

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY BRENDA DOWNES
FOR JUDICIAL REVIEW**

GIRVAN J

[1] Following the judgment given by the court in this application I heard argument for counsel for the parties and counsel instructed on behalf of the Interim Victims Commissioner Mrs McDougall ("Mrs McDougall") whom, for the reasons indicated in the main judgment, I directed to be joined in the proceedings for the purpose of presenting argument in relation to the appropriate remedy to be granted in the light of the judgment of the court. Mr Larkin QC and Mr Scoffield appeared on behalf of Mrs McDougall. I am indebted to them for their helpful submissions. Mrs McDougall has filed two affidavits setting out her position in relation to the issues in the matter so far as affect her position.

[2] In her affidavit Mrs McDougall stated that the first approach made to her in relation to the post of Interim Victims Commissioner ("IVC") came from Mr Donaldson MP on 21 September 2005. He asked her if she would be interested in putting her name forward for appointment. She considered that he approached her because he felt that she had the necessary skills and qualities to do the job well particularly because she had experience lobbying for victims on behalf of the Forgotten Families Group. Before this approach she was not aware of the post of IVC and had therefore not considered applying for the post. This is not surprising since the post was never advertised and was not a matter of public debate. Initially Mrs McDougall told Mr Donaldson that she would not be interested in putting her name forward but she agreed to speak to him on 26 September 2005. On that date she said she would be prepared to let her name go forward for consideration. She met Dr Paisley MP and explained that she had no political affiliations and stressed that she would be impartial and professional in the way in which she would approach the post. This was accepted by Dr Paisley and Mr Donaldson. They also discussed and shared the view that there was a need

for a compassionate needs driven approach across the community through the work of a victims commissioner. She indicated that she would be content to let her name be put forward by the Democratic Unionist Party (“the DUP”). Her understanding was that other names would be put forward by other relevant parties and that her name would be considered along with possible candidates with suitable experience. She was also aware that the DUP had proposed someone else but that name had been withdrawn. She assumed that other interested parties and political groupings would put forward names.

[3] On 5 October 2006 she met both Mr Hamilton and Mr Phillips. They discussed her experience and attitudes. Her understanding was that they would be speaking to others in a similar way. On 10 October 2005 she telephoned Mr Hamilton’s office and indicated that she would be content for her name to go forward. She assumed that other persons who were potential candidates for the job were being spoken to in the same way. As far as she was aware a sifting process was going to be conducted by Mr Phillips and Mr Hamilton in order to consider the best candidate for the job. She thought that names were being put forward on a head hunting type of basis from which an appointment on merit would be made. On 18 October 2005 she was informed that she was being offered the appointment and that the Secretary of State wished to announce the post on the following Monday.

[4] In paragraph 12 of her affidavit Mrs McDougall states that between 18 October and 5 December 2005, when she took up her duties she agreed contractual terms with Mr Hamilton. These were later reduced to writing. The terms and conditions were not sent out to Mrs McDougall until 24 January 2006. Under paragraph 1 of the terms it was agreed that the term of appointment would be one year commencing on 5 December 2005. The period of appointment could be extended by agreement between OFMDFM and the IVC. Paragraph 2 provided that the IVC would be responsible for the production of a report on issues covered in Annex attached. The report would be completed by December 2006. The salary was £62,500 per annum and she was required to work such hours as were necessary to carry out the duties of the post. Under paragraph 9 funding of the office of Interim Victims Commissioner would be provided through the OFMDFM. The budget was set at £276,000 to cover the 12 month period beginning on 5 December 2005. The provision might be amended with the agreement of the OFMDFM. In paragraphs 13 and 14 of her affidavit she states:

“13. Following the judgment that the NIO had not carried out the process of appointment focused solely on merit for the post of Interim Victims Commissioner, I was hurt and dismayed and considered whether, in light of the judgment of the court, I ought to resign my appointment. Indeed I

have reflected on this issue carefully given the revelation that my appointment appears not to have been based strictly on merit.

14. Whilst resigning my office might provide me with some personal satisfaction in distancing myself from what appears to have been a most unsatisfactory process I wish to complete what I consider to be the important work of the post. My commitment to work on behalf of victims and survivors has not been affected by this litigation.”

[5] In her affidavit Mrs McDougall sets out a synopsis of the work which she has carried out. The main body of her work has been carried out. Her report is now at a crucial stage of preparation and she is reflecting carefully on its final content and most importantly on the recommendations that she would be making to the Secretary of State in the interests of victims and survivors in Northern Ireland. She considers that it would not be in the interests of victims and survivors in Northern Ireland and hence not in the public interest for the report not to be finalised.

[6] Mr Clarke, Head of the Victims Unit of the OFMDFM, in his affidavit refers to the work of the IVC and the interim reports she has already produced. He states that the draft Victims and Survivors (Northern Ireland) Order 2006 has progressed through all parliamentary stages and a formal commencement order is expected to be made within the next few weeks. The legislation will provide for the post of Commissioner for Victims and Survivors for Northern Ireland whose incumbent will have a range of statutory functions and duties. The post will fall within the remit of the Northern Ireland Commissioner for Public Appointments. The appointment process is scheduled to commence imminently by advertising the post and it is hoped to appoint a person by the end of January 2007. The view within Government is that Mrs McDougall has not been the subject of any criticisms in relation to the way in which she has carried out her work.

[7] As the written contract provided for a one year term from 5 December 2005 subject to extension by agreement between the IVC and the OFMDFM Mrs McDougall's appointment would have expired on 5 December 2006 unless properly extended. Mrs McDougall in her second affidavit stated that she was aware from an early stage that the report would not be completed within the 12 month framework, not least because the majority of the staff to support her were not in post until March 2006. The relatively slow pace of establishing staff for the office does not appear consistent with Mr Hamilton's averment that it was of the essence that a speedy appointment should be made. Her understanding from an early stage in post was that the post would necessarily continue by agreement until at least the end of December

2006. Mr Clarke in his affidavit of 5 December 2006 states that at an early stage it became apparent that given the extent of her task and the need to secure staff for her office it was unlikely that she could complete her report within 12 months. Mrs McDougall has communicated her concerns about the timescale she would require to complete her report within 12 months. There was, according to Mr Clarke, a mutual understanding and expectation from an early stage that if she needed more time to finalise and publish her report she would be afforded such latitude to do so. The written terms of appointment made provision for extension of agreement.

[8] A meeting took place on 31 October 2006 between Mrs McDougall and Mr Hamilton. At this meeting Mrs McDougall noted that her report would be published in mid to late January 2006. A e-mail from her Private Secretary addressed to the Private Secretary of the Head of the Civil Service recorded that at the meeting on 31 October 2006 Mr Hamilton had indicated that Mrs McDougall's contract would be extended until 31 January 2007. She asked for a copy of the extension contract to be posted to Mrs McDougall and marked for her personal attention. Mrs McDougall in paragraph 3 of her affidavit states that the e-mail is accurate in suggesting that it was at this meeting that a further extension of her term of office to the end of January was confirmed. Mr Clarke in his affidavit expresses the matter somewhat differently. He states that recognising that the final report was the most important function of the appointment he acknowledged that it "would be possible to extend her period of appointment until the end of January to facilitate her". In paragraph 5(iv) he went on to state that an "informal commitment" had previously been given to extend the period of appointment until the end of January 2006 and this appears to refer to what occurred at the meeting of 31 October. The substantive hearing of the judicial review took place on 27 and 28 September 2006. Judgment was delivered on 9 November. The judgment reserved the question of the appropriate remedy. Following receipt of Mrs Graham's e-mail of 14 November 2005 asking for an extension contract there was an internal e-mail from the Head of the Civil Service Office stating that it would have to take further legal advice in light of the remedy to be determined by the court. Mr Clarke in his affidavit summarised the position as being that Mrs McDougall's period of appointment was contractually scheduled to expire on 4 December 2006; the period of appointment had not been formally extended; no new contract with Mrs McDougall had been executed; there exists the mutual understanding and expectation that the appointment would be extended to allow completion of the report; an informal commitment was given to extend the period of appointment until the end of January 2007; and it was always the intention of OFMDFM to honour the commitment subject to the terms of the final order of the court.

[9] It is clear that Mrs McDougall has continued her work since 5 December. It can be assumed that she has been paid to do so and that she has

committed herself to continue to do so until completion of the report. Her staff continues with work under her.

[10] Mr Treacy QC in his argument contended that given the decision reached and the manner in which the court expressed itself in the judgment the applicant was entitled to relief in the form of an order of certiorari quashing the Secretary of State's unlawful decision to appoint Mrs McDougall as the IVC. He contended that a quashing order was the primary and most appropriate remedy for achieving the nullification of the improper public law decision. He relied on Lightman J's statement in R v GMC (ex parte Toth) [2000] 1 WLR 229 that "unless there are strong reasons in public policy for refusing a remedy or unless to quash the decision would occasion so great an injustice either to the defendant or a third party or to require some other course to be taken" the successful party should be granted a remedy and most particularly an order quashing the decision. In R v Restormel Borough Council (ex parte Corbett) [2001] PLR 108 Schiemann LJ said that the judge should include an order quashing an unlawful decision unless the person resisting the quashing order can show at least that he would be harmed by the quashing or some other reason is shown for not striking down. Counsel also relied on Lord Hoffman in Berkeley v Secretary of State for the Environment [2001] 2 AC 603. He stated that:

"It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires..."

Counsel also relied on the judgment of Morgan J at first instance and on Nicholson LJ (dissenting) in Re John Joseph Duffy [2006] NIQB 31 and 2006 NICA 28. He contended that Mrs McDougall's private law rights would not be prejudiced by a quashing order.

[11] Mr McCloskey QC on behalf of the Secretary of State argued that the granting of declaratory relief would be a sufficient remedy. The criteria for the making of a declaration is four-fold: whether there is a dispute between the parties; whether the dispute arises from specific facts already in existence; whether the dispute is still alive; or whether its determination would be of some practical consequence to the public or the parties. A declaration is especially appropriate in circumstances where it is undesirable for a decision to be rendered a nullity for all purposes or none. It may be appropriate for a declaration of invalidity to be made without quashing a decision which needs to remain in place if the parties are not to be placed in an impractical position. The granting of relief is discretionary, the preponderance of factors point persuasively towards the making of a declaration rather than an order quashing the appointment of Mrs McDougall. Thus, at an earlier stage, the applicant appeared to accept that declaratory relief was the appropriate remedy. The court had not questioned the competence, integrity and quality

of work of the IVC during her tenure of office. She had broad support for her work the majority of her duties had been completed. The completion of a formal report to tie together that work remains to be done. The IVC had been remote from all the factual or legal issues considered and determined by the court. An order of certiorari would remove her summarily from office, would be disproportionate and would not serve the wider public interest. It would leave uncompleted work which it was in the public interest should be completed.

[12] Mr Larkin QC and Mr Scoffield on behalf of the IVC argued that judicial review was a discretionary remedy even where a decision had been found to be legally flawed the court may still refuse to quash the decision. The interests of the applicant had to be measured against the needs of good administration (R v Monopolies and Mergers Commission (ex parte Argyle Group) [1986] 1 WLR 763). The question is to be judged in the light of all the circumstances existing at the time of the hearing rather than at the time of the original hearing. The court's findings are sufficient to meet the justice of the applicant's case without granting any further remedy. Quashing the Secretary of State's decision to appoint her would interfere with Mrs McDougall's private law right. Mrs McDougall had a valid contract with the Secretary of State. It would not be in the public interest or in the interests of good administration to remove the Commissioner and section 76 of the Northern Ireland Act 1998 does not envisage removal from office. The applicant did not apply for an injunction on section 24 of Judicature (Northern Ireland) Act 1978, a procedure in the nature of the former writ of quo warranto. The IVC had almost completed her work and her removal from office would frustrate the completion of her important work in the interests of the victims of the Northern Ireland troubles.

[13] Mrs McDougall was appointed by the Secretary of State on agreed terms that her appointment would run for one year from 5 December 2005. This was subject to extension by agreement between her and the OFMDFM. Paragraph 3 provided that the salary was £62,500, the appointment being for that one year period. Paragraph 9 provided that funding would be provided through the OFMDFM. The budget for the office of IVC had been set at £276,000 to include salaries, official travel and so forth subject to amendment with the agreement of the OFMDFM. Mr McCloskey QC on instruction stated that no steps had been to re-set the budget after 5 December 2005. Unless the appointment of Mrs McDougall was validly extended then the term of office ran out on 5 December 2005. If that happened it would be unnecessary to make an order quashing the initial decision to appoint Mrs McDougall since her term of office would have expired. If the appointment has been extended then the question arises whether an order quashing the decision should be made or whether, as the Secretary of State and Mrs McDougall contend, the court should simply grant declaratory relief and leave Mrs McDougall effectively in office to complete her work.

[14] Clearly Mrs McDougall continues to do work as if she continued in office and she continues to receive remuneration and is presumably being paid at the continuing rate of £62,500 per annum payable monthly pro-rata. The contractual and public funding arrangements, however, are unsatisfactory and unclear. According to Mr Clarke's affidavit at the meeting on 31 October 2006, Mr Hamilton acknowledged that "it would be possible to extend her appointment until the end of January." If he was stating what the contract provided he was stating the obvious and did not mean that the contract was actually going to be extended as opposed to stating that it had the capacity to be extended provided that the contractual terms were properly followed. Mrs McDougall appears to have understood that Mr Hamilton was indicating that her contract would be extended until 31 January 2007. Mr Clarke in paragraph 5(iv) of his affidavit states that there was an "informal commitment" to extend the period of appointment. Mrs McDougall asked for a copy of the extension contract. Mr Clarke stated that following the court's decision no further steps had been taken about formalising or extending the contract and no formal extended contract was ever executed. What is clear is that the original contract fixed an annual salary based on a year's appointment commencing 5 December 2005 and a budget had to be fixed on that basis. While the contract did envisage the possibility of extension it is silent as to what the salary for the extended period would be. That would be a matter of agreement between the parties and would be subject to resetting the appropriate budget. There is nothing to indicate that when the parties talked of extending the contract they ever got down to precise particulars of the terms of the extension. No extension contract terms ever emerged. In the absence of agreement on the extension terms the question arises as to whether by necessary implication the Commissioner's salary would continue on similar terms and at the same rate. It is, however, necessary to bear in mind that Mrs McDougall's appointment was in connection with a public office purportedly created under the Royal Prerogative which has staff, accommodation and expenses. Any extension of the Commissioner's term would have to be seen in the context of a continuation of the office and that would have to be seen in the context of agreed administrative arrangements relating inter alia to its funding. An agreement purely on principle or an informal commitment to extend the appointment left many matters to be determined.

[15] The conclusion I have reached is that Mrs McDougall's appointment as the IVC which was contractually due to expire on 5 December 2006 was not the subject of a valid extension. That does not mean that Mrs McDougall may not have ongoing contractual or quasi-contractual rights vis a vis the Secretary of State. After 5 December she has continued to carry out functions in connection with the work that she started as IVC. She continues to be paid. She is working on a report which was originally under contract she was bound to prepare. This judicial review relates only to the decision to appoint

her as IVC and does not relate to the issue relating to any separate engagement after 5 December 2006. In these proceedings there is no challenge to Mrs McDougall's engagement on foot of a separate contract (if any) or to her continued work in completing the report if that work is being carried on outwith the framework of the office of IVC. As a matter of common sense and practicality it would be desirable for Mrs McDougall to be able to complete work on her report. That report will have its own intrinsic value, will bring to finality publicly funded work, will provide material of public use and provide background matter and information of use to the incoming statutorily appointed Commissioner.

[16] For these reasons I do not consider it is necessary to make an order of certiorari quashing her appointment. As I indicated in my judgment in the matter I will make a declaration that the appointment of Mrs McDougall breached section 76 of the Northern Ireland Act 1998 and that, being in breach of the accepted merit norms applicable to public appointments and being in breach of the Ministerial Code of Practice the appointment, in the circumstances was made, in breach of the powers of appointment invested in the Secretary of State under the Royal Prerogative. I further declare that the appointment was motivated by an improper purpose that is to say a political purpose which could not be legitimately pursued at the expense of complying with the proper norms of public appointments where merit is the overriding consideration. I further declare that the appointment failed to take account of the fact that there was no evidential basis for concluding that the appointee would command cross-community support.

[17] If I am wrong in the conclusion I have reached in relation to the continuation of the office after 5 December 2006 and if Mrs McDougall's office has been validity extended I would decline to make an order of certiorari. While I accept that Mr Treacy is correct in arguing that the normal and proper remedy in order to deprive an unlawfully reached decision of legal effect is for an order of certiorari to be made quashing the decision, that principle is not an overriding one and the public interest may on occasions point in favour of the granting of declaratory relief rather than the making of a quashing order. It is significant that Mrs McDougall was appointed on foot of a contract and that Mrs McDougall was not privy to the shortcomings in the reasoning and decision-making process carried out before the contract was entered into. The normal effect of a discriminatory appointment is not to render the appointment itself unlawful but to leave the victim of discrimination with a remedy, leaving the person appointed in office or employment. Here the interests of the victims, which the Good Friday Agreement recognised as important interests to be advanced and protected, would not be advanced by the stopping short of Mrs McDougall's work and would be better served by allowing that work to be concluded. As stated above that work will have its own intrinsic value notwithstanding the legal defects in the appointment process. The outcome of the investigations carried

out by Mrs McDougall and her report and recommendations will be a matter for public discussion and debate and will provide material of assistance (though not in any binding way) to the incoming statutorily appointed Commissioner. Mrs McDougall through counsel indicated a willingness to complete her work in her own name, thereby distancing herself from the illegality of the appointment process. This is a factor which weighs with the court in coming to the conclusion that the granting of declaratory relief would in the circumstances be an adequate remedy.

[18] Mr Treacy argued that if the court does not make a quashing order then the respondent will have avoided any legal consequences flowing from the illegality of his actions. This case has produced a number of important consequences which will have long term effects in the field of public appointments and in the field of how public authorities deal with judicial review challenges of this nature. The case has underlined the importance of freedom of information requests by citizens seeking to establish the legal basis of public law decisions. It has highlighted the duty lying on public authorities to deal with such freedom of information requests openly and honestly and to have in place proper procedures and mechanisms to ensure the accuracy of information supplied in response to such requests. It has demonstrated the consequences that could flow from a breach of that obligation. It has reinforced the duty of frankness and candour that ministers and public servants have in providing factual information to the court at every stage of a judicial review challenge to a public law decision. It provides guidance to deponents and practitioners in ensuring that affidavits are full, clear, unambiguous and factually correct. The sequence of events in this case has reinforced the need for the court to carefully parse affidavits, exhibits and material provided to the court to ensure that the factual basis of the parties' cases are correctly stated and clearly understood. All these factors are now underlined by the greater willingness of courts in appropriate cases to make orders for discovery (as evidenced by the decision in Tweed v Parades Commission for Northern Ireland [2006] UKHL 53.) The present case exemplifies the sort of case where the new modified approach in relation to discovery would have justified the making of an order for discovery. This case is a clear example of the separation of powers between the Executive and the courts and the independence of the courts from the Executive. In light of these important considerations it cannot not be said that the respondent will have avoided legal consequences flowing from the illegality of his actions.