Explanatory Notes to the Commission for Victims and Survivors Act (Northern Ireland) 2008 at paragraph 6, headed "Consultation" states as follows:

> "6. The Act simply replaces the Commissioner for Victims and Survivors with a Commission following the announcement by the First and deputy First Minister of the Appointment of Commissioners Designate. It was not considered necessary, therefore, to carry out further consultation."

[93] It is a well established principle that a promise by a public authority to follow a particular procedure may give rise to an enforceable "legitimate expectation". However, outside a specific statutory framework, such a procedural expectation is not set in stone. It may be varied or withdrawn, at least so long as due notice is given and no procedural prejudice is suffered. (See Shrewsbury case at paragraphs 40 per Carnwath LJ). I find no evidence to sustain the existence of a clear unequivocal or unqualified statement, representation or promise that there would be consultation about the new legislation.

[94] I accept the evidence that extensive consultation had taken place leading to the 2006 Order and the policy decision and political judgment of the FM/DFM to depart from the scheme in advocating four Commissioners rather than one did not in my view engage the need for further time consuming and expensive consultation. Ministers were entitled to decide that the earlier process had established the principle of need for such a commissioner and the change to a multi-person model was not so radical a change as to demand the process start de novo.

[95] I therefore reject the submission that there was a legitimate expectation that consultation would occur prior to the advent of the 2008 legislation.

Were the appointments under the 2008 Act pre-determined and did the FM/DFM unlawfully fetter their discretion or fail to exercise any discretion under the Act.

[96] Mr McDonald contended that in appointing the four Commissioners Designate to the newly formed Commission under the terms of the 2008 Act, the respondents had predetermined the issue and had fettered their discretion. Schedule 1 paragraph 3(1) of the Act provided "The Commission shall consist of such members as are appointed by the First Minister and

deputy First Minister acting jointly." This conferred an obligation to exercise a discretion to be exercised fairly and reasonably.

[97] A public body's basic statutory function is inalienable. Bodies are neither entitled to surrender or ignore their powers and duties nor to "fetter" their discretion by over committing themselves to a particular course or approach (see Fordham "Judicial Review Handbook" 5 Ed. at paragraph 50.1). A public authority therefore cannot disable itself from fulfilling its purpose i.e. effectively binding itself to exercise such a power in any particular way (see R v Secretary of State for the Home Department ex p. Venables (1998) AC 407 at paragraph 496G-497C) An inflexible policy cannot be operated in a manner which fetters a discretion.

[98] Mr McDonald relied upon a number of factual matters with which to fortify his submissions that the respondents had effectively fettered their discretion prior to the introduction of the 2008 Act and had done no more than rubber stamp a decision that already had been taken to appoint the four Commissioners.

[99] On 15 January 2008, prior to the implementation of the new Act, four Commissioners Designate had been written to in the following terms:

> "Further to recent discussions regarding your application for the post of Commissioner for Victims and Survivors you will be aware that the First Minister and deputy First Minister would now like to appoint four Commissioners.
>
> Ministers are of course aware that this will require an amendment to the Victims and Survivors (Northern Ireland) Order 2006. However, in anticipation of the Assembly approving the necessary amendments to the Order, I am writing to you in confidence to ascertain whether you would be willing to act as a Commissioner in a Victims Commission which would act as a body corporate. Such a body would perform the same role and fulfil the same responsibilities as those originally envisaged for the Victims and Survivors Commission in 2006 Order.
>
> In order to progress matters, I would be grateful for your agreement in principle to become one of the Commissioners on these conditions and subject to amendments being made to the relevant legislation. It is intended that an early meeting will be arranged

> with those appointees who have agreed in principle to accept an offer."

[100] It was Mr McDonald's contention that this was an unequivocal assertion that the four Commissioners Designate were going to be appointed even before the new legislation had been introduced.

[101] The Royal Assent to the legislation was not obtained until 27 May 2008 i.e. several months after this letter had been written.

[102] Further strength to this point is suggested by Mr McDonald arising out of correspondence of 21 March 2008 from Mr McMillen of the Office of the FM/DFM to the Commissioner for Public Appointments dealing with the audit report of the recent Commissioner for Victims and Survivors competition. In the course of that correspondence Mr McMillen records:

> "A further area which needs to be recognised is that at this time the appointments to the post of Victims Commissioner have not been made. The position is that an announcement was made that four Commissioners would be appointed following the amendment of the 2006 Order to allow for the creation of a Victims Commission. While four persons have been identified for the positions, they will only formally be appointed once the legislation is amended. This may have implications for some of the drafting in the Audit Report …."

Once again Mr McDonald submits that this is clear evidence that the decision to appoint these Commissioners had been taken well before the legislation had been enacted.

[103] A similar theme underlay Mr McDonald's reference to the affidavit of Colin Jack the Assistant Secretary in the office of the FM/dFM of 19 August 2008 where at paragraph 4 he states inter alia:

> "I do not accept that the requirements under the new legislation are significantly different from those under the unamended legislation. In the debate in the Assembly and the presentation of the 2008 Act (as it now is) to the Assembly it was never contemplated that there would be a new appointment competition consequent under the passing of the 2008 Act. It was always the intention of the Respondents in presenting the Act that the passage of the same would allow for the appointment of the four Commissioners designate

> as Commissioners under the 2006 Order. I do not know any basis upon which it could be argued that the legislative intent was anything else. Equally the competition that rendered the four Commissioners was open, transparent and properly audited as set out in the affidavits filed on behalf of the respondent in the first Judicial Review".

[104] Mr McDonald asserted that it could not be clearer that there was never any intention to appoint anyone other than the four Commissioners designate to the new posts. Hence the new posts were not advertised. There was no recruitment process, no competition, no other candidates considered and no evidence of any genuine reconsideration.

[105] Mr Maguire submitted that it was a perfectly proper exercise of Ministerial discretion to use the competition of 2007 for the appointment of the Commissioners designate to the Commission under the 2008 amendments. It was OCPA approved. Mr Maguire suggested that this approval underlined his assertion that the distinction between the role of the multi person Commission under the 2008 legislation and the single Commissioner under the 2006 legislation was in all material respects extremely small. All the functions, duties and powers were the same. Accordingly to revert to an open competition would simply be to repeat the same criteria in the same process with attendant delay and waste of public money in circumstances where the candidates with the necessary skills and competences had already been found via a full blown competition.

[106] Counsel submitted that it is not the duty of a decision maker to have no views as to who should be appointed so long as he has not fettered the outcome to the extent that no other outcome was possible.

[107] On Tuesday 27 May 2008 the Speaker of the Northern Ireland Assembly announced that the Commission for Victims and Survivors Bill had received Royal Assent on Friday 23 May 2008 and that it would be known as the Commission for Victims and Survivors Act (Northern Ireland) 2008. A memorandum of 28 May 2008 of a meeting of the FM and DFM together with a number of civil servants observed as follows:

> "1. Officials asked if FM and dFM were now content to appoint the four individuals, identified as the "Commissioners designate" to members of the Commission for Victims and Survivors.
>
> 2. FM and dFM confirmed that now the legislation is in operation, they wished to proceed with these appointments.

> 3. Following further discussions, PPS's provided a draft decision note. FM and DFM agreed that the note fully and accurately reflected their reasons for making these appointments and asked that the note be issued to officials as soon as possible."

[108] A note of 30 May 2008 by Mr Jack stated that the FM and DFM had confirmed that they wished to proceed with the appointments to the Commission for Victims and Survivors and recorded as follows:

> "The Victims and Survivors Order (NI) 2006 gives the First Minister and deputy First Minister discretion as regards the number of members to be appointed to the Commission. Ministers have decided to appoint four Members, as they feel that this number will be necessary to meet the needs of victims and survivors in the initial period of four years for which these appointments are made."

[109] The note goes on to outline the names of the persons who are appointed as being those who were appointed as Commissioners designate on 28 January 2008, that each of them had been through the merit based appointments process and had been identified as possessing the necessary competences to successfully fulfil a role in the Commission. The strengths of each one of the proposed members of the Commission were then outlined. It was Mr Maguire's submission that this note indicated that the Ministers had exercised their discretion and that their minds had not been firmly shut given the assessment that was made of these persons who were appointed. There was nothing inevitable about their decision which might have altered on reflection, a change of mind of the commissioner designate themselves or other supervening events.

Conclusion

[110] I have come to the conclusion that the First Minister and deputy First Minister had not fettered their discretion in the appointments to the Commission for Victims and Survivors under the 2008 legislation by over-committing themselves to appointing the Commissioners designate. The respondents had already fully engaged in an exhaustive selection process, with the approval of OCPA and the opinion of Senior counsel, where their aim was to have 4 commissioners designate in position pending the Assembly approving new legislation to permit that very concept to be implemented. The Assembly was well aware of the proposals during the debate and the passing of the new legislation. No member of the Assembly had ever evinced any suggestion that a new competition would be required. Already two

competitions at public expense had been set up with implementation of the appropriate selection process. The process had been delayed for a long time. What purpose would have been served by yet a third competition in circumstances where the requirements under the new legislation were not significantly different from the earlier legislation other than the change from a single commissioner to that of a 4 person commission? The duties and functions were to be the same except that the decisions would now have to be jointly rather than individually. In my view that difference was not so significant that a refusal on the part of the respondents to restart the whole lengthy process evinced a failure to exercise the proper discretion vested in them under the new legislation. If four perfectly competent candidates who had been through the process of selection that was OCPA approved were already in post as commissioners designate, why should Ministers not exercise their discretion to appoint them to the Commission?

[111] The appointment of a Commission made up of four individuals rather than a single Commissioner envisaged by the 2006 Order might or might not have attracted other applicants who would have welcomed the opportunity to be part of a corporate body rather than a single commissioner. For my own part I consider it unlikely given that the public had already been given two opportunities to apply for the post of single commissioner with the same duties and powers. Having gone through the selection process twice, the Ministers were entitled to consider the team strengths of the 4 Commissioners designate and conclude that they were appropriate for the post bearing in mind that it was known they would be working as a team when they were selected as Commissioner Designate.

[112] The Ministerial statement of 28 January 2008 had manifestly indicated to the Assembly their conclusion that a team of four Commissioners working together would be the best way forward. In the course of that address the First Minister said:

> "Accordingly, I am pleased to announce that, in response to an invitation, four of the candidates on the list of those considered suitable for the post of Commissioner have indicated their willingness to act in a joint capacity as Commissioners designate in a new Victims' and Survivors' Commission. The four people who will make up the new Commission are (the four names are then set out).
>
> We anticipate that the Commission will have the same functions as the post of Victims' Commissioner described in the Victims and Survivors (Northern Ireland) Order 2006. It is our intention to make formal appointments in due course, but we must first

> introduce the necessary legislation to create the Victims' and Survivors' Commission that I have described today".

[113] This was a clear indication that these four individuals were considered in the context of the need to have "team" members for the Commission once it was formed.

[114] The four Commissioners designate had been written to as early as 15 January 2008 by the Office of the First Minister and deputy First Minister "in confidence" ascertaining that they would be willing to act as a Commissioner in a body corporate "in anticipation of the Assembly approving the necessary amendments to the Order". I consider that was a wise precaution to see if they would be available for selection. That this was the purpose is clear from the affidavit of 16 April 2008 of Mr Jack who avers at paragraph 49:

> "No appointments had been made under the 2006 Order. The four persons referred to above have agreed, in principle, to become Commissioners should the Assembly decide to pass the Victims and Survivors Bill into law. In the intervening period it was anticipated that the specific work of the four persons would be on developing a work programme to be agreed with the First Minister and deputy First Minister".

Thus no final decision had been taken pending the advent of the new legislation albeit the preferences were clear.

[115] I am not satisfied that the meeting of the respondents with their civil servants that occurred on 28 May 2008 was a rubber stamp exercise. It provides evidence of genuine reconsideration in that the positive aspects of the 4 proposed candidates were again rehearsed. Why would this have been done if it was all a rubber stamp? A detailed analysis of their qualities in the memorandum of 30 May 2008 not only sets out the assertion that they have been identified as possessing the necessary competences to successfully fulfil a role in the commission but details all their individual qualities. I consider that this did constitute a sufficient reconsideration prior to the decision being taken to appoint them. The respondents could have changed their minds or taken the opportunity to reopen the process had they so wished. Whilst no one else was afforded an opportunity to apply to join this new concept of a body corporate, I conclude the decision not to reopen the process was a fair and proportionate decision in all the circumstances given the earlier competitions and the limited change in the legislation.

Determination

[116] I have therefore determined that the applicant has failed to make out any of the grounds set out in the first judicial review and second judicial review and I therefore dismiss both applications.