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Presuming that Legislation Favours a Peace Process: Some Cases from Northern Ireland

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1. The question for consideration

How have senior judges, whether in Northern Ireland or the House of Lords, interpreted legislation in the wake of the Belfast (Good Friday) Agreement? I will address this question by looking at a selection of some of the most prominent cases decided since 1998.¹

2. The political and legal background

- The status of the Belfast (Good Friday) Agreement of 10 April 1998² and the difficulties in forming an Assembly and Executive
- Some related legislation:
 - Public Processions (NI) Act 1998 (c.2)
 - Northern Ireland (Elections) Act 1998 (c.12)
 - Police (NI) Act 1998 (c.32)
 - Northern Ireland (Sentences) Act 1998 (c.35)
 - Northern Ireland Act 1998 (c.47)
 - Police (NI) Act 2000 (c.32)
 - Justice (NI) Act 2002 (c.26)
 - Police (NI) Act 2003 (c.6)
 - Northern Ireland (Monitoring Commission etc) Act 2003 (c.25)
 - Justice (NI) Act 2004 (c.4)
 - Inquiries Act 2005 (c.12)

¹ I have examined some of the House of Lords' decisions in 'The House of Lords and the Northern Ireland Conflict – A Sequel' (2006) 69 MLR 383.

² Cm 3883 (1998).

- Terrorism (NI) Act 2006 (c.4)
 - Northern Ireland Act 2006 (c.17)
 - Northern Ireland (Miscellaneous Provisions) Act 2006 (c.23)
- The status of the St Andrews Agreement of 13 October 2006
 - Some related legislation:
 - Northern Ireland (St Andrews Agreement) Act 2006 (c.53)
 - Northern Ireland (St Andrews Agreement) Act 2007 (c.4)
 - Justice and Security (NI) Act 2007 (c.6)

3. Investigating deaths caused by the security forces

- In *In re McKerr*³ the House of Lords, reversing the Court of Appeal of Northern Ireland, held that a death caused by the RUC prior to the coming into force of the Human Rights Act 1998 on 2 October 2000, did not have to be investigated in a manner compliant with Article 2 of the European Convention of Human Rights.
 - The Human Rights Act 1998, section 7(1)(b) reads: ‘(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may...(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act’.
 - The Human Rights Act 1998, section 22(4) reads: ‘Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section’.
- Lords Nicholls, Steyn, Hoffmann and Brown also rejected counsel’s argument that there was a right under the common law to have an effective investigation of a killing: this, said Lord Nicholls, would mean judges imposing a duty on the state ‘in an area of the law for which Parliament has long legislated’,⁴ although he did not specify what that legislation was.
- On the very same day the House of Lords decided two further appeals in which they held that the law relating to inquests in England and Wales was defective because it did not comply with all the procedural requirements laid down by Article 2 of the European Convention – even though in both cases the deaths in question occurred *before* the Human Rights Act came into force: *R (Middleton) v West Somerset Coroner*⁵ and *R*

³ [2004] 1 WLR 807.

⁴ Para 32.

⁵ [2004] 2 AC 182.

(Sacker) v West Yorkshire Coroner.⁶ And a few months earlier, in *R (Amin) v Secretary of State for the Home Department*, the House had applied the Article 2 standards when judging the effectiveness of an investigation of a racially motivated murder in a young offenders' centre, even though, again, the death had occurred prior to 2 October 2000.⁷

- Were the Lords in *McKerr* influenced by the impact which a contrary decision would have had regarding the post-Agreement investigation of killings by members of the security-force at the height of the troubles? Why did the Court of Appeal of Northern Ireland adopt a different approach?
- In *Jordan v Lord Chancellor*⁸ the House held, by 3 v 2, upholding the Court of Appeal of Northern Ireland,⁹ that a coroner's jury in Northern Ireland cannot return a verdict of unlawful or lawful killing, because this would be to express an opinion on questions of criminal liability. The majority comprised Lords Bingham, Rodger and Brown,¹⁰ and they reached this conclusion because rule 16 of the Coroners Rules (NI) 1963 says: 'Neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability or on any matters other than those referred to in the last foregoing rule'. The same judges thought, however, that a verdict of unlawful or lawful killing *could* be returned in England and Wales because there the prohibition in rule 42 of the Coroners Rules 1984 merely says: 'No verdict shall be framed in such a way as to appear to determine any question of (a) criminal liability on the part of a named person, or (b) civil liability'. The addition of the phrase 'on the part of a named person' was taken to make all the difference.
- The two dissenting judges in *Jordan* were Baroness Hale and Lord Mance. Lord Mance, citing *Jervis on Coroners*,¹¹ said that if issuing a verdict of death aggravated by lack of care was consistent with the English and Welsh prohibition on appearing to determine any question of civil liability, 'there is no reason why it should not be consistent with the Northern Irish prohibition on expressing any opinion on questions of criminal or civil liability'.¹²
- However the majority in *Jordan* did go on to hold that 'nothing in the 1959 Act or the 1963 Rules prevents a jury finding facts directly relevant to the cause of death which may point very strongly towards a conclusion that criminal liability exists or does not exist'.¹³ It would seem that the majority were reluctant to *directly* overturn established

⁶ [2004] 1 WLR 796.

⁷ [2004] 1 AC 653.

⁸ [2007] 2 WLR 754.

⁹ [2005] NI 144 (Nicholson and McCollum LJ; Girvan J), upholding Kerr J, as he then was, at [2002] NI 151.

¹⁰ Lords Rodger and Brown concurred with Lord Bingham's judgment.

¹¹ 9th edn, 1957; p.179.

¹² Para 56.

¹³ Para 39, per Lord Bingham.

practice relating to inquest verdicts in Northern Ireland, perhaps for fear of undermining past decisions; but they were content to *indirectly* overturn it.

- In *McCaughey v Chief Constable of the Police Service of Northern Ireland*,¹⁴ heard alongside the *Jordan* case, all five Law Lords partly allowed the appeal and ruled that section 8 of the Coroners Act (NI) 1959 imposed on the police a continuing duty to supply to the coroner such information as they had at the time of notifying him or her of the death or were thereafter able to obtain.
 - Section 8 of the Coroners Act (NI) 1959 reads: ‘Whenever a dead body is found, or an unexpected or unexplained death, or a death attended by suspicious circumstances, occurs, the district inspector within whose district the body is found, or the death occurs, shall give or cause to be given immediate notice in writing thereof to the coroner within whose district the body is found or the death occurs, together with such information in writing as he is able to obtain concerning the finding of the body or concerning the death.’

4. Proscribing organisations

- In *R v Z*¹⁵ the House of Lords had to decide whether the Real IRA was a proscribed organisation within the terms of section 3(1) of the Terrorism Act 2000, which reads: ‘For the purposes of this Act an organisation is proscribed if (a) it is listed in Schedule 2, or (b) it operates under the same name as an organisation listed in that Schedule’.¹⁶
- In the Crown Court, Girvan J held that the Real IRA was not proscribed and he acquitted the defendants of membership charges, but the Northern Ireland Court of Appeal, after a careful analysis of the statutory language involved, came to the opposite view.¹⁷ The Law Lords unanimously agreed with the Court of Appeal but differed among themselves as to their reasoning. Lords Bingham and Woolf concluded that Parliament clearly intended the Real IRA to be proscribed, although somewhat strangely said that it was not necessary to decide which of the two limbs of section 3(1) was engaged. They simply relied on the principle set out by Lord Bingham himself in *R (Quintavalle) v Secretary of State for Health*:

¹⁴ [2007] 2 WLR 754.

¹⁵ [2005] 2 AC 645.

¹⁶ s 3(1) reads: ‘For the purposes of this Act an organisation is proscribed if (a) it is listed in Schedule 2, or (b) it operates under the same name as an organisation listed in that Schedule’.

¹⁷ [2005] NI 106 (Kerr LCJ, Nicholson and Campbell LJ).

*The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.*¹⁸

Lord Bingham then said in *R v Z*:

*Subsections (1)(a) and (b), although expressed in different language, in my opinion reproduce the effect of the formula first enacted in section 19(3) of the [Northern Ireland (Emergency Provisions) Act 1973¹⁹], and it imposes a single composite test: is this the body listed in the Schedule or a part or emanation of it or does it in any event operate under the name of an organisation listed in the Schedule?*²⁰

- Lords Brown, Carswell and Rodger, while not disagreeing with the interpretative principle set out in *Quintavalle*, stressed that the appeal should be dismissed because the Real IRA clearly fell within the first of the two limbs of section 3(1). They believed that paragraphs (a) and (b) of section 3(1) were mutually exclusive.²¹ With great respect, this seems a preferable approach to that adopted by Lords Bingham and Woolf. One might even query whether the approach of those two judges is consistent with the requirement of certainty in the law, a fundamental principle implicit in Article 7 of the European Convention on Human Rights, which prohibits punishment without law. At the same time, it could not have escaped any of their Lordships' thinking that, had they decided that somehow the Real IRA was not proscribed by legislation, Parliament would almost certainly have had to immediately enact legislation to amend the law retrospectively – as it did when it passed the Northern Ireland Act 1972 on the very next day after the decision by Northern Ireland's Divisional Court in *R (Hume et al) v Londonderry Justices* on the powers of the army to disperse demonstrators.²²
- In *In the matter of an Application by Michelle Williamson*²³ the Court of Appeal of Northern Ireland had to decide whether the Secretary of State for Northern Ireland at the time (Dr Mo Mowlam) had unlawfully failed to 'specify' the Provisional IRA as an organization which was not 'maintaining a complete and unequivocal ceasefire' as required by section 8(b) of the Northern Ireland (Sentences) Act 1998. She had decided

¹⁸ [2003] 2 AC 687, 695.

¹⁹ s 19(3) read: 'The organisations specified in Schedule 2 to this Act are proscribed organisations for the purposes of this section; and any organisation which passes under a name mentioned in that Schedule shall be treated as proscribed, whatever relationship (if any) it has to any other organisation of the same name'.

²⁰ At para 22. One might question whether the test posited by Lord Bingham is indeed a 'single composite test'. It is also worth noting that the second limb of his test does not exactly reproduce the wording of s 3(1)(b): 'operate under the name of' is subtly different from (and wider than) 'operating under the same name as'.

²¹ See, in particular, Lord Carswell at para 54 and Lord Brown at para 68.

²² [1972] NI 91. See B. Hadfield, 'A Constitutional Vignette: From SR & O 1970/214 to SI 1989/509' (1990) 41 NILQ 71 and P. O'Higgins, 'The Northern Ireland Act 1972' (1972) 35 MLR 295.

²³ [2000] NI 281.

not to do so despite the fact that she had already said that she was satisfied that the Provisional IRA had been involved in the murder of Charles Bennett on 30 July 1999 and in the smuggling of weapons into Northern Ireland from the United States earlier in the year. The application for judicial review was brought by the daughter of a couple who had been killed in a bomb planted by the IRA in a shop on the Shankill Road in Belfast in 1993. It was designed to stop the early release from prison on 28 July 2000 of Sean Kelly, who had been convicted of the murder of nine people in that bomb.

- The Court of Appeal rejected the application, Lord Chief Justice Carswell, as he then was, concluding:

'It is not for us in a court of law to intervene unless it is established that the Secretary of State has gone wrong in law...[I]t is not for us to form or express any view on the quality or merits of the decision...The area with which the 1998 Act is concerned is delicate and sensitive, and it is hardly surprising that strong views should be held on it or that decisions within this area should give rise to serious differences of opinion. It is part of the democratic process that such decisions should be taken by a minister responsible to Parliament, and so long as the manner in which they are taken is in accordance with the proper principles the courts should not and will not step outside their proper function of review'.

5. Giving paramilitary prisoners early release

- In *Re McClean*²⁴ the Lords held that the human rights of a prisoner released under the Northern Ireland (Sentences) Act 1998 were not breached when he was re-imprisoned. The Sentence Review Commissioners, had on 2 May 2000 declared McClean to be eligible for release on 28 July 2000, even though he had been convicted just six months earlier of two cold-blooded sectarian murders committed in 1998. While he was on pre-release home leave in early July 2000 McClean got involved in a violent dispute over the positioning of paramilitary flags in Banbridge. He was subsequently found not guilty of having committed any crime on that day but the Secretary of State nevertheless maintained an application to have McClean's declaration of eligibility for early release revoked. In April 2002 the Commissioners granted this application. McClean unsuccessfully challenged this decision by way of judicial review,²⁵ but on appeal two of the three Court of Appeal judges held that the Commissioners had wrongly imposed upon McClean the burden of proving that he would not be a danger to the public if he

²⁴ [2005] UKHL 46, [2005] NI 490.

²⁵ [2003] NIQB 32 (Coghlin J, as he then was). The same judge also held that s 10(7) of the Northern Ireland (Sentences) Act 1998, as amended by SI 2000/2024, was not *ultra vires* the power in s 10(8) or incompatible with the ECHR because the amendment simply ensured that the accelerated date of release was fixed in such a way as to enable any revocation application properly instituted by the Secretary of State under s 8 to be effectively completed prior to release: [2003] NIQB 31. SI 2000/2024 had been issued specifically to authorise McClean's continued detention prior to consideration of the Secretary of State's application for revocation of his declaration of eligibility for release; otherwise he would have had to be released on 28 July 2000.

were released.²⁶ They quashed the decision and sent the matter back to the Commissioners for reconsideration.

- In the Lords all five judges disagreed with the majority of the Court of Appeal, holding that it was perfectly reasonable to require McClean to demonstrate that he would not be a danger to the public. There was no breach of Articles 5(4) or 6 of the European Convention because, in the words of Lord Scott (with whom Lord Brown agreed²⁷):

*the respondent's human rights do not entitle him to any early release scheme...His continued incarceration does not infringe his human rights. The 1998 Act and its Rules constitute a statutory scheme of which the respondent was, and still is, a potential beneficiary. He certainly has the right to have the scheme properly and fairly applied to him in accordance with its terms. But he does not have the right, under the Convention or otherwise, to complain that the scheme is not sufficiently favourable or that part of the scheme...infringes his human rights and should be struck down.*²⁸

- The Law Lords preferred not to characterise the main issue as a burden of proof issue: instead they chose to describe the Sentence Review Commissioners' function as being to assess risk. Lords Bingham and Carswell quoted from their opinions in *R (Roberts) v Parole Board*,²⁹ decided the same day, to bolster their view that it is not apt to apply a burden of proof to a judgment of risk: 'There are dangers in an unduly legalistic approach to what may well be a very difficult predictive judgment'.³⁰
- Throughout the Lords' speeches in *Re McClean* there seems to be an appreciation that the early release scheme was an essential part of the Belfast Agreement, but that it conferred no rights and privileges over and above those protected by the European Convention. The applicant for release appears to have been perceived as a particularly undeserving individual and no doubt their Lordships had in mind the public's interest in a peaceful society when deciding that he should be retained in prison for a further period.³¹
- In *Re McComb's Application*³² a former paramilitary prisoner who had been released early under the 1998 Act was refused a public service vehicle licence because he was not deemed to be a 'fit and proper person to hold the licence' under article 79A of the

²⁶ [2005] NI 21.

²⁷ [2005] UKHL 46, para 87.

²⁸ Para 51.

²⁹ [2005] 3 WLR 152.

³⁰ [2005] UKHL 46, para 26.

³¹ Under the 'ordinary' remission system in Northern Ireland McClean is due for release on 12 November 2008, when he will have served two-thirds of the period he could have been expected to serve as a life prisoner in Northern Ireland: see Lord Bingham's judgment, paras 4 and 10.

³² [2003] NIQB 47.

Road Traffic (NI) Order 1981 (SI 154). But Kerr J, as he then was, seemed to agree with Lord Hoffmann's comments in *Robinson* (discussed below) to the effect that the Belfast (Good Friday) Agreement was an important constitutional development in Northern Ireland. He concluded that 'particular attention should be paid to the fact that a prisoner released under the terms of the Northern Ireland (Sentences) Act 1998 has been adjudged not to be a danger to the public'.³³

6. Defining the powers of the Northern Ireland Human Rights Commission

- In *Re Northern Ireland Human Rights Commission*³⁴ the Northern Ireland courts held that a statutory body with a duty to keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights did *not* have any power to intervene in judicial proceedings.³⁵ The Law Lords, with one dissent, reversed this decision, holding that the duties and powers expressly conferred on the Human Rights Commission carried with them the incidental capacity to make submissions as an intervener if so permitted or invited by courts or tribunals. As in the earlier case of *Macartan Turkington Breen (a firm) v Times Newspapers Ltd*,³⁶ the Northern Ireland judges were upbraided by the Lords for adopting too literal an approach to statutory interpretation. Lord Slynn said that the Commission's capacity to give assistance to the court 'is potentially valuable in achieving the purpose of the legislation.'³⁷ Lord Woolf said 'I find it hard to believe that it could have been the intention of Parliament that the Commission should not be in a position to proffer assistance when the court wishes to have that assistance'.³⁸ Lord Hutton, more traditional in his approach, thought the outcome depended on whether the principle of implied powers³⁹ should be applied with a degree of strictness or in a more liberal way and, after examining the precedents, he opted for the latter approach.
- Lord Hobhouse, who dissented, thought that the precedents referred to by Lord Hutton applied to commercial companies or to local authorities, but not to specially constituted statutory bodies with defined powers. He stressed that the Belfast Agreement, which promised that the Commission would be created, was:

an intensely political act where, after very difficult negotiations and a referendum campaign, agreement was fully obtained for a document which then

³³ Ibid, para 31. See generally Gordon Anthony, *Judicial Review in Northern Ireland* (Oxford: Hart Publishing; 2008) 20-1.

³⁴ [2002] NI 236; L. Blom-Cooper, 'Third party intervention and judicial dissent' [2002] PL 602; A. Smith, 'Access to intervene: The Northern Ireland Human Rights Commission and the Northern Ireland Act 1998' [2003] EHRLR 423.

³⁵ [2001] NI 271 (Carswell LCJ, as he then was, at first instance; McCollum LJ and Sir John MacDermott in the Court of Appeal, with Kerr J, as he then was, dissenting).

³⁶ [2001] 2 AC 277.

³⁷ [2002] NI 236, para 25.

³⁸ Paras 33 and 34 Cf. Lord Nolan at para 38.

³⁹ As encapsulated in *A-G v Great Eastern Railway Co* (1880) 5 App Cas 473.

fell to be given effect to in an Act of Parliament...It must have been a political judgment how proactive an interventionist a Commission would be acceptable to the people of Ulster as a whole...I consider that the Lord Chief Justice and the majority of the Court of Appeal correctly understood the intent of the Belfast Agreement and the implementing legislation and their place in the constitutional framework of the Province.

- In this case we see a clear admission by the Law Lords (whether dissenting or not) that when they are deciding cases from Northern Ireland they are often dealing with matters that are essentially political. On such occasions they must be tempted to adopt decisions which accord with the prevailing bipartisan policies on Northern Ireland espoused by the two leading British political parties. This temptation was probably even greater in the next case, which raised issues going to the heart of the Belfast Agreement and which again split the House.

7. Electing the First and deputy First Ministers

- In *Robinson v Secretary of State for Northern Ireland*⁴⁰ Peter Robinson, a Democratic Unionist MLA, sought to invalidate the election of David Trimble and Mark Durkan as First Minister and deputy First Minister respectively in the Northern Ireland Executive and the decision of the then Secretary of State (Dr John Reid) to hold the next elections to the Northern Ireland Assembly on 1 May 2003 as originally planned. Mr Robinson argued that the election of Trimble and Durkan had not taken place within the required time limit specified by the Northern Ireland Act 1998.
 - Section 16(8) of the Northern Ireland Act 1998 says: ‘Where the offices of the First Minister and the deputy First Minister become vacant at any time an election shall be held under this section to fill the vacancies within a period of six weeks beginning with that time’.
 - Section 32(3) adds: ‘If the period mentioned in...16(8) ends without a First Minister and a deputy First Minister having been elected, the Secretary of State shall propose a date for the poll for the election of the next Assembly’.
- All of the judges were well aware that the preferred outcome of the case from a political point of view was confirmation of the election of the Ministers and of the next Assembly election date, so that devolution in Northern Ireland could continue as planned. Any other decision would precipitate a dissolution of the Assembly just two years after its formation and a much earlier polling day The Attorney General, representing the

⁴⁰ [2002] UKHL 32; [2002] NI 390. See Marie Lynch, ‘*Robinson v Secretary of State for Northern Ireland*: interpreting constitutional legislation’ [2003] PL 640, where the author supports the view that ‘constitutional’ statutes should be interpreted differently.

Secretary of State, described the holding of fresh elections to the Northern Ireland Assembly as the 'nuclear option'. He said fresh elections would throw Northern Ireland into turmoil.

- Lords Bingham, Hoffmann and Millett agreed with three of the four judges in Belfast⁴¹ that the election of Trimble and Durkan was nevertheless valid. They applied a generous and purposive approach to the interpretation of the statutory provisions, 'bearing in mind the values which the constitutional provisions are intended to embody.'⁴² Lord Bingham reminded us that ordinary constitutional practice in Britain does not follow predetermined mechanistic rules: 'Where constitutional arrangements retain scope for the exercise of political judgment they permit a flexible response to differing and unpredictable events in a way which the application of strict rules would preclude'.⁴³ He added that, if Parliament had intended that, on a failure to elect within six weeks as required by section 16(8) the Secretary of State should immediately put arrangements in train to dissolve the Assembly and initiate an early poll for a new Assembly, it could easily and simply have so stated.⁴⁴ Likewise Lord Hoffmann, after contrasting the two approaches to interpretation put forward by the appellants and the respondents, said:

*In my opinion the rigidity of the first alternative is contrary to the agreement's most fundamental purpose, namely to create the most favourable constitutional environment for cross-community government. This must have been foreseen as requiring the flexibility which could allow scope for political judgment in dealing with the deadlocks and crises which were found to occur.*⁴⁵

Lord Millett thought that Parliament was unlikely to have intended that the Northern Ireland Assembly should lack the power to elect a First Minister and deputy First Minister outside the time limit set by section 16(8): 'that would be inconsistent with the purpose of the Act to secure stable government based on cross-community support'.⁴⁶

- Lords Hutton and Hobhouse dissented, not finding it possible to interpret the statutory provisions in such a purposive way. To Lord Hutton: 'Where a statute gives power to a statutory body to perform a certain act within a specified period the normal rule is that the body has no power to perform that act outside the period, and I see nothing in the provisions of the Act pointing to a different conclusion'. Lord Hobhouse, as in *Re Northern Ireland Human Rights Commission*, was more overtly political, observing that

⁴¹ Kerr J, as he then was, in the High Court [2002] NI 64 and Nicholson and McCollum LJ, Carswell LCJ dissenting, in the Court of Appeal [2002] NI 206.

⁴² Para 11 (per Lord Bingham).

⁴³ Para 12.

⁴⁴ Para 14. Some might say that this is precisely what the Northern Ireland Act *did* state.

⁴⁵ Para 30.

⁴⁶ Para 92.

the Assembly had been without a First Minister and deputy First Minister not just for six weeks but for 18 weeks (since David Trimble resigned on 1 July 2001) and that the Secretary of State had, since that resignation, twice briefly suspended and then almost immediately restored the Assembly in order to buy more time for it to again elect a First and deputy First Minister. The implication was that the Secretary of State had already had ample time to ensure that elections for the vacancies took place successfully⁴⁷ and that, if time had run out in the eyes of the law, this was attributable to inherent political difficulties in Northern Ireland and not to the courts.

- So in *Robinson* the judges who held for the Secretary of State did so because they felt able to see a 'purpose' behind the statutory provisions that fitted with the Secretary of State's goal. The dissenting judges did not think that that purpose was so obvious and were prepared to say to the government, by implication, that rather than expecting the courts to twist the superficially clear words of the legislation it should take other steps (through primary or secondary legislation) to achieve the desired purpose. In my view a healthy relationship between the judiciary and the executive depends on the former having the courage to say from time to time that it sees what the executive was trying to do and that it will judge whether the legislation can reasonably bear an interpretation that is consistent with that objective. At times the judiciary must say that the requested interpretation is a step too far and in those circumstances, if the executive wants the law changed, it should be required to achieve that change through fresh legislation.

8. Appointing people to serve on quangos

- In *In re Duffy*⁴⁸ the applicant challenged the appointment of two members of the Orange Orders to the Parades Commission of Northern Ireland, on the ground that there was a risk of bias on their part. The applicant won in the High Court of Northern Ireland, lost in the Court of Appeal,⁴⁹ but won a unanimous judgment in the House of Lords. The House held that the decision to appoint Messrs Burrows and 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. The main judgments were given by Lords Bingham and Carswell, with Lord Rodger, Baroness Hale and Lord Brown concurring.
- Lord Bingham said: '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

⁴⁷ Lord Hobhouse also observed that there was nothing in the Agreement which allowed for Members of the Assembly to re-designate themselves as unionists or nationalists in order to enable an election of a First and deputy First Minister to succeed, although that in fact is precisely what happened to allow Messrs Trimble and Durkan to obtain the necessary cross-community vote.

⁴⁸ [2008] UKHL 4.

⁴⁹ [2006] NICA 28 (Kerr LCJ and Campbell LJ; Nicholson LJ dissenting), reversing Morgan J.

elsewhere. There is nothing in the papers which suggests that the interviewing panel recognised this problem at all... 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.'

- In *In the matter of an Application by Brenda Downes*⁵⁰ Girvan J held that the appointment of Mrs Bertha McDougall as the Interim Victims Commissioner on 24 October 2005 was in breach of section 76 of the Northern Ireland Act 1998 (which prohibits discrimination by a public authority on the ground of political opinion), was in breach of the accepted norms applicable to public appointments, was in breach of the power of appointment under the Royal Prerogative, was motivated by an improper (political) purpose, and failed to take account of the fact that there was no evidential basis for concluding that the appointee would command cross-community support.⁵¹ Peter Hain, the Secretary of State at the time, said he would be appealing the judge's decision 'in the strongest possible terms'.⁵² The judge went on to issue a list of 67 questions which he thought should be addressed in an investigation by the Attorney General into whether the Northern Ireland Office had committed contempt of court in relation to Mrs Downes' application by deliberately attempting to mislead the court.
- On 12 March 2008 Gillen J granted leave to Michelle Williamson (see above) to apply for judicial review to quash the appointment of four Commissioners Designate for Victims and Survivors announced by the First Minister to the Assembly in Northern Ireland on 28 January 2008.

9. Conclusions

- Legislation implementing the Belfast (Good Friday) Agreement tends to be treated as 'constitutional' in nature and therefore as deserving of special purposive interpretation.

⁵⁰ [2006] NIQB 77.

⁵¹ Para 59.

⁵² NIO Press Statement, 15 January 2007.

- Judicial opinions differ as to what the purposes of the Agreement were, and what result in a given case would best help to fulfil those purposes.
- In their interpretation of legislation implementing the Agreement the judges have formally maintained a bright line between legal considerations and political circumstances. They have ostensibly relied only on the former, but there are signs that on occasions judges have adopted a rather unusual interpretation because it is viewed to be a better way of, in broad terms, promoting the values inherent in the peace process in Northern Ireland.