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Hain probe: three papers are key Attorney General to examine judge's 67 questions

By Chris Thornton

22 November 2006

Three key documents will form the backbone to the forthcoming cover-up inquiry that will look into the conduct of Peter Hain and his two most senior civil servants.

Lord Goldsmith, the Attorney General, has approved the inquiry after a senior judge posed 67 questions about misleading material in the three documents that the NIO supplied to the High Court.

Mr Justice Girvan said the inquiry needs to find out if the NIO tried to deliberately mislead the court - which is a criminal act - to hide the DUP's role in a sensitive appointment.

Mr Hain "absolutely" rejected "any suggestion that there was a deliberate attempt to mislead the court".

The dispute arose during a judicial review of Mr Hain's decision to appoint Bertha McDougall as Interim Victims Commissioner.

The three documents were supplied by the Northern Ireland Office at various stages in the hearing.

In the first - a letter that the NIO relied on in initial hearings - an unnamed official said there was no consultation with the DUP or any other party about the appointment.

In the second, the head of the Civil Service said Mr Hain had been "mindful" of DUP support for Mrs McDougall when he made the appointment, but the appointment had been made on merit alone.

Crucially, that statement by Nigel Hamilton was read and approved by Mr Hain.

The third document - provided by a second senior civil servant - said Mr Hamilton may not have known all the facts when he made his statement.

The third document revealed that the NIO had actively approached the DUP to nominate a candidate.

Essentially, the inquiry will try to find out who knew what

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One of the central questions will be why Mr Hain approved Nigel Hamilton's affidavit if it left out crucial information.

"The Secretary of State was clearly privy to the whole reasoning process leading to the appointment since he was the real decision maker in the matter," Mr Justice Girvan said.

The judge noted that almost to the very end of the case, "the respondent was seeking to rely on ambiguous and misleading affidavits and was unwilling to openly set the record straight".

The inquiry will want to know why.

Judge scathing over Hamilton's statement

As questions were building about the NIO's letter, top civil servant Nigel Hamilton gave an affidavit - a sworn statement - to the High Court.

Crucially, that statement was

read and approved by the Secretary of State.

It also came under scathing criticism from Mr Justice Girvan.

Mr Hamilton, the head of the civil service, interviewed Bertha McDougall and wrote the final memo recommending her appointment.

But his description of the process leading up to her choice used, in the judge's words, "guarded, shrouded and carefully crafted language".

In his affidavit, Mr Hamilton said "merit was the sole criterion applied" in filling the post, but also said Mr Hain was "mindful that Mrs McDougall's name had been put forward by the DUP".

When Brenda Downes' lawyers wanted to cross examine Mr Hamilton about what "mindful" meant, the NIO produced a second affidavit -

indicating Mr Hamilton "may not have had personal knowledge" of the whole process.

The NIO admitted the DUP was actively approached to suggest a candidate for the post, a point "that did not clearly emerge from the affidavit of Mr Hamilton".

The judge said Mr Hamilton's affidavit "which was seen and sanctioned by the Secretary of State was ambiguous and failed to disclose all the relevant material pertaining to the appointment."

He added: "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 (Jonathan) Phillips acknowledged was incomplete."

The judge wondered why Mr Hamilton had not fully acquainted himself with the facts before he made his statement.

"One would have expected the Secretary of State, who read and sanctioned the affidavit, to have taken steps to ensure that it fully and accurately explained the situation," said Mr Justice Girvan.



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The judge wants to know:

- What information didn't Mr Hamilton know when he swore his affidavit?
- Was he aware that the NIO letter contained false information when he gave the statement? If so, why didn't he correct it?
- When he swore that merit was the sole criterion, was he aware that Mrs McDougall's merits had not been compared to another candidate?
- Were there any drafts of Mr Hamilton's affidavit? Did the Secretary of State make any changes to it?

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'NIO's problems start with letter'

The NIO's problems start with a letter that was "evasive, misleading and in certain respects clearly wrong", according to Mr Justice Girvan.

Before the case ever got to court, lawyers for Brenda Downes wrote to the NIO and asked for information about the appointment of Bertha McDougall as Interim Victims Commissioner.

In the reply to Kevin Winters & Co., an unnamed NIO official said there had been no consultation about the appointment.

In fact, the DUP had been asked twice to nominate a person for the post.

The letter also said Mrs McDougall - the only person interviewed for the post - had been appointed on merit.

NIO lawyers later "unequivocally accepted", in the judge's words, that the letter "should not have conveyed the impression that the appointee was the best candidate on merit."

The letter avoided answering a question about how Mrs McDougall came to be aware of the unadvertised post.

It gave "a wholly misleading impression that Mrs McDougall's name was put on the list by senior officials thereby impliedly suggesting that this was done internally".

In fact, Mrs McDougall had been approached by DUP MP Jeffrey Donaldson and her name was put forward by the DUP's Ian Paisley.

Mr Justice Girvan said the letter had been carefully written, so the wrong information in it could not be put down to any "mere drafting error".

The letter took on a legal status - contributing to the possible contempt of court - because the NIO initially relied on it in its defence.

The judge wants to know:

- Who wrote the letter?
- Who authorised the wrong and misleading information in it?
- Did Peter Hain consider the letter before it was sent?
- Did the senior officials involved in the case consider it?
- Were NIO lawyers given access to information showing the letter was wrong?
- When did Mr Hain and his officials realise the letter was wrong?

Issues with second statement from NIO

When it became clear Nigel Hamilton might be called in to court, the NIO produced a second sworn statement.

Jonathan Phillips said Mr Hamilton may not have had all the facts when he made the first affidavit.

Mr Phillips' statement is crucial because it marks the point where the NIO admits

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information was obscured from court.

The probe is to determine if any of that information was withheld deliberately.

Mr Phillips interviewed Mrs McDougall with Mr Hamilton before the appointment.

In his statement, Mr Phillips said Mr Hamilton "may not have had personal knowledge" of the whole appointments process.

The judge said Mr Phillips' was "careful in his choice of words" - by saying "may not" instead of "did not", he was implying that he had not asked Mr Hamilton if he was fully aware of the facts. The judge found it "somewhat difficult to understand how he came to swear his affidavit without any discussion with Mr Hamilton".

Nor did he explain what Mr Hamilton didn't know and why he didn't have all the facts.

"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.

He also declared part of Mr Phillips' affidavit misleading.

The permanent secretary said Mr Hain could have consulted with other political parties, but "he did not opt to do so".

The judge said Mr Phillips chose a "striking" way of expressing himself, because Mr Hain had previously agreed to take informal soundings from the parties.

"At some stage he must have made an actual decision to abandon what he had earlier regarded as a more inclusive way of taking views," the judge said. "It is thus misleading to say that "he did not opt to" take informal views."

He said "the fact is" that Mr Hain "deliberately decided not to consult the other parties".

The judge wants to know:

- Who decided Mr Phillips should make the second affidavit?
- Did Mr Phillips see Mr Hamilton's affidavit before it was sent to court without all the facts?
- How did the NIO find out that Mr Phillips' had information of which Mr Hamilton may not have been aware?
- Was there any information in Mr Phillips' statement that Mr Hain did not know?
- If Mr Hain knew everything that was in Mr Phillip's statement, why didn't he tell Mr Hamilton?

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