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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 JOHN JOSEPH DUFFY FOR JUDICIAL REVIEW

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Before Kerr LCJ, Nicholson LJ and Campbell LJ

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KERR LCJ

Introduction

[1] On 19 May 2006, Morgan J delivered judgment in a judicial review application by John Joseph Duffy. Mr Duffy had challenged the decision of the Secretary of State for Northern Ireland to appoint Mr David Burrows and Mr David Mackay to be members of the Parades Commission. Mr Duffy is a member of a group known as the 'Garvaghy Road Residents' Coalition'. Mr Mackay is a member of Portadown Ex Servicemen's Orange Lodge and of the Royal Black Institution. (After the challenge to his appointment began, Mr Mackay resigned from the Commission. Mr Burrows remains a member.) Mr Burrows was a district officer of Portadown Loyal Orange Lodge No. 1 for more than ten years before stepping down from that position in July 2005.

[2] Mr Duffy challenged the appointment of Mr Mackay and Mr Burrows on a number of grounds. It was averred that the Secretary of State had failed to comply with his statutory obligation under paragraph 2 (3) of Schedule 1 to the Public Processions (Northern Ireland) Act 1998. He is required by that provision to exercise his power of appointment to the Commission to secure, so far as is practicable, that it is representative of the community in Northern Ireland. It was also claimed that the Secretary of State had failed to take into account a number of relevant considerations and that the appointment of Mr Burrows and Mr Mackay constituted discrimination contrary to section 76 of the Northern Ireland Act 1998. Other grounds were also canvassed but need not be referred to here.

[3] In the course of the judicial review application it emerged that the Secretary of State had written to community leaders asking them to

encourage anyone whom they considered would be appropriate for appointment to apply to become Commissioners. Those contacted in this way were the leaders of the main political parties, church leaders and the heads of the three loyal institutions, the Apprentice Boys of Derry, the Grand Orange Lodge of Ireland and the Royal Black Institution. Morgan J held that the officials who were responsible for the appointments process had an obligation to consider whether it was necessary to target those groups within the nationalist community which opposed the perspective of the loyal orders. He concluded that because they did not do so, the Secretary of State had failed to secure, as far as was practicable, that membership of the Commission was representative of the community in Northern Ireland. On that ground alone the learned judge quashed the decision.

[4] The Secretary of State appeals against that decision and Mr Duffy cross appeals on a number of grounds. The principal arguments advanced by the respondent on the hearing of the appeal may be broadly summarised as follows: -

1. The judge erred in holding that the encouragement of applicants from the loyal orders did not constitute discrimination under section 76 of the Northern Ireland Act 1998 and in his approach to what amounted to discrimination on the grounds of religious belief or political opinion;

2. He ought to have found that the conflict of interest that arose from Mr Burrows' and Mr Mackay's membership of the loyal orders effectively disqualified them from membership of the Commission;

3. The judge was wrong to find that, before the court could interfere with the exercise by the Secretary of State of his discretion to appoint, it would be necessary to demonstrate that the appointees would be unable to contribute materially to the work of the Commission; and

4. The judge should have found that the appointment process had not complied with guidance issued by the Office of the Commissioner for Public Appointments (OCPA).

The failure to consider whether to target those who opposed the loyal orders

[5] Morgan J held that the statutory obligation to appoint members to the Commission who were representative of the community in Northern Ireland included a duty to achieve a body that was not only diverse in its composition but also one that was balanced. This duty required the appointments process (as well as the actual appointment itself) to be geared to that objective. Because the officials responsible for the procedures before appointment had not thought to target those who might be considered to be in opposition to the loyal orders, in the judge's estimation, the vital element of balance was lost.

[6] Mr McCloskey QC and Mr Maguire, who appeared for the Secretary of State, attacked that conclusion on a number of fronts. Firstly, they said that the judge was wrong to extend the obligation to secure, as far as was practicable, a representative Commission to the stages in the process that preceded the actual appointment. If that had been Parliament's intention, it could easily have been stipulated. It was to be presumed that the legislature had deliberately chosen to restrict this obligation to the exercise of the power of appointment by the Secretary of State.

[7] The appellant also argued that the appointments made on this occasion belonged to the category of decisions where the threshold for judicial intervention was high. A large area of discretion was available to the decision-maker as to how the appointment should be made. This was particularly so because of the substantial political content of the decision.

[8] The next argument made on behalf of the Secretary of State was that the judge should have applied conventional public law principles to the question whether the targeting of other groups ought to have been considered. To characterise this as a relevant consideration which had to be taken into account was wrong. When exercising a statutory function the decision-maker was required to have regard only to those matters which the statute expressly or impliedly identified as considerations to be taken into account. The requirement of representation to 'balance' the appointment of particular individuals was not expressly provided for nor should it be implied.

[9] Paragraph 2 (3) of Schedule 1 provides: -

> "(3) The Secretary of State shall so exercise his powers of appointment under this paragraph as to secure that as far as is practicable the membership of the Commission is representative of the community in Northern Ireland."

[10] I do not accept that the requirement to appoint so as to secure a representative Commission must be confined in the manner suggested by the appellant. If it were, the objective of representativeness could easily be emasculated. The essence of the appellant's argument on this point is that the duty arises only at the moment when appointments are made. On that basis it would be possible for the pre-appointment procedures to be skewed so as to produce a wholly unrepresentative group from which the Secretary of State would make his choice thereby producing a Commission entirely out of keeping with the purpose of the legislation. I cannot accept that this was the intention of the legislature. I consider that the duty to secure a representative Commission must include an obligation to ensure that the appointment

procedures, as well as the appointment itself, are geared towards achieving that goal.

[11] On the argument that the Secretary of State enjoyed a wide area of discretion Mr Barry Macdonald QC for the respondent submitted that the political content of the decision to be taken by the Secretary of State was quite small. In the first place he had to observe the requirements of section 76 and this substantially circumscribed his discretion. Secondly, the Secretary of State had expressly espoused merit as a determining factor and was bound to make the appointment on that basis. He was also obliged to make the appointment to further the purposes of the Act. These included mediation and adjudicative functions to be discharged by commissioners. Those who were ill equipped to discharge those functions by reason of being interested parties on the matter of contentious parades were by definition unsuitable for appointment. Their appointment could not be rescued by recourse to the claim that the court should be reluctant to interfere with the Secretary of State's discretion.

[12] I agree with Morgan J that the Secretary of State enjoys a wide discretion as to the fulfilment of the requirement of representativeness. The breadth of the discretion cannot, however, exempt him from the requirement to take all relevant considerations into account. If the need to consider whether residents' groups should have received the same encouragement as did the loyal orders was a relevant factor and this was not taken into account, I am satisfied that the decision cannot stand. The outcome for this particular issue depends critically, therefore, on whether this was a material consideration and it is to that question that I now turn.

[13] In what has become a celebrated passage, Cooke J in *Creednz v Governor General* [1981] 1 NZLR 172 described those considerations which must be taken into account in the exercise of a statutory power: -

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground [that a relevant consideration was ignored]. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."

[14] This formulation was approved in *Re Findlay* [1985] AC 318, 333h-334c *per* Lord Scarman who also referred to a later comment in Cooke J's judgment

which provided an important qualification to the statement of general principle encapsulated in the passage quoted in the preceding paragraph. This was to the effect that if, notwithstanding the silence of the statute, there were "matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers ... would not be in accordance with the intention of the Act" they too would constitute relevant considerations to be taken into account.

[15] Does the need to consider whether to target residents' groups arise either expressly or by necessary implication from the statute? Alternatively, is that a matter so obviously material to the Secretary of State's decision that failure to consider it would not accord with the intention of the Act? In my judgment both questions must be answered in the negative.

[16] The judge's conclusion that this matter constituted a relevant consideration arose from the need for balance which, he decided, was included in the concept of representativeness. One can accept that balance must play a part in the selection of a representative group but perfect balance between the disparate sections of our community would be impossible to achieve in a small cadre of Commissioners (a chairman and no more than six Commissioners - paragraph 2 (1) of Schedule 1). Representativeness should not be regarded as synonymous with balance, therefore. In *Re White's application* [2000] NI 342 the Secretary of State's appointments to the Commission in 2000 were challenged on the basis that none of the appointees was a woman. It was accepted by counsel for the Secretary of State in that case that this gender imbalance created a Commission that was unrepresentative but Carswell LCJ expressed reservations about the correctness of that concession. At page 440 he said: -

> "I am not altogether persuaded that the phrase 'representative of the community' in para 2 (3) of Schedule 1 to the 1998 Act was intended to mean that there should be gender balance, or at least some representation of each gender in the make-up of the Commission. Counsel drew my attention to the view expressed in para 12.33 of the *North Report*, which led to the enactment of the 1998 Act:
>
> 'The Parades Commission would need to have a geographical spread, and both cross-community and gender balance. We were struck, on several occasions during our meetings, with the different approaches of men and women to the parading issue. We think it is important that women should

> have an effective voice on the Parades Commission.'
> While it is obviously desirable that the Commission should not be composed entirely of persons of one gender, the legislation does not refer in terms to that factor. The phrase in para 2 (3) has to be taken in its context and against the regular usage of the word 'community'. As Mr Watkins observed in para 17 of his affidavit,
>
> > 'The parades or marching issue is primarily an issue which engages the sectarian division within Northern Ireland. It is that division which, in a body as small as the Commission, must be the principal focus of the Secretary of State in making appointments to it.'
>
> The phrase in question does not refer to gender or to the make-up of the population of the Province. It refers specifically to 'the community', which in the context of parades is constantly used to denote the different sectarian blocks—see, for example, the reference in paras 1.15 and 1.16 of the *North Report* to 'another part of our community' and 'the other part of the community', which are plainly references to the sectarian divide. In the context of the 1998 Act, therefore, it is in my view a tenable proposition, notwithstanding Mr Weatherup's concession, that para 2 (3) imposes a requirement only to ensure sectarian balance in the composition of the Commission. I should, however, prefer to have further argument directed specifically to this point before attempting to decide it finally, and in view of my conclusions on the practicability issue it is not necessary to do so in this judgment."

[17] In line with the views expressed in this passage, I consider that the balance dimension to representativeness on the Commission must, as a matter of practical reality, be confined to the representation of both sides of the community in Northern Ireland. To apply a requirement of balance beyond that would create an impossible hurdle. The present case exemplifies this. If the appointment of the loyal orders' members requires to be balanced by the appointment of others representing those who oppose their views, why should a similar approach not be necessary in relation to other members of the Commission? So, for instance, the appointment of a member of a

particular political party would require to be balanced by the appointment of someone from a political party opposed to that of the appointee and so on. I cannot believe that it was the intention of Parliament that this level of balance was needed in order to fulfil the requirement of representativeness.

[18] If the Secretary of State is not required to achieve a balance between individual members of the Commission, a duty to consider whether to target groups to counterbalance the loyal orders' members cannot be imputed to his officials. It might be thought, to borrow the words of Cooke J in *Creednz*, that such a consideration is "one that may properly be taken into account, or even that it is one which many people … would have taken into account" but it is not, in my opinion, one that *had to be* taken into account. Put simply, if the Secretary of State was not obliged to achieve that level of balance, his officials cannot be fixed with a legal obligation of considering ways in which he might realise it. I am therefore unable to agree with the learned judge that the failure of the officials to address the question of whether the residents' groups should be targeted rendered the Secretary of State's decision unlawful.

Section 76

[19] Section 76 (1) of the Northern Ireland Act 1998 provides: -

> "**76 Discrimination by public authorities**
>
> (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."

[20] Mr Macdonald submitted that this provision required the Secretary of State to ensure that there was no differential treatment among the various groups that were invited to put forward candidates for appointment. He was obliged to make appointment to the Commission on the basis of merit. The statutory enjoinder of paragraph 2 (3) of Schedule 1 to the Public Processions Act to appoint a representative Commission could not displace or dilute the prohibition of discrimination. Mr Macdonald contended that the Secretary of State, by extending a special invitation to the loyal orders, had favoured those groups over others in a manner that was forbidden by the Northern Ireland Act. The residents' groups had been treated less favourably, Mr Macdonald argued, than the loyal orders in a manner envisaged by section 98 (5) of the Act which provides: -

> "… a person discriminates against another person or a 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."

[21] Mr Maguire for the Secretary of State argued that any contravention of section 76 was to be remedied by civil action rather than judicial review. He relied on section 76 (2) which, he said, made it clear that an action was the contemplated method of redress where a breach of section 76 (1) had occurred. Section 76 (2) provides: -

> "(2) An act which contravenes this section is actionable in Northern Ireland at the instance of any person adversely affected by it; and the court may—
>
> (a) grant damages;
>
> (b) subject to subsection (3), grant an injunction restraining the defendant from committing, causing or permitting further contraventions of this section."

[22] I do not find it necessary to reach a conclusion on the question whether contraventions of section 76 (1) may only be remedied by civil action or whether judicial review is available to challenge them for I have concluded that no breach of that subsection has been established. I incline to the view of Morgan J, however, that "that section 76 (2) is designed to provide a remedy in damages and to control the exercise of injunctions in relation to personal actions … [but it is not] intended to remove the public law duties of public authorities which otherwise arise from section 76 (1)".

[23] It has not been established that there was less favourable treatment of the residents' groups. As Mr Maguire submitted, one must keep in mind the context in which the decision to solicit candidates from the loyal orders was made. The avowedly less favourable treatment was the failure to send letters such as were sent to the loyal orders to those groups who opposed their point of view. The purpose of sending the letters was to publicise the appointment process and to secure applications from a wide range of people. It was not to confer an advantage on a particular group. The sending of the letter was by no means the only measure adopted to achieve that objective. Advertisements were placed in all the main newspapers circulating in Northern Ireland. The Secretary of State sent a press release to very many media organs. No attempt was made to exclude any group and there was no evidence that anyone from the residents' associations was discouraged or prevented from making an application for appointment.

[24] In any event, it cannot be said that the purpose of sending the letter was to discriminate *on the ground of religious belief and political opinion*. All political parties received the letter. It is undeniable that some of these shared the views of the respondent on the matter of marches. The dispatch of the letter to those persons cannot be reconciled with an intention to discourage the residents' groups. Realistically, the loyal orders were targeted because of their refusal to co-operate with the Parades Commission in the past, a stance that has not been taken up by the residents' groups. There was no intention to confer an advantage on the loyal orders because of their political opinion. The desire was to get them involved in the regulation of marches by the Commission. This was the reason that they were included in the list of recipients of the letter. It was not to place them in a superior position. I am satisfied, therefore, that no violation of section 76 has been established.

Conflict of interest

[25] Mr Macdonald's central proposition on this theme was that both Mr Burrows and Mr Mackay belonged to organisations that had a *parti pris* position on the question of parades. They could therefore not perform most of the essential functions of the Commission without bias – or, at least, the appearance of it. This insuperable handicap to their appointment as commissioners should have been recognised by the Secretary of State. They should not have been appointed on that account.

[26] Morgan J said that, before the court would interfere with the wide statutory discretion given to the Secretary of State, it would be necessary to demonstrate that the appointees would not be able to contribute materially to the work of the Commission by reason of the perceived conflict of interest. Mr Macdonald suggested that this test was not supported by any of the authorities dealing generally with conflicts of interest or bias. In any event, he claimed, applying public law principles, membership of the loyal orders would lead to automatic disqualification from the Parades Commission.

[27] Mr Maguire submitted that the question whether Mr Burrows and Mr Mackay would be able to discharge the functions of commissioners was a matter for the Secretary of State. He claimed that the Secretary of State had addressed this question directly. In a letter to the solicitor for Mr Duffy dated 15 January 2006, the Secretary of State said: -

> "The two applicants to whom you refer, David Burrows and Donald Mackay, will bring a valuable insight on the Orange Order to the Commission, but they, like other members, must consider the interests of the wider community, and are obliged to work corporately to address parading issues. By applying for membership,

> they have shown a commitment to moving the parades agenda forward and they have my full confidence."

[28] In an affidavit filed on behalf of the Secretary of State, Ms Carol Moore, the associate director of policing and security in the Northern Ireland Office, deposed that the Secretary of State had discussed with his minister of state and officials the question whether any of the persons to be appointed would find themselves in a conflict of interest situation. The director of policing and security spoke to candidates who were being considered for appointment and asked each to confirm that, if appointed, they would act objectively and work as part of a corporate team. All candidates, including Mr Burrows and Mr Mackay, confirmed that they would do so. This was reported to the Secretary of State before he made the appointments. The Secretary of State realised, therefore, Mr Maguire argued, that there was a possible conflict of interest difficulty but he had addressed that issue and had received assurances about it. Mr Maguire therefore submitted that the only basis on which the decision to appoint could be challenged was that the Secretary of State had acted irrationally. This claim was simply not viable, he contended.

[29] Much of the debate on this issue arose from the forms completed by the interview panel. In their assessment form, in a section entitled 'public accountability', the panel was asked whether there were any areas of real/perceived conflict of interest. In the forms for Mr Burrows and Mr Mackay the panel answered this question, 'no'. In Mr Mackay's form the following comment was made: -

> "No conflict of interest considered. He declared his membership of the DUP [Democratic Unionist party] and of loyal orders (Orange and Black). Would be keen to ensure these perspectives were reflected on PC [Parades Commission]"

No entry was made in the comment section of Mr Burrows' form.

[30] Mr McCloskey sought to explain these entries on the basis that the panel was making an assessment as to whether the applicants were rendered wholly ineligible for appointment by reason of an insuperable conflict of interest. Since both had signalled their intention to work in a corporate fashion and since both had been open about their backgrounds and, in the case of Mr Mackay, his membership of a political party, they were not ineligible and the panel's entries signified no more than that.

[31] The learned judge found the panel's statement that there was no area of real or perceived conflict of interest inexplicable and, despite Mr McCloskey's proffered explanation, so do I. There were clearly conflict of interest issues in

both cases. As Mr Macdonald has pointed out, much of the work of the Commission concerns mediation between groups who hold opposing views about proposed parades or determining whether contentious parades should take place or if they should be re-routed. Where two of the members of the Commission belong to organisations which are committed to the right of their members to march, the conflict of interest issue is both inescapable and obvious.

[32] But, as Mr Maguire has reminded us, whatever may be the shortcomings of the panel's assessment of the issue, the Secretary of State was clearly aware of the conflict of interest difficulty and he had not only discussed this with the minister of state and his officials, he had acted pro-actively in seeking specific assurances from Mr Burrows and Mr Mackay that they would perform their duties as commissioners objectively and corporately with the other members of the Commission. Ultimately, therefore, the court's review of this aspect of the case must focus on the Secretary of State's consideration of the issue and his decision that this did not prevent the appointment of the two loyal order members. That review must comprehend an examination of whether the Secretary of State left out of account any material consideration that was relevant to his decision. Absent such an omission, however, the only available challenge to it must be founded on the claim that it was irrational.

[33] It has not been established, in my view, that the Secretary of State failed to have regard to any relevant consideration in dealing with this aspect of the appointment of Mr Burrows and Mr Mackay. Although the forms completed after their interviews failed to bring it directly to his attention, he was clearly aware of the conflict of interest issue and, since, as I have said, the potential for this was obvious, I cannot but suppose that he realised if these gentlemen were appointed, there would inevitably be occasions when the question of whether they should participate in the Commission's deliberations would arise. There is therefore no reason to believe that the Secretary of State failed to take account of all relevant considerations in this regard. I must therefore turn to consider the irrationality argument.

[34] Mr Macdonald argued strongly that the decision to appoint these men to the Commission was insupportable on any rational basis. He drew to our attention the number of determinations that the Commission had been required to take in relation to marches in Portadown. Both men belonged to loyal orders that had been directly involved in disputes about those marches. It was inconceivable, he suggested, that they could take part in decisions about them because of the perception of bias that would inevitably arise. Mr McCloskey acknowledged that it would be difficult for Mr Burrows (and for Mr Mackay, if he had not resigned) to participate in some decisions of the Commission. Indeed, he accepted the potential for judicial review challenges to determinations by the Commission on the basis that Mr Burrows should not have been party to them. The fact that such challenges might materialise

did not render the Secretary of State's decision irrational, however, he argued. There was much that Mr Burrows could contribute to the work of the Commission and it was clearly within the realm of reasonableness for the Secretary of State to have chosen him as a commissioner.

[35] The fact – if, indeed, it be the fact – that Mr Burrows' participation in the work of the Commission will be bedevilled with difficulty because of his membership of one of the loyal orders does not, of itself, make his appointment irrational. I agree with the observation of Morgan J on this issue that it could only be so regarded if it were demonstrated that he would not be able to contribute materially to the work of the Commission by reason of the perceived conflict of interest. Indeed, I go further. Only if the Secretary of State was bound to conclude on the material before him that Mr Burrows could make no useful contribution to the work of the Commission could his decision to appoint him be condemned as irrational. While, therefore, I foresee considerable difficulties in Mr Burrows taking part in many of the critical determinations of the Commission, I find it impossible to say that no reasonable decision-maker would have appointed him to this position. That being the standard by which irrationality must be judged, I feel bound to conclude that it has not been met in this case.

OCPA

[36] I can deal with this issue briefly. Mr Macdonald had argued that the appointment of two persons who would inevitably have an appearance of bias in relation to the work of the Commission offended OCPA principles. I do not accept this argument. OCPA guidelines make clear that the existence of a conflict will not necessarily mean that an appointment cannot be made. On this question the following extract from the guidelines is material: -

> "**If I declare a conflict, does that mean I will not be considered for appointment?**
>
> No – each case is considered individually. If you are shortlisted for interview, the panel will explore with you how far the conflict might affect your ability to contribute effectively and impartially on the Board and how this might be handled if you were to be appointed. For example, it may be possible to arrange for you to step out of meetings where an issue is discussed in which you have an interest. However, if, following the discussion with you, the panel believes that the conflict is too great and would call into question the probity of the board or the appointment, they can withdraw your application from the competition."

[37] Ms Moore has explained that all candidates who were interviewed were asked about real or perceived conflicts of interest. Each was assessed for their commitment to public service values such as accountability, probity, openness and equality of opportunity. Both Mr Mackay and Mr Burrows declared their connections with the loyal orders and both strongly asserted that these would not prevent them from performing their duties as members of the Commission impartially, fairly and professionally. An OCPA assessor was engaged in the appointments process. He was involved in discussions to determine the advertised criteria and was consulted about the approach to the pre-sift stage. He was also involved in the sifting of candidates for interview. He was a member of the panel who conducted the interviews and made recommendations to the Secretary of State as to appointable candidates. As I have said, plainly, the interview panel should have said in its assessment form that there were conflict of interest issues in relation to Mr Mackay and Mr Burrows but this failure does not bring the procedures that were in fact followed outside the OCPA guidelines. I have concluded that in fact the appointments process adhered to those guidelines.

[38] If I had held otherwise, this would not necessarily have affected my decision as to the lawfulness of the appointments. There was no freestanding legal obligation on the Secretary of State to observe OCPA guidelines in making these appointments. Failure to recognise that there had not been compliance with the guidelines, where it had been an aspiration that they were to be followed, might give rise to an attack on the lawfulness of the appointments but that is not the species of challenge that has been made here.

Conclusions

[39] I have concluded that the officials responsible for advertising the post of commissioner and soliciting applications for appointment to the Commission were not under an obligation to consider whether to target residents' groups as a counterbalance to the letter sent to the loyal orders. This was the single ground on which the judge had found that the decision of the Secretary of State was invalid. I have considered all the arguments made on behalf of the respondent on the cross appeal and have concluded that none of these has been made out. I would allow the appeal and dismiss the application for judicial review.

[40] It is perhaps right that I should say that the decision considered in this case was *par excellence* a political one. Regrettably, it appears that there is still a widespread misconception that the merits of such a decision fall under scrutiny where a judicial review challenge is made. It is important that this misconception be dispelled. The courts may only entertain a challenge to a decision such as that taken by the Secretary of State on well established judicial review grounds. I am not concerned with the wisdom of the decision

made – either on political grounds or otherwise. The role of the courts is to examine the procedures by which the decision has been made and the rationality (in the legal context) of the decision. It goes no further.