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Hain back in the dock

The row over the job of Victims' Commissioner could finish tomorrow, but, says Chris Thornton, questions remain over how far the NIO went to hide what happened
16 November 2006

At least since Watergate, the adage in Washington has been that it's the cover-up, not the crime, which ruins political careers.

Tomorrow, the High Court in Belfast reconvenes to consider Peter Hain's breach of the law in allowing the DUP to nominate the Interim Victims' Commissioner in 2005. Mr Justice Girvan will listen to arguments about what penalty the NIO should pay. He could remove the commissioner, Bertha McDougall, from her post.

But since Mrs McDougall has only two weeks left to serve in her year-long appointment, that course of action would almost be a formality. The NIO could still go ahead and name someone as her permanent successor and, barring an appeal, that could well be the end of the matter.

There is another matter, however, from the legal action that currently has no end in sight. That covers what could be the cover-up: the Northern Ireland Office's attempt to kill off the court case before it could get to the truth.

The judge wants an inquiry; Mr Hain has yet to respond to that call. The Cabinet Office, the Government's central administration, says it's up to him to decide whether there should be an inquiry - even though the Secretary of State is a central figure in the chain of events, in that he read and approved at least one of the "misleading" statements placed before the court.

It was two months after he arrived in Northern Ireland that Mr Hain started pushing for an appointment to the proposed post. On July 11, 2005, civil servants told him that it would take at least a year to fill the job. That wasn't quick enough: Mr Hain preferred, in the words of one senior civil servant, "an appointment without any formal 'public appointment' process".

Candidates

So the idea of an interim commissioner was born. No advertisements, applications or anything like that. One senior civil servant likened it to hiring a consultant.

Over the next couple of months, civil servants drew a job

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description, the latter being modified by Mr Hain, and a list of candidates. According to the recollection of Nigel Hamilton, the head of the Civil Service, officials thought they thought the candidates "would then be the subject of soundings with local political parties".

"Political party" would have been more accurate. The DUP was invited to "informally propose" a candidate for the job. They submitted the name of one person, who "almost immediately withdrew".

On September 27, 2005 - the day the IRA's final act of decommissioning became public - Ian Paisley sent Mrs McDougall's CV to the Secretary of State.

Mr Hain wanted her interviewed before another candidate selected by his civil servants. So a week later Mr Hamilton and Jonathan Phillips - then the NIO's political director, now the more senior Permanent Secretary - spoke to her and no one else. Within a month her appointment had been announced.

Although one of the criteria for the job was cross-community support, the memos of Mr Hamilton and others made it clear that they expected criticism from nationalists, especially Sinn Fein, because Mrs McDougall was the widow of an RUC officer.

Ultimately - and perhaps mainly because the DUP claimed credit for the appointment - they got more than criticism. Brenda Downes, another Troubles widow whose husband had been killed by a police plastic bullet, sought a judicial review of the decision.

Avoided

Initially she asked for more information about the process to appoint Mrs McDougall through a Freedom of Information request. The Government responded that the commissioner had been appointed on the basis of merit, and avoided answering a question about how she came to learn about the post.

"For some reason it was decided within government that incorrect and misleading information would be supplied," Mr Justice Girvan wrote about the letter at the end of the case.

When the legal action came to court, the NIO argued that there was "no sustainable evidential basis" for saying the appointment had been politically motivated. This was initially accepted by the High Court and Mrs Downes was only allowed to challenge the appointment on a very limited basis.

But, as Mr Justice Girvan concluded, the NIO's case was built on "misleading information". Evidence did exist of a political motive for the appointment. The NIO had just refused to give it up. "Since within the NIO and OFMDFM the true factual situation was known it must be concluded that it was decided that the correct information should not be placed before the court," Mr Justice Girvan wrote in his judgement. Gradually over a series of hearings held over several months, the High Court and Court of Appeal brought out more and more evidence about the appointment.

Initially, Mr Hamilton followed up the letter with an affidavit explaining how the appointment was made. Mr Hain read and approved the affidavit.

The judge said that document "put a spin on the true situation which was misleading" and used "guarded, shrouded and carefully crafted language". He also described it as "a less than full explanation of what actually happened".



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"The inference to be drawn in the circumstances is that the respondent was attempting to divert attention from the true course of events," he said.

When pressure grew for Mr Hamilton to give evidence to the court, Mr Phillips then weighed in with a follow-up affidavit. It said Mr Hamilton may not have been aware of all the facts when he made his statement - a situation that the judge found curious when Mr Hain had put forward Mr Hamilton as the best person to explain the appointment.

"No effort was made to explain how Mr Hamilton's affidavit came to be formulated in a way which was ambiguous and incomplete and implicitly Mr Phillips did not ascertain what aspects of the case as set out in his affidavit actually fell outside the knowledge of Mr Hamilton," the judge said.

"No explanation was provided as to how the Secretary of State came to approve and sanction the swearing and filing of an affidavit which Mr Phillips acknowledged was incomplete."

Part of Mr Phillips' affidavit was also described as misleading, and the judge concluded that, throughout the case, Mr Hain had "failed in his duty of candour to the court". He concluded the appointment had an improper political motivation, and from the letter onwards the NIO had tried to hide that from Mrs Downes.

The proposed inquiry is meant to find out why.

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