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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPLICATION BY BRENDA DOWNES FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Before Kerr LCJ, Nicholson LJ and Campbell LJ

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KERR LCJ

[1] This is an appeal from a decision of Hart J whereby he refused the appellant's application for leave to apply for judicial review on all but one of the grounds on which she sought leave to challenge the decision of the Secretary of State for Northern Ireland to appoint Mrs Bertha McDougall as the interim victims' commissioner.

[2] Mrs McDougall's appointment was announced on 24 October 2005. A press release issued at the time of her appointment stated that she was a police widow. Her husband, a civil servant and part-time member of the Royal Ulster Constabulary Reserve, was shot dead in January 1981 while on duty in Belfast. The appellant, Mrs Brenda Downes, is the widow of John Downes who was killed by a plastic bullet fired by an RUC reserve constable on 12 August 1984.

[3] Mrs Downes' application for leave to apply for judicial review was based on a number of grounds which may be summarised as follows: -

1. The Secretary of State did not have legal authority to make the appointment;
2. In making the appointment the Secretary of State failed to have regard to all relevant factors – in particular, he failed to recognise that there was no evidence that Mrs McDougall had cross community support, although this was stated to be one of the criteria for the post of interim commissioner;
3. The appointment was made for an improper motive *viz* as a response to a list of "confidence building measures" demanded by the Democratic Unionist Party;

4. The Secretary of State acted irrationally in making the appointment;
5. The appellant enjoyed a substantive legitimate expectation that there would be broadly based consultation before such an appointment was made and that it would be made in an open and transparent manner.

[4] Hart J dismissed the application for leave on all grounds save for that contained in paragraph 3 (g) of the Order 53 statement which is in the following terms: -

> "The applicant had a legitimate expectation that any appointment to such a post would be subject to advance consultation due to the practice that had arisen of extensive consultation on victims' issues generally and the need for a victims' commissioner specifically"

[5] It is not necessary to trace the background to the appointment in any detail. Stated shortly, the Secretary of State had announced in Parliament on 1 March 2005 that a victims' commissioner would be appointed. It was deemed necessary to have this appointment rooted in legislation and in July of last year the Secretary of State met officials to discuss how that might be brought forward. It was considered that because of the need for legislation the appointments process could take up to 18 months. In September 2005 ministers agreed to the appointment of an interim commissioner for a period of a year while, at the same time, taking steps to bring forward the legislation.

[6] The first argument advanced by Mr Treacy QC on behalf of the appellant was that the Secretary of State had no legal authority to make the appointment. He submitted that the only way in which such an appointment could be lawfully made was by legislation. Before Hart J the respondent had argued that the appointment was made in the exercise of the Secretary of State's prerogative but Mr Treacy suggested that such a prerogative power was not available to the minister. In support of these arguments he referred to passages from *Wade & Forsyth, Administrative Law* 9th Edition at pages 215 and 217 where the authors discuss the 'atrophy' of the royal prerogative. They suggest that true royal prerogative powers are confined to a very small category. Mr Treacy also relied on a passage from *Hood Phillips & Jackson, Constitutional and Administrative Law* 8th Edition at paragraph 15-013 (page 313) where the authors set out a number of categories of prerogatives relating to executive government. He suggested that none of these bore any resemblance to the power purportedly exercised by the Secretary of State in the present case.

[7] For the Secretary of State Mr McCloskey QC submitted that the power exercised by the minister on this occasion belonged to "the residue of discretionary power left at any moment in the hands of the Crown" (per Lord

Nicholls in *Ex Parte Fire Brigades Union* [1995] 2 AC 513, page 573). He also referred to the description by Lord Diplock of a similar category of powers as "a residue of miscellaneous fields of law in which the executive government retains decision-making powers" in *CCSU -v- Minister for the Civil Service* [1985] AC 374, 409. It had not been shown, he said, even to the limited standard required, that the power exercised by the Secretary of State did not belong to that group of powers available to a member of the Executive. There was no legal impediment of any kind, Mr McCloskey argued, to the act of interim appointment.

[8] There may well prove to be considerable force in the arguments deployed by Mr McCloskey on this issue. Moreover, we have considerable reservations as to whether the passages cited by Mr Treacy in fact support the arguments that he based on them. It is at least arguable that the sections quoted from *Wade & Phillips* are not concerned with the parameters of executive prerogative but merely discuss the desuetude of the concept of royal prerogative. Likewise, one might well conclude that *Hood Phillips & Jackson* are discussing different categories of executive prerogative not for the purpose of prescribing its limitations but in order to provide examples of that particular species of power. But we have concluded that there is an arguable case that the appointment of an interim victims' commissioner lay outside the power of the Secretary of State.

[9] Paragraph 366, Volume 8 (2) reissue of *Halsbury's Laws of England* states: -

> "The legal sources of governmental power are (1) statutes; (2) the royal prerogative; and (3) common law powers or capacities deriving from the legal personality of the Crown and of ministers."

[10] It has not been argued that the power to appoint the interim victims' commissioner derived from statute or common law powers. If the only source of the claimed power is the royal prerogative, a question arises, in our judgment, as to whether that is of sufficient scope to cover this appointment. The particular example of prerogative power on which Mr McCloskey sought to rely was the appointment powers discussed by *Hood Phillips & Jackson* at paragraph 15-013 (a) but, as Mr Treacy pointed out, this passage refers to the appointment of government officials, officers and men of the armed forces, judicial officers and civil servants none of which can be said to apply to Mrs McDougall.

[11] We will therefore grant leave to the appellant to challenge the legality of the appointment. At present the Order 53 statement in relation to this ground of challenge states "there was no legal basis for the appointment". We consider that the point is better expressed as follows: - "the Secretary of State

did not have legal authority to make the challenged appointment" and that is the ground on which leave will be granted.

[12] The second ground on which the application for leave was sought was that the Secretary of State had failed to take account of a relevant consideration *viz* that there was no evidence of cross community support for Mrs McDougall. In a letter of 5 January 2006 to the appellant's solicitors Michael McAvera, a civil servant in the Office of the First and Deputy First Minister, stated that one of the criteria used in the selection process for the post of interim commissioner was that the person appointed would command community support. This letter also stated that there had been no consultation before the appointment had been made. In his judgment Hart J dealt with this point at paragraph [8] as follows: -

> "There is no evidence whatever to support the suggestion that Mrs McDougall is someone who could not command cross-community support, lacks credibility and is neither, nor can be perceived to be, independent … To mount an arguable case that Mrs McDougall cannot perform the role which she has been given requires more than a bald and unsupported assertion on the part of the applicant which is plainly at variance with the facts."

[13] Mr Treacy attacked this passage, pointing out that the appellant's challenge did not impute an actual lack of support on a cross community basis for Mrs McDougall but rather a failure on the part of the Secretary of State to have regard to the fact that there was no evidence to establish that one of his stated criteria had been fulfilled in Mrs McDougall's case. Mr McCloskey submitted that there was no evidence in support of that assertion and that it was not enough to make a bald unsupported claim in order to obtain leave on a particular ground of challenge by way of judicial review – *Re SOS Ltd's application* [2003] NICA 15. The letter from Mr McAvera also contained the statement, Mr McCloskey said, that NIO officials had drawn up a list of potential candidates who were the subject of detailed consideration. There was no reason to suppose that the Secretary of State had not been afforded material on which he could conclude that Mrs McDougall would command cross community support.

[14] It is unquestionably true that an applicant for leave to apply for judicial review must adduce evidence to support any ground on which a challenge is sought to be made. In the *SOS* case this court said at paragraph [19]: -

> "It is for an applicant for leave to show in some fashion that the deciding body did not have regard

> to such changes in material considerations before issuing its decision. It cannot be said that the burden is imposed on the decider of proving that he did do so. There must be some evidence or a sufficient inference that he failed to do so before a case has been made out for leave to apply for judicial review."

[15] In the present case there is no direct evidence that the Secretary of State failed to take into account or assess Mrs McDougall's ability to command cross community support. There is evidence, however, that he did not consult on this issue – *vide* Mr McAvera's letter. One is bound to recognise that direct evidence of the failure of a decision-maker to take account of a particular consideration will frequently not be available. That is, of course, not a reason for imposing a burden on the decision-maker of proving that he took the particular matter into account. But one must be, we think, realistic in assessing what material will be sufficient to raise the inference that there has been a failure to take a relevant consideration into account.

[16] The Secretary of State through his officials has said that one of the criteria to be taken into account was the cross community support for the candidate to be appointed. The letter from Mr McAvera does not purport to identify any basis on which that conclusion might have been reached in relation to Mrs McDougall. We consider, therefore, that there is an arguable case on this ground. We will therefore grant leave to the appellant to challenge the Secretary of State's avowed failure to have regard to the criterion that the appointee would command cross community support.

[17] The next ground on which the appellant seeks leave is that the Secretary of State acted on an improper motive. It is suggested that the true purpose of the appointment was to respond favourably to demands by the Democratic Unionist party that the Secretary of State initiate confidence building measures. In support of this contention Mr Treacy drew our attention to statements appearing in the press attributed to Jeffrey Donaldson MP to the effect that his party had been fully consulted about the appointment and that they were delighted by it.

[18] Mr McCloskey countered this argument with the claim that the overwhelming preponderance of evidence supported the conclusion that the Secretary of State had acted from the best of motives *viz* a desire to do something positive in a field where there had been several years' inertia. He suggested that statements attributed to politicians should be viewed with great caution since they may have been made for political motives. Mr McCloskey reminded us of the strictures that have been made in cases where allegations of bias or impropriety have been made without sufficient evidential support. In *Arab Monetary Fund v Hashim and others* [1994] 6 ALR

348, 355 Sir Thomas Bingham MR said that allegations of bias should only be made where counsel is "conscientiously satisfied that there is material upon which he can properly do so." But that is not an issue that falls to be considered at the present juncture. The issue that we must decide upon is whether there is material on which an arguable case can be made that the Secretary of State chose Mrs McDougall because her appointment would be welcomed by a particular political party and not because he considered that she was the most suitable candidate.

[19] At this stage – and we emphasise that we are of necessity acting on incomplete evidence – there is material which suggests that only one political party was consulted and that, despite having proclaimed that the candidate should have cross community support, no inquiry into that was conducted. All of this may in due course prove to be entirely unfounded but, given the current state of the evidence, we find it impossible to say that there is not an arguable case that the decision to appoint Mrs McDougall was taken for reasons other than those which are claimed to have motivated the Secretary of State. We will therefore grant leave to apply for judicial review on this ground also.

[20] On the argument that the Secretary of State's decision was irrational we can be brief. There was a lively debate between the parties as to whether this was a decision that should be subject to intensive review or whether it was one on which a large measure of discretion should be accorded the minister's decision. We do not find it necessary to expound on that debate for we are satisfied that, by whatever standard it falls to be judged, the Secretary of State's decision cannot be impeached as irrational. We therefore refuse leave to apply for judicial review on that ground.

[21] Mr Treacy also advanced arguments that the judge's confining of the issue of legitimate expectation to the single ground contained in paragraph 3 (g) of the Order 53 statement failed to permit the full and proper exposition of the extent of the potential for this ground. In particular, he suggested that the statement made by the Secretary of State to Parliament that broadly based consultation would be necessary before an appointment was made created its own species of legitimate expectation. We are satisfied that this statement related to the final appointment and we do not grant leave in respect of that ground – paragraph 3 (f) of the Order 53 statement. The same reasoning applies to the particular types of legitimate expectation referred to in paragraph 3 (h) and (i) and we refuse leave in respect of those also.

[22] Finally, we should mention the preliminary point raised by Mr McCloskey in contending that the appellant should not be allowed to pursue her appeal. He submitted that this court had no jurisdiction to entertain this challenge unless leave to appeal was granted, since this was an appeal against a partial refusal of leave which was an interlocutory order. He suggested

that, in consequence, section 35 (2) (g) of the Judicature (Northern Ireland) Act 1978 applied to require that leave be obtained before such an appeal could be pursued.

[23] Section 35 (2) (g) provides: -

> "(2) No appeal to the Court of Appeal shall lie—
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> …
>
> (g) without the leave of the judge or of the Court of Appeal, from any interlocutory order or judgment made or given by a judge of the High Court…"

[24] Mr McCloskey accepted that it was open to this court to grant leave to the appellant to appeal even if (as was the case) no application had been made to the judge at first instance. We have concluded that if leave is required, we should grant it. We will defer for a future occasion, therefore, a final decision on the interesting argument that Mr McCloskey has raised on this issue since we consider that rather fuller consideration of it than was possible on this appeal is warranted.