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House of Lords

**Session 2007 - 08**

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# Judgments - In re Duffy (FC) (Appellant) (Northern Ireland)

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HOUSE OF LORDS

SESSION 2007-08

[2008] UKHL 4

*on appeal from: [2006] NICA 28*

## OPINIONS

## OF THE LORDS OF APPEAL

## FOR JUDGMENT IN THE CAUSE

**In re Duffy (FC) (Appellant) (Northern Ireland)**

**Appellate Committee**

**Lord Bingham of Cornhill**

**Lord Rodger of Earlsferry**

**Baroness Hale of Richmond**

**Lord Carswell**

**Lord Brown of Eaton-under-Heywood**

**Counsel**

***Appellants:***

**Barry Macdonald QC**

**Karen Quinlivan**

**(Instructed by Howe & Co Solicitors (London) P Drinan Solicitor (N. Ireland))**

***Respondents:***

**Bernard McCloskey QC**

**Paul Maguire QC**

**(Instructed by Treasury Solicitors)**

***Hearing date:***

**26 & 27 NOVEMBER 2007**

**ON**

**WEDNESDAY 30 JANUARY 2008**

**HOUSE OF LORDS**

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT**

**IN THE CAUSE**

**In Re Duffy (FC) (Appellant) (Northern Ireland)**

**[2007] UKHL 4**

**LORD BINGHAM OF CORNHILL**

My Lords,

1. Mr Duffy, the appellant, is a member of the Garvaghy Road Residents' Coalition. He applied for judicial review to challenge the appointment by the Secretary of State for Northern Ireland on 30 November 2005 of two new members of the Parades Commission for Northern Ireland. Those members are Mr David Burrows and Mr Donald Mackay (who has since resigned from the commission). Mr Duffy's challenge was based on a number of grounds directed to the suitability of Mr Burrows and Mr Mackay to be members of the commission and to the process leading to their appointment. His challenge was upheld, on a limited ground, by Morgan J but was rejected by a majority of the Court of Appeal in Northern Ireland (Kerr LCJ and Campbell LJ, Nicholson LJ dissenting) in the judgment now under appeal ([2006] NICA 28, [2007] NI 12).

## *Background*

2. The holding of public parades, processions and marches has long been cherished by adherents of both the main traditions in Northern Ireland, the protestant/unionist and the catholic/nationalist, as a means of expressing their values and celebrating their history. In many cases such events pass off peacefully and unprovocatively. But this has not always proved to be so.

3. Dr Peter North, in paragraph 4.4 of Chapter 4 of the report referred to below, recorded that "after a comparative lull from 1989-1994, parades were a source of contention in a number of areas in 1995". One contentious parade in that year was the parade from the parish church at Drumcree along the Garvaghy Road to the centre of Portadown in County Armagh. The parade was held by the District Orange Lodge, a protestant/unionist body, and the parade was contentious because its route along the Garvaghy Road took it through a catholic/nationalist area. There was a prolonged stand-off outside the church, the police were involved and relations between the two communities deteriorated.

4. Events at Drumcree and in the Garvaghy Road in July 1996 were described in the North report as of "critical importance" (*ibid.*, para 4.11). Attempts to secure some agreement between the two sides had been unsuccessful. The police served notice on the organisers restricting the route of the parade, but this order was resisted, large crowds gathered and for several days there was widespread and serious disorder in Northern Ireland. The police and the military security forces struggled to keep order, but the Chief Constable, fearing a threat to life, revoked the order restricting the route of the parade, which accordingly returned from the parish church to Portadown along the Garvaghy Road. This led to serious disorder, particularly in nationalist areas of Belfast and Londonderry: see North, *op. cit.*, paras 4.11-4.17, and Chapter 10. Londonderry experienced the worst rioting in 25 years.

5. Responding to these problems, the government in August 1996 invited a body under the chairmanship of Dr North to conduct an independent review of parades and marches. Their *Report: Independent Review of Parades and Marches* was published in January 1997. They recommended (Chapter 12) the establishment of an independent body which would (para 12.21) allow interested parties to put their views forward about proposed parades, encourage them to settle difficulties locally, and where that proved impossible, itself come to a view on what, if any, conditions should

be imposed on contentious parades after an appropriately transparent process of examination of all the relevant issues against the background of reformed legal provisions. The composition of the proposed commission was accepted to be of critical importance to its success (para 12.31): it would need widespread acceptance, self-confidence and an ability in its members to work together.

6. The review body's recommendation was accepted, and a commission was established on an informal basis in March 1997. In that year the police allowed the parade to process down the Garvaghy Road, but the area was effectively sealed off and residents were confined to their homes for a number of hours. Steps were then taken to give the commission formal recognition, and in February 1998 the Public Processions (Northern Ireland) Act 1998 was enacted. This established the commission as a body with a chairman and up to 6 members. Its duties, expressed in section 2, were in part educational and advisory but included the promotion and facilitation of mediation as a means of resolving disputes about public processions. It was empowered under the same section to facilitate mediation between parties to particular disputes, to take such other steps as might be appropriate to resolve such disputes and to issue determinations in respect of particular proposed public processions. It was to issue a code of conduct for those organising or taking part in public processions or public meetings and to issue procedural rules and guidelines. Under section 8 it had power to impose conditions on those organising or taking part in proposed public processions, prescribing among other things the route to be followed. Criminal penalties attached to wilful breach of conditions imposed by the commission. Relevant for present purposes is paragraph 2(3) of Schedule 1 to the Act:

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

7. In 1998 the newly-established commission made its first determination relating to the Garvaghy Road. It prohibited the parade down the road, a determination which it repeated in subsequent years. Portadown Loyal Orange Lodge No 1 responded by giving notice week by week, up to 50 times each year, of its proposal to hold a deferred parade including a procession down the Garvaghy Road.

8. In recent years the number of parades notified to the commission has varied but has exceeded 3,000 per annum in total. Statistics published by the commission for the year ending 31 March 2006

show that 73% of these parades were organised by loyalist bodies. The majority of these were not contentious, but of those classified as contentious in the year 2005-2006 92% were loyalist. The loyalist organisations had strongly opposed the establishment of the commission and had resisted its regulation of what they saw as the exercise of a fundamental right. There was accordingly an obvious political need to try and secure the co-operation of these loyalist organisations.

### *The selection process*

9. The terms of office of the serving chairman and members of the commission were due to expire on 31 December 2005, and a decision was taken within government not to renew the appointments of those then holding office and to appoint an entirely new commission. At a meeting with members of the loyal (protestant/unionist) orders in the early part of 2005 about the marching season, the Security Minister (Mr Woodward) encouraged the loyal orders to give their support to the commission, to play a constructive part in it and to consider putting forward candidates in the forthcoming competition. Thought was given to the conduct of that competition, and it was directed that the competition should be conducted in accordance with the principles promulgated by the Office of the Commissioner for Public Appointments. In accordance with those principles an assessor was to be appointed to take part in and invigilate the selection procedures.

10. At the end of July 2005 advertisements inviting applications for appointment to the commission were published in the main newspapers circulating in Northern Ireland and a press release was issued to a large number of addressees. On 26 July the Secretary of State sent 11 letters inviting the recipients to encourage anyone they considered appropriate to apply. The recipients of these letters included the leaders of the four main political parties in Northern Ireland, unionist and nationalist, and the leaders of the four main religious denominations, protestant and catholic. These letters are accepted as proper. The recipients also included the Grand Master of the Grand Orange Lodge of Ireland, the Sovereign Grand Master of the Royal Black Institution and the leader of the Apprentice Boys of Derry, all of these being strongly protestant and unionist organisations. The appellant complains that no similar letter was sent to nationalist groups such as, for instance, the Garvaghy Road Residents' Coalition.

11. The Code of Practice promulgated by the Commissioner for Public Appointments in August 2005 contained guidance on the making of ministerial appointments to public bodies. Paragraph 2.09 of this guidance read:

"2.09 Departments should ensure at interview that candidates demonstrate that they are committed to, and have an understanding of, the value and importance of the principles of public service (see Annex A). The problem most likely to arise is that of actual or perceived conflict of interest. Therefore, as early as possible in the recruitment process, all candidates must be asked to disclose information or personal connections which, if they were to be appointed, could be misconstrued or cause embarrassment to the appointing authority. Departments, in consultation with the bodies themselves, are best placed to judge what might constitute a conflict of interest. If it appears that a possible conflict might exist or arise in the future, this must be fully explored with the candidate to establish whether it is sufficiently significant to prevent the individual from carrying out the duties of the post. The discussions and subsequent decision must be fully documented and the department must be able to justify its decision publicly if necessary."

12. The Secretary of State's advertisements and letters elicited 94 applications. Each applicant received an information pack which contained a leaflet entitled "Probity and Conflicts of Interest - A Guide for Candidates" and an application form. The leaflet contained a series of questions and answers, including the following:

"IF I DECLARE A CONFLICT, DOES THIS MEAN I WILL NOT BE CONSIDERED FOR APPOINTMENT?"

No - each case is considered individually. If you are shortlisted for interview, the Panel will explore with you how far the conflict might affect your ability to contribute effectively and impartially on the Board and how this might be handled, if you were to be appointed. For example, it may be possible to arrange for you to step out of meetings where an issue is discussed, in which you have an interest. However, if, following the discussion with you, the Panel believes that the conflict is too great and would call into question the probity of the Board or the appointment, they can withdraw your application from the competition."

The application form included the following:

"Please give details of any possible conflicts of interest which you consider might arise personally, in relation to any employment or other activity, or in relation to your

connections with any organisations, should you be appointed; and/or any other issue which, if it became public knowledge, might serve to undermine your credibility as a member of the Parades Commission for Northern Ireland. Please also provide information on how you would address the issue should you be successful in your application.”

Each applicant was invited on the application form to name two referees who were in a position to comment on the applicant’s suitability to be a commissioner.

13. The closing date for applications was 9 September 2005. The applications were sifted, and 24 applicants selected for interview. Of these, 2 fell by the wayside. The remaining 22 were interviewed in October-November. All candidates were asked about real or perceived conflicts of interest. A decision was made not to take up candidates’ references, since it was thought the application forms and the interview process would suffice to enable the Secretary of State to make his selection, a practice said on his behalf to be not unusual. The interviewing panel, with the agreement of the assessor, rated 5 of those interviewed as “highly recommended”, 12 as “recommended” and 5 as not suitable for appointment. The Secretary of State then, after discussion with Mr Woodward and his officials, made his selection. Before the appointments were announced on 1 December 2005, the successful candidates were approached, on the Secretary of State’s instructions, to confirm (which they all did) that they were willing to accept appointment and that they would, as commissioners, act objectively and work as part of a corporate team. The new commission took up office on 1 January 2006.

#### *The appointment of Mr Burrows and Mr Mackay*

14. Among those seeking appointment were Mr David Burrows and Mr Donald Mackay.

15. In the conflict of interest section of the application form Mr Burrows entered:

“I was a district officer of Portadown [Loyal Orange Lodge] No 1 for over 10 years. After 12 July this year I stepped [down] as a district officer for personal reasons.

If I was successful with application I would adhere to the chair for guidance in this matter. I don't see a problem as I'm an open-minded person and I can adjust to carry out my duties

with dignity.”

Portadown Loyal Orange Lodge No 1 was the lodge which had organised the parades from Drumcree parish church along the Garvaghy Road, and which had, on the evidence, refused to enter into unconditional negotiations with nationalist residents of the Garvaghy Road for over 10 years. From October 2004 until his resignation for personal reasons in July 2005 Mr Burrows was District Master. He remained a member of the lodge, not resigning until some months after his appointment. He had expressed strong opposition to the re-routing of Orange parades and had, in July 2002, said (although this was not specifically known to the Secretary of State at the time of the appointment) that the Garvaghy Road dispute had come to symbolise the victimisation of Northern Ireland’s unionist community, that the commission must be abolished if peace was to have a chance and that the bigoted and intransigent opposition of the Garvaghy Road Residents’ Coalition to the lodge’s church parade had blighted the Portadown district and Northern Ireland as a whole for much too long.

16. Mr Mackay made the following disclosure in this part of the form:

“Member of the Democratic Unionist Party.

Member of the Orange Institution. I am a member of Portadown Ex Servicemen’s Orange Order.

Member of the Royal Black Institution.

Personally being a member of the above organisations if successful would not in my opinion hinder my employment as a member of the Parades Commission. The reason I make this statement is that I firmly believe that I am well capable of carrying out my functions professionally and upholding the seven principles underpinning public life. I also believe that the Parades Commission need members with a diverse range of opinions, which not only reflect the views of the whole community but who can work together objectively as a cohesive team with fairness, dignity, tolerance and respect, and irrespective of any personal views held, always base their decisions impartially.”

17. In their assessment forms on each of these candidates the panel answered “No” to the question

"Any area of real/perceived conflict of interest?", adding in the case of Mr Mackay:

"No conflict of interest considered. He declared his membership of the DUP and of loyal orders (orange and black). Would be keen to ensure these perspectives were reflected on Parades Commission."

The judge (para 16) described the panel's decision that no perceived conflict of interest arose as "inexplicable", a view shared by the Court of Appeal (per Kerr LCJ, para 31, Nicholson LJ, para 53). Both Mr Burrows and Mr Mackay were rated by the interviewing panel as recommended for appointment but not highly so. The panel was favourably impressed by their motivation.

18. In affidavit evidence sworn on 27 March 2006 on behalf of the Secretary of State in answer to Mr Duffy's application, Ms Carol Moore, who was very closely involved in the appointments process, deposed (para 14(i)) that "The Secretary of State has every confidence that those appointed will be capable of discharging satisfactorily their duties and functions and that they and each of them will act fairly, objectively and appropriately in doing so". He regarded (para 14 (iii)) each of the members appointed as having the requisite qualities of impartiality and independence required of a commissioner. His aim (para 14(iv)) had been to ensure that the incoming commission would attain success and would have wide acceptance and would command respect and be balanced and be free from external political pressure. It would not in his view (para 14(ix)) have been right to exclude either Mr Burrows or Mr Mackay from appointment by virtue of their association with the Orange or other loyal orders. In a further affidavit sworn on 9 May 2006, Ms Moore deposed (para 16) that the background and connections of Messrs Burrows and Mackay were viewed positively as a potential asset and also (para 18) that "In appointing the members of the Parades Commission the Secretary of State viewed each member as suitable to perform all the functions of a [commissioner] including functions in connection with any review of procedures or protocols or policy".

19. Following his appointment but before taking up office, Mr Mackay announced publicly that he would participate in the Drumcree parade, a proposal contradicted by the commission. Later, according to press reports not contradicted in the evidence, at a public meeting, he urged Orangemen "not to give in", said he was fighting the cause "from inside the fence" and spoke of taking "the battle forward".

### *The judge's decision*

20. Morgan J ruled (para 18 of his judgment) that the notion of a body representative of the community in Northern Ireland encompassed not just diversity but also the concept of balance. That applied not just to the decision-making of the Secretary of State when presented with the appointable pool, but also to the process by which the appointable pool was formed. The cross-examination of Ms Moore satisfied him that no consideration had been given to the targeting of nationalist groups to match the manner in which the three loyalist groups had been targeted in the letters the Secretary of State had written. The judge therefore found (para 19) that the appointment process was unlawful because the Secretary of State's officials failed to take into account a material consideration, the possibility of targeting nationalist groups, as a result of which he failed to secure as far as was practicable that membership of the commission was representative of the community in Northern Ireland. He accordingly quashed the appointment of Mr Burrows. He made no order in relation to Mr Mackay who had just resigned.

### *The Court of Appeal judgment*

21. The first judgment was that of Kerr LCJ, with whom Campbell LJ agreed. He considered (para 10) that the duty to secure a representative commission must include an obligation to ensure that the appointments procedures, as well as the appointment itself, were geared towards achieving that goal. He agreed with the judge (para 12) that the Secretary of State was required to take all relevant factors into account, but did not consider (para 15) that whether to target nationalist groups was such a matter. The Lord Chief Justice accepted (para 16) that balance must play a part in the selection of a representative group, but perfect balance could not be achieved in so small a body. The balance required (para 17) was between the two sides of the community in Northern Ireland, but there was no obligation (para 18) on the Secretary of State to consider the targeting of nationalist groups. With reference to Mr Duffy's argument that Messrs Burrows and Mackay were disabled from appointment as commissioners by an irreconcilable conflict between their role as active loyalists and the independent and impartial role of commissioners, the Lord Chief Justice accepted that the conflict issue was both inescapable and obvious. In paragraph 33 of his judgment he ruled:

"It has not been established, in my view, that the Secretary of State failed to have regard to any relevant consideration in dealing with this aspect of the appointment of Mr Burrows and Mr Mackay. Although the forms completed after their interviews failed to bring it

directly to his attention, he was clearly aware of the conflict of interest issue and, since, as I have said, the potential for this was obvious, I cannot but suppose that he realised if these gentlemen were appointed, there would inevitably be occasions when the question of whether they should participate in the Commission's deliberations would arise. There is therefore no reason to believe that the Secretary of State failed to take account of all relevant considerations in this regard. I must therefore turn to consider the irrationality argument."

He went on to say (para 35):

"Only if the Secretary of State was bound to conclude on the material before him that Mr Burrows could make no useful contribution to the work of the Commission could his decision to appoint him be condemned as irrational. While, therefore, I foresee considerable difficulties in Mr Burrows taking part in many of the critical determinations of the Commission, I find it impossible to say that no reasonable decision-maker would have appointed him to this position. That being the standard by which irrationality must be judged, I feel bound to conclude that it has not been met in this case."

22. In his dissenting judgment Nicholson LJ (para 51) held that there was an obligation on the Secretary of State not merely to consider whether residents within the nationalist community affected by contentious parades should be encouraged to apply but to encourage them to apply, so that the Secretary of State would have an opportunity to achieve a balance. But the fundamental flaw in the decision-making process was to seek applications for appointment to the commission from those who were active participants in contentious parades and who could not be expected to be impartial in adjudicating on them. The selection panel had not perceived (para 55) any conflict of interest and therefore had not pursued or recorded anything which would indicate that a conflict of interest could be resolved. It should have been apparent to the Secretary of State (para 56) that the conflict of interest question had not been explored by the panel. The decision was flawed from the start of the selection process (para 58). The OCPA guidelines were not followed (*ibid*). The choice of two active participants in contentious parades (para 59) upset the balance of the commission to such an extent as to render the membership of the commission unrepresentative of the community.

### *The appellant's argument*

23. On behalf of Mr Duffy, Mr Macdonald QC presented a number of different arguments. But his main argument was a very simple one: that there was an irreconcilable conflict between the past and continuing activities of these two appointees as prominent loyalist proponents of the parade down the Garvaghy Road and the independent, impartial and objective role required of commissioners; that this conflict plainly disqualified them from taking part in any decision affecting parades in Portadown and similar contentious parades elsewhere; that this conflict and disqualification should have been obvious to those conducting the selection process, but was not appreciated by them; that this conflict and disqualification should have been obvious to the Secretary of State, but was not appreciated by him; and that, far from commanding widespread public acceptance, the appointments were (as Mr Duffy put it in his affidavit, para 16) "received with disbelief and dismay not only by me and the Garvaghy Road Residents' Coalition but also by the Nationalist community generally and those residents' groups in the areas which will be most affected by the decisions of the Commission".

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24. Mr McCloskey QC, for the Secretary of State responded to this challenge by pointing to the complexity and sensitivity of the parades problem, by emphasising the political nature of the problem and the breadth of the discretion accorded to the Secretary of State, by drawing attention to the care taken by the selection panel to follow OCPA procedures, by relying on the fact that conflict of interest was specifically considered and resolved to the satisfaction of the panel and the Secretary of State and by relying on the Secretary of State's confidence that these appointees would discharge their duties as commissioners with impartiality and independence.

### *Conclusions*

25. Mr McCloskey was right to submit, as he did, that the commission is not a court and its procedures, set out in its rules, are not those of a court. But it clearly has a duty to seek to resolve contentious disputes by mediation where this is possible and, where it is not, to make determinations which will, so far as may be, reconcile the wishes of those who wish to parade with the wishes of those who do not wish to be intimidated, insulted or inconvenienced. These are not judicial tasks, but they are tasks which can only be satisfactorily performed by a body which is accepted by both parties as independent, objective and impartial in its approach. Put negatively, the task is one which cannot be satisfactorily performed by a body which is seen by one party to be in

the pocket or under the domination of the other. I do not understand these propositions to be controversial.

26. With a maximum of seven members including the chairman, the commission is a very small body. While the Act provides that a quorum for a meeting of the commission is three (Schedule 1, para 5(1)), no doubt to allow for the occasional absences and disqualifications which inevitably occur, it may be safely inferred that the commission was generally intended to act as a body comprising most, if not all, of the commissioners. Otherwise, the representative quality which the Secretary of State was to seek to secure in its membership would not be reflected in its activities and determinations. It cannot have been contemplated by the legislature that any of the ordinary commissioners would be routinely disqualified from playing a part in the most difficult, contentious and high-profile business of the commission.

27. Mr Burrows and Mr Mackay had both been very prominent and committed proponents of the loyalist parade from Drumcree along the Garvaghy Road to Portadown. When appointed neither had resigned from the bodies to which they belonged and neither gave any recorded indication that he had changed his allegiance. No reasonable person, knowing of the two appointees' background and activities, could have supposed that either would bring an objective or impartial judgment to bear on problems raised by the parade in Portadown and similar parades elsewhere. There is nothing in the papers which suggests that the interviewing panel recognised this problem at all, and I share the judge's doubt, expressed in paragraph 16 of his judgment, whether they understood the nature of the task on which they were engaged. They do not appear to have considered whether these appointees could plausibly or lawfully act as mediators or decision-makers in relation to the Garvaghy Road or similar contentious parades elsewhere or whether, if not, they could play a full part as commissioners. They do not appear to have considered whether the activities and decisions of a body including two such prominent and partisan activists would command widespread acceptance among the general public. If these matters were considered and discussed they were certainly not fully documented, as the OCPA code of practice required. Essentially the same criticisms must be made of the part of the selection process to which the Secretary of State was personally party. Had these matters been addressed, as in my opinion they plainly should have been, the conclusion would have been reached (and certainly should have been reached) that these appointees could not plausibly and lawfully act as mediators or decision-makers in relation to the Garvaghy Road and similar parades elsewhere, and that they could not, accordingly, play anything approaching a full part in the business of the commission. It was one thing to ensure that the

loyalist interest was represented within the commission, but quite another to recruit two hardline members of the very lodges whose activities had been a focus, probably the main focus, of the serious problems which had caused widespread disorder and led to establishment of the commission.

28. I feel bound to conclude that the decision to appoint Mr Burrows and Mr Mackay was one which a reasonable Secretary of State could not have made if properly directing himself in law, if seised of the relevant facts and if taking account of considerations which, in this context, he was bound to take into account. Both appointments were accordingly unlawful.

29. Having reached this conclusion I think it unnecessary to review additional arguments advanced on behalf of Mr Duffy, including an argument based on section 76 of the Northern Ireland Act 1998.

30. No purpose is served by making any order in relation to Mr Mackay. For the reasons I have given, and in agreement with my noble and learned friends Lord Carswell and Lord Brown of Eaton-under-Heywood, I would allow Mr Duffy's appeal and reinstate the judge's order. The Secretary of State must pay Mr Duffy's costs in the House and in the courts below.

## **LORD RODGER OF EARLSFERRY**

My Lords,

31. Although the Parades Commission is not a body to whose proceedings article 6 of the European Convention of Human Rights and Fundamental Freedoms applies, it is nevertheless one which members of the public, and more particularly those involved in disputes over parades, have to perceive as unbiased if it is to do the job for which it was created. As explained by my noble and learned friend, Lord Bingham of Cornhill, there was, however, an inevitable conflict of interest in the case of both Mr Burrows and Mr Mackay. The only way to avoid this infecting the decisions of the Commission would have been for Mr Burrows and Mr Mackay to recuse themselves from taking part in the work of the Commission in resolving contested applications. Yet, according to the affidavit of Ms Moore, in making the appointments, the Secretary of State proceeded on the basis that each member of the Commission was suitable to perform all the functions of a commissioner. In my view, that was plainly not so in the case of Mr Burrows and Mr Mackay. The decision of the Secretary of State to appoint them must accordingly be regarded as unreasonable and, hence, as unlawful.

32. In full agreement with the reasoning of my noble and learned friends, Lord Bingham, Lord Carswell and Lord Brown of Eaton-under-Heywood on this point, I would accordingly allow the appeal and reinstate the order of Morgan J.

### **BARONESS HALE OF RICHMOND**

My Lords,

33. I agree, for the reasons given by my noble and learned friend, Lord Bingham of Cornhill, and in common with my noble and learned friends, Lord Rodger of Earlsferry, Lord Carswell and Lord Brown of Eaton-under-Heywood, that this appeal should be allowed and the decision of the Secretary of State to appoint Mr Burrows to the Parades Commission quashed. Essentially, both he and Mr Mackay would be disqualified from adjudicating or mediating upon the great majority of contentious parades, including the weekly application to complete the march down the Garvaghy Road. Yet there is no indication that the appointing panel or the Secretary of State understood this, or how little there would be left for them usefully to do, or how their membership would affect the credibility of the Commission as a whole. No doubt both men had something to bring to the Commission, but they could never have been perceived as impartial adjudicators or mediators by the public at large. A Secretary of State who had been properly advised of this could not reasonably have decided to appoint them.

### **LORD CARSWELL**

My Lords,

34. In many countries throughout the world parades constitute no more than a colourful and enjoyable diversion. In Northern Ireland, sadly, they have been for many years the focus of hostility, aggressiveness and misunderstanding between different sections of the community. The Introduction to the report produced in 1997 by the Independent Review of Parades and Marches, chaired by Dr (now Sir) Peter North, contains a well informed and perceptive exegesis and discussion of the complex social issues involved, which one would commend to anyone seeking to understand the problem and the ways in which it might best be approached. The avenue recommended in the report, which was accepted by the Government and passed into law in the

Public Processions (Northern Ireland) Act 1998, was to form an independent commission to determine whether and when parades should be prohibited or limited by the imposition of conditions. The formation of the Parades Commission for Northern Ireland ("the Commission") was not without controversy, and a significant proportion of the community refused to accept its legitimacy. But it has now been in operation since 1998 (and on an informal basis for a previous year). The disorder previously attendant on the holding of some parades has largely subsided, and the sections of the community hitherto bitterly opposed to each other appear to be edging towards some accommodation. Against this background it is of cardinal importance that the Commission be regarded as sufficiently detached and impartial for its decisions to carry general credibility. The appointments the subject of this appeal were designed to bring the Loyal Orders into the decision-making process, which was regarded by the Government as an essential step in making progress on the parades issue. I have concluded, however, for the reasons I shall set out, that those appointments failed to achieve the important goal of maintaining the public perception of the impartiality of all of the members of the Commission necessary for its general acceptance.

35. My noble and learned friend Lord Bingham of Cornhill has set out in the first 13 paragraphs of his opinion details of the background to this appeal and of the selection process, which I gratefully adopt and need not repeat. I can therefore turn directly to consideration of the applications of Messrs Mackay and Burrows.

36. Mr Donald Mackay set out in his application form in considerable detail his experience in a senior post in the Fire Brigade, as a trade union representative and in public and voluntary work and enumerated his various academic qualifications in the field of management, all of which would have been relevant to his ability to discharge the duties of a member of the Parades Commission. The section entitled "Conflict of Interest" contained the question:

*"Please give details of any possible conflicts of interest which you consider might arise personally, in relation to any employment or other activity, or in relation to your connections with any organisations, should you be appointed; and/or any other issue which, if it became public knowledge, might serve to undermine your credibility as a member of the Parades Commission for Northern Ireland. Please also provide information on how you would address the issue should you be successful in your application".*

Mr Mackay's answer read:

“Member of the Democratic Unionist Party.

Member of the Orange Institution. I am a member of Portadown Ex Servicemens Orange Lodge.

Member of the Royal Black Institution.

Personally being a member of the above organisations if successful would not in my opinion hinder my employment as a member of the Parades Commission. The reason I make this statement is that I firmly believe that I am well capable of carrying out my functions professionally and upholding the seven principles underpinning public life. I also believe that the Parades Commission need members with a diverse range of opinions, which not only reflect the views of the whole community in Northern Ireland but who can work together objectively as a cohesive team with fairness, dignity, tolerance and respect, and irrespective of any personal views held, always base their decisions impartially.”

37. Mr David Burrows set out his experience as an engineering co-ordinator in problem solving and team work, which he claimed to have put to good use in his capacity as a District Officer in the Orange Order. He had gained a diploma in management and undergone training in media skills. He placed some emphasis on the importance of earning the trust of other people. He had led the delegation from the Portadown District of the Loyal Orange Order at a number of different talks in an attempt to resolve the Garvaghy Road impasse. In reply to the question on conflict of interest he stated:

“I was a District Officer of Portadown LOL No 1 for over ten years. After the 12th July this year I stepped [down] as a District Officer for personal reasons.

If I was successful with application I would adhere to the Chair for guidance in this matter. I don't see a problem as I'm an open minded person and I can adjust to carry out my duties with dignity.”

38. The members of the panel which interviewed candidates for appointment to the Commission recorded their impression of each on individual forms, then the panel completed composite

assessment forms summarising their conclusions about each candidate. Both Mr Mackay and Mr Burrows were rated as "Recommended", as distinct from "Highly recommended", a grade given to several other candidates. Mrs Carol Moore, Associate Director Policing and Security in the Northern Ireland Office, who chaired the interview panel, stated in paragraph 10 (vii) of her affidavit sworn on 27 March 2006 that it was the view of the interview panel that candidates given either grade should be regarded as suitable for appointment and should form the pool of suitable candidates from which the members of the Commission would be chosen.

39. The panel's overall assessment of both Mr Mackay and Mr Burrows was reasonably favourable in its terms. In the section of the assessment form headed "Public Accountability" there was contained a box "Any area of real/perceived conflict of interest". In respect of each of these candidates the panel gave the answer "No", and on Mr Mackay's form added the comment:

"No conflict of interest considered. He declared his membership of the DUP and of Loyal Orders (Orange and Black). Would be keen to ensure these perspectives were reflected on PC."

Morgan J stated in relation to these assessments of conflict of interest (para 16 of his judgment):

"The decision of the panel members that no perceived conflict of interest issues arose in relation to these applications is in my view inexplicable. It causes one to doubt whether the panel members properly understood the nature of the task on which they were engaged."

The members of the Court of Appeal endorsed this view, Kerr LCJ stating at para 31:

"The learned judge found the panel's statement that there was no area of real or perceived conflict of interest inexplicable and, despite Mr McCloskey's proffered explanation, so do I. There were clearly conflict of interest issues in both cases. As Mr Macdonald has pointed out, much of the work of the Commission concerns mediation between groups who hold opposing views about proposed parades or determining whether contentious parades should take place or if they should be re-routed. Where two of the members of the Commission belong to organisations which are committed to the right of their members to march, the conflict of interest issue is both inescapable and obvious."

40. Mrs Moore sent a submission to the Secretary of State on 11 November 2005 concerning the candidates for appointment. She pointed out the links with the Loyal Orders of three of the candidates, including Messrs Mackay and Burrows. In an annexed summary of the assessment of each candidate she said of Mr Burrows, *inter alia*:

“He is closely identified with the Orange Order and the Drumcree Parade. However he has sought to move this forward and has reached out to the Nationalists. He could add a useful perspective to the Parades Commission.”

Of Mr Mackay she said:

“He is a member of the Orange Order and is keen to ensure that their perspective is reflected in the Parades Commission deliberations (as well as generally wanting to make a difference).”

41. Mrs Moore’s first affidavit, sworn on 27 March 2006, contains a number of averments which illustrate the approach of the Secretary of State to the appointments and the matters to which he had regard in reaching his decision. She stated in paragraph 10(ix):

“On 23 November 2005 the Secretary of State, after considering the application forms and the panel’s assessment of them, discussed with Shaun Woodward MP and officials his provisional conclusions as to who should be the persons selected for appointment. The discussion embraced such issues as how best to give effect to the obligation to ensure as far as practicable that the new Commission would be representative of the community in Northern Ireland as well as the issue of whether any of the persons to be appointed would find themselves in a conflict of interest situation.”

In paragraph 14(i) Mrs Moore deposed:

“The Secretary of State has every confidence that those appointed will be capable of discharging satisfactorily their duties and functions and that they and each of them will act fairly, objectively and appropriately in doing so.”

Similar statements are contained in paragraphs 14 (iii) and 14(vii), and in paragraph 14(iv) it is stated:

“His aim in making the appointments was to ensure so far as he could that the incoming Commission would attain success and would have wide acceptance and would command respect and be balanced and free from external political pressure.”

In paragraph 14(ix) of Mrs Moore’s first affidavit it is stated:

“In respect of the appointments of Mr Burrows and Mr McKay it is the Secretary of State’s view that it would not have been right to have excluded either appointee from membership of the Commission by virtue of their association with the Orange or other loyal Orders. The key questions considered by the Secretary of State were whether these appointees and each of them would be committed to acting in the role of a Commission member in the interests of the wider community and would work as part of the corporate Commission in addressing parading issues.”

In paragraph 16 of her second affidavit, sworn on 9 May 2006, Mrs Moore says:

“Their background and connections were viewed positively as a potential asset, as acknowledged by the Secretary of State in the Press Release he issued at the time of the impugned appointments. The Secretary of State stated that he was particularly pleased that two persons with personal experience and understanding of the Orange Order and the cultural importance of parades had been appointed to the Commission.”

It may be observed that there is little or no mention (apart from the entry in the assessment forms) of the perception among the different sections of the community in Northern Ireland of the ability of the appointees to make impartial and disinterested decisions on contentious parades. I propose to focus now on this aspect of the appointments.

42. Counsel for the appellant drew to your Lordships’ attention a number of documents obtained from the website of the Grand Orange Lodge of Ireland and exhibited to an affidavit sworn by the appellant. It is unnecessary to set out *in extenso* the content of these documents. It is sufficient to say that a constant theme is the expression of the Loyal Orders’ “inalienable right” as citizens to

process along any public highway, in particular on the routes of their traditional parades along which they regularly passed in former years. Another theme is their implacable opposition to residents' groups and their rejection of the legitimacy of the Parades Commission and its function. In one of them, a Press statement dated 1 July 2002, Mr Burrows is recorded as saying that he "was at a loss to understand the latest ban" of the Garvaghy Road parade, and called for the abolition of the Commission. It appears to me inescapable that any person reading these documents - and no doubt many similar statements made in the media by representatives of the Loyal Orders - would take the views contained in them to be those of the members of the Loyal Orders in general.

43. On 23 December 2005 the appellant's solicitor wrote to the Secretary of State expressing her client's concern that the make-up of the Commission demonstrated "a partiality or bias in favour of the Orange Order when determinations are being made on whether to permit controversial parades." The Secretary of State replied on 16 January 2006, as follows:

"Thank you for your letter of 23 December on behalf of your client, Mr J J Duffy, concerning appointments to the Parades Commission.

Firstly, by way of general background, could I say that the recruitment process was entirely open and based on the merit principle. All of those appointed met the required standard at interview. The panel for shortlisting and interviewing applicants included an independent assessor from the Office of the Commissioner for Public Appointments (OCPA) and the process was OCPA-regulated from the outset.

Turning now to your specific questions, I am satisfied that the composition of the Commission is balanced and that the membership is representative of the community in Northern Ireland. In making these appointments, I sought the relevant mix of skills and experience to enable the Commission to effectively discharge its responsibilities. I would ask that you give the Commission the opportunity to demonstrate that. I will judge how far the Commission succeeds based on its performance over time. I hope others will do the same.

The two appointees to whom you refer, David Burrows and Donald MacKay (sic), will bring a valuable insight on the Orange Order to the Commission, but they, like other members, must consider the interests of the wider community, and are obliged to work corporately to

address parading issues. By applying for membership, they have shown a commitment to moving the parades agenda forward and they have my full confidence.

As to the question of any apparent conflict of interest, I am satisfied that membership of an Orange lodge does not of itself amount to a conflict of interest when considering applications for Parades. In addition, the Commission has taken its own independent legal advice to ensure its internal procedures are fair and impartial. On the basis of that advice they have concluded that, provided the interest is declared and taken into account in the Commission's decision making process both Mr Burrows and Mr McKay (sic) can discharge their duties as Commissioners.

As to Mr MacKay's (sic) stated intent, post-appointment, to participate in the Drumcree parade, I understand that the Commission has agreed that members will not participate in any contentious parade or protest."

44. Mr Mackay had announced publicly, after his appointment but before he commenced his office as a member of the Commission, that he would participate in the Drumcree parade. On a later occasion he was reported as having urged Orangemen "not to give in" and saying that he was fighting the cause from "inside the fence" and that he would take "the battle forward". He resigned from the Commission before the judge's decision in the application for judicial review was given.

45. Morgan J held that the appointing process had been unlawful, in that the Secretary of State targeted Loyalist groups when encouraging people to put their names forward for appointment to the Commission, but did not give any consideration to the targeting of nationalist groups. He thus failed to exercise his powers of appointment in such a way as to secure that as far as practicable the membership of the Commission was representative of the community in Northern Ireland, the obligation placed upon him by paragraph 2(3) of Schedule 1 to the Public Processions (Northern Ireland) Act 1998. He therefore quashed Mr Burrows' appointment, Mr Mackay having by then resigned. The judge did not rule on the question of bias, but it appears from the final part of his judgment that he did not regard Mr Burrows as being debarred from consideration for re-appointment. He did not rule on the appellant's submissions made under section 76 of the Northern Ireland Act 1998 or the relevance of or adherence to the OCPA guidelines.

46. In the Court of Appeal Kerr LCJ, with whom Campbell LJ agreed, held that the need to consider

whether to target residents' groups did not arise from the 1998 Act, either expressly or by necessary implication, nor was it so obviously material to the Secretary of State's decision that failure to consider it would not accord with the statutory intention. It was accordingly not a consideration which he was under a legal obligation to take into account.

47. Kerr LCJ went on to hold that no violation of section 76 of the Northern Ireland Act 1998 had been established and that the appointments process adhered to the OCPA guidelines. On the issue of conflict of interest, he held that the Secretary of State was clearly aware of that issue and that there was no reason to believe that he failed to take account of all relevant considerations in this regard. He accepted that Mr Burrows would be unable to take part in some decisions, but considered that there was much that he could contribute to the work of the Commission and found it impossible to say that no reasonable decision-maker would have appointed him to the Commission. The majority of the Court of Appeal therefore allowed the Secretary of State's appeal. Nicholson LJ in a dissenting judgment disagreed on all issues, considering that the decision of the Secretary of State had been flawed from the start of the selection process and that the appointments made upset the balance to such an extent as to render the membership of the Commission unrepresentative of the community.

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48. I am inclined to agree with the conclusion reached by Kerr LCJ on the targeting of the Loyal Orders, but for somewhat different reasons. I think that the targeting or trawl process is one of outreach. It may often be of importance to encourage under-represented sections of the community to apply for appointment to various bodies. Nevertheless, as my noble and learned friend Lord Brown of Eaton-under-Heywood states, it might have been far better if the Secretary of State had targeted bodies likely to recommend candidates who, while possessing the ability to adjudicate impartially, understood the Loyalists' perspective and might have been expected to enjoy their confidence. One can appreciate that the Secretary of State was very keen indeed to bring the Loyal Orders "into the tent". He regarded it as the way to make some progress, if they would take some part in the process of controlling parades so as to minimise disorder and encourage harmony. This was hardly likely to occur if the Loyalist Orders put forward candidates from their own ranks who had been closely associated with contentious parades, which is what they did. The Secretary of State decided to target strongly Loyalist groups, without attempting to seek similar proposals from any persons or bodies who might have been likely to hold the opposite opinion on parading. That decision was bound, when it came to the knowledge of members of the public, to have given rise to a perception of one-sidedness in the minds of many. That was a policy decision for the Secretary of State to make, the wisdom of which may properly be the subject of some debate. As a matter of legality, however, I am not convinced that such targeting was in itself an unlawful act capable of being judicially reviewed. As at present advised, I incline to the view that even-handed targeting is

not a freestanding obligation. It may be evidence, in some cases very strong evidence, of the unbalanced nature of the eventual appointments. I think that there is much to be said for the proposition that the appointments themselves are the matter on which the searchlight of the law should fasten. In view, however, of the conclusion which I have reached on the propriety of those appointments, I do not find it necessary to express a definite opinion on the lawfulness of the targeting.

49. In my opinion the central and determinative question in this appeal is that of perceived bias arising from conflict of interest. Actual or perceived bias on the part of the members of a tribunal will make their decision unlawful and liable to be set aside on judicial review. It is now very firmly established, to the point of being trite law, that, even if no actual bias on their part is shown to exist, the decision of a tribunal will be set aside if the circumstances are such that a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that it was biased: see *Porter v Magill* [2002] 2 AC 357, para 103, per Lord Hope of Craighead. This is what I have termed for convenience perceived bias.

50. It is clear that Messrs Mackay and Burrows had been so closely involved in the Drumcree parades issue that they could not adjudicate or take part in mediation on any further application relating to a parade along the Garvaghy Road. That at a stroke would have removed them from participation in one of the most sensitive and contentious issues with which the Commission has to deal. When it came to such applications, they would have had to recuse themselves, reducing the number of members available to consider the issue and the amount and breadth of expertise and judgment available to the Commission, which it requires in order to reach wise and proportionate decisions. Beyond that specific local issue, they would have faced a similar, if less starkly posed, question if they adjudicated or attempted to mediate on contentious Loyalist parades in other parts of the Province. Against the background of their connection with the Loyal Orders in Portadown, whose insistence on their right to parade on public roads had been so vigorous and single-minded, it is in my view inescapable that the fair-minded and informed observer would have regarded them as committed in favour of permitting all Loyalist parades to be held. They may in fact have suffered a Damascene conversion, but I cannot suppose that that observer would have been ready to accept it. That would have ruled them out of participation in the most important and significant part of the Commission's work, the *raison d'etre* of its foundation. They might well have been able to employ themselves usefully to some extent on such matters as education of the public, but such work is peripheral to the central role of the Commission in issuing determinations about proposed parades.

51. The issue in this appeal, however, is not one of questioning the validity of actual decisions by Messrs Mackay and Burrows, but concerns the validity of the decision of the Secretary of State to appoint them. He was under a statutory duty to ensure, so far as practicable, that the membership of the Commission is representative of the community. I adhere to the view which I expressed in tentative terms in *Re White's Application* [2000] NI 432, 440, that this requirement is to ensure sectarian balance in the composition of the Commission, a view accepted by Kerr LCJ at paragraph 17 of his judgment in the present appeal. It may be arguable that some representation of the sections of the community on each side of the sectarian divide is all that is required and that, whatever else may be said against the appointments, the composition of the Commission as a whole was such that the Secretary of State fulfilled his duty in this respect.

52. For the reasons I have given I do not consider that the appointees Mackay and Burrows could have acted as participants in decisions or mediation in respect of any contentious Loyalist parades in the Province. They would have been confined to the residual work of the Commission, which would have ruled them out of contributing to its substantial task. There is no indication in any of the documents before the House that the panel or the Secretary of State gave any consideration to this fact. On the contrary, Mrs Moore stated in paragraph 18 of her second affidavit that the Secretary of State "viewed each member as suitable to perform all of the functions of a member of the Parades Commission."

53. In making his decision the Secretary of State was bound to have regard to the proper factors, and not to have regard to any other improper factors, in reaching his decision. This involves in the present case two issues, on both of which I find myself unable to agree with the majority in the Court of Appeal. The first is that there is no indication anywhere that the interview panel or the Secretary of State understood or addressed the question of the perceived bias of Messrs Mackay and Burrows. Secondly, if it had been properly addressed -- even in such an area in which the courts will pay deference (perhaps better expressed as recognising a discretionary area of judgment) to ministers' decisions - I agree with Lord Bingham (para 28 of his opinion) that a reasonable Secretary of State could not properly have reached a decision to appoint them as members of the Commission.

54. I accordingly am of opinion, in agreement with Lord Bingham and Lord Brown, that the appointments cannot stand. I do not think it necessary to set out or consider the arguments

developed by both parties on the issues of discrimination or the OCPA guidelines and I shall express no opinion on either.

55. I would allow the appeal and restore the judge's order quashing the Secretary of State's decision to appoint Mr Burrows as a member of the Parades Commission for Northern Ireland. As Mr Mackay has resigned from the Commission, I would not make any order in respect of his appointment.

## **LORD BROWN OF EATON-UNDER-HEYWOOD**

My Lords,

56. I have had the privilege of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. I agree with it completely and there is only one aspect of the matter upon which I wish to say a few words.

57. As Lord Bingham has noted (para 20), Morgan J at first instance regarded the appointment process here as unlawful because account had not been taken of the possibility of encouraging applications for appointment to the Commission from nationalist groups as well as from the three strongly loyalist organisations which *were* targeted. The majority in the Court of Appeal thought that this was not a material consideration which *had* to be considered but merely a matter which some might have considered; Morgan J had gone too far. Nicholson LJ, however, thought that Morgan J had not gone far enough: he thought that there was an obligation on the Secretary of State to encourage applications also from amongst the residents within the nationalist community affected by contentious parades.

58. For my part I respectfully disagree with all these views. Plainly, as Kerr LCJ recognised (at para 24), "the loyal orders were targeted because of their refusal to co-operate with the Parades Commission in the past, a stance that has not been taken up by the residents' groups." But to my mind the obvious vice here was in seeking applications from those totally committed to the loyalist cause. As Nicholson LJ rightly observed (at para 51), "the fundamental flaw in the decision-making process was to seek applications for membership of the Parades Commission from those who were active participants in contentious parades and who could not be expected to be impartial in adjudicating on them." There would have been no point in targeting also those equally committed to

supporting the opposing cause: that would merely have produced yet more applications from people who could not be expected to adjudicate impartially upon contentious parades. Mr MacCionnaith, the spokesperson of the Garvaghy Road Residents Coalition, was clearly correct in the view he took in his affidavit of 26 April 2006:

“I would have considered myself ineligible to apply for a position as a Parades Commissioner. I held this belief because I consider that as someone who has had a prominent role in the controversy over the Drumcree Parade down the Garvaghy Road in particular I would have been regarded as biased and it would have been perceived that I would have a conflict of interest.”

59. It would of course have been another thing entirely if the Secretary of State had instead chosen to target Unionist bodies with a view to their encouraging applications, not from committed and active participants in contentious parades, but rather from people who plainly understood the loyalists' perspective and who therefore might have been expected to enjoy their confidence but who could nonetheless adjudicate impartially. That would have been a perfectly lawful way of seeking to win the loyalists' co-operation in the Parades Commission's work and in my opinion would not have required any corresponding targeting of residents' groups. A useful analogy may perhaps be drawn here with regard to encouraging applications from women. The widely published advertisements inviting applications for membership of the Commission did just that: "Women are not currently represented on the Parades Commission, so applications from women would be particularly welcome." There was plainly no corresponding obligation to tell men that their applications would be no less welcome. And had women's organisations been specifically written to for the same purpose, equally there would have been no obligation to write to men's organisations too.

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60. In short, the single critical error made here was in appointing to the Parades Commission two men with an irredeemable conflict of interest rendering them in effect ineligible for the office. They would have been bound to recuse themselves from mediating or adjudicating upon most of the more contentious disputes before the Commission (although this appears to have gone unrecognised before the furore prompted by their appointment) and in any event their very membership of the Commission (whose determinations are assumed to be those of the body as a whole and are issued simply under the hand of the chairman) would inevitably give rise to the perception of bias against the nationalist community. It is for this reason, more fully developed in Lord Bingham's opinion and leading to the conclusion expressed by him at para 28, that the appeal must succeed with the result he proposes.

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