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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Williamson's Application (Michelle) No. 5 [2009] NIQB 30

AN APPLICATION FOR JUDICIAL REVIEW BY MICHELLE WILLIAMSON NO. 5

GILLEN J

Application

[1] This is an application by way of summons for leave to administer interrogatories on the respondents in this matter namely Dr Ian Paisley and Mr Martin McGuinness the First Minister and Deputy First Minister respectively ("the respondents/FMDFM"). The application is made pursuant to the Rules of the Supreme Court (Northern Ireland) 1980 ("RSC") Order 53 rule 8 and Order 26 rule 1.

[2] In the helpful skeleton argument provided by counsel on behalf of the applicant Mr McDonald QC and Mr Donaghy the applicant's contention is summarised as follows:-

(i) the respondents have failed to make candid disclosure of the relevant facts in this case and of the reasoning behind their decisions; and

(ii) since the respondents are not prepared voluntarily to comply with their obligations to make candid disclosure of the relevant facts and reasoning, the court should require them to do so by giving leave to administer the interrogatories in the draft attached to the summons.

(iii) it was Mr McDonald's contention that the respondents were seeking a licence to draw up decisions without notes or a paper trail .This would render decisions immune from challenge and frustrate the duty of candour.

[3] There are 18 interrogatories most of which contain a number of detailed interrogatories therein. They are as follows:-

"1. (a) During the period between 8th May 2007 and 5 July 2007 did the First Minister make an assessment (formal or otherwise) of the suitability for appointment to the post of Victims Commissioner of the six candidates identified in the submission dated 8th May 2007?
(b) If so, in what order of preference did he rank each of the candidates?
(c) If scores were given to the candidates, what were the scores for each?
(d) If he made no such assessment, why exactly did he not do so?

2. (a) During the period between 8th May 2007 and 5th July 2007 did the Deputy First Minister make an assessment (formal or otherwise) of the suitability for appointment to the post of Victims Commissioner of the six candidates identified in the submission dated 8th May 2007?
(b) If so, in what order of preference did he rank each of the candidates?
(c) If scores were given to the candidates, what were the scores for each?
(d) If he made no such assessment, why exactly did he not do so?

3. (a) During the period between 8th May 2007 and 5th July 2007 did the First Minister and Deputy First Minister disagree on their assessments of the most suitable candidate for the said post?
(b) If so, in what specific respects did they disagree?
(c) If they did not disagree, why exactly did they not make an appointment in accordance with their stated intention to do so?
(d) Insofar as their decision to "extend" the appointment process related to the cross-community aspects of the work involved as Victims Commissioner, what exactly were the concerns of (i) the First Minister and (ii) Deputy First Minister in respect of the candidates respectively?
(e) Insofar as their decision to "extend" the appointment process related to a lack of "representativeness" of the candidates, in what respects exactly were the candidates (either individually or collectively) lacking in representativeness in the opinion of (i) the First Minister and (i) the Deputy First Minister?

4. (a) How many times did the Respondents meet or converse by telephone or otherwise to discuss the said appointment during the period specified above?
(b) What was the approximate total duration of these meetings and/or conversations?

(c) Did either of the Respondents or their respective junior ministers or political advisers or anyone else on their behalf make or take notes or make any other record of the assessments and decisions referred to above during the period specified?
(d) If not, why did they not do so?
(e) If they did, what notes or records did they make or take?

5. When was the decision made to explore the option of stopping the first process?

6. (a) During the period between 8th May 2007 and 1st November 2008, did either the First Minister or the Deputy First Minister approach any person directly or indirectly to encourage any such person to apply for the post of Victims Commissioner?
(b) If so, (i) who was approached, (ii) on whose behalf was the approach made and (iii) why was the person encouraged to apply?

7. (a) During the period between 12th October 2007 and 15th January 2008, did the First Minister make an assessment (formal or otherwise) of the suitability for appointment to the post of Victims Commissioner of the 8 candidates deemed suitable by officials under the extended process?
(b) If so, in what order of preference did he rank each of the candidates?
(c) If scores were given to the candidates, what were the scores for each?
(d) If he made no such assessment, why exactly did he not do so?

8. (a) During the period between 12th October 2007 and 15th January 2008, did the Deputy First Minister make an assessment (formal or otherwise) of the suitability for appointment to the post of Victims Commissioner of the 8 candidates deemed suitable by officials under the extended process?
(b) If so, in what order of preference did he rank each of the candidates?
(c) If scores were given to the candidates, what were the scores for each?
(d) If he made no such assessment, why exactly did he not do so?

9. (a) Did either the First Minister or the Deputy First Minister rate or rank each of the seven candidates that made presentations to them between 11th and 19th December 2007?
(b) If so, what rating or ranking did they respectively give to each candidate?
(c) If not, why not?

10. (a) During the period between 12th October 2007 and 15th January 2008 did the First Minister and Deputy First Minister disagree on their assessments of the most suitable candidate for the said post?
(b) If so, in what specific respects did they disagree?
(c) If they did not disagree, why exactly did they not make a single appointment in accordance with the Order?

11. (a) How many times did the Respondents meet or converse by telephone or otherwise to discuss the said appointment during the period between 12th October 2007 and 15th January 2008?
(b) What was the approximate total duration of these meetings and/or conversations?
(c) Did either of the Respondents or their respective junior ministers or political advisers or anyone else on their behalf make or take notes or make any other record of these meetings and/or conversations and the decisions made during this period?
(d) If not, why did they not do so?
(e) If they did, what notes or records did they make or take?

12. (a) Did any consultation process take place before the decision was made to appoint four candidates instead of one?
(b) If it did, what form did it take?
(c) If it did not, why did it not?

13. To what extent was it considered important by (i) the First Minister and (ii) the Deputy First Minister to have a religious and political balance on the Commission?

14. To what extent was it considered important by (i) the First Minister and (ii) the Deputy First Minister to have a Commission that was representative of the community in Northern Ireland?

15. Insofar as the reason for not making a single appointment was a desire to have a wider spread of experience and/or ability, what factors or criteria were applied by the First Minister and Deputy First Minister in making the decision (i) to appoint 4 persons and (ii) to appoint the 4 persons who were selected?

16. On what basis, scoring or criteria was Brendan McAllister chosen when Dr Marie Breen Smyth dropped out?

17. (a) To what post exactly was each of the successful candidates appointed in January 2008?
(b) What were the terms and conditions of their appointment in January 2008?
(c) What was the exact legal power or authority under which they were appointed in January 2008?

(d) What was the authority for the use of the public funds out of which the successful candidates were paid between January 2008 and their appointment on 3ft1 June 2008 under the 2008 Act?

18. (a) Did any consultation process take place before the legislation was amended to allow for the appointment of four candidates instead of one?
(b) If it did, what form did it take?
(c) If it did not, why did it not?
Note: These interrogatories must be answered on affidavit within 28 days of service hereof."

[4] Order 53 governs applications for judicial review and Order 53 rule 8 makes provision for application for interrogatories.

[5] Order 26 rule 1 makes provision for discovery by interrogatories in the following terms:

> "1.-(1) A party to any cause or matter may in accordance with the following provisions of this Order serve on any other party interrogatories relating to any matter in question between the Applicant and that other party in the cause or matter which are necessary either –
>
> (a) For disposing fairly of the cause or matter; or
>
> (b) For savings costs."

Background Facts

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

[7] The grounds upon which the first substantive application has been made are as follows. First, that the FMDFM are required or authorised by Article 4 of the 2006 Order to appoint only one person to the Office of Commissioner for Victims and survivors. The post was advertised as a post for one person. Accordingly it is the Applicant's case that there was no legal authority to appoint four Commissioners. Secondly, it is the Applicant's case that the

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

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

[9] It is the Applicant's case that Mr Rooney's affidavits and the documents discovered indicate that there must have been a considerable number of intensive meetings between the FM and the DFM. During these meetings they "deliberated long and hard", according to the DFM in his Ministerial statement, on the impugned appointments and the manner in which they should exercise their powers of appointment under 2006 Order. It is also contended by them that they were advised on the matter by the Commissioner for Public Appointments.

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

[11] A second judicial review ("the second substantive application") was mounted by the applicant--leave again was granted by this court-- against the same parties to quash the decision of the FMDFM made in June 2008 appointing four Commissioners to the Victims Commission pursuant to the Victims and Survivors Act (Northern Ireland) 2008 ("the 2008 Act").

[12] I granted leave to amend both applications at the outset of this hearing to plead the fresh allegation by the applicant that there was nothing to show that there was any consultation process engaged in relation to the amendment of the 2006 Order by the enactment of the 2008 Act. It is the Applicant's case that no consultation process took place in relation to the amendment of the legislation enabling the appointment of the four Commissioners. Mr McDonald contended that the Applicant had a right to expect such a consultation process

to have taken place before legislation was amended resulting in the appointment of the four Commissioners which was made on 3 June 2008.

[13] The Applicant has unsuccessfully sought leave for the issue of a Writ of Subpoena ad Testificandum requiring the attendance of Dr Ian Paisley and Mr Martin McGuinness for cross examination. at the hearing of the judicial reviews see Re Williamson's application [2008] NICA 52.

Principles governing the present application

[14] The path of the authorities, found in such textbooks as Larkin and Scoffield "Judicial Review in Northern Ireland" at paragraph 10.67, indicates that it is very rare for interrogatories to be issued in judicial review. Such applications must be directed to facts which are relevant to prove or disprove the material issues in the case and must be capable of definite factual answers rather than opinion.

[15] The court, on applications for interrogatories, will be guided by the principles governing discovery – see Anthony on Judicial Review in Northern Ireland at paragraph 3.60.

[16] Prior to the advent of *Tweed v. Parades Commission for Northern Ireland* [2006] UK HL(2007) NI 66, the principles governing discovery in judicial review proceedings found authoritative expression in *Re Rooney's application* [1995] NI 398 where Carswell LJ distilled the following propositions:

> 1. The discretion under Order 24, r3 is accompanied by the contents of r9 under which the court may refuse to make the order if it is satisfied (the onus being on the party from whom discovery is sought) that discovery is not necessary either for disposing fairly of the matter or for saving costs.
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> 2. Discovery may be ordered in applications for judicial review but because of the nature of the issues and the remedies available to an applicant it is more restricted that in ordinary actions.
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> 3. It is essential to examine carefully the issues which arise in any particular application for judicial review, to ascertain whether discovery is necessary for the resolution of some issue arising in the application.
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> 4. Unless there is some prima facie case for suggesting that the evidence relied on by the deciding authority is in some respects incorrect or inadequate it is

improper to allow discovery of documents, the only purpose of which would be to act as a challenge to the accuracy of the affidavit evidence.

5. Discovery is not necessary unless the Applicant is able to point to any material which suggests that the Respondent has acted improperly in coming to his decision. Mere suspicious of impropriety is not enough.

[17] Both Mr Maguire QC who appeared on behalf of the respondents with Mr McMillen and Mr McDonald acknowledged that Tweed's case had now revised the fourth proposition put forward in Rooney's case.

[18] In Tweed's case at page 78 paragraph 32 Lord Carswell said:-

> "I do consider, however, that it would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances. It will not arise in most applications for judicial review, for they generally raise legal issues which do not call for disclosure of documents. For this reason the courts are correct in not ordering disclosure in the same routine manner as it is given in actions commenced by writ. Even in cases involving issues of proportionality disclosure should be carefully limited to the issues which require it in the interests of justice."

[19] Lord Brown of Eaton-Under-Heywood echoed this at paragraph 56 p 87 where he said:-

> "In my judgment disclosure orders are likely to remain exceptional in judicial review proceedings, even in proportionality cases, and the court should continue to guard against what appeared to be merely "fishing expeditions" for adventitious further grounds of challenge. It is not helpful, and is often expensive and time-consuming, to flood the court with needless paper. I share, however, Lord Carswell's view that the time has come to do away with the rule that there must be a demonstrable contradiction or inconsistency or incompleteness in

> the Respondent's affidavits before disclosure will be ordered. In future, as Lord Carswell puts it . . . "a more flexible and less prescriptive principle" should apply, leaving the judges to decide upon the need for disclosure depending on the facts of each individual case."

Conclusions

[20] I consider that the issues in this case are tolerably clear. Was the appointment process in this case unexceptional and appropriate as contended on behalf of the Respondents or was it wholly exceptional as contended by the Applicant. The matter is as crystallised by Kerr LCJ at paragraph 19 in Williamson's case as follows:-

> "The appellant contends that the First and deputy First Ministers had manipulated the manner of the appointment of the Commissioners designate so as to leave no documentary trace of the true reason for the appointment of four persons to a post which the legislation prescribed should be held by one. The Respondents aver that there was nothing unusual about Ministers holding a private, unrecorded meeting at the final stages of an appointed process and that there is no warrant for the manipulation that is imputed to them. In any event, the Respondents say, both Ministers made statements about the appointment to the Assembly and answered questions on those statements. They consulted and took advice from the Commissioner for Public Appointments while arrangements for the appointment of the Commissioners designate were taking place and they gave assurances that the appointments were not made for a collateral purpose."

[21] As Kerr LCJ also said at paragraph 21 of that decision, the question as to whether the Respondents have fulfilled that duty in this instance is not suitable for determination at the interlocutory stage at which the proceedings now stand. Such a conclusion is only possible after the evidence has been carefully weighed and a judgment is made in the context of a substantive hearing of the judicial review application.

[22] Already there is a considerable corpus of material and affidavits before the court to assist in the determination of those issues. Both sides have made their case. The respondents contend that they have made a number of

ministerial public statements giving reasons for their actions. On 20 January 2008 they assert the two ministers made a public announcement of the appointment of 4 commissioners designate and gave their reasons for so doing. On the 28 January 2008 the DFM answered questions in the Assembly and there is a verbatim account of this before the court in manuscript form. On such evidence the court will have to depend to decide if the applicant has made out her case and if the response is adequate. The Respondents, through an affidavit of Mr Jack found at page 613 paragraph 8, have unequivocally stated that there is nothing unusual in meetings which solely involve the Ministers and where such meetings are not minuted. The court will have to determine whether that bald assertion is acceptable or not. Does it dispel suspicion or does it invite it? Does it lead to a conviction that the Respondents' case is correct or does it point the court towards an adverse inference that attempts have been made to conceal what is going on and a lack of candour on the part of the respondents? Such issues will clearly be matters for careful scrutiny at the substantive hearing. This is not the stage when the court should determine if the respondents have been in breach of the duty of candour.

[23] Similarly the court has before it 18 pages of transcript dealing with the formal statement made by the First and deputy First Ministers to the Assembly dealing with the appointment of the Commissioners Designate together with questions and scrutiny from members of the Assembly. Is this sufficient to dispel the matters raised by the Applicant or is it devoid of any such evidential basis?

[24] I have come to the conclusion that the interrogatories being sought in this instance are attempts to revisit the right to cross examine the Respondents which was refused by the Court of Appeal in Williamson's case. It is a further effort to have the court determine the issues surrounding the decision making process at this interlocutory stage. I am satisfied that this is not the role of interrogatories in judicial review and that this is not an instance where the sparing exercise of the discretion of the court to order them should be made for that reason.

[25] I am therefore unpersuaded that the material currently available will enable the judge, with the benefit of submissions from counsel to engage in whatever fact finding exercise is necessary without the need for the invocation of the interrogatories in this case.

[26]Apart from the objections in principle to this application to which I have referred, I now turn to consider the sought interrogatories individually. So far as numbers 1, 2 and 3 are concerned, the issue of the suitability for appointment to the post of Victim Commissioner for the period 8 May 2007-5 July 2007 occurred during the first phase of this whole process. All six candidates proceeded into the later process and therefore I do not consider that consideration of the issues raised in interrogatories 1, 2 and 3 are necessary for

determination of the issue in this judicial review. Accordingly I accept the submission of Mr Maguire that in any event the answers to these questions are too remote from the decision making which has been impugned in these proceedings.

[27] Number 4 is in my view an attempt to ascertain a quantitative assessment which is wholly unnecessary for the resolution of this judicial review. In so far as 4(c)-(e) is concerned, the Applicant is aware of the absence/presence of such documentation.

[28] As far as interrogatory 5 is concerned the Applicant is already in possession of information when the decision was made to explore the option of stopping the first process. The first affidavit of Mr Rooney of 16 April 2008 avers at paragraph 14:-

> "A note of a meeting of the First Minister and deputy First Minister on 5 July 2007 indicated that as the existing appointment process was begun by the Secretary of State prior to 8 May . . . and there was now an entirely different context in which the Ministers would like advice from officials. The advice sought was on the option of stopping the current process and instead commencing a fresh public appointment competition which would be firmly grounded in the dispensation and which would enjoy the confidence of the entire community."

I consider therefore that this is an unnecessary interrogatory.

[29] I regard interrogatory 6 as a classic instance of a"fishing expedition" sought in the hope of eliciting some impropriety or to see if something may turn up. No evidential foundation or base has been laid for such an interrogatory.

[30] The Respondents in this matter are relying on the public statements which they made to the Assembly explaining their reasons for appointing the candidates concerned. In the affidavits of Mr Rooney and Mr Jack an attempt has also been made to explain the process through which the decision to appoint the candidates emerged. It will be for the court to determine whether or not this is either plausible or adequate. I do not believe that the questions posed by this interrogatory are therefore necessary to take this matter forward. The court will at the appropriate time draw whatever inferences or conclusions can properly be drawn from the information now in the court arena. Interrogatory 8 is a similar question posed to the deputy First Minister and 9 is basically an attempt to improve upon interrogatory 7 and 8.

[31] I regard interrogatory 10 as another classic "fishing expedition" and is not suitable for interrogatories in an action of any kind. No proper basis has been laid for seeking such information.

[32] Interrogatory 11 is similar to interrogatory 4 in terms of it being a quantitative interrogatory which is unnecessary in the context of this judicial review.

[33] Interrogatory 12 is premature since leave has only now been granted for this aspect of the case to be pleaded and time must be given for the Respondents to consider a response.

[34] Interrogatories 13 and 14 are arguably the key issues in this case. Is there evidence that the First Minister and deputy First Minister have acted as they did to ensure a religious political or representative balance on the Commission? These are matters upon which I will have to make a judgment once the evidence has been evaluated in the substantive hearing. It is not appropriate that such matters should be investigated at this interlocutory stage. In terms therefore it is not necessary for these matters to be answered in interrogatories in order to fairly dispose of this case.

[35] Interrogatory 15 is unnecessary. The First Minister and deputy First Minister rely upon the reasoning which they gave in their statement to the Assembly as justification for moving from the appointment of one Commissioner to four. The Respondents are relying upon that statement and the parameters of their case are thus confined. I do not believe that a fair disposal of the case requires this interrogatory to be answered.

[36] The Respondents have purported to set out the basis upon which Brendan McAllister was chosen in the affidavits before me. It will be a matter for me to determine at the hearing just how adequate that explanation is. I consider interrogatory 16 is unnecessary.

[37] It is the Respondents' case that the successful candidates have been appointed to the post of Commissioners Designate. The terms and conditions of that appointment in January 2008 sought in interrogatory 17 are not necessary in order to dispose of this matter fairly. So far as 17(c) is concerned, I am not clear upon what power or authority the Respondents are relying on for the appointment in January 2008. However I do consider that this is a matter of law which I would expect the Respondents to fully set out at the very least in their skeleton argument. If they delay doing so until that time, I will ensure that Mr McDonald and the Applicant have appropriate time in order to research and review that argument prior to the hearing. It seems to me that this is a matter that the Respondent should deal with sooner rather than later and that the Applicant should be left in no doubt in good time prior to the hearing as to the nature of the exact legal power or authority on which the

Respondents rely for the appointment in January 2008. However since I am satisfied that it is a matter of law, I do not consider that it is appropriate for an interrogatory.

[38] Finally I consider that interrogatory 18, in so far as it deals with issues of the consultation process, is premature as I have only recently granted leave in this matter and the Respondents must be given time to react appropriately.

[39] I have come to the conclusion therefore that this application by the Applicant is not well founded either in general or particular terms and I therefore dismiss the application.