

## THE SCOTT REVIEW

### Index

	<u>Page</u>
Executive Summary	i – iv
Introduction	1
The Early Background	6
The OFMDFM	6
The NIO	7
Relationship Between the NIO and OFMDFM	7
DUP Demands	8
Development of the Solution	8
The FoI Request (26.11.05)	18
The OFMDFM Response (5.1.06)	22
Girvan J's Criticisms of the FoI Response	24
The Secretary of State	29
The NIO's Failure to Respond	30
Mr M	31
Mr O	34
Ms Z	37
Jonathan Phillips	37
Mr C	37
Ms U	38
Summary	38
Further Requests to KW of 16 and 17.1.06	39
The Failure to Correct the OFMDFM Response of 5.1.06	40
The Litigation	40
The Application for Leave (Hart J)	45
The Application for Leave (the Court of Appeal)	47
The Crown's Evidence	58
Mr Hamilton's Affidavit	58
Interlocutory Applications	65
Mr Phillips' Affidavit	65
The Secretary of State's Involvement in the Affidavits	66
Recommendations	68
Conclusion	73

**Annexes**

Judgment of Girvan J. dated 9.11.06	A
Judgment of Girvan J. dated 20.11.06	B
Judgment of Girvan J. dated 15.1.07 and Order	C

**THE SCOTT REVIEW**  
**Chairman: Mr Peter Scott QC**

**Report**

**Executive Summary**

1. Proceedings brought in January 2006 in the High Court of Justice of Northern Ireland by Mrs Brenda Downes against the Secretary of State for Northern Ireland (“the Secretary of State”), complained of his appointment of Mrs Bertha McDougall as Interim Victims’ Commissioner for Victims and Survivors. Mrs Downes sought judicial review of his decision.
2. Amongst other things Mrs Downes complained that Mrs McDougall’s appointment was motivated by a desire to please the Democratic Unionist Party (“the DUP”) and was not based on upon a proper selection process, nor upon Mrs McDougall’s personal merits.
3. Before initiating these proceedings, Mrs Downes’ solicitors, Kevin R Winters & Co (“KW”), made on 28.11.05 a request for information about the circumstances of Mrs McDougall’s appointment, including the source of her nomination (“the Fol request”). The Office of the First Minister and Deputy First Minister (“the OFMDFM”) treated the letter as a request for information under the Freedom of Information Act 2000 (“the Fol Act”) and responded in writing to that request on 5.1.06 (“the Fol response”). The Northern Ireland Office (“the NIO”) should also have responded, but did not do so.
4. The Hon Mr Justice Girvan (“Girvan J”) gave judgments on 9.11.06 and 20.11.06 in favour of Mrs Downes, and in the course of doing so expressed serious criticisms of the Fol response and the way in which the litigation had subsequently been handled on behalf of the Secretary of State. He considered that an inquiry should be instituted by the Attorney General into these matters. In his view, the material before the Court appeared to show breaches of the duty of candour owed to the Court, and raised questions as to whether there had been an intention to obstruct or pervert the course of justice.

5. On 4.12.06 I was appointed by the Attorney General to review these matters on the following terms:

*“Further to the referral of papers to the Attorney General by Girvan J and in the light of his judgments of 9 November and 20 November 2006:*

- *to examine the concerns raised by the judge;*
- *to examine in particular the way in which the Government carried out its obligation of candour in the judicial review proceedings relating to the appointment of an interim Commissioner for Victims and Survivors;*
- *to report to the Attorney General with recommendations to prevent a recurrence of any shortcomings identified.”*

I was asked to report to the Attorney General as soon as is possible consistent with the need to conduct a thorough review.

6. In carrying out this Review I have had the advantage of access to voluminous contemporary material and evidence from witnesses which were not before Girvan J. I have come to the following main conclusions, details of which may be found in the body of the Report:

(a) The FoI response was in some respects misleading and avoided addressing the question of by whom Mrs McDougall had been nominated. This, coupled with the failure of the NIO to respond to KW’s request, as it was required to do under the FoI Act, affected the litigation which followed.

(b) In particular, the OFMDFM response was relied upon by Counsel for the Secretary of State during the initial stages of the litigation and led to the Court being misled by submissions based on the content of that letter. Those submissions suggested that Mrs McDougall had been appointed by a suitable selection process, and that her appointment was not politically motivated. In fact, Mrs McDougall had been nominated by the DUP and her appointment was intended to be a confidence building measure towards that party. In all the circumstances the appointment was indeed, as Girvan J found, politically motivated, though as he noted this in no way reflected on Mrs McDougall’s competence or integrity.

- (c) The reason for the unacceptable terms of the response was in all probability the misguided view of a senior civil servant that it was not for the OFMDFM to reveal in a FoI response the political motivation for Mrs McDougall's appointment. That was, in his view, primarily the responsibility of the NIO and so the FoI response from the OFMDFM should be framed accordingly.
- (d) The reason for the failure of the NIO to respond in accordance with arrangements made with the OFMDFM and its own statutory responsibility was a failure to collate the necessary information and respond to the request in a timely fashion.
- (e) Neither the officials in the NIO nor those in the OFMDFM acted in relation to the FoI response with the intention of obstructing or perverting the course of justice. The effect on the subsequent litigation was neither foreseen nor intended by those involved, nor was it appreciated during the early stages of the litigation.
- (f) The Secretary of State was not at the material times aware of the FoI request, nor was he involved in any way in dealing with it.
- (g) The relevant facts as to the political motivation for Mrs McDougall's appointment were eventually put before the Court in affidavits sworn with the approval of the Secretary of State by two senior civil servants.
- (h) The first affidavit was not prepared as carefully as it should have been, failed with sufficient precision to make the factual position clear, and under pressure in the litigation had to be supplemented by a second affidavit and by concessions to the Court as to the basis of Mrs McDougall's appointment.
- (i) However, I accept that the Secretary of State and those involved in the drafting and swearing of the two affidavits acted in good faith and did not intend to pervert or obstruct the course of justice. In the case of the Secretary of State, his role was essentially to consider the accuracy of the draft submitted to him so far as they dealt with matters within his own knowledge, and he duly did this.

(j) From the outset, the litigation lacked the strategic direction and control that it should have had at a sufficiently senior level, and coordination between the two Departments involved was inadequate. These failures meant that adequate attention and care was not given to the matters which later led to Girvan J's criticisms, including the failure properly to instruct solicitors and Counsel appropriately at the early stages of the litigation.

(k) Errors which occurred were however due in considerable part to the complexity of government in Northern Ireland at a time when devolution was still suspended, the fact that the two Departments concerned had divided responsibilities, and the fact that those involved especially at senior level had demanding and competing pressures of work.

7. The details of my findings will be found in the body of the Report. Furthermore, I make some recommendations, which in addition to the recent restoration of devolution, and steps already taken within the Departments concerned for dealing with Fol requests, may help to reduce the risk of repetition of the matters which gave rise to concern.

**THE SCOTT REVIEW**  
**Chairman: Peter Scott QC**

**Report**

**Introduction**

1. The basic facts leading to this Review can be summarised briefly. On 24.10.05, the Rt. Hon. Peter Hain MP, the Secretary of State for Northern Ireland (“the Secretary of State”) announced the appointment of Mrs Bertha McDougall, the widow of an RUC policeman killed during the troubles, as an Interim Victims’ Commissioner (“IVC”) for Victims and Survivors. On 28.11.05 Kevin R Winters & Co (“KW”), solicitors representing Mrs Brenda Downes whose husband had been killed by a plastic bullet fired by a policeman, addressed a number of written questions to the Secretary of State. These demanded information concerning the process by which Mrs McDougall came to be nominated and appointed, and the legal and factual basis for the appointment.
  
2. KW’s request was treated by officials as a request under section 1 of the Freedom of Information Act 2000 (“the Fol Act”). On 5.1.06, a response to this request (“the Fol response”) was sent by the Office of the First Minister and Deputy First Minister (“the OFMDFM”). On 16 and 17.1.06, KW raised further detailed questions to the Secretary of State, but before waiting for a reply applied on behalf of Mrs Downes to the High Court of Justice in Northern Ireland for leave to apply for a judicial review of Mrs McDougall’s appointment. They contended that the appointment was unlawful for a number of reasons. These included lack of consultation and transparency in the process. It was asserted that the Secretary of State had in making the appointment an “improper” motive, namely a political purpose in response to demands for “confidence building measures” by the Democratic Unionist Party (“the DUP”).
  
3. Leave was sought by Mrs Downes from the Hon Mr Justice Hart (“Hart J”). He rejected all the proposed grounds except one of legitimate expectation of consultation. In doing so, he was influenced by submissions on behalf of the Crown that there was no sustainable evidential basis for the allegation of improper or political motive in appointing Mrs McDougall. Mrs Downes appealed to the Court of Appeal of Northern Ireland where Counsel for the Crown made the same

submissions on the allegation of motive, but this time unsuccessfully. The appeal was allowed and permission to apply for judicial review was granted. From then forward the allegation of a political motive for Mrs McDougall's appointment was firmly amongst the issues to be resolved.

4. The proceedings which followed were lengthy and complex. They led on 9 and 20.11.06 to two judgments of the Hon. Mr Justice Girvan ("Girvan J") as he then was. Both these judgments are annexed to this Report (Annex A and B). Mrs Downes' challenge succeeded and Girvan J delivered robust criticisms of the Fol response, and the manner in which the litigation which followed had been handled on behalf of the Secretary of State. It appeared to Girvan J that serious breaches had occurred of the duty of candour owed to the Court by the Respondent to an application for a judicial review. The second judgment made it clear that Girvan J felt that an inquiry should be made into these matters, and concluded with no less than 68<sup>1</sup> questions which he felt should be addressed in the course of the inquiry. At a hearing on 19.1.07, he finally determined the matter by declaring that Mrs McDougall's appointment was unlawful in various respects. These included breach of accepted merit norms applicable to public appointments, being motivated by an improper purpose i.e. a political purpose (so called "confidence building") which could not be legitimately pursued at the expense of complying with proper norms of public appointments where merit is the overriding consideration, and failing to take account of the fact that there was no evidential basis for concluding that the appointee would command cross-community support. The judgment of 15.1.07 and Order of the Court is annexed herewith (Annex C).
  
5. The main criticisms of Girvan J in three linked areas were as follows:
  - A. The information supplied to Mrs Downes' solicitors in the Fol response "was evasive, misleading and in certain respects clearly wrong. Since the letter was clearly carefully drafted having regard to the highly political nature of the issues I am forced to the conclusion that this was no mere drafting error .... For some reason it was decided within Government that incorrect and misleading information would be supplied".

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<sup>1</sup> The Schedule to the judgment of Girvan J lists 68 questions but, through a numbering error, the final question is listed as 67

- B. “The evasive and misleading nature of the information ... forms the background to the case which led to the Respondent contending at [the hearings before Hart J and the Court of Appeal when Mrs Downes applied for leave to seek judicial review that] there was no evidence to justify the applicant’s ground of challenge based on alleged improper political considerations. The instructions given to Counsel were obviously misleading.” The opposition on the basis of “no sustainable evidential basis” for the allegation of political motivation as a ground for judicial review misled the Court and “it must be concluded that it was decided that the correct information should not be placed before the Court”.
- C. An affidavit from Mr Nigel Hamilton (the Head of the Northern Ireland Civil Service and of the OFMDFM) which had been “seen and sanctioned by the Secretary of State... was less than a full explanation of what actually happened and sought to minimise the political considerations”. It wrongly asserted that “merit was the sole criterion” applied to the selection of Mrs McDougall. The Respondent was attempting to divert attention from the true course of events ... “and almost to the end was seeking to rely on ambiguous and misleading affidavits” and was unwilling to openly set the record straight.

Girvan J was also critical of the affidavit of Mr Jonathan Phillips in two specific respects. He concluded that there was a “significant lack of candour” in the case put forward by the Secretary of State.

6. In suggesting questions for consideration in the inquiry which Girvan J felt should be held, he clearly expected that relevant failures by individuals and/or in the system within which they worked would be identified and appropriate action taken. It is of course for the Attorney General and not for me to decide what if any action should be taken in the light of this Report.
7. On 4.12.06 I was appointed by the Attorney General to carry out this Review on the following terms:

“Further to the referral of papers to the Attorney General by Girvan J and in the light of his judgments of 9 November and 20 November 2006:

- to examine the concerns raised by the judge;
- to examine in particular the way in which the Government carried out its obligation of candour in the judicial review proceedings relating to the appointment of an interim Commissioner for Victims and Survivors;
- to report to the Attorney General with recommendations to prevent a recurrence of any shortcomings identified.”

I was asked to report to the Attorney General as soon as is possible consistent with the need to conduct a thorough review.

8. In compiling this Report, I have had access to the relevant Departmental files, the Crown Solicitor’s files and documents held by Counsel. I have obtained 20 written statements, and in some cases supplemental statements, from those who appeared to have a significant role in the matters I deal with in this Report. I have interviewed 8 of those who provided statements in order to satisfy myself of specific matters. I have taken into account all the questions raised by Girvan J and the answers provided by various witnesses to those questions but have not prolonged this Report by detailed responses to each of these. I have received prompt and helpful responses to my enquiries from the individuals concerned and I believe that the voluminous documentation I have seen is not incomplete in any significant respect. Some of that documentation is subject to legal professional privilege, or is otherwise confidential. In deciding whether, or if so to what extent, to publish this Report, the Attorney General will no doubt wish to take this into account amongst other considerations.
9. I have been greatly assisted by Mr Duncan Henderson of the Treasury Solicitor’s Department, who has acted as Secretary and Solicitor to the Review, by Miss Elisabeth Noble also from that Department, and by Junior Counsel, Miss Eleanor Grey.
10. My Report examines Girvan J’s criticisms. Discovering the state of knowledge of numerous individuals and the parts they played and hence their responsibility at intervals over a period of many months has been a formidable and time consuming task, and the certainty of some of the results is less than I would wish. When in doubt, I have been inclined to give the benefit of that doubt to the persons concerned, bearing in mind the profusion of e-mails and draft documents which were circulated and often widely copied to various individuals who had little if any

relevant part to play and no particular reason to focus on matters which now seem important. I have borne in mind the peculiar features and complex problems of the Government of Northern Ireland, and the pressures which these imposed on officials whilst dealing with the matters under consideration. I also propose steps which might be taken to prevent or reduce the risk of unacceptable matters happening again.

11. The judgment of Girvan J is now the subject of an appeal to the Court of Appeal in Northern Ireland and for that reason, if no other, it would be inappropriate for me to comment upon Girvan J's substantive conclusions on the merits of Mrs Downes' case. Nor do I think it is necessary to do so when dealing with his concerns. Candour is not as I understand it an issue in the appeal.
12. I should also make it clear that I do not seek to express a view as to whether or not it was a sensible decision by the Secretary of State to appoint an IVC, on the validity of his reasons for doing so, or on his reasons for seeking and accepting nominations of the DUP for the post. The decisions were made in a highly charged political atmosphere. That the appointment and the process leading to it reflected a desire to accommodate the DUP, and risked displeasing other political constituencies, are all now established facts; the question in the litigation was, and while an appeal is pending to some extent still is, whether what was done was lawful, and not whether it was in other respects politically wise. Girvan J approached the case in this way, and made his criticisms on this basis and I shall do likewise when considering those criticisms.
13. As Girvan J recognised, he did not have access to material which, had it been available, might have thrown a different light upon at least some of the matters which gave him concern. I have had such material in abundance, as well as statements and oral evidence from many of the people involved and together they do make a significant difference. It should be added that on two occasions Girvan J himself specifically invited the Respondent and his officials to give oral evidence to explain what had happened and to deal with his obvious concerns. This invitation was refused. Although Leading Counsel inclined on balance towards accepting Girvan J's invitation and so advised, the two senior officials concerned did not agree. I consider that their decision on this point was justifiable for a number of reasons; by this time it was probably too late to hope that oral or other evidence would do much, if anything, to repair the situation. In addition, given the

delicate relations between the Crown and individual political parties, the political risks were significant and the course which cross-examination might take unpredictable.

14. Girvan J gave a detailed account of the duty of candour owed by the Crown to the Court in judicial review proceedings, and supported his remarks on that duty, and on the possible consequences of breach of that duty, by citations of relevant legal authority. I respectfully consider that what Girvan J said about those matters is a more than adequate basis for this Review, and I note that none of those who have given evidence to me have suggested otherwise.

### **The Early Background**

15. Girvan J's first judgment sketches the early background (paragraphs 5-10, Annex A). When Mr Hain took office on 5.4.05 he inherited wide-ranging responsibilities, the structure for dealing with which was complex and unusual. Devolved rule had been suspended since 1.10.02 and it is particularly important to understand the division between, and the respective responsibilities of, the OFMDFM and the NIO within that structure. In addition to the NIO, no less than 11 Departments of the Northern Ireland administration reported to Mr Hain.

### **The OFMDFM**

16. Matters which in 1999 had been devolved to the Northern Ireland Executive and were dealt with by Civil Service officials under the Secretary to that Executive, continued after 1.10.02 to be dealt with within the Northern Ireland Civil Service ("NICS") headed as before by the previous Secretary to the Executive, Mr Nigel Hamilton. From that time Mr Hamilton was under the direction of, and responsible to, the Secretary of State. His title was Head of the Northern Ireland Civil Service ("HOCS") and Head of the OFMDFM.
17. The OFMDFM under Mr Hamilton was responsible for a range of central matters comparable to those of the Whitehall Cabinet Office. The OFMDFM was responsible for the development, sponsoring, financing and implementation of Government policy towards victims in Northern Ireland. The person leading the team responsible for this work ("Division 1") was Mr A. His line manager was Mr B.

## **The NIO**

18. The NIO is a Whitehall Department with its own separate reporting line to the Secretary of State. Its permanent Head is a member of the Home Civil Service and its core responsibilities were the delivery of a lasting political settlement in Northern Ireland, with the return of stable devolved Government, and the constitutional framework underpinning that, a stable security situation, policing, criminal justice and other matters for which legislative competence remained with Parliament rather than with the Northern Ireland Assembly. One of its divisions was "Division 2", headed by Mr C assisted by Ms D.
19. Until 30.11.05, Mr Jonathan Phillips was the Political Director of the NIO, (now described as Director General (Political)). As such, his primary responsibility was the formulation and provision of advice to the Secretary of State on the political process in Northern Ireland and associated matters. He became the Permanent Secretary to the NIO on 1.12.05.
20. The different parts played by officials in the OFMDFM and the NIO in the process of Mrs McDougall's appointment, in responding to the FoI request, and in the conduct of the litigation which followed will need to be considered.

## **Relationship Between the NIO and the OFMDFM**

21. The OFMDFM considered that it had (and was seen by the NIO as having) for many relevant purposes the comparatively mundane role of giving effect to political decisions taken by the Secretary of State on advice from the NIO. Thus, the task of dealing with the process which on advice the Secretary of State had decided to initiate in choosing an IVC fell mainly on the OFMDFM, and in the end it was the OFMDFM which concluded the arrangements with Mrs McDougall, and was the lead Department in the litigation which followed.
22. The relationship between Mr Phillips and Mr Hamilton appears to have been broadly what one would expect between two Senior Civil Servants with different responsibilities, and the same was true of their respective Departments. But at various levels including theirs, communication did not operate as well as it should have done.

## **DUP Demands**

23. The DUP, the largest single party of the Northern Ireland Legislative Assembly, had since the Good Friday Agreement pressed the British Government to take “confidence-building measures” to promote a return to devolved Government. In particular, the DUP wanted a Victims’ Commissioner (“VC”) to be appointed on a permanent basis. But public consultation on this matter confirmed the existence of significant controversy. The DUP and Sinn Fein on this as on many other issues took opposite positions; other parties leaned in one or other direction and had other views as well.
24. The disagreements included the desirability of having a VC at all, whether that person should have the power (and resources) to award compensation, and the definition of “victim”. In particular was the remit of the VC to be limited to “innocent” victims of the troubles (as the DUP defined them) or might it extend to others. Such disagreements were obviously emotionally charged.

## **Development of the Solution**

25. The solution which was developed led to Mrs McDougall's appointment.
26. On the 8.7.05, a member of Division 1 in the OFMDFM made a submission to Ministers. This was copied to numerous officials in both the NIO and OFMDFM from Messrs Hamilton and Phillips downwards. The parts subsequently played by such officials are relevant to their state of knowledge at the later stages, i.e. at the time of the FoI request and during the litigation which followed.
27. The submission emphasised the problem of defining “victim” and referred to the related funding issue and to the wish of the DUP to have “victims” defined to exclude perpetrators.
28. The submission proposed a solution. It suggested the appointment of a Commissioner on an interim basis who could advise on the funding issue and other matters. The IVC’s report could, it suggested, be used to inform the final strategy for victims and survivors. Three options were offered:-

- (a) An immediate appointment of an Interim Commissioner without legislative process. This could be done immediately by the Secretary of State, subject to identification of a suitably qualified individual with sufficient standing in the community to be broadly acceptable.
  - (b) An interim appointment subject to formal Public Appointment procedures. This would be transparent in accordance with the relevant Code of Practice, but a major difficulty was that the appointment process “could lead to unhelpful debates about past events”. It would take three to four months.
  - (c) Establish a Commissioner on a statutory basis involving an Order in Council and application of the Code of Practice. There was a risk of the boycotting of such a process by the “innocent” victims camp (i.e. the DUP and others) and this would take eighteen months.
29. On the same day, C, Head of Division 2 of the NIO, made a submission to the Secretary of State saying that there was a need to consider soon the next steps on a VC now that the consultation had closed. He said: “OFMDFM, who lead on the Victims’ Commissioner, are providing parallel advice directly to you on this issue. Victims group and the parties – especially the DUP and SDLP – will watch next steps on the Commissioners very closely”. This was copied to numerous people in the NIO and OFMDFM, including Messrs Phillips and Hamilton.
30. On the 11.7.05, the Secretary of State met officials to discuss the VC and other matters. He asked officials to give consideration to the appointment of an IVC.
31. Mr E of Division 2 in a note of 18.7.05 sent to PPS/Secretary of State summarised the meeting of 11.7.05. He said it had been attended by 12 officials including Mr Phillips (but not it seems Mr Hamilton). The OFMDFM was represented by Mr A and B. Others were from the NIO.
32. Mr E’s note recorded the Secretary of State’s desire to see action taken quickly now that consultation had concluded – perhaps through the appointment of an IVC. The DUP in particular, he said, would certainly expect to see early movement. The note was copied to C and D in Division 2, but it was not copied to the OFMDFM.

33. On 20.7.05, F, a Special (Political) Adviser to Mr Hain, sent an e-mail to A and C and copied it to numerous people including Jonathan Phillips, D, E, G and O. The email said:

“I think we talked about asking the DUP informally to suggest a name or two – could add to sub [submission] that Peter [Hain] should mention this to him when they see each other next week??”

34. On 21.7.05, C informed A by a lengthy e-mail copied to numerous individuals in both the NIO and the OFMDFM of his views on the draft submission to be made to Ministers. Mr C confided that finding someone who was “a hit with the DUP” and sufficiently credible across the community and available might be “a very tall order indeed”.

35. On 26.7.05, in an e-mail to Mr A copied to C, F and G, Mr E said it might be worth “explicitly pointing out to the Secretary of State the DUP situation? That is the Secretary of State wanted a quick “gain” for Unionism” (and was concerned that a reduced role for the IVC might even serve to antagonise the DUP). This led to further revisions of the submission and it was finally dispatched on 28.7.05.

36. In a further e-mail, also widely copied, dated 28.7.05 Mr C suggested his view of how the submission might be presented along the following lines. The Secretary of State did not think the time was right for further consultation on the past. He wanted to move quickly on the VC given DUP interest so agreed to go for an interim appointment to show commitment. As for the mechanics of making an interim appointment, there were two options: to pick someone or have a quick appointment process. On 29.7.05 a further submission was made to Ministers. This document like the one of 9.7.05 was not exhibited to the first of the three affidavits subsequently placed before the Court on behalf of the Secretary of State, but was mentioned obliquely in Mr Hamilton’s affidavit (paras 14-16) and in a little more detail in Mr Phillips’ affidavit (paras 16 and 17).

37. This submission:

- (a) proposed that officials should work during August on potential issues and a process for an interim appointment without any formal appointment process,

but should in parallel consider a more formal appointment process to keep that option open;

- (b) discussed how to deal with the DUP's concerns about the definition of "victim" and the power of the Commission to award compensation by an appointment on an interim basis. "Potential difficulties" included identifying someone who would be broadly acceptable and the expectation that there would be some degree of opposition to anyone appointed regardless of the process. If it was decided to adopt a process without legislation or formal appointments procedure: "Some may feel that a particular individual is being imposed on the basis of some political consideration. However, as the suggested terms of reference ... are clearly preparatory to a more permanent appointment that problem may be minimal."

Nothing was said about how the candidate might be appointed; merely that officials would work on some potential names. It concluded that Option (a) of the paper of 8.7.05 (para 28 above) was on balance the more attractive.

- 38. On 8.8.05, the Secretary of State thanked officials for the submission of 29.7.05 and said he preferred Option (a).
- 39. On 4.8.05, at a meeting with the Prime Minister ("the PM") at No.10 Downing Street ("No. 10"), attended in Mr Phillips' absence on leave by Mr O of the NIO, Dr Paisley handed over a list of immediate matters which needed to be dealt with as confidence-building measures "to bring confidence back to the Unionist community and support democratic politics." The list included:

"PM has agreed to the appointment of a Victims' Commissioner – this post will be advertised (sic) next month and the appointment made in October."
- 40. Mr O's note of this meeting was copied widely, to Messrs Phillips, Hamilton, C and others. It recorded that the PM had spoken to the Secretary of State on the VC and that the Secretary of State was keen to move quickly on this. The Secretary of State would be speaking to Dr Paisley when he returned from leave and planned to consult him on the post and possible candidates. Mr O mentioned the need for a discussion about the issue of "victim" definition and suggested that that issue would have to move quickly in legislation.

41. On 11.8.05, Mr O met the two DUP MPs (who had accompanied Dr Paisley to No.10 a week earlier). His important note of the meeting was copied widely as before including to Mr Hamilton. It mentioned a lengthy discussion on the VC and said the MPs knew that the Secretary of State wanted to move quickly and were positive about the idea of an Interim Commissioner.
42. Mr O said: "I stressed that although you [the Secretary of State] were keen to hear their suggestions of credible candidates they needed to be realistic credible candidates who would need to command confidence across the community ... they undertook to come back to Jonathan or me with names before they met you."
43. He concluded after mentioning other "confidence-building measures" that he had discussed these issues with Mr Hamilton and others and could do so with Mr Phillips on his return with a view to discussing DUP handling with the Secretary of State on his return from holiday.
44. Mr Phillips met one of the DUP MPs again on 25.8.05 and discussed confidence-building measures but the IVC was mentioned only briefly. Again his note was widely copied but not on this occasion to Mr Hamilton.
45. C, O, E, G, A and others continued to discuss the draft submission until it went to the Minister.
46. On 7.9.05, the proposed sequence of events was submitted to Ministers. The Secretary of State indicated on 14.9.05 in response to one suggestion that he did not necessarily agree that the IVC appointee should come from an academic or professional background, and orally stated that he wanted if at all possible to be able to accommodate the DUP's requests. Though Mr Hamilton told me that that oral message was not conveyed to him at that time, he added that it is right to say that the message had certainly been picked up by the OFMDFM that there was a political desire to respond positively to the DUP's demands and proposals, subject to satisfying the normal policy considerations which would apply in any particular area. In the case of an appointment this meant, according to Mr Hamilton, that NICS would take steps to satisfy itself that the individual recommended for appointment was capable of doing the job well.

47. Qualifications that candidates would need were proposed in the submission. In addition to commanding cross-community support, a candidate was to be expected to have an established record in dealing with conflict situations either within Northern Ireland or elsewhere, together with inter-personal and analytical skills. The submission suggested that the Secretary of State might wish to take soundings with political parties on the proposed role of the IVC and to discuss possible candidates. The Secretary of State did not comment on the suggestion of taking soundings but Mr Hamilton understood that he had formally approved this. In the result, soundings were not taken and there was no formal process of consultation. No consideration appears to have been given to the legal risks of proceeding in this way, and it does not appear to be the general practice to seek legal advice in circumstances comparable to the present unless a legal issue is identified.
48. Mr Hamilton told me that he understood that the Secretary of State had, with the qualification mentioned (see para 46 above), formally approved what the submission proposed. He suggests that he was unsure at this stage that there had already been discussions with the DUP regarding their suggestions for the IVC appointment, but he confirmed, as mentioned above, that in OFMDFM the general message was understood that the Government wished to respond positively to the DUP's requests.
49. On 14.9.05, the Secretary of State had a meeting and dinner with Dr Paisley and three other people selected by Dr Paisley. In a number of requests Dr Paisley included as an "immediate demand" the early appointment of a VC. It was recorded that: "he favoured Candidate XX... in this role. You are I believe reflecting on this."
50. This note was circulated to O, H, I, J and F (all in the NIO) but not to Mr Hamilton. However Mr Hamilton obviously was told of XX's nomination. Plans were promptly made to interview this individual, but on or about 21.9.05 he withdrew, and Mr Phillips told Mr Hamilton that he had been instructed "not to make contact for the time being".
51. On 20.9.05, O informed F, G (OFMDFM) and C by an e-mail which emerged as an attachment to Mr O's statement to me: "Jonathan [Phillips] and Nigel [Hamilton] are meeting the DUP's nominee privately, possibly this week. They will then report

back and Peter [Hain] will have to decide whether to go with this name as the interim appointment. You are right that it will have to move quickly once he's decided."

52. On 22.9.05, the Secretary of State had a telephone conversation with Dr Paisley in which Dr Paisley told him that he had another name, and while declining to mention this name over the telephone urged that the person concerned was suitable and impartial, and promised to provide the name and some supporting documentation. A note of this conversation was sent to O saying the Secretary of State wanted Mr O to have a word with two DUP MPs and adding that he had stressed that he wished to talk briefly with Dr Paisley specifically on names. The Secretary of State expected Mr O to take matters forward.
53. On 27 or 28.9.05, Dr Paisley (delivering the letter by hand to ensure confidentiality) wrote to the Secretary of State enclosing a C.V. for Mrs McDougall ("the lady I spoke to you about as a suitable candidate for Victims' Commissioner"). The letter was circulated by the Secretary of State's Private Office; the distribution shown on its face was to K, Jonathan Phillips, O, H, L, M, N and F. A few days later Mr Phillips sent it to Mr Hamilton. The e-mail to O from Private Office said "Dr Paisley was keen for secrecy to be observed, so grateful if recipients could be discreet."
54. Mrs McDougall's name was promptly added by Mr Hamilton to the list of candidates previously compiled by OFMDFM officials, making a total of 16. Mr Hamilton says he considered that the two best candidates were Mrs McDougall and Candidate YY.
55. On 4.10.05, Messrs Phillips and Hamilton met the Secretary of State before approaching any individuals on the list. Mr Hamilton indicated that there was a shortlist of two, and that YY was suitable for appointment and available and willing to be appointed. After discussion, the Secretary of State requested that Mrs McDougall be interviewed. Mr Phillips and Mr Hamilton expected her to be appointed if assessed as appointable.
56. On the following day, Mrs McDougall was interviewed by Messrs Phillips and Hamilton. She was impressive and it was agreed by the two officials that Mr Hamilton should recommend her to the Secretary of State if she were willing to be

appointed. None of the other candidates were interviewed at this or any other stage.

57. On 13.10.05, Mr Hamilton and Mr Phillips proposed to the Secretary of State that Mrs McDougall should be appointed as IVC. Mr Hamilton's submission said that it was likely that exemption would be sought under section 35 of the FoI Act (formulation of government policy, etc.) for the submission, and remarked that the appointment was likely to be welcomed by the broader Unionist community but was likely to be criticised by the Nationalist community, particularly Sinn Fein. He confirmed that her personal experience, skills, interests and views were such that she could undertake the role and envisaged a "handling plan" for the announcement.
58. On receipt of this submission, the Secretary of State decided to appoint Mrs McDougall.
59. On 21.10.05, A, leading Division 1 at the OFMDFM, informed the Secretary of State that Mr Paisley and another DUP MP had been alerted about the forthcoming announcement. Nothing was said about other parties. A briefing note for the occasion of the announcement was prepared by A including how to deal with possible questions about the involvement of the DUP. Nothing was to be said about confidence-building measures, the DUP's nomination(s) or the fact that only one person had been interviewed. It included the following:-

**Q Is the appointment of an Interim Commissioner not simply a concession to the DUP?**

A I know that the DUP have campaigned for a Commissioner but so too have other parties. I have been persuaded of these arguments (as was my predecessor Paul Murphy). There are some divergences of view, but the reality is that there are many people from differing political standpoints who believe that having a Commissioner will help create a greater focus on the needs of the victims of the troubles.

**Q Why not have a more transparent process for appointment? Why Mrs McDougall?**

A I have to emphasise that this is an interim appointment to carry out some key tasks. These are key issues which those who work with victims and

survivors wish to have examined. Victims and survivors groups and individuals want to have someone who will look at their needs. I wish to have work underway as soon as practicable in relation to some key areas of concern to them. When it comes to the appointment of a Commissioner on a more permanent basis we will of course engage in appropriate formal appointments processes.

**Q Why appoint Mrs McDougall?**

A A number of individuals were considered. Mrs McDougall was both willing and has the necessary ability and commitment to undertake the task.

60. This document seems at first glance to show a clear intention to avoid revealing the involvement of the DUP/Dr Paisley in the process of appointing Mrs McDougall. Similar innocuous answers were prepared for Mrs McDougall herself. In fact, as appears below, Mr A was at this stage unaware of the DUP involvement in the process of appointment.

61. On 24.10.05, Mrs McDougall's appointment was announced. Mr Hamilton immediately prepared an important "Note for the Record". This Note gave a brief history of the background to the appointment and listed 16 candidates "considered by OFMDFM and NIO colleagues and myself". The Note says that "following my personal consideration of each candidate, I was of the view that the following two candidates met all the criteria and would be, by far, the strongest in respect of those criteria i.e. Candidate YY and Mrs Bertha McDougall." It records that following discussion with the Secretary of State "Jonathan Phillips and I met Mrs McDougall ...". It says that after discussion in which Mrs McDougall confirmed that she had no affiliation with the DUP, they advised the Secretary of State that in their view Mrs McDougall had the range of experience, knowledge and ability to undertake the role satisfactorily. Though her appointment might attract some criticism from Nationalists, she seemed likely to be able to handle such criticism sensitively. Neither that Note nor Mr Hamilton's earlier submission of 12.10.05 to the Secretary of State made any reference to the following facts:

- (1) the DUP/Dr Paisley had been invited to nominate a candidate for the post of IVC;
- (2) Mrs McDougall had then been nominated by the DUP/Dr Paisley;

- (3) none of the other candidates (including Candidate YY) had been interviewed;
- (4) the only candidate whom the Secretary of State wished to be interviewed was Mrs McDougall, and that is what happened;
- (5) though the Note records that the shortlist of two were the strongest by far in respect of the job criteria, no attempt had been made to compare Mrs McDougall's personal merits with those of any other candidate; and
- (6) the exercise of appointing an IVC, seeking nominations from the DUP and appointing Mrs McDougall was for the political purpose of undertaking confidence-building measures towards the DUP.

The Note for the Record was copied to G, B and A (all in OFMDFM).

62. On the day of the appointment Jeffrey Donaldson MP was reported as saying that the DUP had been consulted. Trouble was not far behind.
63. On the same day, an article appeared in The Irish News quoting Patricia Lewsley of the Social Democratic and Labour Party ("the SDLP") criticising the idea of a VC and saying that the Government should not be consulting or seeking the approval of one political party only for the appointment.
64. On the 26.10.05, Mrs Lewsley's website spelt out her complaints, saying that the NIO appeared "to have broken every rule in the book". In particular, the post was not advertised, only the DUP was consulted to the exclusion of others, and that party was said to have "approved" the appointment. She complained of inequality and unfairness.
65. On the same day she wrote to the Secretary of State making her complaints. The reply that was drafted neither confirmed nor denied that the DUP had been consulted, alone or otherwise.
66. Other complaints followed. Eileen Bell MLA (Member of the Legislative Assembly of Northern Ireland) complained that she had heard nothing of an interim appointment, and there had been no consultation. Councillor Sir Reg Empey, European Leader of the Ulster Unionist Party, said that the DUP knew of the identity of the new Commissioner before anyone else and were claiming to have approved the appointment.

67. Against this background, KW's FoI request of 28.11.05 was received. Within a few days (6.12.05) the Belfast Telegraph reported that "Troubles widows may face Court battles" over the appointment of the IVC, and, quoting the DUP as having supported Mrs McDougall's selection, asserted that other parties regarded the appointment as a political handout to the DUP. Mrs Downes was quoted as saying that the appointment was politically motivated. It should have been clear that the FoI request which followed was seeking ammunition for legal proceedings, and that any answer had to be well-informed, prepared with care and in accordance with the facts.

### **The FoI Request (28.11.05)**

68. On 28.11.05, KW addressed their request to Secretary of State as follows:-

Secretary of State for Northern Ireland  
Private Office  
Northern Ireland Office  
Stormont Castle  
Belfast  
BT4 3TT

69. KW referred to the appointment of Mrs McDougall which had been announced on 24.10.05. They said that their client Mrs Downes had particular concerns about the lack of transparency and consultation in the process leading up to Mrs McDougall's appointment and asked for the following information:

- (a) What was the legal basis for the post of Interim Victims' Commissioner?
- (b) How was the post to which Mrs McDougall has now been appointed advertised, if at all?
- (c) If the post was advertised in any manner, how many applications/nominations were received for the post?
- (d) If it was not advertised how did Mrs McDougall become aware/how was she made aware of the vacancy i.e. was she approached or nominated? If she was so approached or nominated, by whom this was done?

The post was not advertised. So (d) was the crucial question for present purposes.

70. The letter also required information on the nature and extent of any consultation carried out in relation to the following:
- (a) the need for a Victims' Commissioner;
  - (b) the need for an Interim Victims' Commissioner;
  - (c) the remit and role of a Victims' Commissioner;
  - (d) the remit and role of an Interim Victims' Commissioner;
  - (e) the criteria for appointment of a Victims' Commissioner;
  - (f) the criteria for appointment of an Interim Victims' Commissioner;
  - (g) the appointment process for a Victims' Commissioner;
  - (h) the appointment process for an Interim Victims' Commissioner; and
  - (i) the actual appointment of the Interim Victims' Commissioner.
71. KW also sought information on and documentation associated with section 75 "screening" exercises carried out to avoid discrimination<sup>2</sup> and asked whether or not an Equality Impact Assessment had been carried out in relation to the appointment of the IVC or any aspect of Government's "victims policy". They asked whether Mrs McDougall's appointment had been made in accordance with best practice in the area of public appointments and whether the appointment was overseen by the Commissioner for Public Appointments. They asked for a reply by 5.12.05.
72. The policy in both the NIO and the OFMDFM, at that time, was (in accordance with the Fol Act) to respond to requests (subject to any exemptions which might be relied upon) within 20 working days of receipt of the request. In this case that meant by 5.1.06.
73. Receipt of the request was acknowledged by the Secretary of State's Private Office on 29.11.05 and the letter was passed to the OFMDFM to be dealt with.
74. On 5 and 6.12.05, discussions took place within the OFMDFM's Division 1 about the letter. They involved B, P, Q, R, S and T. B confirmed that they held relevant papers, and although the letter sought commentary on specific matters as well as

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<sup>2</sup> The Northern Ireland Act 1998, section 75: Statutory duty on public authorities. This section requires a public authority, in carrying out its functions relating to Northern Ireland, to have due regard to the need to promote equality of opportunity between (a) persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; (b) between men and women generally; (c) between persons with a disability and persons without; and (d) between persons with dependants and persons without.

information already held, they agreed that they should nevertheless treat it under the Fol regime and respond accordingly. It was also suggested that the NIO should be checked for papers.

75. On 8.12.05, Mr T e-mailed some concerns he had regarding the handling of the request to P. He said:

*“Could we speak about this. Dealing with this under the Fol presents various issues. This request has been made to the Secretary of State (at the NIO) who is responsible for various separately scheduled public authorities which may be holding relevant information, including the NIO and OFMDFM.*

*I think we need to determine at the outset who in Fol terms this request has been made to and who is holding the relevant information. I appreciate that the customer/Applicant is normally only interested in having the information made available but it is unlikely that all of the relevant information would be made available in this case. If we include NIO information in our deliberations then I feel it would complicate matters further – what control would we have, for example, over information which was being provided. One of my main concerns is around how we will be seen to have handled this request, procedurally and otherwise, if it gets to Internal Review (which could complicate matters for yourself) and then to the Information Commissioner there is every chance that this will happen if information is withheld.*

*I also appreciate that the issues involved are of much greater significance than (sic) departmental Fol procedures but my concern really relates to further down the line if we get into a complaints scenario. If all the pertinent information was likely to be released, then this wouldn't be an issue but it's difficult to envisage that happening, particularly in relation to all of the relevant information held by the NIO. If the NIO give us some information, and withhold some, how should we deal with that.*

*Perhaps Fol is not the route to respond to this request. Initially though, perhaps we need to determine how a (Fol) request that is made to a Minister with responsibility for two or more public authorities which are holding relevant information should be dealt with. Perhaps...R... could help.*

There are some other related issues which I would like to explore with you.”

76. On 9.12.05, a letter was sent to KW to say that their letter had been passed to the OFMDFM for dealing with under the Fol legislation. On 12.12.05, Mr T met P to discuss his concerns. Mr P agreed that the best way forward would be for both the NIO and OFMDFM to deal with the request for information under the Fol regime and then both parties should meet to discuss handling issues, and what was intended to be released/withheld etc. prior to the issue of the responses.
77. In pursuance of this strategy, on 13.12.05 Mr T spoke to U, as a person responsible for handling an FOI request such as this at the NIO and then sent a confirmatory e-mail to her as follows:

*“As discussed please see the request below from Kevin Winters regarding the information on the Interim Victims’ Commissioner. As we agreed, as this was addressed to the Secretary of State (at the NIO) it is appropriate that both NIO and OFMDFM log and deal with this as a Fol request.*

*For information I have also attached the acknowledgement letter which we issued to the Applicant and a recent relevant newspaper article. Please note that the request was received in OFMDFM on 5 December and in the NIO originally on 29 November.*

*It would also probably be beneficial to meet to discuss the handling of this request perhaps as soon as we have both identified and collated the relevant information and made some (interim) decisions on what we propose to release/withhold. Look forward to hearing from you.”*

78. This e-mail was copied within the OFMDFM to B, S, P, and in the OFMDFM legal section, Q. The “newspaper article” was the one from the Belfast Telegraph of 6.12.05 threatening litigation on behalf of Mrs Downes.
79. After the e-mail of 13.12.05, Mr T of the OFMDFM telephoned the NIO on several occasions between 19 and 23.12.05 to ascertain the position, seeking in particular a meeting to discuss the information which the two Departments proposed to release. He was told that the NIO had not identified information relevant to the request and therefore was not in a position to meet to discuss it. Ms U’s

recollection is that it was arranged that OFMDFM would send their response to the NIO in draft before dispatch. That is not Mr T's recollection. I cannot be sure who is right about that but I do not consider it would have made any difference if a draft had been sent to the NIO. Neither Ms U's e-mails seeking to find a 'home' for the request within the NIO (see paras 110-112 below) nor the circulation of the OFMDFM's actual response produced any reaction within the NIO; and I do not think that the circulation of a draft, even if feasible, would have done so. Mr T told me that he rang the NIO again on 3 and 4.1.06 to ascertain progress but the position remained unchanged. He says that he informed the NIO that the OFMDFM intended to meet its statutory deadline of responding to the request by 5.1.06. The NIO view at that stage was that the OFMDFM should proceed and send a copy of the reply to the NIO when it had been sent to the applicant.

80. On 6.1.06 T duly forwarded to Ms U a copy of the OFMDFM's final reply dated 5.1.06.

81. I now turn to what the OFMDFM and the NIO each did to deal with the request themselves.

### **The OFMDFM Response (5.1.06)**

82. Various drafts (11 in total, all but the initial one of which survive) of a response were then prepared within the OFMDFM by officials conscious of the deadline of 5.1.06 which they were anxious to meet. S sent an initial and then a revised draft to Mr T on 22.12.05. Comments on that draft were then provided by Q, and T, and a revised draft was circulated on 29.12.05 by V of Division 1. By this time Q had noticed that the drafts did not respond to the question about consultation on the need for an IVC or on the appointment process for the actual appointment. She noted that she presumed there was none. The further drafts said that there had been no consultation. Further drafts were produced by W, Q and B. None of these drafts made any mention of DUP involvement in the process of the appointment of Mrs McDougall or responded to question (d) about the nomination of or approach to Mrs McDougall. The draft sent to Mr Hamilton by Mr V "because of his interest in the topic", said that a list of candidates had been prepared by senior officials from the OFMDFM and the NIO and "Mrs McDougall was considered by Ministers as the best candidate for the interim position". Mr Hamilton received the draft on the afternoon of 4.1.06. He looked at it in the early afternoon of the following day

and made one factual amendment to it to reflect the fact that Candidate YY had been considered for the position of IVC but had not been interviewed by him for that post.

83. The draft submitted to Mr Hamilton for approval expressly quoted the following question from the KW letter:

*“(d) If it was not advertised how did Mrs McDougall become aware/how was she made aware of the vacancy i.e. was she approached or nominated. If she was so approached or nominated by whom this was done.”*

84. To that question an answer was drafted by officials as follows:

*“Because the post is an “interim” position for the purpose of having the post holder carry out some advanced preparatory work as early as possible a list of potential candidates was prepared by senior officials from the Office of the First Minister and Deputy First Minister and the Northern Ireland Office. Mrs McDougall was considered by Ministers as the best candidate for the interim position.”*

Mr Hamilton did not amend this answer in any way.

85. Under the heading of “the actual appointment of the interim victims’ commissioner” the draft submitted to Mr Hamilton continued: “Both candidates were interviewed by senior officials from both the above Departments and subsequently it was recommended to the Secretary of State that Mrs McDougall be appointed as Interim Victims’ Commissioner”. Mr Hamilton amended that so that it read “Mrs McDougall was considered the most suitable candidate, had discussions with senior officials from both the above Departments and subsequently it was recommended to the Secretary of State that Mrs McDougall be appointed as Interim Victims’ Commissioner.” This reflected the fact that Candidate YY had been considered for the position of IVC but had not been interviewed by him for that post.

86. On the same day (5.1.06) Q checked with V:

*“Can I take it that in Fol terms, you are not withholding any information?”*

87. By sending the draft to Mr Hamilton for his approval, Mr V can be taken to have intended that no information should be withheld.
88. A copy of the response in its final form as amended by Mr Hamilton was circulated to Mr Hamilton himself and to others in the OFMDFM, and to the NIO. The response in this form was dispatched to KW. Nothing was said to KW about any future response from the NIO. In spite of the numerous officials involved in dealing with the drafts of the Fol response before it was sent to Mr Hamilton, I am satisfied that none of them had been involved in or knew of the invitation to the DUP to nominate candidate(s) for the post of IVC, the nominations made by the DUP, or the process by which Mrs McDougall came to be interviewed by Messrs Phillips and Hamilton and appointed by the Secretary of State, except to the very limited extent that these matters were recorded in Mr Hamilton’s Note for the Record. That document was the basis upon which officials attempted to respond to question (d) in the Fol request for the purposes of submitting a draft to Mr Hamilton. These officials had not seen nor were they aware of the contents of Dr Paisley’s letter of 27.9.05, a copy of which was held in a confidential file in Mr Hamilton’s office. The letter was not available to other officials in the OFMDFM without Mr Hamilton’s permission.

### **Girvan J’s Criticisms of the Fol Response**

89. As recorded above (para 5), Girvan J considered that the letter was “evasive, misleading, and in certain respects clearly wrong. Since the letter was clearly carefully drafted having regard to the highly political nature of the issues I am forced to the conclusion that this was no mere drafting error... For some reason it was decided within Government that incorrect and misleading information would be supplied”.
90. Girvan J’s criticism was specifically in three respects:
- (1) The response to question (d), which in his view evaded revealing the DUP’s source of Mrs McDougall’s candidature, and instead misleadingly implied that her name had simply been put on a list compiled by officials;

- (2) The misleading claims that Ministers considered Mrs McDougall to be “the best candidate for the interim position”, and that “Mrs Mc Dougall was considered the most suitable candidate”;
- (3) The “false” claims that “no consultation was considered necessary” and “none took place”.

91. Girvan J said (para 5 of his judgment of 20.11.06, Annex B):

*“The letter of 5 January 2006 was in response to a solicitor’s letter written in the context of a likely judicial review challenge. If incorrect or misleading information was deliberately given to put the applicant on a false trail then prima facie that conduct would appear to fall within the concept of perverting the course of justice. If in the course of the substantive judicial review, there was a deliberate attempt to mislead the Court the same would be true. The letter... had the tendency to mislead. The question which arises in this case is whether there was a deliberate attempt to mislead and if so by whom.”*

92. In my view there can be no serious doubt that Girvan J was correct in his first two specific criticisms of the letter. I will deal with these below.

93. On the third criticism, I take with respect a different view, though it is not surprising that in the context of the other matters Girvan J concluded as he did. The Fol request had asked wide-ranging questions about consultation concerning the VC and IVC posts (see para 70 above). These were interpreted by numerous officials in the OFMDFM including the legal adviser Q as meaning public consultation. Such consultation would be by way of the normal consultative process with a wide range of consultees, as had already occurred before July 2005 in relation to the issue of “victims” and the post of VC, and this consultation was referred to elsewhere in the letter. In my view, this interpretation, which was later also thought acceptable by the NIO, was not unreasonable. In adopting it, there was in my view no intention to mislead on the part of the officials concerned. In particular those OFMDFM officials other than Mr Hamilton could not have had an intention to conceal the discussions with the DUP by denying that there was consultation with the DUP because they were ignorant of those discussions until months after the

letter was dispatched. In Mr Hamilton's case, I accept that like the other OFMDFM officials he considered that the questions referred to public consultation.

94. The response to question (d) is a different matter. The draft submitted to Mr Hamilton was the work product of various officials who had no knowledge of the source of Mrs McDougall's candidature and the process by which she was appointed except that which was contained in Mr Hamilton's Note for the Record and the general file of the Department. What Mr Hamilton received in draft for his consideration had been produced by officials in good faith and on the basis of that information available to them at the time.
  
95. In considering Mr Hamilton's responsibility for the terms of the reply to the Fol request, I have taken into account on this, as on other matters, the points which he has made both in his written statement and when I saw him, as well his long and distinguished career as a Civil Servant. He firmly denied any attempt to mislead and says he skim-read the draft letter, having limited time in which to deal with it, and so failed to correct the draft so as to deal with question (d) appropriately. Nevertheless I have concluded that, whilst I cannot entirely rule out the alternative suggested by Mr Hamilton, he did, in all probability, decide not at that stage to reveal the DUP's nomination of Mrs McDougall and thus to obscure the process of selection. Mr Hamilton must in my view take the responsibility for the misleading content of that response and the result was rightly described in Girvan J's word as "evasive". Since, in my view, Mr Hamilton intended to respond as he did but only on the basis that the question would be addressed by the NIO in that department's response, the evasion, though unacceptable, was of a limited character.
  
96. My reasons for this conclusion include the following. In preparing his Note for the Record, Mr Hamilton had carefully ensured that the political aspects of Mrs McDougall's appointment and in particular the DUP/Dr Paisley nomination were not part of the "audit trail" (as he described it to me), and that secrecy was protected by ensuring that Dr Paisley's nomination letter of 27.9.05 was kept in a confidential file in his Private Office. When subsequently faced with the draft Fol response, I cannot accept that an experienced and able official such as Mr Hamilton failed to appreciate the political significance, and indeed sensitivity, of questions about how Mrs McDougall became a candidate. He had less than 3 months earlier been personally and significantly involved in the decision-making process at the highest level, and the change he meticulously made to the draft to correct the statement

that two candidates were interviewed does not reflect a casual, superficial, or time-limited exercise when dealing with the FoI request.

97. I consider that Mr Hamilton's approach to that request, as it had been to his Note for the Record, and was later to be to the drafting of his proposed affidavit in the judicial review proceedings (see below), was driven both by the important and well-recognised division of roles between the NIO and the OFMDFM, and by Mr Hamilton's view of how that division should be reflected in what he did. Mr Hamilton's view seems to have been that responsibility for disseminating sensitive information with a political dimension was primarily for the NIO, and not the OFMDFM. His Department's role was to give effect to political decisions: it was primarily for the NIO to deal with and, if appropriate and necessary, to reveal the delicate aspects of political activity including the Government's dealings with political parties in Northern Ireland. Mr Hamilton himself seems not to have sought nor to have received sensitive political information except to such extent as appeared necessary for discharging the function of his own Department. Although aware of the DUP nominations he was, for example, until June or July 2006 unaware that those nominations were the result of express invitations to the DUP to make them. Nor did he enquire of Mr Phillips or anyone else about how they came to be made. He attempted to preserve his own and his Department's role as a non-political one. This was not in itself improper, but it led, when faced with questions which crossed into the political arena, to an attempt to maintain a somewhat artificial and unreal distinction between the political and the non-political process, whilst at the same time carefully avoiding saying anything which Mr Hamilton knew to be untrue.
98. This was, in my view, an unacceptable approach to a request under the FoI Act. It should have been possible to ensure a response (or responses) coordinated between the NIO and the OFMDFM which was accurate and full, subject only to any statutory exemptions which might legitimately be relied upon.
99. Mr Hamilton doubtless expected that the NIO would respond separately to the FoI request in a way which dealt satisfactorily with the awkward questions, and indeed would do so from a greater knowledge of the contacts between the Secretary of State and his officials on the one hand and the DUP on the other. This was a justified expectation given the arrangements already in place between the two Departments (see para 77 above), but neither Mr Hamilton nor his Department

ensured that such coordination took place and a response (or responses) was then made which satisfied the statutory obligations of both Departments. It is also important to say that on 24.1.06 Mr Hamilton expressly told Mr Phillips of the request (Mr Phillips having been unaware personally of the request up to that point) and pointed out that the NIO had not yet responded to it. This conversation, which may have been prompted by the commencement of the litigation, does suggest that Mr Hamilton was not unwilling for the truth to be revealed, but felt that it should not come from him. If the NIO had then or even somewhat later responded in frank and accurate terms, the outcome would probably have been significantly different whatever the Court eventually decided about the lawfulness or otherwise of Mrs McDougall's appointment. I should add that whilst Mr Hamilton does in my view bear the responsibility for deciding to provide a misleading and inappropriate answer to the FoI request, he could not have expected or intended when doing so that the response would have the very significant impact which it later had on the process of the litigation (which had not then been started) or upon its outcome.

100. I have also considered whether the letter of 5.1.06 was intended by Mr Hamilton in the Girvan J's words "in the context of a likely judicial review challenge... to put the applicant on a false trail...". In other words whether it was intended to pervert the course of justice.
101. Mr Hamilton did not in my view appreciate at the time of Mrs McDougall's appointment that there were consequent risks of litigation and so far as he knew (and indeed so far as I have been able to discover) that did not occur to anyone else involved. He had personally – as opposed to others within his department – never been responsible for briefing or preparing material for judicial review proceedings, and his own conduct had never been the subject of such proceedings. He had no legal training or background. Mr Hamilton told me that he would normally see all the main local papers on a daily basis but he had no recollection of seeing the article of 6.12.06 in the Belfast Telegraph.
102. Mr Hamilton was in fact unaware of the FoI request (which came to his department on 5.12.05) at the time of that article, and indeed remained unaware of the request so far as I can tell until a month later when the draft response was sent to him for approval.

103. Some within his department had seen the possibility of litigation linked to the request. For instance, V spoke of “the possibility I put it no higher than that, for some form of legal action”, whilst Q said firmly that it “is clearly a pre-judicial review fishing exercise”, and Mr T had linked it specifically with the Belfast Telegraph article (see paras 77 and 78 above).
104. When the draft response was sent to Mr Hamilton, however nothing was said to him about the possibility of litigation; and I consider that on balance I should accept his statement that he did not link the Fol request with future legal action and he was not intending when he approved the Fol response to influence any litigation which might follow. If he had seen the article in the Belfast Telegraph on 6.12.05 (and this is not entirely clear) it was not in my view in his mind a month later when dealing with the Fol request. Others in his position might have been more perceptive, but as Girvan J pointed out, the key question is one of intention.
105. If Mr Hamilton intended to set a false trail, and in particular to avoid disclosing the political elements of Mrs McDougall’s appointment, it is odd to say the least that he reminded Mr Phillips of the need for the NIO to respond to the request, and indeed did so within a few days of the litigation being started. He had no reason to suppose that the NIO would continue to fail to answer the request.
106. There is also the question of motive. Whilst I conclude as explained above that Mr Hamilton would not wish to be the one to disclose the delicate political matters involved, it does not follow that he intended ultimately to take responsibility for the extent of what was revealed to Mrs Downes and indeed to a Court. On the whole, I am not satisfied even on a balance of probabilities that the facts would justify concluding that Mr Hamilton intended to obstruct or pervert the course of justice when dealing with the Fol request.

### **The Secretary of State**

107. The Secretary of State was not aware of the Fol request until many weeks later and indeed had no part whatever in the compilation of the response of 5.1.06. There is in my view no basis for holding the Secretary of State responsible for the contents of the Fol response or for the effect which it had on the litigation.

## **The NIO's Failure to Respond**

108. The NIO made no response whatever to the Fol request during this period (or indeed later) in spite of the fact that it had quite rightly been agreed with the OFMDFM that the NIO would log the request and deal with it. A number of factors contributed to this. One official, U, led a team of three, responsible for handling Fol requests. She dealt with the request from the outset. Ms U had a relatively heavy workload and her team was understaffed. She was effectively working alone on Fol matters. During the relevant period she was dealing with 24 active cases as well as other matters. Once the request was logged, her role was to allocate it to the appropriate division, and it would be the responsibility of that division to process it (and if appropriate to do so in conjunction with other relevant divisions within the NIO).
109. The request was received from Mr T at the OFMDFM by Ms U on 14.12.05 after her conversation on the previous day (see para 77 above). It was not logged until 22.12.05, which Ms U says was the earliest opportunity given her other commitments.
110. It was not until that date that U at the NIO took any other action on the request. She forwarded it to X who was the Head of Division 3, as she thought that might be the appropriate division given its responsibility for some work in relation to victims. Mr X promptly replied saying it was not for his division and suggesting that U should contact Y who used to head Division 4 which existed within the NIO until 28.1.05 (after that date the work of the Unit was transferred in its entirety to OFMDFM). U then e-mailed Y on the same day asking if she could help with the request. Y replied immediately informing her that she held no information and that any information that Division 4 had held had either been transferred to Division 1 within the OFMDFM or to the file store in Millbank. She suggested that senior personnel within the NIO's political directorate might have been consulted over Mrs McDougall's appointment.
111. Accordingly, on the same day U sent important e-mails to three senior officials. She e-mailed Mr O, Z and M sending them a copy of the KW request. She also attached a screenshot of a search carried out on the EDRMS (the Electronic Document and Records Management System) using the phrase "Victims' Commissioner". She said:

*“Dear all,*

*Please see e-mail exchanges below regarding a FOI request from Kevin Winters in relation to Bertha McDougall’s appointment as interim Victims Commissioner – request is attached. I have carried out a search on TRIM on “Victims Commissioner” and have attached a copy of the results (apologies the text is quite small). I would be really grateful if you could let me know if we are likely to hold a lot of material on this request. Am happy to view any documents in relation to exemptions, etc. OFMDFM will send a copy of their draft response.*

*Many Thanks,*

*U”*

112. M replied on 23.12.05 by e-mail that he did not hold any information; any information he had held would have been read and deleted. Neither O nor Z responded in any way to the e-mail. U then went on leave from the evening of that day until 4.1.06 and no reminder was sent to either O or Z. Ms U says that she was under considerable pressure of work on her return, and but for that might well have sent a reminder to Mr O and Ms Z. During that period a further e-mail was sent from Y on 29.12.05 copied to Z and O amongst others stating:

*“There will indeed be papers in Division 4’s files. There may even have been a dedicated file: I can’t be sure as the earlier policy was debated and set before my time in Division 4. But as I saw, the issue resurfaced from time to time.”*

This produced no response or action on the part of the recipients. No response was sent by the NIO by 5.1.06 and nothing further transpired on this until 24.1.06. I must now consider the responsibility for the failure of the NIO to respond during this period.

### **Mr M**

113. Mr M had been since early 2002 a senior official of the NIO in Belfast whose primary function was to handle the relationship with the Irish Government whilst maintaining a keen awareness of events on the ground in Northern Ireland across a very broad range of issues. The NIO Division 4 responsible for victims issues in

the NIO was, until January 2005 when it was disbanded, part of his area. Thereafter the responsibility for victims issues lay with Division 1 in the OFMDFM, though M continued to be copied in on correspondence about victims related matters which might have political ramifications.

114. He was sent a copy of the e-mail of 20.7.05 from F to A and C. This raised the possibility of asking the DUP informally to suggest a name or two for appointment as IVC and that Mr Hain might mention this to the DUP. Mr M says he has no recollection of reading this. He did comment on the submission to Ministers of 29.7.05 but says he had no further active part though he continued to receive e-mails and other documents up to Mrs McDougall's appointment in October 2005, including O's note of his meeting with DUP representatives on 11.8.05 and Jonathan Phillips' note of 26.8.05 which made plain to him the wish to accommodate the DUP, provided the appointee was suitable in terms of experience, personal qualities and cross-community acceptability. He knew that the DUP had nominated one person who subsequently withdrew. He received a copy of the note of the telephone conversation between the Secretary of State and Dr Paisley on 27.9.05 as well as Dr Paisley's nomination letter of that date.
115. Mr M was asked on 29.9.05 by Jonathan Phillips to "give any indications of Mrs McDougall's personal qualities and how she might be received". Mr M did not know Mrs McDougall and gave no reply to this, nor did he attend the meeting between Jonathan Phillips and Nigel Hamilton to discuss Mrs McDougall's appointment. Mr M says that he assumed candidates other than Mrs McDougall would have been interviewed.
116. U's e-mail of 22.12.05 to Mr M (see para 111 above) included the previous response from Y explaining that Mrs McDougall's appointment was handled by the OFMDFM, that senior personnel within the NIO's political directorate were consulted, and that there might be papers/e-mails "in our system". It attached the KW FoI request and the rather uninformative response to a TRIM search.
117. Mr M's response to all this was brief. He said Y's reply "covered his interests too". He added that "although I attended a couple of VCR meetings on the subject I had no papers of my own and my copies of the meeting record were deleted after I read them".

118. Mr M says he took Ms U's request as a request for any documents such as e-mails including deleted items which were still retrievable and registered files that were held by him personally or by his Private Office: not as a request for a narrative about Mrs McDougall's appointment.
119. He says he was "content to carry out a search in order to assist" though the request was not a strict application of the NIO's policy which would have involved allocation to a lead division (and he was not himself the head of a division).
120. In fact Mr M did not carry out a full search at that time. He checked his inbox (the record of e-mails received) and recently deleted items folder, and his personal secretary did the same. He apparently found nothing since his practice was to delete e-mails every two weeks or so.
121. He says:
- "I understood it to be an informal request for assistance, and, in particular, a request to be informed as to whether I had any material relating to the request. If I had been asked to carry out a full FoI search of both the documents I held personally and the documents that were held by units for which I was responsible then I could and would have done this."*
122. Mr M did subsequently in March 2006, when requested by E to do so, promptly cause such a search to be carried out and accepts that, if he had done so earlier, it would probably have revealed the same documents as were revealed that month. These included Dr Paisley's letter of 27.9.05.
123. Mr M's approach to Ms U's request was influenced by various factors. First, he was replying on his last day in the office before the Christmas break. Secondly, he says any victims related documents would normally have been deleted and destroyed shortly after he had read them, so the negative result of the search he carried out was unsurprising. Thirdly, he was reassured by Y's negative response after apparently giving the matter thorough consideration. Like other senior officials, he had many other significant pressures on his time. He continues to regard his response to Ms U as an appropriate one in the circumstances.

124. I regret that I cannot agree. It was or should have been apparent to Mr M that the KW request was one that required careful handling, that the facts relating to Mrs McDougall's appointment had significant political importance and might well not be known widely in the NIO, and that there was a legal obligation to respond accurately within a statutory time limit to the probing questions about this appointment. A relatively junior member of staff who plainly did not know where to look for information and documents was struggling to deal with the request. She was seeking his admittedly informal assistance on a subject on which he could have guided her; indeed with a full search Mr M could have provided her with important documents such as emerged in March 2006. His response provided no effective help.
125. Mr M says that he had deleted Dr Paisley's letter when he responded to the e-mail, and cannot now recall whether he specifically addressed his mind to that letter. As he says however, he was well aware that the DUP had been asked to provide a nomination and that Dr Paisley had nominated Mrs McDougall. This seems to me to emphasise that the response which he gave prevented at the least Ms U from pursuing a line of enquiry to which Mr M could and should in the circumstances have helped to direct her.
126. Though he received on 9.1.06 a copy of the OFMDFM's response, and took no action as a result, I consider that that is understandable, as he was not asked to take any action at that stage.
127. I have also considered whether what I regard as an inadequate response to Ms U's enquiry was deliberately designed to prevent the facts emerging. I do not consider that to be the case. The response was too casual but there is nothing to suggest it was more than that. I do however consider that Mr M's response was one of a number of factors, though not one of the main ones, which contributed to a limited extent to what happened later.

#### **Mr O**

128. Mr O's role was to support the Political Director (Jonathan Phillips) in advising Ministers on the political process in Northern Ireland.

129. The IVC appointment was, he says, primarily an OFMDFM issue, but both he and Jonathan Phillips were involved, with Mr Phillips handling it and O being sufficiently aware of the facts to enable him to take it forward in Mr Phillips' absence. Mr O had significantly more involvement in the events leading to Mrs McDougall's appointment and in particular in relation to the DUP involvement than Mr M. Mr O stresses that the principal effort of the NIO was directed at more important issues such as ending IRA activity (announced in July 2005) and the decommissioning of IRA weapons as well as managing unionism during this period. He also refers to details of his busy schedule and travel between Belfast, London and Dublin. He explains that he took a decision to read only those e-mails of direct and pressing relevance to the political process, but he also stresses the political importance of confidence building measures such as the appointment of a VC to the Unionist community.
130. Mr O attended the meeting with the Secretary of State on 11.7.05 and two meetings involving the DUP, one with the Prime Minister and a delegation led by Dr Paisley on 4.8.05, and a follow-up one with two DUP MPs on 11.8.05. His notes were copied only to those who needed to know inside and outside the NIO due to the "extreme political sensitivity" of other aspects of the notes.
131. It was at the meeting with the DUP MPs on 11.8.05 that Mr O floated the idea of an IVC and told them that the Secretary of State was keen to hear their suggestions of realistic, credible candidates who would command confidence across the community. Mr O was informed of the DUP's first suggestion, the one who then withdrew. Later he learnt of Mrs McDougall's nomination (probably on seeing Dr Paisley's letter of 27.9.05 with the e-mail from the Secretary of State's private office). He thought this nomination well worth following up and as he says his e-mail of 20.9.05 to F shows that he was broadly aware of what was going on. It says: "Jonathan and Nigel are meeting the DUP's nominee privately, possibly this week. They will then report back and Peter [Hain] will have to decide whether to go with this name as the interim appointment. You're right that it will have to move quickly once he has decided."
132. Mr O believes that he had no further involvement in the appointment thereafter.
133. Ms U's e-mail of 22.12.05 arrived on the evening of that day which was Mr O's last working day before Christmas, and by then he was at Heathrow catching the 17:35

flight to Belfast. He returned to work on 5.1.06 but flew to London that day and would have been engaged in preparations for a meeting at Chequers that afternoon. He has no recollection of seeing Ms U's e-mail and says that if he had, he would probably have thought he had nothing to contribute to a "routine Fol trawl addressed to a number of people".

134. I infer that Ms U's e-mail did not fit into his definition of an e-mail of direct and pressing relevance to the political process and so probably he did not read it.
135. It is true that Ms U's e-mail strictly asked only if the NIO was likely to hold a lot of material on the Fol request. However, that broad and informal inquiry related to something of which Mr O had significant personal knowledge, and was triggered by a solicitor's letter copied to Mr O which plainly raised sensitive political issues about matters he had personally dealt with. Indeed, in connection with the DUP involvement, his own role had been greater than that of anyone else. It is also true that Mr O was not responsible for a division, but it should have been obvious that Ms U's request was aimed at finding the appropriate 'home' for dealing with the request, and if as seems to be the case she should have been directed to C of Division 2, that could and should have been Mr O's response.
136. Nor has he any memory of seeing the OFMDFM's reply of 5.1.06 which was sent to him on 9.1.06. As he was not asked to do anything in relation to that reply, I consider that it is understandable that it made no impact and that he took no action at that stage.
137. Notification on 25.1.06 of the judicial review proceedings did cause Mr O to e-mail C to the effect that this was largely an OFMDFM issue but "there was involvement mostly of [Jonathan Phillips], C and me which may be relevant". On 6.3.06, in response to Mr E's enquiry, he did cause a full Fol search to be initiated by his office, but little if anything of significance emerged.
138. The failure of Mr O to deal with or respond to Ms U's request of 12.12.05 was one of the factors, though not one of the main ones, which contributed to a limited extent to what happened later. Mr O understandably emphasises the mass of e-mails which came his way and the need to prioritise his time, as well as the brief period between 22.12.05 and 6.1.06 when he was at work due to holidays.

139. But Mr O does not suggest that his inactivity depended on a time limit nor was that the case. Ms U's e-mail could have been answered after 6.1.06 if doing so earlier was not practicable. I consider it is probable that the matter was simply regarded by Mr O as comparatively unimportant and was simply put aside and ignored. I do not, however, consider that this was a deliberate obfuscation. If the request had been dealt with, the documents which were later produced would have been available somewhat earlier than was the case and a response might well have been sent by the NIO albeit belatedly. As will be seen however, even when those documents did eventually surface, the NIO failed to respond to the FoI request. Clearly by this time, Mr O's error, like that of Mr M, had been overtaken by other events.

### **Ms Z**

140. Ms Z is a director of the NIO. Although she was a recipient of U's e-mail of 22.12.05, she had joined the NIO only recently, and played no part in the nomination, selection or appointment of Mrs McDougall. All of this occurred before her own arrival. She also received on 9.1.06 a copy of the OFMDFM's response but had no papers relating to the process which it addressed. In these circumstances, she understandably made no response to U's request or commented on the OFMDFM's response. Nor did she have any role in the litigation which followed.

### **Jonathan Phillips**

141. Mr Phillips was not aware of the FoI request until 24.1.06 when it was drawn to his attention by Mr Hamilton who pointed out that the NIO had not responded. He promptly arranged for the information in his office to be sent to U the following day.

### **Mr C**

142. Mr C was not aware of the FoI request until 31.1.06, although his division (Division 2) was indeed the appropriate one to deal with the FoI request.

## **Ms U**

143. U had no personal knowledge of the matters which were the subject of the Fol request. For the reasons indicated above, I do not consider that she can be held responsible for the failure of her attempts to get the Fol request dealt with, and although there were some delays in dealing with the matter, those delays were not culpable (see paras 108 and 109 above).

## **Summary**

144. The NIO failed to deal substantively with or to respond at all to the Fol request during this period in spite of an arrangement with the OFMDFM to do so, and despite having as a Department relevant material upon which to base a response. The causes of this were a departmental failure to have in place working arrangements to deal with such requests when difficulties arose in directing those requests to an appropriate division and addressing within an appropriate timetable the statutory requirements of Fol requests. This failure was compounded by: a shortage of staff for the existing Fol workload; the Christmas and New Year holiday period; and the failure of two individuals (Mr O and Mr M) who could have guided the person dealing with the request to relevant information, either when first approached or later.

145. There was also a significant breakdown in communication between the two Departments. I have described T's arrangements with the NIO and understanding of what the NIO would do. Mr Hamilton rightly acknowledges that some of the problems with the letter of response might have been avoided if OFMDFM officials had insisted that NIO clear the OFMDFM response before despatch, or if the response had referred KW to the NIO as another potential source of information.

146. The evidence does not however justify a conclusion that the failure of the NIO to respond to the Fol request up to this point was a result of any deliberate decision to avoid doing so, or to cause the Court to be misled.

### **Further Requests by KW of 16 and 17.1.06**

147. Unsurprisingly, the OFMDFM's response of 5.1.06 prompted further detailed requests from KW about Mrs McDougall's appointment. The request of 16.1.06 included the following:

*"9 (f) Was there any contact with any body or individual outside of OFMDFM or the NIO as to potential candidates at any time in advance of the list of potential candidates being compiled? If so, with whom was that contact and what was its nature.*

*(g) Were potential candidates nominated by others or had they ever been so nominated?*

...

*12 Were both short listed candidates spoken to/contacted about the position?"*

Also included were numerous other probing questions.

148. On 23.1.06, Q sent to Nigel Hamilton and Jonathan Phillips the KW letters of 16 and 17.1.06 together with draft answers she had prepared based upon her own limited knowledge.

149. In response to question 9(f) she proposed: "OFMDFM – No. NIO input required". In response to 9(g) the answer proposed was "No".

150. On the following day, as I have said, Nigel Hamilton met Jonathan Phillips and told him that the OFMDFM had received a Fol request (this was apparently the one of 28.11.05) about the appointment of the VC and the NIO had not yet responded. Mr Phillips asked Ms U for a briefing and was then informed of the limited result of her attempts to deal with it.

151. Mrs Downes and her solicitors decided not to wait for responses to these questions, but instead on 23.1.06 started proceedings for judicial review. Before turning to that, it is desirable to complete the story about the original Fol request and the two supplementary ones.

### **The Failure to Correct the OFMDFM's Response of 5.1.06**

152. Girvan J's criticisms of the responses to KW's requests were confined to the content of the one sent on 5.1.06 and what happened in reliance on that letter thereafter (see paras 24-28 of the judgment of 9.11.06 (see Annex A) and paras 2-6 of the judgment of 20.11.06 and questions 1-33, 40, 41 and 57 at the end of the judgment (see Annex B)). In essence, Girvan J's questions reflect his concerns that the contents of the letter of 5.1.06 were misleading and evasive, and that having been put in evidence at the outset as an exhibit to Mrs Downes' affidavit, the letter was relied upon at the leave hearing before Hart J. and the Court of Appeal, and remained uncorrected until Messrs Hamilton and Phillips swore their affidavits in which the facts which answered KW's questions emerged sufficiently for the purposes of the judicial review.
153. The absence of responses by either the NIO or the OFMDFM to the letters of 16.1.06 and 17.1.06 are not commented upon by Girvan J, nor are they the subject of any of his questions. Those letters were very wide-ranging, and in the view of some of officials, not legitimate Fol requests at all. Accordingly, in reviewing the activity during the litigation, I will, amongst other matters, focus on the failure of the OFMDFM and the NIO to correct the impression given by the letter of 5.1.06 in the context of the litigation.

### **The Litigation**

154. The litigation was commenced on 23.1.06 by Mrs Brenda Downes. Her Application sought the following relief:
- (a) an order of certiorari quashing the appointment of the Interim Victims' Commissioner;
  - (b) a declaration that the appointment was illegal;
- and other interim and consequential relief.
155. The grounds upon which the relief was sought included the following:

(a) In making the appointment the Secretary of State failed to give any or any adequate weight to the following:

1. The need for consultation.
2. The need for the proposed Interim Victims' Commissioner to command cross-community support and credibility.
3. The need for actual and perceived independence.

(b) The Secretary of State's decision to appoint an Interim Victims' Commissioner was unreasonable for the following reasons: -

1. There was no consultation on the need for such a post.
2. The appointment process was not at all transparent. This lack of transparency has been the subject of much criticism and has fuelled allegations that Mrs McDougall's appointment was made for ulterior, political motives.

(c) The Secretary of State made the appointment for an improper motive, namely for a political purpose in response to a demand for "confidence-building measures" by the Democratic Unionist Party.

(d) The Secretary of State could not have reached the conclusion that the proposed Interim Victims' Commissioner would "command cross-community support" as was required as he had no means of determining that that was the case.

156. There were variations on the themes of these particular grounds of relief. They included suggestions of legitimate expectations on the part of Mrs Downes.

157. Mrs Downes' affidavit in support of her application said that the appointment of the IVC came as a shock and a disappointment to her. She said that she only became aware of the appointment through the media, and it seemed to her that this was a political appointment as it did not appear to have cross-community support and was made without any consultation. She suggested that it appeared that the IVC could

not be seen to be independent or impartial, and that Mrs McDougall appeared to be aligned with party politics in Northern Ireland, namely the DUP. In support of this she produced as an exhibit an extract from the website of Patricia Lewsley, an SDLP equality spokesperson and a MLA, in which Mrs Lewsley pointed out that the post was not advertised, and only one political party had been consulted i.e. the DUP. Worse, the DUP were said to have approved the appointment. The appointment was a concession to the DUP and others should have been given the opportunity to apply for it. She said the Government had consulted with only one party to the exclusion of all others. Mrs Downes also exhibited, and this is of importance, both the Fol request of 28.11.05 and the response of the OFMDFM of 5.1.06. The Court therefore had before it a statement of the Crown's position which, as I have set out above, was in fact misleading.

158. Ms L1, a solicitor in the Crown Solicitor's Office in Belfast, represented the Respondent throughout this litigation until Girvan J's final judgment on 20.11.06. Her office dealt, amongst other matters, with judicial review proceedings on behalf of UK Departments, but in this case instructions came from Division 1 of the OFMDFM. On receipt of the papers served on 24.1.06, Ms L1 sought urgent instructions from Mr A. The persons most closely involved in the "process" for selection of Mrs McDougall were identified to her as Messrs Phillips and Hamilton.
159. Mr Bernard McCloskey QC was instructed as Leading Counsel by Ms L1 on 27.1.06, initially to deal with the application for leave scheduled to be heard on 8.2.06. The hearing was eventually held on 16.2.06.
160. Mr McCloskey's instructions, which were copied on 2.2.06 to Junior Counsel, Mr Paul Maguire, consisted of a brief letter from Ms L1 outlining Mrs Downes' grounds for seeking relief, and a paragraph apparently based upon Mr Hamilton's Note for the Record summarising her understanding of the background to and the process by which Mrs McDougall's appointment took place. Being unfamiliar with appointments made pursuant to the Royal Prerogative rather than by open competition, she concluded:

*"On any reading, it is a strange way of doing business, but no doubt in due course we will have an opportunity to discuss matters with the decision makers to obtain their justification for the procedure (or lack of procedure) followed for the appointment of the Interim Commissioner."*

The papers available to Counsel and Ms L1 then and up to the hearing before Hart J were:

- (a) Mrs Downes' affidavit and exhibit (though not the letter of 5.1.06 which was only provided to the Respondent's advisers on the day before the hearing);
- (b) Mr Hamilton's Note for the Record;
- (c) KW's letters of 16.1.06 and 17.1.06; and
- (d) a table prepared by OFMDFM setting out proposed answers to some of the questions raised in these letters.

161. None of these revealed the DUP's involvement in Mrs McDougall's appointment. As noted above (see para 149), the table stated that in order to answer question 9(f) regarding contact with outside bodies about political candidates, NIO input was required, and in response to question 9(g) as to nomination of candidates, it was said there had been no such nomination.
162. A meeting on 3.2.06 was arranged between NIO and OFMDFM officials to discuss the judicial review. Almost at once Mr Phillips indicated through C that he would not attend. Instead, Mr C said he would attend "in listening mode". Q said that G, B and A would attend from the OFMDFM, with L2 (a senior lawyer in the OFMDFM who has since died), and Ms Q herself. In the event Q did not attend. Ms L1 did not attend the meeting either and no note of it appears to exist. No instructions or strategy emerged from this meeting, which was unsurprising as the two key players, Mr Philips and Mr Hamilton, were absent.
163. Meanwhile, Mr McCloskey had asked on 2.2.06 that consideration be given to any delay, misrepresentation, non-disclosure or omission on the part of the Applicant. Ms L1 forwarded this request to Q who said that those issues would be dealt with at a meeting with OFMDFM officials "tomorrow".
164. Mrs Downes' application was as stated above originally fixed to be heard on 8.2.06. A consultation was held with Leading Counsel on 6.2.06 attended by three officials from the OFMDFM (G, B and A), and by L2. The NIO was represented by C and

D. None of these officials knew at this stage of the DUP involvement in Mrs McDougall's appointment, and the original instructions to Counsel were not supplemented before the consultation.

165. It is far from clear what was said at this meeting as there was, apart from Mr McCloskey's e-mail of 2.2.06, no agenda (it seems that it has never been the practice to have one in the case of judicial review in Northern Ireland) and proper notes were not taken as they obviously should have been. There was some discussion between Mr McCloskey and L2 about legal issues, such as the application to the appointment of prerogative powers. No minutes were circulated of this or any other meeting between Ms L1 and Counsel. It seems that there was also some brief discussion about the general political background to the appointment of a VC or IVC, and there may have been some reference to a desire to please the DUP, but Counsel was not told of the DUP's involvement in Mrs McDougall's appointment and did not ask for details of how Mrs McDougall came to be a candidate. He advised that it was for Mrs Downes to establish her allegations of fact to the standard necessary to obtain leave.

166. This no doubt welcome advice was reflected in the skeleton argument which on the following day was circulated to the Crown Solicitor, inviting L2 and L1 to comment. The skeleton remained substantially unaltered up to and including the hearing before Hart J. Documents supplied on 13.2.06 to Counsel by the OFMDFM did not reveal DUP involvement or take matters for relevant purposes any further.

167. Under the heading 'improper motive' the skeleton argument said this:

*"It is submitted that this ground of challenge should be disregarded as it has no sustainable evidential basis. Its sole foundation is the undeveloped assertion in paragraph 14 of the Applicant's affidavit coupled with the bare assertion and subjective speculation of a single politician. It is well established that where allegations of this seriousness are made, the threshold of arguability is correspondingly heightened. [The lawyer's duty is to be "conscientiously satisfied" that there exists "material upon which he can properly" advance such allegation – per Lord Bingham in **Hashim** [1994] 6ALR348, page 355 – and see the comparable judicial admonition of Kerr*

*LCJ in Re Foster [2004] NI248, at paragraph 67.]” (Emphasis as in the skeleton argument.)*

168. Nothing was said in the skeleton argument about the FoI request or the response from the OFMDFM, both of which were exhibited to Mrs Downes’ affidavit.

### **The Application for Leave (Hart J)**

169. At the hearing on 16.2.06, Mr McCloskey argued the case in line with his skeleton argument, and referred to the letter of 5.1.06 in support of his position on the allegation of political motive.

170. Hart J concluded on 24.3.06 that leave to seek judicial review should be refused upon all but one ground. He quoted Mrs Downes’ allegations about the political appointment not appearing to have cross-community support and seemingly to have been made without any consultation. He mentioned her reference to reports that she had seen from which it appeared that the IVC could not be seen to be independent or impartial, and appeared to be aligned with party politics in Northern Ireland, namely the DUP. He concluded that there was no evidence whatever to support the suggestion that Mrs McDougall was someone who could not command cross-community support, lacked credibility and was not or could not be perceived to be independent. He said that to mount an arguable case that Mrs McDougall could not perform the role which she had been given required more than a bald unsupported assertion on the part of the applicant which was plainly at variance with the facts. He considered there was no evidence to support assertions of non-transparency in the appointment.

171. Finally he said this:

*“A related submission is that the appointment of Mrs McDougall was made for what is alleged to be an improper motive. There is no evidence for this either. Allegations of this sort require more than the assertion of the Applicant alone. So far as the choice of Mrs McDougall is concerned, there is nothing whatever to suggest that she is not suited for this position, and the Secretary of State has stated the reason for the appointment of an Interim Victims’ Commissioner in the passage from the letter from the OFMDFM.”*

172. That passage recited what had been said in the letter of 5.1.06 about the historical background to the making of the appointment but did not deal with the actual process by which Mrs McDougall was appointed. Hart J continued:

*“This is a perfectly rational policy and one which does not provide any support for an argument that the Secretary of State was activated by an improper motive.”*

173. It is clear that Hart J was misled. Girvan J said (see para 5B above) “the instructions given to Counsel were obviously misleading... and it must be concluded that it was decided that the correct information should not be placed before the Court.”

174. To examine this conclusion, it is necessary to consider in detail what happened and the position of various individuals who were involved. Up to the hearing before Hart J, the papers and information supplied to Ms L1, and through her to Counsel, were incomplete (see paras 160 and 161 above). The stance taken by Counsel in the leave application was a product of these incomplete instructions coupled with the contents of the FoI response which was exhibited to Mrs Downes’ affidavit.

175. Mr Hamilton himself, although aware of the DUP involvement, was not involved in instructing solicitors or Counsel at this stage. Nor were the Secretary of State or the NIO officials with knowledge of the DUP’s role. As indicated above, Mr Phillips did not attend the meeting of 3.2.06, and he too was not involved in instructing solicitors or Counsel at this stage.

176. Mr Hamilton was in one sense responsible for the fact that the instructions to Counsel were misleading because of his responsibility for the contents of the letter of 5.1.06 (see above), but he was not consulted about the relevant information to be provided to Counsel or to be placed before the Court. I am satisfied that neither he nor any other official decided that the information should not be placed before the Court. The ramifications of the response to the letter of 28.11.05 were not foreseen by Mr Hamilton or anyone else.

177. Following the judgment of Hart J, Mrs Downes appealed to the Court of Appeal of Northern Ireland.

## **The Application for Leave (the Court of Appeal)**

178. The skeleton argument presented on behalf of the Secretary of State to the Court of Appeal was, when dealing with the substantive points, broadly in the same terms as before. The paragraph dealing with 'improper motive' was in identical terms to that which had been submitted below, together with the references to the judgment of Hart J. By this time, the Applicant had supplemented her evidence by producing on 4.5.06 an article from the Irish News in which Jeffrey Donaldson of the DUP was reported as confirming that his party had been "fully consulted about the appointment" and expressing delight at the appointment for which that party had been calling for some time. It also reported criticism from Nationalists of the appointment of Mrs McDougall, and that Sinn Fein's Victims' Spokesman had said he "had not been consulted and that when you are dealing with victims it shouldn't be done in terms of appeasing a party". Mrs Lewsley was reported as saying that "playing the concessions game will only sour politics and take us all away from reconciliation and working together".
179. The Respondent's skeleton argument prepared by Counsel for the Court of Appeal was sent to L1 on 3.5.06 for circulation, and by her to Q. The skeleton was effectively the same as the one put before Hart J and, unsurprisingly, no input was invited or forthcoming from the OFMDFM. Q circulated it to OFMDFM officials (A, B, G, L2 and S) and NIO officials (C and D). She, who like the others had seen the revised synopsis by this time, cannot recall if she read the skeleton argument, and it is clear that neither she nor the other officials addressed the question of whether Counsel's skeleton argument was appropriate in the light of the content of the synopsis (see para 195 below).
180. Following a hearing on 8.5.06, the Court of Appeal delivered its judgment on 22.5.06 in which the appeal of Mrs Downes was allowed. Having referred to the article in the Irish News the Court said:

*"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."*

*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.”*

181. The instructions to L1 and to Counsel had not changed and so, once again, the Court was misled, though on this occasion to no effect since the appeal was allowed. Nevertheless, both Counsel’s skeleton argument and the oral presentation of the Crown’s case in the Court of Appeal failed to acknowledge the truth of the political aspect of Mrs McDougall’s appointment, and so it was left to the Court to assess whether the Applicant had surmounted the evidential hurdle notwithstanding the Crown’s submissions.

182. I now turn to the reasons for this.

183. In an attempt to put together a factual summary to deal with the litigation, attempts were made in February 2006, initially by OFMDFM officials, to compile a synopsis of events. This draft was brought to the consultation on 6.2.06, but not handed over. It had no details of the DUP’s involvement as OFMDFM officials were unaware of that. The draft seeking NIO input on this went to the NIO on 14.2.06.

184. Work was then done on this within the NIO, and was the subject of a meeting between Jonathan Phillips and C (who was directing the work) on 22.2.06. I infer that it was this which led C to ask Q about the accuracy of the OFMDFM’s response of 5.1.06. She replied on 23.2.06 saying:

*“I have checked with all concerned including HOCS [i.e. Mr Hamilton] and we are certain all responses are accurate.”*

185. On 29.3.06, D advised C on the outstanding FoI request and the two letters of 16.1.06 and 17.1.06. She referred to the need when replying to the former to disclose the DUP’s nomination, and said that the synopsis of events would need to include this too.

186. On 6.4.06, the synopsis was approved by Mr Phillips, but on the basis that it was to be approved by Mr Hamilton. The synopsis was accordingly sent to the OFMDFM

by D on that day. She plainly intended that once approved by Mr Hamilton, the synopsis should go to Counsel for his advice.

187. In her e-mail of 6.4.06 to Q she said:

*“We’ve been quite frank in the attached document about what happened, because it’s important that Counsel has the full facts. I’d like to stress that the part about DUP involvement and their suggestions should not be made public – please come back to us if there is any need to go into this in the affidavit or arguments. I hope that there would be no need to disclose these unless the appeal is successful, and even then we’d want to think carefully about what should be said.”*

188. On the same day (6.4.06) there was a consultation with Mr McCloskey to discuss a proposed affidavit dealing with the single ground allowed by Hart J. It seems that it was decided that in dealing with this ground (i.e. a legitimate expectation of consultation) there was “no need to deal with names”, and no need to provide particulars of the events leading to Mrs McDougall’s appointment.

189. It has been suggested that at this meeting everyone (B, A and L1), including Counsel, had copies of the revised synopsis, and the implication of that suggestion is that Counsel was aware of its contents. I do not accept that suggestion. I think it is much more likely that the synopsis was not produced at this stage. It had not yet been approved by Mr Hamilton. D had expressed a hope in her e-mail that the DUP involvement might not need to be made public, and the doubtless welcome advice from Counsel about the limits of the proposed affidavit seemed to indicate that as long as the appeal was successfully resisted, there might indeed be no need to do so.

190. On 7.4.06, D sent specifically to A a copy of the synopsis, repeating that it be run past Mr Hamilton, and adding:

*“As you know, there are some parts that are sensitive – particularly in terms of the DUP role in suggesting names – and we’d want to think carefully before disclosing them. I think we’ll need advice from Bernard [McCloskey] on how much of the detail we need to disclose in paragraphs 13 and 14 in order to fulfil our duty of candour to the Court. My own view is that the process of*

*identifying potential candidates and selecting a final one is not directly relevant to the legitimate expectation point, and that there is no reason to go into it, but I'd be much happier if Bernard could confirm this. Of course, if the appeal is successful then this may change."*

191. Mr Hamilton confirmed on 10.4.06, that he was content with the synopsis, but it was not sent to Counsel. On the following day, Counsel sent his proposed skeleton argument to L1. This maintained the previous stance of no sufficient evidence of improper or political motive and summarised the OFMDFM letter of 5.1.06, claiming that there was "detailed consideration of all candidates."
192. I am satisfied that notwithstanding D's expressed wish to obtain Counsel's advice, the synopsis was not provided to Counsel or the Crown Solicitor as it should have been, nor was Counsel's advice sought upon its contents. The synopsis was first provided to L1 on 2.6.06 i.e. after the judgment of the Court of Appeal on 22.5.06.
193. If the synopsis had been passed to Counsel before the Court of Appeal hearing, as in my view it should have been, I am sure that the submissions to the Court of Appeal would not have been misleading.
194. The responsibility for what happened at this stage must in my view rest primarily with the OFMDFM as the Department handling the litigation. The NIO had indeed taken from 14.2.06 to 6.4.06 to revise and complete the synopsis, but insofar as this delay was excessive, it made no real difference to the outcome. It is also true that the NIO's continuing failure to provide a reply to the original FoI request of 28.11.05 precluded another route by which the OFMDFM's own response of 5.1.06 could and should have been in the relevant respect put right (see below), but I consider that a major cause of the short-comings at this stage was the failure to seek Counsel's informed advice as D had obviously intended. Between 6.4.06 and 8.5.06, I consider that the NIO could not unreasonably expect that if the contents of the synopsis were not disclosed, that was on the basis of Counsel's informed advice.
195. In my view there was a failure on the part of Q in not arranging for the amended synopsis sent to her on 6.4.06 to be provided to Counsel once it had been approved by Mr Hamilton, with appropriate instructions to Counsel to take it into account for the purposes of conducting the forthcoming appeal. At the least she

should have sought Mr Hamilton's or Mr B's instructions as to whether to do so, if she did not feel able to do this on her own initiative. Although the information in the synopsis came from the NIO, it was sent to her "for Counsel" and on the basis that "it's important that Counsel has the full facts." The e-mail of 7.4.06 from D to Q reiterated the need for Counsel to advise as to how it should be dealt within the context of the duty of candour to the Court. As should have been apparent, the content of the synopsis related to the letter of 5.1.06 which she had reviewed before it was sent, and whose contents she had confirmed as accurate to the NIO some six weeks before. She was, and was seen by the NIO as being, the contact for the conduct of the litigation of which the OFMDFM were the lead Department. I have taken into account in reaching this view the fact that when she received the synopsis, she sent it to B, A, and L2 who were attending the consultation with Counsel that afternoon. But Miss Q did not have as far as I can see any relevant feedback from that meeting, and had no, or no sufficient, grounds for knowing what Counsel had advised about the synopsis. No notes of that meeting were circulated. Q frankly told me (with the benefit of hindsight) that the revised synopsis made Counsel's submission of no evidence of a political motive "questionable". In my view that if nothing else, required Q to act on D's communication to her.

196. There was also in my opinion a failure on the part of B to arrange for the amended synopsis to be provided to Counsel once it had been approved by Mr Hamilton, with appropriate instructions to Counsel to take it into account for the purposes of conducting the forthcoming appeal. If necessary, he should have sought Mr Hamilton's instructions about this. In reaching this conclusion I have taken into account the fact that Mr B was on leave from 6.4.06 to 19.4.06. I have also noted that Mr B was under the impression at the meeting of 6.4.06 that "all participants were aware of the revised synopsis." As I have said, I do not consider that the participants were aware of it. It was not, so far as I can tell, even discussed, and its significance was certainly not identified. I think Mr B overlooked the matter on the day before he went on leave. On 26.5.06 he was sent a revised draft of a submission to Ministers by D on a possible section 36 exemption for the Fol request. This revealed Dr Paisley's involvement. He promptly responded that this information was "deeply disturbing" as "the details were not disclosed to us when considering and briefing Counsel." In response, D pointed to the revised synopsis, and Mr B then frankly acknowledged that, going on leave on 6.4.06, he had missed

the NIO changes to the synopsis. This, incidentally, confirms my view that the effect of the NIO's contribution to the synopsis was not raised or taken in at the meeting on 6.4.06.

197. Finally, I consider that there was a failure on the part of A, having received D's e-mail of 7.4.06, to ensure that Counsel was made aware of the synopsis, and advised upon it. His assumption that Counsel had the document on 6.4.06 was not well founded and the decision about the content of his proposed affidavit was not an adequate basis for assuming that Counsel had sanctioned the non-disclosure of something strongly supportive of the Applicant's case.
198. In all three cases, however, whilst I consider that these individuals did not do what they should have done, I can find no basis for concluding that they were intending to do anything improper, still less that they intended to cause the Court to be misled.
199. The failure to send the amended synopsis to Counsel, coupled with the belief that it had been sent to him, provides some explanation of why Counsel continued to assert that the allegation of motive was not justified by the evidence produced by Mrs Downes. It was against this background not altogether surprising that individual officials, each with their own limited role and other responsibilities, did not seriously address, still less challenge, the details of several pages of legal and factual argument produced shortly before the hearing by Leading and Junior Counsel, nor attempt to relate those details to the other material being produced to the Court. The result, however, was entirely unacceptable. The underlying reason for what happened, in my view, was the failure to have in place from the outset of the litigation and throughout its progress at a suitably senior level arrangements for the strategic direction of the case, together with proper monitoring and record-keeping to avoid misunderstandings.
200. This underlying factor was a product of several things: the division of roles between the NIO and the OFMDFM, the particular complexity of managing a piece of litigation across two Departments whose knowledge of the facts was not the same, the pressures of work often involving delicate political issues, and the priorities chosen to deal with the demands of the time. These facts (which operate in several areas which are the subject of this Review) go a not inconsiderable way to explain the shortcomings in the instructions to Counsel.

201. In addition, however, it seems to me that some responsibility must be attributed for the failure to establish and maintain strategic direction of the case from the outset. Ideally, the meeting of 3.2.06 should have included Mr Phillips and Mr Hamilton and at that stage the full circumstances of Mrs McDougall's appointment should have been made clear and a strategy developed for dealing with the case. If that was not feasible then there were obviously other ways in which the basic facts, as they eventually emerged from the amended synopsis, could have been assembled and communicated to solicitors and Counsel at least well before the hearing at the Court of Appeal.
202. In my view, the responsibility for this failure to provide the strategic direction must rest first with Mr Hamilton and Mr Phillips as the heads of the two Departments concerned. In Mr Hamilton's case, he not only knew most of the relevant facts, but his knowledge had not been shared with his own officials. In Mr Phillips' case, apart from a discussion on 22.2.06 with Mr C when some facts relating to the DUP involvement in Mrs McDougall's appointment were given to Mr C, he did not give strategic direction to the conduct of the litigation until after the Court of Appeal judgment on 22.5.06.
203. I also consider that it is part of the solicitor's role to understand the essence of the case to be met and to seek, and if necessary, insist on clear instructions as to the response to be made and the evidential basis for such response. If such instructions are not forthcoming in a timely fashion, it may well be necessary to raise the matter formally at a suitable level. In this case the instructions needed were a full account of the appointment of Mrs McDougall supported by the relevant contemporary documentation. Ms L1 rightly anticipated at the outset "the need to discuss matters with the decision-makers", but that did not happen for four months, and by then the Court of Appeal had been presented with a misleading and inappropriate argument. I consider, however, that Ms L1 was justified in not pressing for these instructions between the hearing before Hart J and the decision of the Court of Appeal. Between those times Ms L1 received no instructions from the OFMDFM (except as were necessary to deal with the single point on which Hart J granted permission). In particular, as I have said, she did not receive the amended synopsis (which had been approved by Mr Hamilton on 10.4.06) until 2.6.06. She had therefore no compelling reason to require further instructions on a topic which Hart J had ruled was not to be pursued. Ms L1 was entitled to greater

assistance than she received from those whom she represented, and I am satisfied that at no time did she wish to or intend to mislead the Court.

204. For completeness, I should add that in my opinion Leading and Junior Counsel both acted in accordance with the instructions they received, and in my view neither of them wished to or intended to mislead the Court.
205. I must now revert to the position of the NIO in relation to the Fol request since what happened there, especially before 6.4.06, was also a contributing factor to what occurred.
206. By 31.1.06, Mr C as Head of Division 2 was both the contact point in the NIO for the litigation and responsible for dealing with the outstanding Fol request of 28.11.05. Whilst I accept that he did not at that time remember the details, he had been involved in the process which led to the decision to appoint an IVC in the period between July and September 2005. Although not involved in the identification of candidates for the post in September or October, he had been sent a copy of a note of 29.9.05 indicating that Dr Paisley was proposing a candidate for the post, and of an earlier e-mail that indicated that Messrs Phillips and Hamilton were to meet "the DUP's nominees" privately.
207. When he became responsible for dealing with the Fol request, the position was that his Department had sensibly agreed to respond to that request, but had failed to do so. If there was any doubt about the NIO's obligation to do so, it was resolved by advice from the Home Office Legal Adviser's Branch on 6.3.06.
208. Meanwhile, Mr C had seen the OFMDFM's response of 5.1.06 and must have appreciated at the latest by 22.2.06 that, even if it reflected the full extent of OFMDFM knowledge at the time it was sent, it conveyed a misleading account of Mrs McDougall's appointment. Mr C had also seen the OFMDFM's draft synopsis of 14.2.06 which made clear that OFMDFM officials needed input from the NIO to answer KW's detailed questions about Mrs McDougall's selection.
209. I am satisfied that on 22.2.06, in discussion with Mr Phillips, Mr C obtained confirmation of at least the fact that Mrs McDougall's name had come from the DUP. He must also have appreciated at this stage the significance in the litigation

of the DUP's involvement, whatever its precise details, and realised that the NIO were likely to hold papers relating to that involvement.

210. I should mention that Mr C suggested on 31.5.06 that Leading Counsel had been informed where Mrs McDougall's name had come from at the consultation he attended with D.
211. I am satisfied that Mr C was wrong about that (as he was about the date of the consultation which he said was "back in January" but was in fact on 6.2.06). In fact, as I have said, Counsel were not informed of this central fact or the other details of the DUP's involvement until after the Court of Appeal decision on Mrs McDougall's application for leave. At the most, at the meeting on 6.2.06 Counsel was informed of an underlying wish to accommodate the DUP.
212. In my view, the failure of the NIO, and in particular of Division 2 under Mr C, to provide responses to the FoI request between 31.1.06 and 6.4.06, or to take any other steps to correct the misleading content of the OFMDFM's response, contributed to the inadequacy of the instructions to Counsel, and thus to Counsel misleading the Court. I would, on balance, accept that this was not a serious failure before 16.2.06 (the date of the hearing before Hart J). Some time was needed to assemble the necessary information, assess it and draft a response after seeking any advice needed. However, I cannot accept that the delay thereafter was justifiable. In reaching this conclusion, I have had regard to numerous points made by Mr C, including the pressures on him and his division of other significant matters. For example, it is true that he sought and obtained from Q confirmation of the accuracy of the OFMDFM's FoI response of 5.1.06. His request for this confirmation was in my view triggered by his knowledge that the OFMDFM's response was not consistent with the facts known to the NIO. By 22.2.06 (if not before), following his discussion with Mr Phillips (the precise content of which is unclear), Mr C was at least aware that Mrs McDougall's name had been put forward by the DUP. Q's confirmation did not change that fact, nor the fact that the NIO's continuing failure to respond meant that the Crown's case in the litigation failed to take account of what was known to the NIO. It is also true that during this period Mr C recognised the need to instruct Counsel with the full picture and took steps to this end. This was, in particular, the purpose of the synopsis eventually submitted to the OFMDFM on 6.4.06. But it must be noted that, even after 6.4.06, the NIO continued to fail to provide its response to the FoI request. Whilst it can be

said that it could reasonably have considered that the amended synopsis had fairly shortly thereafter been passed to Counsel, and thus disclosed to him the essence of the DUP's involvement, the fact remains that the false impression given by the OFMDFM's response remained months later uncorrected vis-à-vis the Applicant.

213. Though the NIO do not accept this, I do not, incidentally, consider that it is at all likely that a section 36 exemption would in all the circumstances have been claimed had the matter been considered fully and carefully. The draft submissions prepared before the Court of Appeal decision by NIO officials for Ministers on this point were neutral i.e. did not advise one way or the other. The factors identified for consideration were the likelihood of disclosure inhibiting the free and frank provision of advice or exchange of views for the purposes of deliberation; these had to be balanced against the general public interest in the workings of government and in the process of appointing a public figure. To justify withholding information, the balance must fall in favour of non-disclosure. These draft submissions did not deal with the following facts. When the OFMDFM replied to question (d) of the Fol request it did so without claiming any exemption. The effect of the OFMDFM's answer, coupled with the continuing failure of the NIO to respond to the request, gave a misleading impression. The answer had been put in evidence in the judicial review proceedings and had been relied upon by Counsel on behalf of the Secretary of State. Furthermore, existing newspaper reports had clearly reflected, to a significant extent, the political motivation of the appointment. If the question of exemption under section 36 had been considered before the Court of Appeal decision, it is in my view not likely that the exemption would have been claimed. It is much more likely that before Ministers were advised and acted a full assessment of the position would have identified the unacceptable consequences of a course which would have perpetuated the misleading effect of the OFMDFM's response on both the Applicant and the Court. I note that in spite of invitations to do so, neither Mr Phillips nor Mr C suggested at the time that the draft submissions prepared before the Court of Appeal decision should advise Ministers one way or the other. The draft submissions were never finalised with input from Mr Phillips and Mr C and I do not consider it right to assume that Ministers would have been advised to claim the exemption or would have decided to do so. There is therefore no sufficient reason to doubt that a Fol response by the NIO would have dealt with the problem.

214. I have carefully considered whether the NIO's failure to respond to the FOL request occurred with the intention of misleading the Court or obstructing justice. In my view, it did not. Steps were taken to assemble the necessary information and documentation and to complete the synopsis. The synopsis was sent, albeit belatedly, to the OFMDFM with the intention of seeking Counsel's advice, specifically to ensure compliance with the duty of candour to the Court. This was done well before the Court of Appeal hearing and is quite inconsistent with any intention of the sort to which I refer above.
215. In addition, of course, the OFMDFM's own failure to correct its response of 5.1.06 continued from that date and throughout the litigation. That failure continued until Mr Hamilton's affidavit was served on about 12.6.06. The primary responsibility for this must rest with Mr Hamilton for reasons obvious from what I have already said. In addition, however, I consider that those who were handling the litigation on behalf of the OFMDFM (Q, B and A) should have realised the need to do this after they had received the revised synopsis and after it had been approved by Mr Hamilton on 10.4.06. The contrast between the synopsis and the letter of 5.1.06 should have been detected and raised with Mr Hamilton with a view to putting the record straight, and I see no reason why this could not have been done between 10.4.06 and 8.5.06 (the date of the Court of Appeal hearing). In fact, in so far as this matter was considered, it seems that the view was taken that the letter was one of the matters before the Court, and to be dealt with in the litigation. This, combined with the belief that Counsel had been provided with the revised synopsis, meant that no steps were taken as they should have been. Once again, the failure of proper strategic direction and control rather than a deliberate intent to mislead the Court created a significant short-coming.
216. For the avoidance of doubt, I am satisfied that if Counsel had been made aware of the facts about the DUP's involvement before the leave hearing in the Court of Appeal (and, indeed, before Hart J), the argument that there was no sustainable evidence of a political motive would not then have been pursued, and any reliance on the relevant parts of the letter of 5.1.06 would have been abandoned. If that had happened, it could realistically have been said that the letter of 5.1.06 had been overtaken by events. But of course that was not the case.

## **The Crown's Evidence**

217. The evidence for the Crown eventually consisted of three affidavits and various exhibits. The first, dealing with the point of legitimate expectation of consultation, raises no questions directly relevant to this Review. The others from Nigel Hamilton (12.6.06) and Jonathan Phillips (30.8.06) were both the subject of criticism by Girvan J. He also raised questions about the Secretary of State's position since each of these affidavits said that the Secretary of State had authorised them to be sworn by the deponents.

## **Mr Hamilton's Affidavit**

218. Once the Court of Appeal had given Mrs Downes leave to pursue the allegation of a political motive, it was recognised that there was no realistic alternative but to reveal the facts about the DUP's involvement, and it was agreed between the two Departments that the necessary affidavit would be sworn by Mr Hamilton. The lack of proper strategy, coordination and leadership to which I referred above had immediate effect. L1 produced on the basis of the limited material with which she had been supplied at an early stage, a first draft of Mr Hamilton's affidavit for consideration by Junior Counsel, Mr Maguire. This was almost two weeks after the synopsis revealed at least an important part of the DUP's involvement, weeks after Dr Paisley's letter of nomination had surfaced in the NIO together with other documents, and after D's draft submission to Ministers had been discussed with Jonathan Phillips and caused B (OFMDFM) to express deep concern that the material in it had not been available for briefing Counsel.

219. Discussions over the next few days between officials in both Departments led to an intention to tackle head-on the question of where Mrs McDougall's name had come from.

220. Against this unsatisfactory background a meeting was held on Monday 5.6.06 to discuss L1's draft of Mr Hamilton's affidavit. L1, A, Nigel Hamilton and Paul Maguire were present. The purpose of the meeting was to give Mr Maguire sufficient instructions to enable him to produce a revised draft. Mr Maguire's instructions were prepared by Mr A, and after comments by G and B had been forwarded on 25.5.06 to L1 and then to Mr Maguire. They were sparse and

referred to DUP's list of confidence building measures, but not to the DUP's nomination.

221. The meeting on 5.6.06 was not satisfactory. Mr Hamilton had never previously sworn an affidavit or attended a conference with Counsel. It was accepted by Mr Hamilton that the DUP had advanced names for the IVC post, but in spite of several attempts, Mr Maguire was unable to discover how the DUP came to advance such names. Mr Hamilton simply avoided dealing with Mr Maguire's questions on this. I can accept that Mr Hamilton did not know the answer to the question but his persistent failure to deal with it seems to me to confirm the view I expressed in para 97 above. The meeting was described to me as "tense". Accordingly, Mr Maguire noted plainly on the face of the draft affidavit which he despatched the following day that a full explanation of how this nomination came about was required.
222. In the next week, the draft passed through various hands including Q, L2, A and Mr Hamilton himself.
223. In the meantime Mr Phillips had attended a meeting with D, C and OFMDFM Officials on 31.5.06, when in a refreshingly coordinated if brief interlude, it had been agreed to tackle head-on the source of the suggestion that Mrs McDougall would be a suitable appointee. Mr Phillips had no further involvement until he received a copy of Mr Hamilton's proposed affidavit on the afternoon of 6.6.06. The deadline was said to be the following day. D in an accompanying e-mail pointed out that the draft was coy, far too vague and took "a completely different tack to that which we discussed with OFMDFM last week (that is, acknowledging that there was a political dimension to the decision but arguing that there is nothing wrong with that)...". It was clear that the affidavit would have to be recast.
224. As received by Mr Phillips, the draft persisted in the line that Mrs McDougall's appointment was not made to please the DUP, that her appointment was based on her personal merits, and that her nomination was coincidental and not in any way orchestrated by Government Officials or the Secretary of State. (It was the latter point at which Mr Maguire had indicated that a full explanation of how the DUP came to advance names to the Government was needed and this comment remained on the draft sent to Mr Phillips.) The draft did however state that the DUP had suggested Mrs McDougall's name (and that of another person) and

provided a CV for Mrs McDougall. Mr Phillips altered the text significantly. He deleted the denial of political involvement and instead drafted a passage to indicate that the Secretary of State was concerned to give careful consideration to the DUP's suggestion, but also proposed to say that the DUP's suggestion was at their own initiative.

225. He proposed wording to say that there was no doubt that the Secretary of State "had in mind" that Mrs McDougall's name had been put forward by the DUP. But as the affidavit was then drafted it said "I have confirmed with the Secretary of State that he gave careful consideration to the possibility of a different candidate and would not have appointed her unless persuaded that she genuinely met the criteria."
226. Mr Phillips explained to me that his initial drafting suggestion that the DUP provided names on their own initiative had been made by him on the basis of a faulty recollection without having access to the documents which showed otherwise, and under time pressure. Broadly, as he pointed out, his changes apart from this brought the text far closer to the truth than the one which he had received.
227. Mr Hamilton seems to have accepted Mr Phillips' changes and the draft affidavit was sent to the Secretary of State for his approval. This approval was given but in the meantime Counsel had made some further changes, described by L1 to Q as "stylistical and to provide more of an explanation."
228. These changes by Counsel included the following underlined passages:

23 *"My recommendation was based exclusively on Mrs McDougall's personal merits for the appointment given the range of criteria considered and in particular her qualities and experience which I communicated to the Secretary of State in my submission. Merit was the sole criterion applied.*

.....

45 *In considering the appointment the Secretary of State was mindful [in place of had in mind] when the appointment was made that Mrs McDougall's name had been put forward by the DUP...*

229. Counsel also questioned whether “the last sentence at paragraph 32 was accurate.” This was the sentence which on the draft submitted to the Secretary of State incorporating Mr Phillips’ amendments had said that the DUP had provided names on their own initiative.
230. Clearly this was not correct and Mr C suggested it be removed and Mr Phillips promptly agreed with this. Once it was removed there remained an unanswered question, originally proposed by Mr Maguire, as to how the DUP’s nominations came about (see para 221 above). This gap in Mr Hamilton’s affidavit subsequently had to be addressed by Mr Phillips in his affidavit.
231. The process by which this crucial affidavit was produced was deeply unsatisfactory. It was or should have been clear from the outset that a full and frank account of how and why Mrs McDougall had come to be appointed was needed. Indeed I am satisfied that the Secretary of State, Mr Hamilton and Mr Phillips intended that to be the case, as did the other officials involved. They made changes to ensure accuracy on sensitive points so far as their own knowledge went. But here again information and recollection were being put together by various people, none of whom had the primary responsibility for the end result.
232. What should have happened? First, it was necessary to identify what points needed to be covered in the evidence and to decide who was best able to deal with them, ideally of their own knowledge or if necessary on the basis of information and belief. In this case given the divided responsibilities of the two Departments the sensitivity of the material and the fact that each department had generated and possessed information not held by the other, it might well have been better to produce in a coordinated way at the outset two affidavits (and not just one), as eventually became necessary. In deciding what points needed to be covered, advice would clearly be needed from solicitors and probably Counsel. Second, the documentation, especially that which was contemporary and any supporting factual statements which were to be reflected in the affidavit, needed to be assembled and provided to the proposed deponent(s), to solicitors and to Counsel. A statement (in the form of a draft affidavit or otherwise) should then have been taken from the deponent(s) and circulated to those who could usefully comment. Comments should have been tracked to identify their source and in the end the result should be reviewed to ensure the overall impression as well as individual parts reflected appropriately a full response to the case against the Crown. To achieve

completeness and accuracy, a single official of sufficient seniority was needed to be responsible during the process for collecting the necessary information and for liaison and instructions to solicitors and Counsel.

233. At all times in such cases the deponent should be aware that he may be cross-examined on the affidavit and it is therefore of great importance that he is satisfied of and can confirm the accuracy of his affidavit.
234. I do not of course suggest that every case is like the present, but if a system is in place to ensure that the basic elements are covered, it can always be adapted appropriately, even if as in the present case officials are working under demanding time constraints.
235. The contrast in the present case in terms of process is striking. Having agreed to be the deponent, and having come to discuss his affidavit with Counsel, Mr Hamilton apparently did not know and had not sought to assemble all of the basic facts which led to Mrs McDougall's appointment. The draft which emerged from this discussion, whilst admitting that the DUP nominated Mrs McDougall, contended that this had not been a factor which entered his mind in the course of his dealings with Mrs McDougall, nor had the appointment been made to please the DUP or gain favour with them. This was in spite of the discussion which had taken place a few days earlier with Mr Phillips. The draft affidavit denied that the DUP's nomination had been solicited or that there had been any consultation with the DUP on the appointment process.
236. This draft was produced by experienced and able Junior Counsel after his efforts to clarify the factual situation with Mr Hamilton. Its inaccuracy was not his fault. It reflected the lack of a systematic approach to the production of such a document, the residue of an unreal and inappropriate attempt on Mr Hamilton's part to distance himself from the political activity which was driving the appointment process, and a dangerous and unsuitable attitude to the drafting process which led to others putting words into Mr Hamilton's mouth.
237. In the end most of the relevant story somehow emerged through the contribution of various people, but not all of it. Mr Maguire's attempt to unearth a full explanation of how the DUP came to advance names was never dealt with as it should have been. Drafting changes, including those described as "grammatical" and "stylistic",

for which NIO officials were not responsible, created an overall effect which, as Mr Phillips acknowledged to me, lessened the accuracy with which the DUP dimension was portrayed. In short, it acknowledged but underplayed the political motivation behind Mrs McDougall's appointment.

238. Girvan J's points on Mr Hamilton's affidavit included the following:

- (1) He pointed out that the affidavit did not deal with how the DUP came to make their two nominations, and indeed painted a picture which fell short of a full and accurate account of the decision making process of which Mr Hamilton averred he had personal knowledge.
- (2) He challenged the suggestion that Mr Hamilton's recommendation was as he said "based exclusively on Mrs McDougall's personal merits for appointment, given the range of criteria considered and in particular her qualities and experience which I communicated to the Secretary of State.....". "Merit was the sole criterion applied".
- (3) He considered that the statement that the Secretary of State "was mindful that Mrs McDougall's name had been put forward by the DUP" when considering the appointment was ambiguous, and deliberately so.
- (4) He considered that it seemed unlikely that Mr Hamilton did not have personal knowledge of the matters to which Mr Phillips later swore, but observed that if he did not have that knowledge he should have obtained it.
- (5) Overall, Mr Hamilton's affidavit sought to minimise the political considerations.

239. With two qualifications, I respectfully consider that Girvan J's points are well founded. Furthermore, I do not accept the suggestion that what really mattered was simply to reveal the DUP's nomination and the importance attached to that, and thus the fact that the nominations had been invited was simply a detail of comparative unimportance. What was important, as Girvan J said, to give a full and accurate account, and it was and should have been clear that the invitations to the DUP added significant weight to the allegation of political favouritism.

240. As to Girvan J's second point, the passages referring to "exclusively on personal merit" and "merit was the sole criterion applied" contribute to a misleading picture. As to his point that before swearing an affidavit asserting personal knowledge on Mr Hamilton's part, he should have ensured that he had that knowledge (if necessary swearing on the basis of information and belief) and there is in my view no answer, and none has convincingly been suggested to either of these points.
241. My two qualifications are, first, it should be mentioned that the phrases "merit was the sole criterion" and "mindful", both criticised by the Judge, were in fact inserted by Leading Counsel. Mr McCloskey explained that the former phrase was simply to put Mr Hamilton on the spot, in other words to test exactly what he wanted to say. Mr McCloskey justifiably considered that what Mr Hamilton eventually attested to was a matter for Mr Hamilton himself. The purpose of Counsel's amendments was to state as clearly as possible what Mr Hamilton wished to convey, something which after discussion with Mr Maguire remained somewhat obscure. Mr Hamilton may have thought that since it originated with Counsel, the phrase should be retained, but I feel that this is another example of what I said earlier about a process which was productive of inapt and, to some extent, inaccurate or misleading language.
242. Secondly, whilst I can entirely understand why in the context of this case Girvan J was not satisfied with "mindful" without an indication of whether or not the fact of the DUP's nomination affected the decision, it should perhaps be pointed out for completeness that this word replaced "had in mind" on Mr McCloskey's suggestion. Neither phrase, in my view, was entirely apt when attempting to describe a factor which had influenced the Secretary of State's decision, but I do not feel that either the original or the modified version were intended to be deliberately evasive or ambiguous.
243. As I have indicated, the underlying cause of the inadequacies of Mr Hamilton's affidavit lies, in my view, in the lack of a systematic approach, something for which both the NIO and the OFMDFM must, in the particular circumstances of this case, take departmental responsibility. This was coupled with the unsuitable approach adopted by Mr Hamilton in the respects which I have mentioned above. I consider, however, that Mr Hamilton acted in good faith and that the inexperience in such matters which contributed to his approach would have been of little, if any,

significance if a more co-ordinated and systematic approach to the drafting of the affidavit had been adopted.

### **Interlocutory Applications**

244. The effect of the contrast between the OFMDFM's response to the FOI request on 5.1.06 and the contents of Mr Hamilton's affidavit, coupled with various alleged defects in that affidavit, triggered applications on behalf of Mrs Downes for cross-examination of both Mr Hamilton and the Secretary of State, and for discovery of documents. Girvan J ordered cross-examination of Mr Hamilton but not of the Secretary of State. He did not order discovery. The Crown appealed to the Court of Appeal and by the time that appeal was heard Mr Phillips had sworn his affidavit. Accordingly the Court of Appeal remitted the matter for reconsideration by Girvan J in the light of this new evidence. This produced an application by Mrs Downes to cross-examine both Mr Phillips and the Secretary of State. Mrs Downes' applications for cross-examination and discovery focused on the allegedly improper motive for Mrs McDougall's appointment, the way in which the Crown's case had evolved (from the evasion of the letter of 5.1.06 through the assertions of Counsel on the application for leave that there was no sustainable evidence in support of the allegation), and the attempt in Mr Hamilton's affidavit to portray Mrs McDougall's appointment as being based on her personal merits compared with those of other possible candidates. The application to cross-examine Mr Phillips and the Secretary of State obliged the Crown to concede through Counsel that the letter of 5.1.06 should not have conveyed the impression that Mrs McDougall was the best candidate on merit, rather the case was that she was one of the two best candidates. This seems to have been enough to halt the interlocutory warfare, and Girvan J gave his substantive judgment without ordering the cross-examination or discovery sought by Mrs Downes.

### **Mr Phillips' Affidavit**

245. I can deal with this more shortly. The affidavit was designed to deal with the Applicant's amendments to her Order 53 statement which clarified her case but also to address the problems to which Mr Hamilton's affidavit had given rise, and to seek to avert the cross-examination of Mr Hamilton which on KW's application Girvan J had ordered. In the latter respect it was successful in that the Court of Appeal set aside that Order. In the former it was less so. The affidavit did not, and

probably could not, assuage Girvan J's concerns to any great extent and it evoked some criticism itself. In particular, he felt:

- (1) it hard to understand how Mr Phillips came to swear his own affidavit without ascertaining Mr Hamilton's state of mind when swearing his; and
- (2) when dealing with the fact that the Secretary of State did not take soundings from political parties other than the DUP, as had been envisaged in the original proposals approved by him on advice from officials, Mr Phillips misleadingly used the phrase "did not opt to" take such soundings. There must, said Girvan J, have been a deliberate decision not to take such soundings.

246. The first point reflects the need for co-ordination to which I have previously referred. On the second point, Mr Phillips insisted to me in a lengthy and careful statement that on this point he continues to be of the view that the phrase he used was not inappropriate. So far as the records show, the Secretary of State did not reconsider whether to take soundings as matters progressed, and so did not make a positive decision not to do so. The internal documentation produced during the drafting of Mr Phillips' affidavit shows that consideration was given to whether or not a conscious decision had been taken, it was not clear that it had been, and the phrase then used was seen to be an accurate reflection of the facts as understood by Mr Phillips.

247. It seems to me that whilst the use of the phrase may have seemed unsatisfactory, it was not inappropriate and more importantly did not indicate an intention to mislead on the part of Mr Phillips.

### **The Secretary of State's Involvement in the Affidavits**

248. The Secretary of State was invited to consider and approve or otherwise the affidavits of both Mr Hamilton and Mr Phillips before they were sworn. Each affidavit said that the deponent was authorised to swear it by Mr Hain.

249. In the case of Mr Hamilton's affidavit a draft was submitted to Mr Hain and his attention was drawn to specific passages to which he was asked to give careful

consideration; these included the references to himself and his decisions. Mr Hain was asked to agree that the affidavit be sworn subject to any views he might have.

250. Mr Hain considered the passages referred to, and authorised the swearing of the affidavit. One of the passages said that Mr Hain had in mind when appointing Mrs McDougall that her name had been put forward by the DUP; this was (as explained at paras 228 and 241 above) later altered to say that he was “mindful” of that fact. In my view, both statements like the others to which Mr Hain’s attention was drawn were in fact accurate. Understandably, Girvan J did consider that for the purposes of judicial review the word “mindful” was ambiguous in all the circumstances. This judicial perception is not one which could reasonably have been expected to be shared by a non-lawyer in the position of the Secretary of State and its use does not in my view justify criticism of Mr Hain. For completeness I should add that Mr Hain did make a suggestion about Mr Hamilton’s affidavit. He said that it might be amended to refer to the way in which Mrs McDougall had carried out her role and handled the media, which in Mr Hain’s view demonstrated that she was the correct choice. In my view, nothing turns on that.

251. The pattern in relation to the draft of Mr Phillips’ affidavit was similar to that in relation to that of Mr Hamilton. Again, Mr Hain approved the execution of the affidavit, and suggested adding that Mrs McDougall was a good candidate in her own right. As to the phrase “did not opt to” (take informal soundings from political parties apart from the DUP), Mr Hain considers that the phrase reflected the true position. He had not abandoned the option of taking such soundings, but nor had he actually decided not to take them. He points out that if Mrs McDougall’s appointment did not work out as hoped, it might in Mr Hain’s view have been necessary to take wider soundings. In my view, this is and was a reasonable approach, and neither this nor his approval of the two draft affidavits suggest to me that Mr Hain was being or intended to be less than candid with the Court.

## **RECOMMENDATIONS**

### **General**

252. Making recommendations to try to prevent the repetition of short-comings which have emerged in one specific case has obviously less value than a more broadly-based attempt. I am particularly conscious of the specific factors in this case, including the unique structure of government and the political complexities of Northern Ireland, both of which had a bearing upon what happened, and even in the last few weeks have significantly changed.
253. Nevertheless, there are many features of this case which are common to other Government Departments. These include the need to address strategic as well as tactical and administrative problems when dealing with requests under the FoI Act, especially when those requests are or become a prelude to litigation. Issues concerning the FoI Act are likely to become more not less frequent, and there seems to be a tendency for some of them to be linked to litigation. Whilst it is obviously desirable to have consistency across government in such matters (whilst at the same time recognising that foolish consistency is the hobgoblin of small minds) it may be useful to look at the lessons to be learnt from the present case where they may inform others not directly involved.
254. Finally, I should say that I am conscious that some of my recommendations may well now be covered by the Departments involved and/or by the Department for Constitutional Affairs ("the DCA") guidance. In particular, the NIO now has an arrangement under which the Director of Resources of that Department will promptly be involved if a difficulty occurs in identifying the correct division to respond to an FoI request (though I understand that this has not yet had to be invoked and thus has not yet been tested), and the OFMDFM had in place a system in December 2005 that should have ensured (but did not) that all business areas, including the office of the HOCS, were covered by a trawl for information needed to respond to an FoI request. I understand that that system is now operative. I have also noted the DCA guidance concerning the allocation of transfer arrangements for FoI requests which covers some of the points I make as suggestions to the two Departments concerned.

## **Handling of Freedom of Information Requests**

255. In connection with such requests I recommend that advice to officials and protocols be reviewed to ensure that arrangements are in place and working satisfactorily with regard to:

- (a) deciding which department should take the responsibility for dealing with the request;
- (b) allocating the request to an appropriate division, the head of which will take the responsibility on behalf of the department for dealing with it;
- (c) informing the applicant (seeking if necessary his or her approval) of the arrangements for dealing with the request;
- (d) assessing the implications of the request, including any potential claims for statutory exemptions and whether or not the request is or may be a prelude to litigation. In the latter case, to seek as necessary legal advice and to liaise with the department's legal officials before responding;
- (e) ensuring that information or assistance is sought from all business areas of the department concerned and these are thoroughly searched for the information needed to deal with the request. Further, that the internal enquiries for information are explicit and require a nil response if no other response is appropriate;
- (f) ensuring that if for any reason the statutory time limit cannot be met, or is extended by operation of the Act, the applicant is informed and an estimate given of when a response can be expected;
- (g) considering what advice or assistance should be given to the applicant: in particular whether a response should normally say that it is limited to the information held by the responding department, and whether it should suggest that any other department should be approached;
- (h) ensuring that decisions relating to the request are properly recorded;

- (i) considering whether any other Department or division should be consulted before a response is provided to the applicant.
- (j) ensuring that if an FOL response is subsequently discovered to be inaccurate, this is corrected as soon as possible. If the error is that of another Department, ensuring that the department is informed and asked to confirm that the error will be corrected.
- (k) monitoring, I suggest annually, the handling of FOL requests within each department to identify and address problems which have emerged.

256. A key problem exposed by the Downes case was the need to ensure that for the purpose of responding to a FOL request, or for dealing with a case of judicial review, all the relevant recorded information, including privileged and confidential material, could be assembled in a timely fashion and considered.

257. In such circumstances a Note for the Record (or similar document), which purports to be a trail for audit purposes but which omits sensitive and relevant information recorded separately and held in confidential files, is capable of being misleading (as it was here). That sensitive information should nonetheless be taken into account, and so in principle the decision-maker dealing with the request or the litigation needs to be made aware of its existence. But to reveal the existence of such information on the document may itself cause problems. If Notes for the Record or the like are to be used, I recommend that consideration be given, as the NIO have suggested, to ensuring that they do not omit sensitive information but rather that circulation is appropriately restricted. That should at least ensure that such documents are not in themselves misleading.

258. There remains of course the problem that any relevant confidential documents need to be found for the purposes of the response. Searching on the basis of key words for information held electronically or in paper files requires an element of judgment and a reasonable knowledge of the subject area. Developing effective systems for the retrieval of information and the necessary internal expertise is a complex and wide ranging task beyond the scope of this Review. I would stress however that the bottom-up approach to this task is as important as the top down approach. That is why a periodic review of experience in dealing with litigation and FOL requests is likely to be helpful in developing appropriate solutions.

259. I would only add that I have been struck by the profusion of documentation, including particularly e-mails sometimes with voluminous attachments distributed to large numbers of people, often with no expectation of response and for no particular purpose. Statements I have received typically (and often not unreasonably) point to such communications making no impact and/or say that they have been skim-read. In some cases, the content has simply been ignored. The failure to ensure that responsibility for a given task is allocated and discharged by an identified individual coupled with the ease of electronic communication seems to encourage copying document to numerous people to no useful purpose. In short, unnecessary ill-digested and ill-directed communications can undermine productive efforts and there were numerous signs of that in this case. In the unforgiving circumstances of both FoI legislation and litigation, this is a side effect of the lack of strategic control and an aspect which merits consideration in its own right.

#### **Handling of Judicial Review Proceedings**

260. On receipt of an application for leave to seek judicial review, the Department concerned should appoint a designated officer at a suitably senior level (in a case of any complexity at Grade 3 level or above), to have responsibility for ensuring that the case is properly managed throughout. This responsibility should extend to ensuring coordination with other Departments and bodies which may have an interest in or material relevant to the allegations. It also includes ensuring that Counsel and solicitors are properly briefed.

261. The designated officer should promptly in consultation with other officials involved in the allegations and with legal advice devise and record a strategy for dealing with the case and develop this as necessary as the case proceeds. He should specify and record the arrangements for collecting any necessary documents and other information to enable this strategy to be implemented.

262. The designated officer should normally attend all meetings with Counsel and solicitors. Such meetings should have a written agenda, the material for consideration being circulated in good time to all concerned. Notes should be taken at the meeting. The minutes should clearly show who has attended, what advice has been given, what decisions have been reached and what further steps

have been identified as necessary and by whom they are to be taken. The minutes should be circulated to all present within two working days of the meeting.

263. For the purposes of an application for leave to seek judicial review, consideration should so far as possible be given by the designated officer in consultation with the lawyers concerned as to whether the position previously taken by the Crown in correspondence or otherwise seems in all respects to be defensible, and on that basis decide what position should be taken on the application for leave, and instruct Counsel accordingly.
264. The designated officer should report monthly on the progress of the case and on any other matters to which attention should be drawn to the Departmental Accounting Officer and the Head of Government Legal Services in Northern Ireland.
265. When affidavits or witness statements of fact are required, the following basic steps should be taken to:
  - a. identify the deponent or witness who should be the individual with the best personal knowledge of the factual issues;
  - b. list before producing the first draft each of the specific points to be covered, taking Counsel's advice if necessary;
  - c. collect the full documentary and other information relevant to the issues to be addressed, ensuring that the search for such material is comprehensive and effective;
  - d. when submitting drafts to the deponent or witness, make it clear that it is his responsibility to satisfy himself that the content is accurate, is not misleading, and as a whole is expressed in a way which truly reflects his position and understanding;
  - e. ensure that all changes to drafts are tracked;

- f. review the end result to ensure it addresses the factual and legal needs of the case without ambiguity.

### **Northern Ireland Court Procedures**

266. Consideration should be given to formal adoption of a pre-action protocol similar to that in use in England and Wales. In making the suggestion, I have noticed Girvan J's endorsement of the underlying approach in Cunningham [2004] NIQB 58.

### **Conclusion**

267. In general, I have found that although there were serious short-comings in the handling of the FoI request of 28.11.05 and in some respects of the litigation which followed, I do not consider there was an intention on the part of the individuals involved to mislead or obstruct the Court. Accordingly, I have not during the Review thought it necessary or appropriate to advise the Attorney General of evidence that might warrant police investigation, and I do not consider that it is necessary to do so at the end of the Review.

Peter Scott QC

25.6.07

## ANNEX A

Neutral Citation no. [2006] NIQB 77

Ref: GIRC5669

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

Delivered: 9/11/2006

### IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

#### QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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

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#### GIRVAN J

#### **Introduction**

[1] In this application the applicant seeks an order of certiorari quashing the appointment of the Interim Victims Commissioner ("the IVC") and or alternatively, a declaration that her appointment by the Secretary of State was illegal. The application is based on five grounds. Firstly, it is contended that the Secretary of State did not have legal authority to make the challenged appointment. Secondly, it is alleged that in making the appointment the Secretary of State failed to take account of a relevant consideration, namely that there was no evidence that the appointee would command cross community support. Thirdly, the Secretary of State made the appointment for an improper purpose, namely for a political purpose in response to a demand for "confidence building measures" by the Democratic Unionist Party ("the DUP"). Fourthly, the applicants claimed to have a legitimate expectation that any such 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. Finally, the case is made that the involvement of the DUP in the process leading to the appointment of the IVC and the failure to involve any other political party was contrary to Section 76 of the Northern Ireland Act 1998.

[2] The five grounds referred represent the final pleaded case made by the applicant. Initially Hart J at the leave stage granted leave only on the legitimate expectation ground. On appeal the Court of Appeal on 22 May 2006 granted leave on the additional grounds referred to above save the last ground which was

added by leave of this court on an application by the applicant subsequent to the Court of Appeal judgment.

[3] Mrs Bertha McDougall was appointed as the IVC on 24 October 2005. She is the widow of a part-time member of the RUC who was shot dead in January 1981 while on duty in Belfast. The applicant is a widow of John Downes who was killed by a plastic bullet fired by an RUC Reserve Constable on 12 August 1984. Both have thus suffered grievously as a result of the Troubles.

[4] The applicant in her affidavit referred to the circumstances of her husband's death. This occurred just over a year after they married. She has one child of the marriage. An RUC officer who was charged with his murder was acquitted. The applicant feels aggrieved that she was not informed or consulted by the prosecution in relation to the criminal proceedings or the prosecution in general. As a victim of the Troubles she welcomed the government victim strategy for people affected by the Troubles or who had had relatives and friends injured or killed throughout that period. She welcomed the concept of a Victims Commissioner as a move towards recognising the impact of the legacy of the Troubles provided that the Commissioner is independent and representative of the views of all victims and is fairly appointed. She feels aggrieved that she only learned of the appointment of the IVC through the media and did not know that such an appointment could be made. It appears to her that Mrs McDougall could not be seen as independent and impartial as she appears to be aligned with party politics.

### **The Issues Relating to Victims Interests**

[5] Issues relating to reconciliation and to the victims of violence were touched on in the Good Friday Agreement in April 1998. In Section 6 of the Agreement dealing with Rights, Safeguards and Equality of Opportunity under the subheading Reconciliation and Victims of Violence paragraph 11 and 12 recorded:

“11. The participants believe that it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation. They look forward to the results of the work of the Northern Ireland Victims Commission.

12. It is recognised that victims have a right to remember as well as to contribute to a changed society. The achievement of a peaceful and just society would be the true memorial to the victims of violence. The participants particularly recognise that young people from areas affected by the Troubles face particular difficulties and will support the development of special community based initiatives

based on international best practice. The provision of services that are supportive and sensitive to the needs of victims will also be a critical element and that support will need to be channelled through both statutory and community based voluntary organisations facilitating locally based self-help and support networks. This will require the allocation of sufficient resources including statutory funding as necessary to meet the needs of victims and to provide for community based support programmes.”

[6] In April 1998 Sir Kenneth Bloomfield the designated Commissioner for Victims published his report “We Will Remember Them”. The intention of establishing a Commission to look at possible ways to recognise the pain and suffering felt by victims of violence arising from the Troubles of the last 30 years including those who had died or been injured in the service of the community was announced by the Secretary of State in Belfast on 24 October 1997. Sir Kenneth’s terms of reference were to lead the Commission and to examine the feasibility of providing greater recognition for those who have victims in the last 30 years as a consequence of the events in Northern Ireland recognising that the events had also had appalling repercussions on many people outside Northern Ireland. The report, the product of painstaking and sensitive investigation, contained a wide range of recommendations relating to helping victims to deal with the trauma they had suffered and the practical difficulties faced by them. One of the recommendations was that in the longer term the interests of victims should be made the concern of a Standing Commission or Protector or Ombudsman for Victims.

[7] The Government accepted the report and this led to the creation of the Victims Liaison Unit in the Northern Ireland Office whose remit was to progress work in that area. In the Office of First Minister and Deputy First Minister (“OFMDFM”) a Victims Unit was established to raise awareness of and coordinate activity affecting victims across the devolved administration. This latter unit replaced the Victims Liaison Unit.

[8] In August 2001 a consultation paper on a victims' strategy was published by the devolved administration and the Ministers with joint responsibility for victims Dennis Haughey MLA and Dermot Nesbitt MLA. This reflected the Northern Ireland Executive’s Programme for Government which included a commitment to cross departmental strategy which would be put in place during 2001-2002 to meet the needs of victims through effective, high quality help and services. The Ministerial Foreword to the Consultation Paper stated that the consultation would be valuable in developing a strategy. One of the specific matters raised in the consultation process was the question whether a Victims Commissioner should be established. While there was no clear view about what the Commissioner would do it is envisaged that he or she would in some way

provide a voice for victims and act as a watchdog over the implementation of policy or service delivery. The cost of a Commissioner would have to be met from Government funds which would leave less money for service provision and help. Question 12 in the consultation paper posed the questions whether a Victims Commissioner should be appointed and, if so, what role and remit he should have.

[9] In April 2002 the Victims Unit published a paper called “Reshape Rebuild Achieve” which set out how the Northern Ireland administration would deliver practical help and services to those who suffered most over 30 years of violence. In relation to the question of a Victims Commissioner paragraph 318 stated:

“One of the specific questions asked in the consultation paper is whether a Victims Commissioner should be established. Again, a wide range of responses was received to this question with a diverse range of opinions being expressed. As some respondents pointed out if this strategy is implemented properly and efficient structures put in place, then any perceived need for a Commissioner should be eroded. Some respondents felt that the appointment of a Commissioner would be a positive move as such a person could provide a voice for victims, while others felt that no clear role existed and that the money to fund a Commissioner could be better spent on providing services. There was also a range of views as to whether a Commissioner should be victim or should come from Northern Ireland. Given that clear view emerged during the consultation as to whether a Commissioner should be appointed and, having considered the matter carefully, we are not convinced of the need for a Commissioner at this stage and do not intend to proceed in this area, although the situation will be reviewed in due course.”

[10] In March 2005 the Secretary of State announced proposals for a Victims and Survivors Commissioner and published a consultation paper “Services for Victims and Survivors” concerning the next phase of the victim strategy and the establishment of a Commissioner for Victims and Survivors. Paragraph 59 et seq deal with the proposal to establish a Commissioner for Victims and Survivors. It was envisaged that the Commissioner would have a key role in promoting the interests of victims and survivors and ensuring that they have access to services appropriate to the needs. What was needed was a model that ensured practical help to victims and survivors and would provide leadership and focus for this area of work. Response to the consultation paper on the topic of a Victims

Commissioner showed a divergence of views on the need for such a post. Some felt that he or she should be appointed on a dedicated long-term basis, should not be a civil servant and should come from grass roots level. Others question the need for a Commissioner given that all the required structures were in place. The consultation period ended in March 2005 and the Government was satisfied that the need for the appointment of a Commissioner was established and concluded that legislation should be introduced to establish the post.

### **The Respondents' Evidence**

[11] According to the affidavit of Mr Clarke, the head of the Victims Unit, on 11 July 2005 officials met with the Secretary of State to discuss issues relating to the past including the appointment of a Commissioner. The Secretary of State noted that the appointment could take up to 18 months. He was keen to demonstrate commitment to build confidence that the Government was serious about addressing the needs of victims of survivors and he asked officials to give consideration to the appointment of an Interim Commissioner. In paragraph 14 of his affidavit Mr Clarke states:

“Following further consideration, in September 2005 the Secretary of State decided in principle on the appointment of an Interim Commissioner for a period of a year while in parallel taking steps to bring forward the legislation mooted in paragraph 13. It was intended that the Interim Commissioner would focus, in particular, on reviewing arrangements for service delivery, coordination of services across departments and agencies, reviewing current funding arrangements in relation to services and grants paid to victims and survivors groups and individuals and consideration of the modalities of establishing a victims and survivors forum. The thinking was that all of this work could be usefully and constructively carried out in the public interest in advance of a permanent appointment.”

The announcement of the appointment of an IVC was made on 24 October 2005. Mr Clarke points out that there was no statement or representation in any of the Government publications including the consultation paper that the Government would consult with the public or any section of the public or any group or any individuals on the appointment of a Victim Commissioner or Interim Victims Commissioner. There was no intention to represent that any such consultation would be undertaken and no such representation was made at any time.

[12] Following the Court of Appeal decision widening the permitted grounds of challenge to the impugned appointment Mr Hamilton, the Head of the

Northern Ireland Civil Service, swore an affidavit recording that he had personal knowledge of the decision making process. He stated in paragraph 1 of his affidavit that where he records in the affidavit the Secretary of State's views about the appointment they were based on information supplied by him. The Secretary of State had seen and approved the contents of his affidavit. In paragraph 6 of his affidavit Mr Hamilton stated that the central reason for the Secretary of State's decision was that he was keen to demonstrate governmental commitment in the area and wanted to build confidence that the Government was serious about addressing the needs of victims and survivors. The Secretary of State did not wish to wait 12 to 18 months before a Commissioner for Victims and Survivors could be placed on a statutory basis but he wanted to take immediate action to give a role to an Interim Commissioner in the period leading up to the statutory appointment of the Commissioner. In reaching that view the Secretary of State was making a judgment as to which course of action would best serve the public interest. He was also conscious that this issue was important in raising the confidence of Unionists in relation to the wider political process.

[13] The remit of the Interim Commissioner was to review current arrangements for service delivery, to review current funding arrangements, to consider the modalities of establishing a victims and survivors forum and to provide a report on his or her findings.

[14] It was considered that speed was of the essence in the making of the appointment and that it would not be necessary to go through a full formal process of appointment in relation to it since the appointment was essentially advisory in nature. While a more formal process of appointment would have gained in terms of transparency, speed was necessary and would prevent the process being divisive. At short notice it might not be easy to find suitable candidates. In a confidential paper addressed to the Secretary of State and the relevant minister Mr Clarke set out in paragraph 5 the criteria proposed for the appointment:

"List of Potential Candidates

5. We can discuss this at the proposed meeting with officials, but in general it is thought that someone from an academic or professional background may be best suited to the role. In particular, we would be seeking someone who would:

- i. have an established record in dealing with conflict situations either within Northern Ireland or elsewhere;

- ii. have the capacity and interpersonal skills to work with the diverse range of groups and organisations in the victims sector;
- iii. have the necessary analytical skills to organise and prepare a report on his or her findings and be able to
- iv. command cross community support."

In paragraph 14 of his affidavit Mr Hamilton translates the criteria into criteria that the person "should" have the various criteria. Whether there is a difference between the use of the word "would" in Mr Clarke's paper and "should" in Mr Hamilton's affidavit is a matter to which I shall have to return. According to Mr Hamilton's affidavit the Secretary of State was content with the qualities indicated but considered that the search should not be confined to those with an academic or professional background. Initially the process which officials had in mind was that they would draw up a list of potential candidates which would then be the subject of soundings with local political parties followed by the checking of availability of candidates to take up early appointment. The Secretary of State approved this approach. A list of candidates was accordingly drawn up by senior officials. This consisted of 16 names. It included one name put forward by the DUP but that person almost immediately withdrew his/her name and the DUP then provided Mrs McDougall's name. Mr Hamilton's affidavit does not deal with the question of how it came about that the DUP had put forward a name in the first place or how it came about that they then provided the alternative name. Both those matters are a matter of some significance. Mr Hamilton selected two candidates whose names should be forwarded to the Secretary of State for discussion. One was Mrs McDougall. According to a Note for the Record prepared by Mr Hamilton dealing with the appointment of the Interim Commissioner under "Shortlist" Mr Hamilton stated:

"Following my personal consideration of each candidate, I was of the view that the following two candidates met all the criteria and would be, by far the strongest in respect of those criteria ie Mr X and Mrs Bertha McDougall.

I had also discussed with NIO/OFMDFM colleagues the possibility that if Mrs McDougall was appointed Mr X might be approached to see if he would be available on a part-time basis to offer advice on the trauma issues, particularly since that is required under the terms of reference of the Interim Commissioner.

Following discussion with the Secretary of State Jonathan Phillips and I met with Mrs McDougall to explore her availability. During this discussion, she was at pains to point out that she is not, never has been, a member of any political party (including the DUP) and sees the need for the Commissioner to be seen as independent of any such political affiliation. I subsequently advise the Secretary of State that in our view Mrs McDougall had the range of experience, knowledge and ability to undertake this role satisfactorily. I also advise that while her associations with RUC widows and trusteeship of the RUC GC Foundation would mean that her appointment might attract some criticism from Nationalists, we were of the view that her personal dispositions seemed to us likely to enable her to handle such criticism sensitively."

The criterion on cross community support was viewed by Mr Hamilton as not simple to satisfy. It was clear that it would be difficult to find persons who would be acceptable to all sides of the community. Mr Hamilton noted that the appointment would be warmly welcomed within the broad Unionist community particularly by the DUP but was likely to be criticised by the Nationalist community, particularly Sinn Fein. However Mr Hamilton in his affidavit said he was satisfied that "she was an individual who had the qualities to secure sufficient cross community support and acceptance." In paragraph 30 Mr Hamilton stated that in the view of the Secretary of State and of Mr Hamilton and Mr Phillips, having regard to her track record and general approach she would be able to establish credibility and sufficient acceptance across the community. Mr Hamilton asserted that while it was the case that Mrs McDougall's name was fed into the process by the DUP his recommendation was based exclusively on Mrs McDougall's personal merits for the appointment given the range of the criteria and her qualities and experience. "Merit was the sole criterion applied" he asserts in paragraph 32. He stated that the DUP provided a curriculum vitae for Mrs McDougall and when this was examined it was demonstrated that she was a candidate of considerable strength and ability. Her name was placed on the list with other persons whose names had been generated internally. In paragraph 34 of his affidavit he stated:

"In considering the appointment, the Secretary of State was mindful that Mrs McDougall's name had been put forward by the DUP. I have confirmed with him that he gave careful consideration to the possibility of a different candidate and would not have appointed Mrs McDougall had he not been persuaded by the information and advice submitted

to him that she genuinely satisfied the criteria that had been devised for the appointment.”

[15] In paragraph 16 of his affidavit Mr Hamilton stated that the process officials had in mind was that they would draw up the list and that that which would be the subject of soundings of the local political parties and that the Secretary of State approved that approach. He did not address the issue why the Secretary of State did not pursue that approach. The affidavit was approved by the Secretary of State and he could have indicated his reasons for changing his approach. Neither the deponent nor the Secretary of State took the opportunity to explain this change of approach.

[16] The applicant sought leave to cross-examine Mr Hamilton on his affidavit and to have the Secretary of State called as a witness. I acceded to the application to cross-examine Mr Hamilton largely because I considered that his use of the “mindful” in paragraph 34 of his affidavit was ambiguous, a view with which the Court of Appeal agreed and a view which has been reinforced by subsequent events.

[17] Following the lodging of the appeal against my ruling and before the hearing in the Court of Appeal a further affidavit was lodged on behalf of the Secretary of State sworn by Mr Phillips now the Permanent Secretary of the Northern Ireland Office and at the material time Political Director of the NIO. In paragraph 2 of his affidavit Mr Phillips stated that it was apparent to him that there were certain aspects of the background of the impugned appointment of which Mr Hamilton may not have been personally aware and which should properly have been outlined in his affidavit. As in the case of Mr Hamilton he stated that he was authorised by the Secretary of State to make the affidavit. Mr Phillips’ affidavit thus recognises that Mr Hamilton’s affidavit failed to set out the full and accurate picture relating to the appointment. There is no explanation given by Mr Phillips, Mr Hamilton or the Secretary of State as to why the evidence given previously came to be so worded as to fall significantly short of being a full and accurate picture of the true course of events.

[18] Before turning to the contents of the affidavit a number of points must be made. Firstly, Mr Hamilton in his affidavit swore that he had personal knowledge of the decision-making process. Such an averment is a clear representation that he was purporting to provide a clear and accurate picture of the decision-making process to which he was fully privy. His statement was unqualified and clear. Secondly, he purports to record the Secretary of State’s views about the appointment. The affidavit was filed on behalf of the Secretary of State and purports to reflect accurately the Secretary of State’s knowledge and views about the appointment. The Secretary of State was clearly privy to the whole reasoning process leading to the appointment since he was the real decision maker in the matter. Thirdly, the affidavit stated that the Secretary of State had seen and approved the contents of the affidavit. The Secretary of State,

accordingly, is to be presumed to have read and sanctioned the affidavit. It is thus surprising to read in Mr Phillips' affidavit that Mr Hamilton "may not" have appreciated all the background as set out in Mr Phillips' affidavit which, as Mr Phillips stated, should have been outlined in the affidavit. In view of the clear centrality of Mr Hamilton's role in the process in the interviewing and appointment of Mrs McDougall and in the preparation of the submissions to the Secretary of State it seems unlikely that Mr Hamilton did not have personal knowledge of the matters set out in Mr Phillips' affidavit. The centrality of Mr Hamilton's role is borne out by the fact that the Secretary of State put him forward as the proper person to explain the factual background to the appointment. If Mr Hamilton had not had direct involvement in all matters leading up to the decision one would have expected that he would have made himself aware of the factual picture before swearing that he had personal knowledge of the decision-making process. If he had not, he should have done so. One would have expected the Secretary of State who read and sanctioned the affidavit to have taken steps to ensure that it fully and accurately explained the situation. Mr Phillips, of course, was careful in his choice of words "may not have had personal knowledge". It is implicit in this statement that Mr Phillips did not check with Mr Hamilton what his actual state of knowledge was but it is somewhat difficult to understand how he came to swear his affidavit without any discussion with Mr Hamilton to find out what in fact Mr Hamilton's actual state of mind was when he swore his affidavit.

[19] In his affidavit Mr Phillips asserts that there were certain political aspects of the background to the impugned decision in which in his capacity as the Northern Ireland Political Director he was directly involved. He refers to the recurrent feature of the political process known as "building confidence". Following the Assembly elections in November 2003 Ministers began a process of trying to engage all the political parties including the DUP in dialogue aimed at restoring Government. One of the "confidence building measures" consistently advocated by the DUP from mid 2004 was the appointment of a Victims Commissioner in Northern Ireland. Bearing in mind that the DUP had previously exhibited an intense interest in the subject of victims generally and in the establishment of a Victim's Commissioner in particular the DUP were informed of the Secretary of State's intention in principle to establish the post of Victims Commissioner. This was announced in a Parliamentary written statement on 1 March 2005 the publication of the consultation paper. After considering the advice of OFMDFM and the NIO the Secretary of State at the end of July 2005 decided in favour of an interim appointment without a formal public appointment process. Mr Phillips said it was open to the Secretary of State to take informal soundings from the main Northern Ireland parties on potential candidates but "he did not opt to do so." The way Mr Phillips expresses himself in paragraph 17 on this point is striking. Mr Hamilton had indicated in his affidavit that the Secretary of State had earlier agreed with the view that informal sounding should be taken from all the political parties. At some stage he must have made an actual decision to abandon what he had earlier regarded as a more

inclusive way of taking views. It is thus misleading to say that "he did not opt to" take informal views. The fact is that the Secretary of State, notwithstanding earlier advice and agreement, deliberately decided not to consult the other parties. In paragraphs 18 and 20 of his affidavit Mr Phillips sets out the position thus:

"[18] The Secretary of State did decide, however, that given the continuing interest by the DUP in the establishment of a Victims Commissioner and the background outlined above, if they wished to informally propose a particular individual for the interim appointment he would consider their recommendation. This was duly conveyed to the DUP. The Secretary of State's expectation was that, having regard to the background outlined above and the other evidence, the DUP would be likely to propose a candidate for appointment to the post of Interim Victims Commissioner. This expectation was duly fulfilled as described in paragraph 17 of Mr Hamilton's affidavit, together with the letter dated 27 September 2005 exhibited at paragraph 9 of the accompanying documents.

[20] Accordingly, the views and representations of the DUP and the possible establishment of a Victims Commissioner and Interim Victims Commissioner and their suggestions regarding a suitable candidate for the interim appointment constituted factors taken into account by the Secretary of State in making the impugned appointment. However, this was simply one of the factors in the decision to appoint Bertha McDougall. The Secretary of State also considered carefully her ability to command sufficient cross community support and her individual merits generally. The Secretary of State in considering the appointment of Mrs McDougall was of the clear view that her considerable personal qualities together with a constructive outlook and relevant background and experience made her a strong candidate in her own right. Both Mr Hamilton and I had been of the same opinion and we had advised the Secretary of the State accordingly."

Mr Phillips concluded his affidavit resolutely rejecting the ground of challenge that the impugned appointment was activated by some improper motive on the part of the Secretary of State was rejected. The Secretary of State was acting on

what he considered to be the public interest at all material times. He was making a political judgment about what he judged to be in the public interest.

### **The applicant's challenge on the issue of candour**

[20] At the outset to his submissions Mr Treacy QC made an attack on the respondent alleging that he had failed to comply with his duty of candour. He alleged that from the outset the respondent attempted to conceal the truth about the process of appointment. He referred to correspondence set out prior to commencement of the judicial review proceedings and he referred in particular to a letter of 5 January 2006 from OFMDFM which he contended gave misleading and evasive answers to a request for information about the process. The respondent at the leave stage in the judicial review application argued that there was no sustainable evidential basis for the ground of improper motive (that is the politically motivated basis of the decision to create the post and to appoint Mrs McDougall as the IVC as a nominee of the DUP). This argument sought to cover up the material which showed the political motivation and, had the Court of Appeal rejected the appeal, the role which the Secretary of State invited the DUP to play would never have emerged. Mr Hamilton's affidavit lodged after the Court of Appeal gave leave on extended grounds was incomplete, misleading and evasive. Mr Phillips' affidavit was sworn, it was argued, as a result of the order for cross-examination. Only then did the facts emerge showing the centrality of the role of the DUP and the Secretary of State's desire to engage them in the political process and his use of the appointment to that end. Mr Phillip's affidavit made it quite clear that the main, if not the only, motivating factor for establishing the post of Interim Victim Commissioner was to satisfy the DUP's call for action in this area. Mr Hamilton's affidavit had downplayed the centrality of the Secretary of State's confidence building thinking to the point of effectively saying that the Secretary of State was merely conscious of it. Mr Phillips makes clear that the DUP was actively approached to suggest a candidate for the post. That did not clearly emerge from the affidavit of Mr Hamilton. While Mr Hamilton said that the Secretary of State was "mindful" of the fact that Mrs McDougall had been recommended by the DUP Mr Phillips affidavit shows that the factors taken into account by the Secretary of State were that Mrs McDougall had been suggested as a suitable candidate by the DUP and that the early appointment of a Victims Commissioner would be favourably regarded by the DUP and the step would build confidence of the DUP in the political process. Mr Treacy contended that in assessing the evidence offered by the Secretary of the State the court should approach the evidence in the light of the lack of candour.

[21] The duty of good faith and candour lying in a party in relation to both the bringing and defending of a judicial review application is well established. The duty imposed on public bodies and not least on central government is a very high one. That this should be so is obvious. Citizens seeking to investigate or challenge governmental decision-making start off at a serious disadvantage in

that frequently they are left to speculate as to how a decision was reached. As has been said, the Executive holds the cards. If the Executive were free to cover up or withhold material or present it in a partial or partisan way the citizen's proper recourse to the court and his right to a fair hearing would be frustrated. Such a practice would engender cynicism and lack of trust in the organs of the State and be deeply damaging of the democratic process, based as it is upon trust between the governed and the government, a point underlined in the Ministerial Code published by the Cabinet Office in July 2005 which in paragraph 1 stresses the overarching duty of ministers to comply with the law, to uphold the administration of justice and to protect the integrity of public life. The Code also requires ministers to be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest which should be decided in accordance with the relevant statutes and the Freedom of Information Act 2000. In Quark Fishing Limited v Secretary of State for Foreign Affairs [2002] EWCA 149 Laws LJ put it thus at paragraph 50:

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

A breach of the duty of candour and the failure by the Executive to give a true and comprehensive account strikes at the heart of a central tenet of public law that the court as the guardian of the legal rights of the citizen should be able to rely on the integrity of the executive arm of government to accurately, fairly and dispassionately explain its decisions and actions.

[22] Mr McCloskey QC on behalf of the respondent frankly accepted that the evidence should not have emerged in the way in which it did. However, he argued that while Mr Treacy had made an attack on the candour of the respondents in presenting the evidence the applicant had not shown any legal consequences flowing from that since the court now knows the full case. Mr Treacy's points, however, raise important issues in relation to this case and also on a wider front. If there has been a significant breach of the duty of candour it poses the question as to why this occurred and why the decision-makers considered it necessary to be less than open and frank in presenting their evidence and in dealing with pre-action inquiries. As noted the lack of candour

has the consequence referred to by Laws LJ in Quark Fishing. The court must address the issue of candour as it may impact on how the court approaches the totality of the evidence ultimately adduced. If the court finds a lack of candour, even if it did not ultimately make a difference to the outcome, it has a wider duty to ventilate the issue to ensure that the obligation imposed on the Executive to be full and frank is reinforced for the future.

[23] In Fordham on Judicial Review 4<sup>th</sup> Edition at para. 10.4 states:

“The general absence of orders of disclosure in judicial review is largely sustained by the fact that the court feels able to trust public authorities to approach judicial review in a spirit of candour. It is not surprising that the courts have both praised defendants for frank disclosure and expressed troubled disappointment should have transpire that a public authority has fallen short of the expected duty of openness.”

The words “troubled disappointment” fails to meet the strength of the trenchant criticism that on occasions courts feel compelled to make. For example Lord Lowry in R v IRC (ex parte Continental Shipping) [1996] STC 813 lamented:

“the excessive degree of reticence of the Revenue in the case and then the uncommunicative intransigence in correspondence which admittedly without knowing all facts I found difficult to reconcile with the reasonable attitude which ought to characterise a government department in its dealings with the public.”

In R v Home Secretary (ex parte Bugdaycay) [1987] AC 514 Lord Bridge, referred to the Home Office’s:

“obscurely drafted affidavit ... at worse self-contradictory, at best ambiguous and which does not condescend to particularity.”

The words of Lord Lowry and Lord Bridge in those different cases appear to be singularly apt when applied in the present case. Unlike Lord Lowry whose criticism was made tentative by his lack of full knowledge of all the facts, this court does have much fuller access to the factual situation.

[24] It must be recorded that the court was very conscious that it was being called on to pass a judgment on matters which could reflect on those involved in the decision making process, those who made and sanctioned affidavits and

those who wrote letters on behalf of the Secretary of State. I was anxious to ensure fairness to all concerned and I suggested that in the light of the criticisms clearly spelt out in the applicant's skeleton argument the respondent might wish to consider the question whether he should file an affidavit or provide further explanatory evidence to the court. I also indicated to the respondents that in the interest of fairness and justice the respondent's deponents might wish to be called to go into the witness box to give such evidence as they wished to dispel any criticisms. After the conclusion of the argument I re-listed the matter to indicate that the provisional view which I had reached on the issue of candour was that there had been a lack of candour and that the letter of 5 January 2006 (to which I refer in greater detail below) was misleading and contained false information. I again indicated that the court was anxious to ensure fairness and that it would be willing to permit the respondent to adduce any further material he considered appropriate to dispel my provisional views. After taking instructions counsel in a further written submission indicated that the respondent did not wish to avail of the opportunity. The written submission recorded that the respondent unequivocally accepted that the letter of 5 January 2006 should not have conveyed the impression that the appointee was the best candidate on merit. It was submitted that it was unnecessary and inappropriate for the court to make any finding in its judgment about "the best candidate" issue.

[25] Mr Treacy argued that in considering the question of candour it was necessary to see the whole matter in the light of the way it unfolded from the commencement of the pre-proceedings correspondence to the end of the process. In line with this court's admonition to practitioners in Re Cunningham [2005] NIJB 224 to seek to deal with impugned decisions and actions initially in correspondence the applicant's solicitors by letter 28 November 2005 raised a number of questions of relevance to the appointment of the IVC and in respect of which the applicant was entitled to an answer. In question (d) the question posed was how Mrs McDougall became aware or was made aware of the vacancy of the post and if she was approached by whom that was done. The letter also asked about the nature and extent of any consultation exercise carried out in the actual appointment of the IVC. In relation to the question how Mrs McDougall came to be aware of the post the answer given in this letter of 5 January 2006 was:

*"because the post is an "interim" position for the purpose of having the post holder carry out some advance preparatory work as early as possible a list of potential candidates was prepared by senior officials from the Office of the First Minister and Deputy First Minister and the Northern Ireland Office. Mrs McDougall was considered by ministers as the best candidate for the interim position."* (Italics added).

It is noted that the draft of the letter simply evaded answering the question how she became aware of the post or how she got onto the list. On the question about the consultation on the need for an IVC the answer given was that as it was an interim post with a specific focus on particular areas:

*“No consultation was considered necessary and none took place.”* (italics added)

On the question of the appointment process for the actual appointment the answer given was:

*“No consultation took place on this issue. Based on the criteria set out at (f) above senior officials within the Office of the First Minister and Deputy First Minister and the Northern Ireland Office drew up a list of potential candidates for the post. After further detailed consideration of these candidates against the criteria at (f) officials produced a short list of two persons whom they considered most suitable for the post. Mrs McDougall was considered the most suitable candidate and had discussions with senior officials from both the above departments. Subsequently it was recommended to the Secretary of State that Mrs McDougall be appointed as Interim Victims Commissioner.”* (italics added)

[26] I am satisfied that the information supplied in the letter of 5 January 2006 was evasive, misleading and in certain respects clearly wrong. Since the letter was clearly carefully drafted having regard to the highly political nature of the issues I am forced to the conclusion that this was no mere drafting error. The Office of First Minister and Deputy First Minister clearly avoided answering the question how Mrs McDougall came to be aware of the vacancy and gave a wholly misleading impression that Mrs McDougall’s name was put on the list by senior officials thereby impliedly suggesting that this was done internally. It was incorrect to state that no consultation took place about the actual appointment of the Interim Commissioner. The reality is that the Secretary of State did consult the DUP. The Secretary of State did in fact invite them twice to informally propose a particular individual whom he would consider. This was clearly a form of consultation on any proper understanding of the term. The impression that the appointee was the best candidate on merit was false as the further written submission lodged on behalf of the Secretary of State frankly conceded.

[27] Under section 1 of the Freedom of Information Acts 2000:

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

There are exceptions to this duty but the OFMDFM did not seek to rely on any of the exceptions. The duty lying on the relevant department was thus to provide the information honestly and correctly. For some reason it was decided within government that incorrect and misleading information would be supplied. It may be the case that the writer of the letter acted conscientiously in passing on the information that was supplied to him to pass on. Questions, however, arise as to the source of the incorrect information that was sent out in the letter of 5 January 2006; as to who decided to provide that information in that form; and as to who decided to effectively withhold the correct information that the DUP was consulted, played a role and had nominated Mrs McDougall at the request of the Secretary of State. When the matter was mentioned before me when I indicated my provisional views I raised the question as to how it came about that the incorrect information came to be sent out in the letter. The respondent did not explain that and the additional submissions left that question unanswered.

[28] The evasive and misleading nature of the information in that correspondence forms the background to the case which led to the respondent contending at the leave stage that there was no evidence to justify the applicant’s ground of challenge based on alleged improper political considerations. The instructions given to counsel were obviously misleading. The respondent attempted to compound the inaccurate information supplied in the letter of 5 January 2006 by presenting opposition to the grounds of this review challenge on the basis that there was “no sustainable evidential basis” for the allegation of political motivation. At the hearing of the interlocutory appeal before the Court of Appeal the respondent sought to rely on the letter of 5 January 2006, counsel for the respondent stating that Northern Ireland Office officials had drawn up a list of potential candidates who were the subject of detailed consideration (see para [13] of the judgment of Kerr LCJ in the Court of Appeal). Thus, on instructions, counsel on behalf of the Secretary of State were making to the Court of Appeal a case based on the misleading information contained in the letter of 5th January. Had the letter of 5<sup>th</sup> January 2006 contained the correct information leave would undoubtedly have been given at the leave stage on the issues that are now before the court. The incorrect information thus did mislead the court at the initial leave stage. Since within the NIO and OFMDFM the true factual situation was known it must be concluded that it was decided that the correct

information should not be placed before the court. This exercise which was successful before the lower court was repeated again in the Court of Appeal. Had the Court of Appeal not allowed the appeal the respondent would have successfully frustrated the applicant's legal challenge by the withholding from the court of material evidence. This case, thus, raises very serious issues which should be the subject of immediate and searching inquiry at a high level.

[29] Having failed to properly and fairly deal with the matters referred to in the letter of 5<sup>th</sup> January 2006 the respondent then filed the affidavit from Mr Hamilton which, as has been already been shown was a less than full explanation of what actually happened and sought to minimise the political considerations and to stress the proposition that the appointment was entirely merits based ("merit was the sole criterion applied.") The down playing of the importance of the DUP's nomination to a factor of which the Minister was merely "mindful" put a spin on the true situation which was misleading. The inference to be drawn in the circumstances is that the respondent was attempting to divert attention from the true course of events.

[30] In the circumstances I accept that Mr Treacy's contentions that there was a significant lack of candour. In consequence the court must approach the totality of the evidential basis of the respondent with considerable caution and parse the words used by the deponents with considerable care. While the normal approach is that in a judicial review application the affidavits of public officers will be interpreted in bonam partem that principle is based on the assumption that candour, openness and frankness are to be expected of public officials. If the trust of the court is broken then, as Laws LJ has pointed out in Quark, the court may have to draw inferences against the decision maker on points which remain obscure.

[31] Before concluding this aspect of the case it is timely to forcefully remind parties of their duties of candour in relation to the provision of information to the court. The affidavits of all parties should be drafted in clear unambiguous language. The language must not deliberately or unintentionally obscure areas of central relevance and draftsmen should look carefully at the wording used in any draft to ensure that it does not contain any ambiguity or is economical with the truth of the situation. There can be no place in affidavits in judicial review applications for what in modern parlance is called "spin". Public bodies and central government agencies in particular are involved in the provision of fair and just public administration and must present their cases dispassionately and in the public interest. Justice lies at the heart of public interest and can only be served by openness in assisting the court to arrive at a proper and just decision. The judicial restraints on matters such as discovery and cross-examination would not long survive if lack of frankness and openness were to become commonplace in judicial review applications.

### **The legal authority of the Secretary of State to make the appointment**

[32] Mr Treacy contended that the Secretary of State had no statutory or other power to make the appointment and that the respondent has late in the day sought to found his legal entitlement to make this appointment on the Royal Prerogative. While under the Royal Prerogative the Crown may appoint and dismiss minister, government officials, officers and men of the forces and the appointment and dismissal of judges and civil servants this does not include appointments such as the one at issue in the present case. The Royal Prerogative is a much attenuated remnant of the Crown's powers. Numerous statutes have expressly restricted it and even where statute merely overlaps it the doctrine is that the Royal Prerogative goes into abeyance. Prerogative powers may be atrophied by mere disuse.

[33] As a further argument Mr Treacy argued that one of the differences between the actions of the Secretary of State in making the appointment and the action of a private citizen in making a similar appointment was that the substantial expenditure involved would come from the public purse. The salary of the IVC is £62,500 and the estimated cost of the office £276,000 per annum. It was contended that the money expended on the IVC and her office has not been shown to be approved in the appropriate manner. In the absence of funding the Secretary of State had no authority to make the appointment.

[34] Mr McCloskey relied on the Royal Prerogative as a legal basis for the appointment. As a matter of constitutional doctrine all functions of government belong to the Crown. While the Crown cannot act under the prerogative if to do so would be incompatible with statute patently there was no such incompatibility in the present instance. Counsel argued that the appointment of commissioners under the Royal Prerogative to carry out similar functions regularly occurs throughout the public service. He cited, by way of example, Sir Kenneth Bloomfield's appointment as the Commissioner to prepare the report into victims under the Good Friday Agreement. Sir Christopher Patten was appointed to head the inquiry into the policing service in Northern Ireland. Sir George Baine was appointed by the DFP to investigate the legal professions. Such appointments were the stuff of governance. Appointees are paid out of the public funds and only government could make a publically funded appointment. While this area will fall within a statutory framework in the future there is no legislation currently in force and thus the Royal Prerogative remains exercisable there being no suggestion of the matter of making such appointments having falling into desuetude.

[35] Counsel for both parties drew the court's attention to the Commissioner for Public Appointments (Northern Ireland) Order 1995. This deals with the powers of the Commissioners for Public Appointment for Northern Ireland. The order was itself made pursuant to letters patent under the Royal Prerogative and the Commissioner for Public Appointments in a person appointed by the Secretary of State. The functions of the Commissioner for Public Appointments

include the maintenance of the principle of selection on merit in relation to public appointments. A public appointment is defined as meaning any appointment not being an extension of an existing appointment by re-appointment or otherwise made by a department to a public body listed in Part II of Schedule I to the Commissioner for Complaints Act (Northern Ireland) 1969 or in Part I of the Schedule to the Order itself but excluding any public body listed in Part II of that Schedule. The appointment of the IVC did not fall within the remit of the Commissioner because, as the Commissioner of Public Appointments pointed out in correspondence the post is not included within the statutory definition. Mr McCloskey pointed to the Order and to the appointment of the Commissioner for Public Appointments as evidence of a clear practice of resort to the Royal Prerogative in the field on public appointments.

[36] Mr Treacy also referred to the Ministerial Code published by the Cabinet Office in July 2005. He refers to para. 1.5 which provided that the Code should be read against a background of the overarching duty on ministers to comply with the law, to uphold the administration of justice and to protect the integrity of public life. In sub-paragraph (d) it is stated that ministers should be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest which should be decided in accordance with the relevant statutes and the Freedom of Information Act 2000. In paragraph 2.6 of the Ministerial Code it is stated:

“Subject to the above paragraphs and to the constitution of the body to which the appointment is made, public (non-civil service) appointments are the responsibility of the minister concerned who should appoint the person *he or she considers to be best qualified for the position*. In doing so, the minister should have regard to public accountability the requirements of the law and to the Commissioner for Public Appointments Code of Practice for Ministerial Appointments to Public Bodies. The process by which such appointments are made should conform to the principles in the Code – ministerial responsibility, merit, independent scrutiny, equal opportunities, probity, openness and transparency, and proportionality – and to the procedures set out in detail in the Code.” (Italics added).

Counsel also referred to the principles of personal conduct of those in public life established by the Committee on Standards in Public Life. Under the heading “Objectivity” it is stressed that in carrying out public business including making public appointments, awarding contracts or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

[37] The Code of Practice for Ministerial Appointments to Public Bodies established by the Commissioner for Public Appointments for Northern Ireland recorded that the Commissioner's remit is restricted to ministerial appointments within the bodies listed but there were many other public appointments in the wider sphere all of which fall outside the Commissioner's remit. These included appointments to advisory bodies and tribunals. The Northern Ireland departments agreed, however, to apply the Code of Practice of the appointments so far as is practicable and with due regard to proportionality. In the context of the guiding principles it is stated that:

“All public appointments should be governed by *the overriding principle of selection based on merit*, by the well informed choice of individuals who through their abilities, experiences and qualities match the needs of the public body in question.” (Italics added).

Under the heading of “Merit and Diversity” it is pointed out in paragraph 2.4 that appointment on merit is the overriding principle within the appointments process. In line with the Nolan Committee's original recommendations criteria for selection can take account of the need to make appointments which include a balance of skills and experience. Nonetheless, departments must guard against positive discrimination and political activity cannot be used as a criterion for selection unless there is a statutory requirement to do so. Under the heading “Openness and Transparency” in paragraph 2.16 it is pointed out that the workings of the appointment system must be clearly visible. All stages to the process including relevant conversations must be documented and the information should be readily available for audit. Under the heading of “Proportionality” it is pointed out that proportionality arguments must not be used to circumvent proper procedures. All deviations from the process set out in the Code of Practice must be fully recorded and departments are advised to consult OCPANI in advance of any significant departure.

[38] Mr Treacy also referred to a statement published by the Commons Public Administration Select Committee which considered the question of the width of the Royal Prerogative. The paper helpfully brings together details of significant aspects of the Prerogative and gives an overview of the mechanism for the control of the prerogative referring in particular to limitations on the prerogative by Parliament and judicial intervention. It concluded by pointing out that it remains impossible to define the exact limits of the prerogative. Mr Treacy argued that it is significant that in the list of areas in the sphere of domestic matters subject to the Royal Prerogative it included the appointment and regulation of the Civil Service and the appointment of QC's but no appointments to other non-statutory offices created by the Crown.

[39] It is clear that over the years the Executive has appointed individuals to positions in the nature of the office in issue in this case, a clear example being the

Commissioner for Public Appointments himself. I accept Mr McCloskey's argument that this is a matter which belongs to the domain of governance. Only the Executive can make an appointment of someone such as the IVC to be funded out of public funds. The appointment to public office of persons who are not civil servants and outwith the ordinary structure of the civil service has been widespread and common over the years and has been unquestioned. Mr Treacy has not persuaded me that no such power exists.

[40] The exercise of the prerogative powers is subject to judicial review in appropriate cases. It is subject to any statutory limitation. An interesting question which was raised in the argument is whether the Executive can by its practices, conduct and representations qualify the width and arbitrariness of the power. That there remains what has been described as a residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown (Dicey's Law of the Constitution) is somewhat anomalous in modern society where the concept of arbitrariness is alien to the commonly accepted features of the rule of law. For example, though not directly relevant here, convention case law repeatedly condemns arbitrariness as inconsistent with the convention rights being alien to the concept of legal certainty, a principle more fully established in the civil law system. Mr McCloskey argued that in the case of appointments falling outwith the remit of the Commission of Public Appointments the exercise of the Royal Prerogative in making appointments is constitutionally unrestrained. The question arises whether, absent a statutory provision, the Executive is bound by any restraining considerations. In view of the conclusion I have reached on other grounds it is unnecessary for me to come to a final conclusion on this question. But in case this case goes further I venture to express my conclusion recognising that the point is one which may require more extensive research and argument. The principles of non-discriminatory appointments and the leaving out of account of political opinion, religion, sex and other characteristics which are now the subject of anti-discrimination law are so soundly established that they have come to represent norms that must inform public appointments and which do in fact inform public appointments having regard to the various codes referred to. Paragraph 2.6 of the Ministerial Code makes clear that Ministers must appoint persons to be considered to be the best qualified for the position. Ministers are required to have regard to public accountability, requirements of the law and the Commissioner's Code relating to public appointments. Merit, independence, scrutiny, openness and transparency are among the overriding principles to which the Executive is wedded under the Codes. By wedding itself to these principles and by its practices the Executive effectively has qualified the otherwise arbitrary width of the powers of appointment to public office. The Crown may by its disuse of powers show an abandonment of a particular prerogative power. Likewise I consider that the Crown may in appropriate cases by its words and conduct make it clear that it will restrict its otherwise arbitrary powers for the future and exercise those powers subject to certain clear principles of restraint. In CCSU v Ministers for the Civil Service [1985] 1AC 374 it was the national security considerations which

prevented the relevant employees from relying on a legitimate expectation of consultation on which they otherwise could have relied. Had national security considerations not been in play the case recognised that the exercise of the Royal Prerogative could be reviewed on grounds of breach of legitimate expectation, the legitimate expectation thus qualifying the otherwise arbitrary powers of the Executive. It would be in my view a legitimate and logical development of the law to hold the Government to its public assurances as to how it proposes to exercise its prerogative powers of appointment.

[41] I now turn to the question whether the appointment was an unlawful exercise of the Royal Prerogative in the absence of approval for the funding of the post. The applicant has not established that the respondent was acting unlawfully on this ground. Within the approved departmental estimates of the OFMDFM funding was approved for a programme on victims (see the provisions of the Budget (No. 2) (Northern Ireland) Order 2005 and the Budget (Northern Ireland) Order 2006). Funds were available under the approved estimate to meet the costs of the IVC who was being appointed to carry out functions in the context of the victims policy. While the expenditure may well have raised issues which would be subject to scrutiny and possible criticisms by the relevant parliamentary committee the incurring of the expenditure would not be unlawful or render the appointment itself *ultra vires* or unlawful.

[42] For reasons to which I will come I am satisfied that the appointment powers in this case were not carried out with regard to the principle of merit which, as the Ministerial Code make clear in the case of public appointments, means choosing the person considered to be *best qualified* for the position. (see para. 2.6 of the Code). In the ordinary employment field the principle of merit always refers to a process whereby the appointer seeks to appoint the *best* candidate. The Secretary of State decided to make an appointment disregarding the principle and thus went outside the constraints that the Executive had imposed on itself in relation to the exercise of the Royal Prerogative powers of appointment.

[43] Nowhere in their affidavits do Mr Phillips or Mr Hamilton assert that Mrs McDougall was the best qualified person for the job. Mr Hamilton's note for the record records that he was of the view that the two candidates met all the criteria and would be by far the strongest in respect of the criteria. Taking that statement at face value, no effort was made to compare Mr X and Mrs McDougall or to weigh up their respective merits in an attempt to identify the objectively better of the two strongest candidates. What emerges from Mr Hamilton's note for the record is that there were internal discussions within the NIO and OFMDMF before Mr Phillips and Mr Hamilton met with Mrs McDougall to explore her availability. That meeting appears to have occurred after a view had been formed that she was the *preferred* candidate. What transpired at the meeting, according to Mr Hamilton, satisfied them of her appointability and qualities. At no time did they interview Mr X or seek views from him. Against that

background it is clear that the exercise which they carried out was not an exercise designed to the appointment of the better of the two leading candidates but to decide to proceed with Mrs McDougall as a good candidate (but not necessarily the better of the two and thus the best in the pool). Why Mrs McDougall was singled out could only have been because she was nominated by the DUP. As we have seen in paragraph 34 Mr Hamilton states that the Secretary of State was "mindful" of her nomination by the DUP and that he had given careful consideration to the possibility of a different candidate and would not have appointed Mrs McDougall had he not been persuaded by the information and advice submitted to him that she genuinely satisfied the criteria devised. What this carefully worded paragraph does not say is that the Secretary of State was satisfied that she was the best candidate or the better of the two strongest candidates. The Secretary of State was not merely "mindful" of the fact that her name had been put forward by the DUP. The inference must be drawn is that this was the decisive factor that diverted the respondent away from what was the proper exercise namely to decide which of the two strongest candidates was the better candidate and the best of the pool uninfluenced by the question of whether Mrs McDougall was nominated by a political party.

[44] Mr McCloskey initially argued that Mr Hamilton's note and affidavit should be read in bonam partem and that it should not be assumed that Mrs McDougall was not the better of the two leading candidates. For reasons already given I am not able to read the affidavit in that way. Had the Secretary of State actually applied the proper merit principle (that is determining the best person for the position on merit) Mr Hamilton would have said so. His guarded, shrouded and carefully crafted language avoided saying that. In this regard his affidavit is significantly different from what was asserted in the letter of 5 January 2006 which stated that "she was considered to be the best candidate for the interim position". The matter is now, in any event, clear in the light of the respondent's most recent unequivocal concession that the letter of 5 January should not have conveyed the impression that the appointee was the best candidate on merit. The fact that counsel on instructions had mounted the argument that the court should not assume that the appointee was not the best candidate ( and thus hold against the applicant on that point under the onus of proof rule applicable in a judicial review) merely underlines the fact that almost to the end the respondent was seeking to rely on ambiguous and misleading affidavits and was unwilling to openly set the record straight. Mr Hamilton's affidavit is so worded as to give the impression, without saying so in terms, that the appointee was the best candidate ("merit was the sole criterion"). The subsequent evidence and the concession made on behalf of the respondent shows that the statement that merit was the sole criterion applied was misleading. The wording led counsel to feel able to effectively mount that very argument. Had the court succumbed to counsel's in bonam partem argument on that point the court would have been persuaded to reach the wrong conclusion on that issue, a result which would have been brought about by the ambiguous wording of the affidavit.

[45] My analysis set out in the preceding paragraphs is relevant when we come to consider the argument that the Secretary of State breached Section 76 of the Northern Ireland Act 1998. Section 76 provides so far as material:

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

(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 sub-section (3) grant an injunction restraining the defendant from committing, causing or permitting further contraventions of the section."

[46] Mr McCloskey sought to argue that Section 76 taken as a whole excludes judicial review because the section contains a distinct set of remedies in sub-section (2) onwards. He called in aid the decision in Re Neill [2006] NICA 5 both at first instance and in the Court of Appeal in which the court had concluded that the special mechanisms under Section 75 for investigations into alleged breaches of a duty to have "due regard to the principle of equality of opportunity" excluded any other remedy. In Re Duffy [2006] NICA at first instance before Morgan J the court accepted that a judicial review remedy arose under Section 76(1). The Court of Appeal tentatively agreed with that proposition.

[47] The predecessor of Section 76 of the 1998 Act was Section 19 of the Northern Ireland Constitution Act 1973 which provided that the obligation not to discriminate was a duty owed to any person adversely affected by a breach and any breach was actionable. In Re O'Neill [1995] NI 274 Kerr J (as he then was) did not query that a judicial review challenge could arise under Section 19. In Purvis v Magherafelt District Council [1978] NI 26 Murray J granted declaratory relief in the context of an alleged breach of the Section 19 duty not to discriminate. The 1998 Act must be seen in the context of the Good Friday Agreement which recorded the British Government's commitment to "the strengthening of anti-discrimination legislation". It cannot have been the intention of Parliament to weaken the remedies by removing judicial review.

[48] Mr McCloskey argued that a litigant relying on Section 76 must establish victim status, a relevant comparator, differential treatment that was motivated by the victim's religious belief or political opinion and a consequential detriment.

He contends that the applicant could not be considered a victim of discrimination or discriminatory treatment. If there is any Section 76 victim it is one of the unspecified parties which was not consulted.

[49] In Re O'Neill [1995] NI 274 Kerr J concluded that a decision taken on the ground of the religious belief of the person who made it would amount to discrimination under Section 19 if its effect was that a person adversely affected by it was thereby treated less favourably than another would have been treated in the same circumstances. For a breach of Section 19 to have occurred the deciding authority must have had the option to treat one group or person as favourably as it would have another in the same circumstances but it had declined or failed to do so on the ground of religious belief or political opinion. In Purvis v Magherafelt District Council [1978] NI 16 Murray J (as he then was) concluded that a plaintiff does not have to prove that the discriminatory action was taken on the ground of *his* religious belief or *his* political opinion. The belief or opinion could be that of some third party provided the plaintiff is adversely affected by the relevant discrimination.

[50] It is true that the applicant could not assert a claim for damages or injunctive relief under Section 76 as she is not the direct victim of any act of discrimination. However, central to the case is the proposition that the Secretary of State carried out the appointment process in an unlawfully discriminatory manner by deciding in favour of Mrs McDougall on a political ground (ie because she was nominated by the DUP and the Secretary of State considered it would be politically advantageous to appoint her in preference to another candidate not because she was the established better candidate between the two but because she was a good candidate who had been nominated by the DUP). Counsel did not seriously take issue with the proposition that if the Secretary of State publicly announced a policy whereby to persuade the DUP into government in all future public appointments DUP nominees would be given preference such a policy could be challenged by judicial review by reliance on section 76. An applicant in such a case could not be precluded from seeking judicial review by recourse to the argument that until actual discrimination happens there is no victim As a victim of the troubles the applicant in this case has standing and a legitimate interest in the proper implementation of the victims policy properly and lawfully conceived and implemented. As a victim of the troubles with such an interest she is affected by unlawfully discriminatory practices in the implementation of victims' policy. I conclude that she can rely on a breach by the Secretary of State of the Section 76 duties in this judicial review application.

### **Improper Motive**

[51] On the issue whether the Secretary of State made the appointment for an improper motive (namely for political purposes in response to a demand for confidence building measures by the DUP) the conclusion is reached that the

Secretary of State was motivated by political considerations to decide not to carry out a proper procedure to identify the best candidate. This leads to the conclusion that he acted for an improper motive. The political consideration which the Secretary of State considered trumped the need to make the appointment fairly having regard to the proper understanding of the merit principle could not justify committing an act of discrimination rendered unlawful under Section 76. Even apart from Section 76 the appointment would have been in fundamental breach of all the relevant Codes relating to the making of public appointments.

[52] There is nothing to indicate that the DUP was expecting or demanding that their nominee should be appointed if she was not the best of the candidates. Doubtless the DUP was anxious to advance the interests of victims and doubtless they considered that their nominee was a strong candidate. The DUP would presumably say that they did not expect or demand that the Secretary of State should disregard the principle of merit in the choice of the IVC. The elected political leaders of the party would be bound to subscribe to the standards set out in the Members' Code of Conduct which demands of MPs full acceptance of the merit principle. The fact is that the Secretary of State decided to disregard the accepted merit norms applicable to public appointments in order to secure the appointment of the DUP's nominee who *ex hypothesi* might not have been the *best* candidate, simply because she was the DUP's candidate. The merit principle is based on a rational and sensible principle, namely that the successful candidate should be the person best able to do the job and give best value for money. The proper purpose for the appointment of the IVC who was being funded from public moneys was the purpose of appointing the person best able to advance the interests of victims, albeit on an interim basis. Inasmuch as the respondent failed to appreciate that point and allowed the political nomination to circumvent proper inquiry into the relative merits of the candidates he was not making the appointment for the proper purpose. The rationale behind the respondent's actions was that by making an appointment disregarding the relative merits of the candidates the interests of political confidence would be advanced. This approach presupposed a belief that in some way the DUP would be impressed by an action which disregarded established norms of appointment and disregarded the merit principle to which ministers and MPs are committed by the relevant Codes of Conduct. The respondent's rationale was not a legitimate or proper one.

### **Cross-Community Support**

[53] The applicant's case is that the Secretary of State failed to take account of a relevant consideration, namely that there was no evidence that the appointee would command cross-community support. It clearly was a criterion of the job that the appointee would "command cross-community support". Mr Hamilton's affidavit records the criterion as "should command cross-community support". While the move from "could" to "should" might be open to the interpretation

that he considered the criterion as meaning something different from the requirement “to be able to command cross-community support” there is probably no real or intended difference in Mr Hamilton’s wording. The requirement was such that the appointer would have to consider whether the person proposed to be appointed would have support across the community. The dictionary definition of “support” is “strengthen a person by assistance or backing, stand by, back up.” In the context of Northern Ireland “cross-community” means in effect throughout the community and thus both religious and political communities of Northern Ireland. Mr Hamilton was no doubt correct in his affidavit in indicating that in the context of the victim issues in Northern Ireland that was going to present a difficulty but it was a difficulty to be grappled with and thus required a careful effort to maximise the attempt to find a person who did generate backing from the two communities and avoid making an appointment of somebody whose appointment would cause division or dissension. In his note to the Secretary of State and Angela Smyth MP under “presentational issues” Mr Hamilton recorded that the appointment of Mrs McDougall would be warmly welcomed within the Unionist community particularly by the DUP but was likely to be criticised by the Nationalist community particularly by Sinn Fein. This was tantamount to saying that the appointment was going to be divisive. It is difficult to understand how it could sensibly be said that the candidate to be nominated “would command cross-community support” unless the decision maker was reinterpreting that phrase to mean something different from its obvious meaning.

[54] When we turn to Mr Hamilton’s affidavit it is to be noted that in paragraph 23, having recognised the difficulty of finding a person acceptable to all sides of the community, he stated that the issue had to be approached by scrutinising carefully the individual and making “a considered judgment of degree.” The question whether an individual had support throughout the community was a question that involved not simply looking at the qualities of the individual but considering how the community as a whole with all its divisions would view the appointment and whether across the community there would be sufficient backing and assistance for the appointee. Criterion (iv) (cross community support) was not to be conflated with Criterion (ii) (inter personal skills). In paragraph 23 Mr Hamilton shows that the decision makers were concentrating on the individual’s qualities without a proper additional focus on the wider community perception or the likelihood of the nominee receiving cross-community support in reality. This is borne out in paragraph 24 where Mr Hamilton acknowledged that the appointment “might be subject to criticism”. Here Mr Hamilton has subtly changed the words “is likely to be criticised by Nationalists” to the seemingly more attenuated words “might be the subject of criticism.” This is an example of the shifting use of language in the affidavit. He goes on to say “I was satisfied she was an individual who had the *qualities* to secure *sufficient* cross-community support and acceptance.” Here the deponent is concentrating on personal qualities and leaving out of account the question whether she would *actually* generate cross-community support. The

introduction of the word “*sufficient*” is also of significance since it appears to have been an intentional watering-down of the criterion to something below the straightforward concept of “cross-community support” plain and simple. In paragraph 30 the deponent concluded that having regard to her track record and general approach she “would be able to establish credibility and sufficient acceptance across the communities.” The question in this criterion was not whether she *would* establish credibility (which might incidentally be referring to a process taking time) but whether on her appointment she could command cross-community support. The use of the words “sufficient acceptance” (the deponent now dropping the word “support” altogether) points to something substantially less clear cut than actual support.

[55] The conclusion I have reached on this issue is that the decision-makers failed to properly address what was involved in establishing that the appointee would command cross-community support. They failed to look for the evidence to show that the appointee would generate that support. It was known as a fact that the appointment would generate criticism in one section of the community and would therefore be likely to be divisive. Notwithstanding that, by a nuanced change of language, they repackaged the concept of cross-community support to mean something different from its primary main meaning. Accordingly, I accept the argument that the Secretary of State failed to take account of a relevant consideration namely that there was no evidence that the appointee would command cross-community support.

### **Legitimate Expectation**

[56] Mr McCloskey argued that the evidence failed to establish the existence of a clear unequivocal and unqualified statement, representation or promise that there would be consultation about the establishment of the post of IVC or in relation to the actual appointment. Mr Treacy argued that the Government had by its representations made clear that if there was going to be consultation on victim issues the consultation would be fair consultation. The statement to Parliament by Mr Murphy MP the then Secretary of State on 1 March 2005 indicated that any process for dealing with victims issues could not be designed in isolation or imposed. There would need to be broadly based consultation with other individuals and groups across the community to put their views.

[57] In his statement to Parliament on 1 March 2005 the then Secretary of State stated that:

“Government has the ultimate responsibility for ensuring that an appropriate mechanism is found for dealing with the past to the satisfaction of all sections of the community. But I recognise too that, for some, the Government’s role in past events is itself seen as an issue and it is hard for some sections of the community to see

us as a genuinely neutral party. Neither does the Government have a monopoly of wisdom, and I recognised the major contribution that many practitioners and other bodies are already making in this field.

These considerations have led me to conclude that any process for dealing with the past in Northern Ireland cannot be designed in isolation or imposed by Government there will need to be broadly based consultation that allows individuals and groups across the community to put their views on what form any process might take and that consultation process would need broad cross-community support if the ideas it generates are to be constructively received."

[58] The statement that a consultation process would need broad community support if the ideas it generates are to be constructively received is a statement of an obvious political reality in the context of the issue of victims in Northern Ireland. The actual process that was followed in the present instance, with a partial consultation involving only one political party, was not apt to generate cross-community support. That, however, is a different point from whether the applicant had a legitimate expectation that she would be consulted or that there would be a consultation process before the establishment of an interim commissionership or the appointment of an IVC. I conclude that the applicant has failed to establish the basis for a legitimate expectation on which she could rely in the present context and I accordingly accede to the thrust of Mr McCloskey's argument on this point.

## **Conclusions**

[59] The appointment of Mrs McDougall

- (a) breached section 76 of the Northern Ireland Act 1998;
- (b) being in breach of the accepted merit norms applicable to public appointments and in breach of the Ministerial Code of Practice in the circumstances the appointment, was in breach of the power of appointment under the Royal Prerogative;
- (c) was motivated by an improper purpose, being motivated by a political purpose (so called confidence building) which could not be legitimately pursued at the expense of complying with the proper norms of public appointments where merit is the overriding consideration; and
- (d) failed to take account of the fact that there was no evidential basis for concluding that the appointee would command cross-community support.

[60] The relevant government departments initially provided partial, misleading and incorrect information as to the manner of the appointment, failing to disclose the true nature of the limited consultation which took place with one political party; implying that no consultation took place when it had taken place; and giving the false impression that the appointment was made on the basis that the appointee was the best candidate in terms of merit when in fact the ordinary principles applicable to an appointment solely on merit were disregarded. The true basis of the appointment did not emerge from the letter of 5 January 2006 under the Freedom of Information Act. The respondent opposed the grant of leave to apply for judicial review of the appointment by reliance on the case made out in the misleading letter and failed to reveal to the court the true factual situation prevailing. The court at first instance was accordingly misled and refused leave on an incorrect basis. When the applicant appealed the respondent sought to persuade the Court of Appeal to refuse the appeal by reliance on the same flawed material. When leave was granted the respondent put forward Mr Hamilton as the person with knowledge of the true circumstances relating to the appointment. His affidavit which was seen and sanctioned by the Secretary of State was ambiguous and failed to disclose all the relevant material pertaining to the appointment. When the court ordered the cross-examination of the deponent the respondent sought to appeal against that decision and to rely on an affidavit which it is now conceded was unsatisfactory and failed to disclose all the material circumstances of the appointment. Before the appeal came on for hearing the respondent filed an affidavit from Mr Phillips which purported to set out the full factual situation. No effort was made to explain how Mr Hamilton's affidavit came to be formulated in a way which was ambiguous and incomplete and implicitly Mr Phillips did not ascertain what aspects of the case as set out in his affidavit actually fell outside the knowledge of Mr Hamilton. No explanation was provided as to how the Secretary of State came to approve and sanction the swearing and filing of an affidavit which Mr Phillips acknowledged was incomplete. Had leave been refused by the Court of Appeal to apply for judicial review the true evidential position would not have come to light and the interest of justice would have been frustrated. Had the respondent succeeded in resisting the cross examination of Mr Hamilton the respondent would have been relying on an affidavit which it is now conceded was incomplete and unsatisfactory. This likewise would have frustrated the interests of justice. In adopting the course that was followed starting with the letter of 5<sup>th</sup> January 2006 and continuing up until the filing of Mr Phillips' affidavit and the concession made to the court that the letter was misleading the respondent failed in his duty of candour to the court.

[61] Nothing in this judgment should be taken as in any way reflecting on Mrs McDougall, on her competence, integrity or quality of workmanship during her tenure of office. She was in no way privy to the inner workings of government in relation to the manner of her actual appointment. She has no doubt carried out

her functions competently, conscientiously and to the best of her ability. Similarly it should be recorded that there is no evidence that the DUP expected or demanded that their nominee should be given preference in disregard of the ordinary merit principle. Neither the IVC nor the DUP were parties to this application. It will be necessary to hear further argument on the appropriate relief to be granted in the light of this ruling. In view of the impact of any order on Mrs McDougall's rights and interest she should be given notice of her entitlement to appear and be heard on the issue of the appropriate relief. Subject to hearing argument on the point, it would appear that any costs incurred by her in such an appearance should be defrayed by the respondent.

## **ANNEX B**

**Neutral Citation no. [2006] NIQB 79**

*Ref:* **GIRF5696**

*Judgment: approved by the Court for handing down*

*Delivered:* **20/11/06**

*(subject to editorial corrections)*

### **IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

#### **QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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

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#### **GIRVAN J**

[1] In the judgment I addressed the question of the manner in which the OFMDFM dealt with the applicant's request for information under the Freedom of Information Act 2000 ("FOIA") and the way in which the respondent dealt with the provision of information and evidence to the court in the course of the judicial review application. As the judgment sought to make clear there were matters which emerged in relation to the way in which the matter was handled that led to the view that the case should be the subject of inquiry. The reference to an inquiry was intended to be a reference to an investigation and the court was not seeking to be prescriptive as to how that investigation should be carried out. If such an investigation is to be fair and meaningful it could not be conducted by any of the personnel involved in the handling of the case. The court's view that such investigation was necessary related to the manner of the handling of the judicial review proceedings and the pre-action letter rather than with the actual decision which was, of course, the subject of full analysis in the course of the judicial review. The Secretary of State has a right of appeal in relation to the court's substantive decision if he considers that the decision was wrong in law.

[2] In relation to the inadequacies and errors in the letter of 5 January 2006 the applicant has potential remedies of her own. Arguably she may pursue the issue of maladministration with the Commissioner for Complaints. More significantly she may have recourse to mechanisms laid down by the FOIA itself. Section 16 of the Act imposes a duty on public authorities to provide advice and assistance so far as it would be reasonable to expect the authority to do so to persons who have made requests for information. Under section 45 provision is made for the issue and periodic review of a code of practice providing guidance to public authorities as to the proper practices to be followed in connection with

the discharge of public authorities' functions. Under section 46 the Lord Chancellor shall issue a code providing for the keeping, managing and destruction of records. The Information Commissioner has a duty to promote the following of good practice by public authorities and to promote the observance of the requirements of the Act and codes. The Information Commissioner may with the consent of the public authority assess whether the authority is following good practice. Under section 50 a complainant may apply to the Commissioner for a decision whether in any specified respect a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. There may be a complaints procedure in the section 45 code of practice which the complainant may have to exhaust before recourse to the section 50 procedure. It will be a matter for the applicant to take advice as what further steps, if any, she may wish to pursue under the FOIA. This may include seeking further information from the NIO and OFMDFM in response to particular questions including some or all of the questions set out in the Schedule. The inaccuracies in the letter of 5 January 2006 were such that it would appear that something went seriously wrong with the procedure for dealing accurately and properly with the FOI request.

[3] The shortcomings in relation to the FOI letter are, however, only one aspect of the matter. The letter formed the background to the respondent's approach to the case thereafter. In my judgment I analysed in some detail the way in which the respondent approached the legal challenge to the decision to appoint the IVC and it is not necessary to repeat those matters. The papers and manner in which the respondent met the legal challenge raised serious issues as to whether there was an attempt to allow the court to be misled as to the true factual and legal situation. The letter, it is now accepted, was wrong to create the impression that the IVC was appointed as the best candidate on merit. It also evaded providing certain information and gave a false answer in relation to the question of consultation. Nothing was done to correct the false impression until after the conclusion of the argument and as a result of the court's direct intervention to clarify the situation. Of course, it is open to the applicant to pursue whatever legal rights or remedies she may have over and above any remedies open to her as referred to in the preceding paragraph. However, the court itself must ensure the integrity of the judicial review system and ensure public confidence in the independence of that system to investigate applications and grant relief when appropriate. This court exercising its judicial review functions is concerned with issues such as the regularity of procedure, the fairness of decisions, the legality of actions by public authorities and the reasonableness of governmental action. These matters go to the heart of proper administration. If the court is to perform its functions properly and if court decisions are to command respect it is imperative that its proceedings are conducted with conspicuous transparency, integrity, openness and fairness. Public authorities have a duty to ensure that the court can fulfil its functions properly. For this reason irregularities that affect its process should be properly investigated in a manner that can allay public concern and the concern of the

court to ensure that its process is not abused. Any possible attempted interference with or obstruction of the course of justice is a grave matter which demands a proper investigation.

[4] It is at common law an offence to pervert or obstruct the course of justice. The offence is concerned with the course of justice and not merely the ends of justice. It is committed when a person or persons act or embark on a course of conduct which has the tendency to and is intended to pervert or obstruct the course of justice. In R v Selvage and Morgan [1982] QB 372 it was held that in order to lay the charge a course of justice must have been embarked on in the sense that proceedings of some kind are in being or are imminent or investigations which could or might bring proceedings about are in progress. The conduct must be:

“conduct which relates to judicial proceedings, civil or criminal, whether or not they have been instituted but which are within the contemplation of the defendant whose conduct was designed to affect the outcome. That conduct includes giving false information to the police with the object of among other things putting them on a false trail.” (at pp379,399).

In R v Ratifiqu [1993] QB 843 it was held that the answer to the question whether particular conduct had a tendency to pervert the course of justice could not depend on whether investigations of the matter which might become court proceedings had begun. Lord Taylor giving the judgment of the court said that if an intention to pervert the course of justice in relation to the matter was proved the conduct had the same quality whether performed before the matter was investigated or even discovered as it would have had at a later stage.

[5] The letter of 5 January 2006 was in response to a solicitor’s letter written in the context of a likely judicial review challenge. If incorrect and misleading information was deliberately given to put the applicant on a false trail then prima facie that conduct would appear to fall within the concept of perverting the course of justice. If, in the course of the substantive judicial review itself, there was a deliberate attempt to mislead the court the same would be true. The letter and the evidence provided by Mr Hamilton as approved by the Secretary of State had the tendency to mislead. The question which arises in this case is whether there was a deliberate attempt to mislead and if so by whom.

[6] At common law a contempt of court is an act or omission calculated to interfere with the due administration of justice. Conduct is calculated to prejudice the due administration of justice if there is a real risk that prejudice will result. (AG v Times Newspaper Ltd [1974] 273.). Sir John Donaldson in AG v Newspaper Publishing PLC [1988] Ch 333 pointed out that in the course of a breach of a court order it is a matter for the parties to raise a complaint in court.

In the case of other contempts (which cover “any conduct which involves an interference with the due administration of justice” ) these

“are in general considered to be matters for the Attorney General to raise. In doing so he acts not as a Government minister but as the guardian of the public interest in the due administration of justice.”

[7] The Attorney General thus has the function of protecting the due administration of justice. I consider the proper course for this court to take is to refer the papers to him to decide what, if any, steps should be taken in the matter in the light of all the circumstances and in the light of all the papers before the court and any documents to which neither the court nor the applicant has access. In the Schedule I set out what appear to me to be the key questions which need to be addressed in a rigorous and searching investigation into the matter. The applicant who was the recipient of the misleading and incorrect information will of course have an interest in the proper conduct of the investigation. This court itself retains an interest in ensuring that this matter is properly investigated. I leave open for argument the question of what further or other powers are vested in this court as the court which was at the receiving end of the evidence adduced by the Secretary of State.

#### Schedule

1. Who drafted the letter of 5 January 2006 (“the letter”)?
2. What information was supplied to the drafter of the letter?
3. Who supplied that information?
4. From what source did that information come?
5. Did the letter as sent incorporate all the supplied information?
6. If not who decided to omit certain information, what information was omitted and who authorised or required the omission of the information?
7. At what level within Government was the request for information considered?
8. How many drafts of the proposed letter were prepared?
9. Who prepared those drafts?
10. Who considered the drafts?
11. Who settled the final draft?
12. Do all the drafts continue to exist and if so where are they?
13. What are the normal practices to be followed in the preparation and approval of a FOI letter and in the retention of documents and drafts?
14. Were the normal practices followed in this case and, if not, why not?
15. What safeguards exist within the OFMDFM and NIO to ensure that a FOI letter contains correct information?
16. How did those safeguards fall down in the present case?
- 17 Who authorised answers indicating that no consultation took place?

18. Who authorised answers indicating that Mrs McDougall was the best candidate in terms of merit?
19. Who decided not to answer the question how Mrs McDougall became aware of the post?
20. To what records and documents was the drafter of the reply given access in preparing the response contained in the letter?
21. To what documents and records did the person who approved the letter have access when the letter was being considered?
22. Was the letter considered by the Secretary of State (“the SoS”) before it was sent?
23. Did the SoS play a role in the settling of the document and, if so, what role?
24. Was the letter considered by Mr Hamilton before it was sent?
25. Was it considered by Mr Phillips?
26. Was it considered by Government lawyers before it was sent and if so were they given access to all the records relating to the appointment and were they fully briefed? If not, why no?
27. At what point did
  - (a) the SoS
  - (b) Mr Hamilton
  - (c) Mr Phillipsbecome aware of the contents of the letter and become aware that the letter was inaccurate?
28. Before swearing his affidavit did Mr Hamilton consider the exhibits to the applicant’s affidavit which included the letter?
29. Did he review the accuracy of the contents of the letter?
30. Why did he not correct the false impression which it is now accepted was created by the letter?
31. Did Mr Hamilton draw the attention of the SoS to the contents of the letter?
32. Did the SoS consider the terms of the letter before authorising Mr Hamilton to swear the affidavit?
33. If the SoS did not consider the terms of the letter before authorising Mr Hamilton to swear the affidavit what documents and material did the Secretary consider before so authorising the affidavit?
34. Did anyone in the NIO and/or OFMDFM and if so who review the papers and records to ensure that the correct factual situation was known to the Crown legal advisers before the hearing before Hart J and before the hearing in the Court of Appeal?
35. Was Mr Hamilton aware of the leave hearing and the appeal hearing and of the information that was being put before the courts?
36. When Mr Hamilton swore that merit was the sole criterion in relation to the appointment was he not aware that no exercise had been carried out to assess the comparative merit of Mrs McDougall and Mr X?
37. If the appointment was not the product of an exercise designed to ascertain who was the best qualified for the job on what basis did he assert that merit was the sole criterion?

38. To what material set out in Mr Phillips' affidavit did Mr Hamilton not have access when he swore his affidavit?
39. Of what material in Mr Phillips affidavit was Mr Hamilton unaware when he swore his affidavit?
40. By the time of the substantive hearing in the judicial review were any of the deponents aware that the letter contained incorrect information?
41. If they were, why were no steps taken to correct the errors and false impression created by the letter?
42. Before Mr Hamilton swore his affidavit did he prepare a statement to enable the affidavit to be drafted?
43. What material was provided to those engaged in drafting the affidavit?
44. How many drafts of the proposed affidavit were prepared?
45. Are these drafts still in existence and if so are they still available?
46. What changes were made to the drafts before the affidavit was finalised?
47. Did the SoS make or suggest or require any changes to the draft of the affidavit before it was finally sworn? If so what changes did he make or suggest or require?
48. Why was it decided that Mr Phillips swear the final affidavit and who made that decision?
49. Was Mr Hamilton a party to that decision?
50. Did he participate in any discussion relating to the decision to file a final affidavit?
51. Was Mr Hamilton involved in the decision to appeal against the decision that he should submit to cross-examination?
52. Was the SoS involved in the decision to appeal the order for cross-examination?
52. When the appeal was brought to the cross-examination order was Mr Hamilton or the Secretary of State aware that the letter contained incorrect and misleading information?
53. Was the decision to file the affidavit of Mr Phillips made after the order for cross-examination?
54. Were minutes kept of the meeting at which it was decided that Mr Phillips should swear the final affidavit and are they available?
55. How was it discovered that Mr Phillips had information of which Mr Hamilton "might not have been aware"?
56. Who discovered that Mr Phillips had such information?
57. Had Mr Philips played any role in the letter of 5 January 2006 or in the judicial review proceedings previously? If so what role?
58. Had Mr Phillips seen Mr Hamilton's affidavit before it was sworn or before the application for cross-examination?
59. If he had did he record any concerns about its contents?
60. Did anyone express concerns in writing or orally about the contents of the affidavit before it was filed? If in writing, in what documents and where are those documents? To whom were such concerns expressed?

61. Did anyone express any written or verbal concerns about the contents of the letter before it was sent? If in writing, in what documents and where are those documents? To whom were such concerns expressed?
62. Did anyone express any verbal or written concerns about the contents of the letter before the hearing before Hart J or before the Court of Appeal hearing on the question of leave? If in writing, in what documents and where are those documents? To whom were such concerns expressed?
63. Did anyone express any verbal or written concerns about the contents of the affidavit of Mr Hamilton before the application to cross-examine Mr Hamilton? If in writing, in what documents and where are those documents? To whom were such concerns expressed?
64. If any concerns in relation to any of the foregoing matters were expressed how were those concerns dealt with?
65. If any such concerns were expressed by anyone were those concerns brought to the attention of the SoS and, if so, how did he deal with them?
66. Was there any information in Mr Phillips' affidavit of which the SoS was not aware and, if so, what information?
67. If the SoS was aware of all the information contained in Mr Phillips' affidavit why did he not bring that to the attention of Mr Hamilton before the affidavit was sworn?

## ANNEX C

Neutral Citation no. [2007] NIQB 1

Ref: GIRC5713

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

Delivered: 15/01/2007

### IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

### QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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

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### 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.

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

**BEFORE THE RIGHT HONOURABLE LORD JUSTICE GIRVAN  
On Friday the 19<sup>th</sup> day of January 2007**

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

UPON this matter being in the list on 21 December 2006 for hearing on the issue of remedy, the matter having been reviewed on 20 November 2006 and 1 December 2006,

AND UPON READING the affidavits of John Clarke filed 20 November 2006 and 5 December 2006 on behalf of the Secretary of State for Northern Ireland (hereinafter referred to as "the respondent"),

AND UPON READING the affidavit of Bertha McDougal (hereinafter referred to as "the notice party") filed 24 November 2006 and 8 December 2006,

AND UPON HEARING Counsel on behalf of Brenda Downes (hereinafter referred to as "the applicant"), Counsel on behalf of the respondent and Counsel on behalf of the notice party,

IT WAS ORDERED that the application do stand for judgment,

AND the application being in the list on 15 January 2007 for judgment in the presence of Counsel for the respective parties,

THE COURT DECLARED that the appointment of Mrs McDougall:-

- (a) breached section 76 of the Northern Ireland Act 1998;
- (b) being in breach of the accepted merit norms applicable to public appointments and in breach of the Ministerial Code of Practice in the circumstances the appointment, was in breach of the power of appointment under the Royal Prerogative;
- (c) was motivated by an improper purpose, being motivated by a political purpose (so called confidence building) which could not be legitimately pursued at the expense of complying with the proper norms of public appointments where merit is the overriding consideration; and
- (d) failed to take account of the fact that there was no evidential basis for concluding that the appointee would command cross-community support.

AND ORDERED that the matter be adjourned,

AND UPON this matter being in the list this day for mention,

IT IS ORDERED:-

1. That the respondent do pay to the applicant the costs of this application,
2. That there be no order as to costs with respect to the notice party.

Ian McWilliams  
Proper Officer

Time Occupied: 20 November 2006 45 mins  
1 December 2006 2 hours 50 mins  
21 December 2006 1 hour 40 mins  
15 January 2007 10 mins  
19 January 2007 10 mins

Filed Date 31 January 2007