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OVERSIGHT AND ACCOUNTABILITY: THE PRICE OF JUDICIAL INDEPENDENCE ?

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Preface

[i] It is an enormous pleasure for me to contribute to this important event involving delegates from around the globe. Your countries have simply fascinating histories in which the rule of law and its constituent ingredients have frequently struggled to flourish.

[ii] There can be a tendency to overemphasise judicial independence, vital though it is to the rule of law. This concept is, of course, a cornerstone of the rule of law in every democratic state. But an excessive insistence on judicial independence as an indelible right runs the risk of diluting, even neglecting, other indispensable elements of judicial office in a state governed by the rule of law – and, perhaps, elevating judicial office holders to the lofty, untouchable perch of bygone times There is a duty on every judge to appreciate **all** of the immutable tenets of judicial office, each of them rooted in the obligation and privilege of serving fellow members of the community, and to give effect to them daily. They embrace both the judge's public persona as a judicial office holder and the judge as private citizen.

[1] Initially I wondered whether there is anything genuinely novel to be said about judicial independence. Those who read what follows and reflect on my presentation and the ensuing discussion among participants at this prestigious event will be the arbiters.

[2] Judicial independence is inextricably linked with the separation of powers and, fundamentally, the rule of law. It is a cornerstone of every democratic state. It is a shield against tyranny and despotism. Judicial independence and judicial impartiality combine to provide every citizen with the guarantee of fair, detached and disinterested adjudication of their disputes with state agencies and with private citizens and entities. The judges to whom such disputes are submitted are the guardians of the rule of law. This explains why in certain cases a judge must proactively disqualify himself on the ground of having an interest, however remote, in the outcome or do so giving effect to the principle of apparent bias. Justice must not only be done but must manifestly and undoubtedly be seen to be done.

[3] The majority of the population do not have any direct encounter with the legal system of their country during their lifetime. Those who do are more likely to experience it in the context of administrative law and administrative courts or tribunals than in private law litigation. The members of this small minority become litigants who seek to hold the State, or their fellow citizens, accountable for acts, decisions and, in some cases, omissions detrimentally affecting the rights, interests or freedoms guaranteed to the citizen by the law. Every litigant has a right, of constitutional stature, to fair, impartial and independent judicial adjudication of every such dispute.

[4] The populations of many nations have, during much of the last century and before, been subjugated to their own home grown dictators or the invading armies of tyrants. While in Europe in particular democracies have multiplied since 1989, many are young and still fragile. In contrast, in mature democratic states there is a tendency to take for granted the rule of law and its several constituent elements, including judicial independence.

[5] Thus it has been said that complacency is the enemy of the rule of law. Even mature democracies are not immune from threats and incursions. This is vividly illustrated in the "Fortisgate affair in Belgium, which occurred as recently as 2009. During the course of legal proceedings involving Fortis, Belgium's largest financial service company which had been the beneficiary of a state bail out, it emerged that the government had twice tried to influence the judges of the court concerned. The Prime Minister was driven to admit in public that one of the officials of the Minister of Justice had contacted the husband of a judge of the Court of Appeal on several occasions during the proceedings. The Minister of Justice was obliged to resign in consequence.

[6] This shocked the Belgium community. Looking back, one must be glad that the reaction provoked was indeed one of shock and abhorrence. One is equally glad that shock and outrage have been the dominant features of the mass protests stimulated recently by the unvarnished interference, under the thin

guise of legislation, by the Polish government with the independence of the senior judiciary of that country. To the outsider, the name of the main coalition party driving these "reforms" – 'Law and Justice' - is supremely ironic.

[7] Events in Poland have undoubtedly given rise to division and instability in society. However, they have had the shinning merit of bringing sharply to the attention of the population and the international community the nature and importance of judicial independence and the rule of law itself. The conduct of the state agencies in the Belgium and Polish examples may not have had the extreme trappings of the tyranny of the 19th and 20th centuries. But the dangers to the rule of law lie in incursions of a subtle and insidious nature. Thus alertness to the first steps, however tiny, is essential.

[8] The judicial oath of office (in the United Kingdom, at any rate) obliges the judge to swear that he or she will discharge their duties without fear or favour, without affection or ill will. Within these deceptively simple words one finds the essence of independence and impartiality. It is within the oath of office that one identifies the concept of judicial responsibility.

[9] On the international plane, there is no shortage of materials relating to judicial independence. There is a veritable proliferation of instruments of respected international bodies: declarations, resolutions, memoranda, charters, recommendations *et al*. Judicial impartiality and independence are also enshrined in a series of international treaties and conventions, exemplified by the International Covenant on Civil and Political Rights (Articles 3 and 14), the European Convention on Human Rights and Fundamental Freedoms (Article 6) and the Charter of Fundamental Rights of the European Union (Articles 20 and 47). One finds the *fons et origo* of these instruments in the Universal Declaration of Human Rights, which as long ago as 1948 proclaimed unequivocally that every person is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge (see Articles 7, 8 and 10).

[10] These noble international instruments are not merely aspirational. Rather they have practical effects and outworkings. They not infrequently stimulate debate and discussion, particularly among lawyers and judges. Sometimes they give rise to media comments and more public debate. These tend to be provoked by real cases raising issues of judicial independence or impartiality.

[11] The infamous Pinochet case in the United Kingdom provides one of the more striking examples in modern times. In a nutshell, Amnesty International was a party to legal proceedings designed to secure the extradition of General Pinochet from the United Kingdom to Chile to face trial for alleged multiple murders committed when he was the head of the governing regime. The highest court in the United Kingdom – then the Judicial Committee of the House of Lords – reversed its initial decision and reheard the case on the ground that one of the chamber of judges, Lord Hoffmann, had an association with a charity linked to Amnesty, with the result that the appearance of bias principle had been infringed.

[12] The Pinochet case prompts the observation that in the more mature democracies issues of judicial independence rarely arise, whereas in contrast issues of judicial impartiality are encountered with some frequency. It is uncontroversial to suggest that these are clear indicators of the strength of the rule of law in such countries.

[13] Judicial independence provides guarantees and protections to both the citizen and the judge. It prohibits any attempt from any quarter – be it the executive, a litigant, a witness or the media – to subject the judge to fear, favour, affection or ill will vis-à-vis any party to the proceedings. The citizen asserts and demands judicial independence with the same strength and expectations as does (or should) the judge. In every instance of a possible threat to judicial independence the judge, as well as the citizen, emerges as the person under threat, the victim whether actual or putative. But there is a downside: this sometimes has a tendency to generate heavily one sided assessments and debates. Judicial responsibility barely flickers in such cases and discussions.

[14] One view is that judicial responsibility is the reverse side of the judicial independence coin. It has a tendency to be outshone, even neglected. This is illustrated in a well-known Council of Europe instrument, namely the European Committee of Legal Co-Operation ("CDCJ") recommendation entitled "Judges: Independency, Efficiency and Responsibilities". This recommendation was furnished to the Committee of Ministers (see CDCJ/2010/34, dated 21 October 2010). In this instrument the front side or "upside") of the notional coin dominates, by some measure. Chapter after chapter addresses the topics of constitutional protection of judicial independence, external judicial independence, internal judicial independence, judicial councils, efficiency and resources, status and career, tenure and irremovability, training and assessment. What is there on the flip (or "reverse") side of the notional coin? If one digs energetically, one discovers just 12 lines devoted the subject of judicial duties. While followed by a very short section entitled "Liability and Disciplinary Proceedings", this is directed solely to judicial protection. Finally, there are six lines directed to judicial ethics, within which judicial protection also features.

[15] Much the same may be said of the European Charter OnThe Statute For Judges (DAJ/DOC (98)23), another Council of Europe measure, published in July 1998. This instrument is divided into seven sections, none of which addresses the issue of judicial responsibility. Thus it belongs almost exclusively to the front side of the notional coin. I consider that the average European citizen reading each of these instruments would do so through *inter alia* this lens and would react with disappointment and concern in consequence.

[17] The concerned reader would, however, derive at least some reassurance from a measure of more universal application, namely the Bangalore Principles Of Judicial Conduct. In this instrument the emphasis is on the duties owed by the judge to society rather than vice-versa. Judicial independence ("Value 1") is described in these terms:

> "*Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee to a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.*"

Notably, in the text which follows, there is nothing about what the executive, society, the media *et al* owe to the judge. The value of independence is listed together with five further values: impartiality, integrity, propriety, equality and, finally, competence and diligence.

[18] The Bangalore Principles are notably detailed and prescriptive. Judges will find most of the answers to recurring quandaries and dilemmas within their text. In my opinion this measure, one of the most important in the judicial landscape, receives insufficient attention and exposure. I wonder how many of the judges who attended a recent EU meeting to which I contributed (some 70 in total) had even heard of this instrument, never mind read it. This inference could be made from the questions and observations which were ventilated. This meeting, in common with others, served to confirm my growing belief that there is a significant deficit in judicial training and education in this respect. This deficit will not be addressed simply by adjustments to judicial formation programmes. Rather, this subject must also form part of recurring continuous professional development exercises thereafter. <u>The issue is one of culture, philosophy and mindset.</u>

[19] The proactive and earnest implementation of what I have advocated immediately above should, as a minimum, bring home to judges the true meaning and import of the judicial oath of office, together with the full meaning of judicial independence. In this way judges will learn, and re-learn, the indelible duty of resisting fear or favour, affection or ill will, in all forms. They will further learn the value of responsibility and accountability to one's conscience and to the administration of justice, resisting even the most minimal influence in their decisions of even the smallest twinges of fear or the mildest blandishments of possible favour. They will discover that they must be impervious to negative reactions to their decisions extending in some instances to outright derision and intense public hostility. Submission to influences of this kind give rise to judicial corruption, in the true sense of the latter word. It is a notorious fact that senior judges in the United Kingdom were branded the <u>enemies</u> of the people by senior politicians and the press alike following their decisions in the "Brexit" case. This was doubtless distressing for certain judges and their families. But opprobrium, sometimes in extreme forms, is occasionally the price which a judge must pay for upholding the rule of law fearlessly and without affection or ill will. It may also be viewed as the price of the privilege of serving the public.

[20] I turn to the outward face of justice, which I view as a matter of supreme importance. This is manifest in everything judges do and say in the court room and in their writings. It may also be manifest in attendance at legal seminars, the presentation of papers and the delivery of lectures to law students or

lawyers. In every aspect of this kind of interaction, the judge must be acutely aware that respect for the judiciary and the confidence in the administration of justice must be earned and re-earned. These critical elements of the rule of law can never be assumed.

[21] At a mundane level, in the court room a constant awareness of the broader audience is essential. The judge must not make the error of focusing exclusively on the legal representatives present. The audience includes the parties, witnesses, the media, interested spectators and, ultimately, those who are likely to read the judgment of the court, including teachers and students of law. Both the conduct of the judge and, ultimately, the judgment must be directed to this wide audience.

[22] The modern judge also has duties of efficiency, expedition and good communication. Efficiency and expedition are required in the manner the judge manages his or her workload and in the provision of judgments. They are also required, particularly of presidents of chambers, in the broader organisation and administration of the court.

[23] Judges must also be self-taught in the matter of continuous professional development. They cannot complain that it is for others eg the Ministry of Justice or the relevant judicial president to make the necessary arrangements. If such arrangements are made, so much the better. But they are never a complete substitute for self-learning on an ongoing basis. The judge must always strive to be a better and more knowledgeable legal scholar than the lawyers presenting the cases. And there can never be any substitute for adequate case preparation through diligent advance reading preceded by assiduous case management. Equally, a detailed knowledge of and familiarity with procedural rules is indispensable.

[24] The foregoing reflections serve to highlight that judicial independence can never be an excuse for judicial inefficiency or idleness. In the case of the indolent or uncommitted judge, the shield of independence is paper thin. And let it be remembered that the idle or less than diligent or uncommitted judge is not merely antithetical to the rule of law: judges of this kind also serve to undermine the judiciary as a whole and to weaken the public respect for and confidence in judges and judicial institutions so vital in every legal system.

[25] Increased emphasis on judicial responsibility and its multiple out-workings will also serve to enhance every judge's appreciation of the restrictions and challenges bearing on private life. In this way judges will be alert, or more alert, to, for example, their behaviour in leisure, social, cultural, sporting, community, voluntary, parochial and church contexts. The most conscientious judge will positively seize the opportunity to generate and enhance public confidence in, and respect for, the judiciary in these private life contexts also.

[26] There is nothing old fashioned or romantic about the notion of the judge as a visible, recognisable and upstanding and respected member of the community in which he lives and works; a person who gives example and provides inspiration to fellow community members. By his conduct and lifestyle the judge

earns the respect of others which is a crucial component of judicial independence and the rule of law.

[27] It is instructive to reflect on some concrete situations:

(i) Are there restrictions on the judge's ability to forge friendships and make acquaintances? The short answer is "yes". The judge, by definition, passes judgment on the conduct of others. A deeper understanding of fellow citizens can flow from active and normal participation in one's community. But there is an ever present need for caution and reticence in what the judge says and does, ever more so in the contemporary world of high speed communication, instant publicity and social media. The appearance is, as always, vital: thus while there may be some reasonable explanation for a judge's conduct or words on a particular extra-judicial occasion, this may not suffice to redeem or correct the appearance created in the eyes and minds of others.

(ii) Social conduct - an illustration: In Bradford v McLeod (1986) SLT 244, a Scottish case, a magistrate, on a social occasion (a local dance) in a conversation with others concerning television images of violent exchanges between the police and striking miners, stated that, in the event of prosecutions, he would not grant legal aid to a miner. Some three months later a striking miner was prosecuted in his court for disorderly conduct. The miner's solicitor, who was present on the social occasion, requested that the judge disqualify himself for bias. The judge refused and proceeded to hear 15 cases in which he convicted miners. On appeal the convictions were reversed on the ground of apparent bias. A comparable illustration is provided by Takiveikata v The State [2007] FJCA 45, a Fujian case.

(iii) Friendships:Can the judge's circle of friends include practising lawyers and prosecutors? "Yes" – but acting with caution and circumspection at all times. Thus, in a North Carolina case, the judge obviously acted improperly in posting comments about a pending divorce and custody case on the Facebook page of an attorney representing one of the parties and an acquaintance of the judge. Equally improper were the judge's actions in conducting independent internet research into the business of one of the parties without disclosing this to anyone.

(iv) Social Networking: What about the use of social networking sites by a judge? The general rule must be that while there is nothing unethical in this – after all they act as a substitute for other media such as a web page, skype or even the telephone – the question will always be how the judge uses the social network. The increasing use of guidelines on this in certain states and regions is to be welcomes. Here is an extract from the guidance in England and Wales:

> "*Blogging by members of the judiciary is not prohibited. However, judicial office holders who blog (or who post comments on other people's*

blogs) must not identify themselves as members of the judiciary. They must also avoid expressing opinions which, were it to become known that they hold judicial office, could damage public confidence in their own impartiality or in the judiciary in general."

(v) Involvement in community organisations? The answer is "yes, of course": however, inevitably, this is followed by a "but ….". The guidance published by the Council of Chief Judges of Australia and New Zealand is instructive. It exhorts that (a) community commitments should not be too numerous or too time consuming, (b) they should not involve active business management and (c) there is a need to consider any government control of or intervention in the organisation or group concerned.

(vi) Religious affiliations: Every judge has the same freedom of thought, conscience and religion as every member of society. But alertness to any resulting appearance of bias is required.
An illustration. The judge was a member of the International Association of Jewish Lawyers and Jurists. This association's quarterly publications included some articles that were fervently pro-Israeli and antipathetic to the PLO. The judge made a decision adverse to a litigant connected with the PLO. This was challenged on appeal. The ultimate decision was that apparent bias was not established because: the judicial members of the Association held widely differing views; the Association's publications did not reflect the views of all members; and there was no evidence that the judge said or did anything associating herself with the published material. [See Helow v SSHD [2008] 1 WLR 2016]. What does this mean in practice? It leaves each judge free to read what they like, so long as they do not say or do anything to associate themselves with the content.

(vii) Previous involvement in earlier proceedings, whether as judge or advocate. This touches on the DNA of the doctrine of apparent bias. See Hawthorne and White [2018] NIQB 5 at [147] – [155], a recent judgment of mine (Appendix 1).

[28] In small communities judges may be expected to undertake certain leadership or advisory roles. This is a reflection of the size of the community and the limited number of candidates. In this illustration, the judicial office holder concerned is based in a small island community. The tiny population aspires to attract lucrative tourist trade. An investor seeks to acquire community owned land for this purpose. A process of agreeing a deal between the investor and the community is undertaken. The judge gives members of the community informal advice. The deal is struck. Later a dispute between the investor and the community arises and litigation follows. The judge is required to determine an urgent application for an interim injunction. There is no other judge on the island and the impoverished state consisting of a total of 30 islands does not have the resources to supply another judge. What would you, the judge, do in this situation?

[29] One further example. An elderly gentleman dies in the course of a hospital operation. His daughter, as personal representative, brings a claim against the hospital. Liability is conceded and damages are assessed by a first instance judge. The daughter appeals against this award. Some time before the hearing of the appeal there was an inquest into her father's death. At the conclusion of the inquest the jury delivered a verdict in certain terms. The daughter, being dissatisfied, brought an application for judicial review before the High Court. This was dismissed by a panel of two judges. The daughter's application for permission to appeal against this decision was refused. In the latercase concerning the award of damages, the Court of Appeal panel of three judges includes (a) one judicial member of the two judge panel which had dismissed the daughter's claim for judicial review and (b) one judicial member of the three judge panel which had subsequently dismissed her application for permission to appeal against the latter. Should these two judges recuse themselves on the ground of apparent bias?

[For answers see Shaw v Kovac [2017] EWCA Civ 1028.]

Some Concluding Remarks

[30] A heavier emphasis on judicial responsibility will alert judges to the manifold dangers of social media and the private life restrictions which apply in this respect. All private life restrictions are a consequence of willingly accepting the burdensome responsibility and privilege of judicial office.

[31] Unfortunately, there is good reason to bve profoundly concerned about the state of the rule of law in contemporary Europe. Short term political gain and personal advancement, coupled with quick fire and ruthless opportunism, are usually inimical to the rule of law. Worryingly, there are increasing illustrations of this disturbing phenomenon. Developments in several EU Member States – Hungry, Austria, Italy and Poland in particular – bear testimony to this inescapable fact. The shining beacon of the expert and dedicated activities of certain organisations - TAIEX, The Montenegro Centre ForTraining In JudiciaryAnd State Prosecution, the South Eastern Europe Regional Council, the International Bar Association and the OSCE and ODIHR in Warsaw - must be recognised and applauded in this context.

[32] The judicial oath of office obliges every judicial office holder to discharge all functions and duties "*without fear or favour, affection or ill will".* I consider that every debate about judicial independence and every issue raised about judicial impartiality must ultimately find its resolution within these profound words.

[33] Finally, it has sometimes been said that there is a binary choice: either the rule of law or tyranny. I rather suspect that this stark choice has been present in the minds of, amongst others, many Polish citizens during the past two years. The constitutional crisis in Poland may have reminded many of the truism that complacency is the enemy of the rule of law.

[34] While I recognise, and readily confess, that this paper may have strayed a little from the narrow contours of the title of this session, I suggest that the topic of measures such as judicial disciplinary action belongs to the second of two notional chapters. It cannot be properly understood, or debated, in the absence of the first chapter, to which I have devoted my attentions.

APPENDIX 1

HAWTHORNE and WHITE [2018] NIQB 5, paras [147] – [155]

Governing Principles

[147] I had occasion to consider the governing principles extensively in *R –v- Jones* [2010] NICC 39, in the following passages:

> "*Governing Principles*
>
> *[6] While the importance of judge and jury being entirely impartial is a longstanding feature of the common law, it has been reinforced by Article 6 ECHR, in an era of sophisticated technology and mass communication. In the contemporary setting, the modern jury is in some ways the antithesis of its predecessor of several centuries ago, as highlighted by Campbell LJ in Regina –v- Fegan and Others [unreported]. See also Regina –v- McParland [2007] NICC 40, paragraph [20] especially. I consider that the modern law differs in no material respect from the pronouncement of Maloney CJ almost a century ago, in Regina v Maher [1920] IR 440:*
>
> > *'The rule of law does not require it to be alleged that either A or B or any number of jurors are so affected, or will be so affected; but if they are placed under circumstances which make it reasonable to presume or apprehend that they may be actuated by prejudice or partiality, the court will not, either on behalf of the prosecutor or traverser, allow the trial to take place in that county … It is a wise and jealous rule of law to guard the purity of justice that it should be above all suspicion'".*
>
> *[Emphasis added].*

Thus perceptions are all important: the terms of the immutable rule that justice should not only be done but should manifestly and undoubtedly be seen to be done are familiar to all practitioners. These principles apply to both trial by judge and jury and trial by judge alone.

[7] In considering whether the composition of any court or tribunal poses any threat to the fairness of a given trial, the test to be applied is that of apparent bias, as articulated by the House of Lords in Porter v Magill [2002] 2 AC 357 : would a fair-minded and informed observer conclude that, having regard to the particular factual matrix, there was a real possibility of bias? In Regina v Mirza [2004] 1 AC 1118, the question formulated by Lord Hope was whether a juror had "knowledge or characteristics which made it inappropriate for that person to serve on the jury": see paragraph [107]. Bias, in my view, connotes an unfair predisposition or prejudice on the part of the court or tribunal, an inclination to be swayed by something other than evidence and merits".

[148] The following passage in Locabail is also of some significance:

" The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be".

The judgment in Jones draws attention to certain further considerations:

"… *there will always be a risk in every litigation context that some recusal applications are made on flimsy , though superficially attractive, grounds and are granted without rigorous scrutiny by an overly sensitive and defensive tribunal*…

[10] It is trite that where an application of this kind is made, an asserted risk to the fairness of the trial which is flimsy or fanciful will not suffice. However, the converse proposition applies with equal force. The court

> *is required to make an evaluative judgment based on all the information available. This requires, in the words of Lord Mustill, the formation of "what is essentially an intuitive judgment" (Doody v Secretary of State for the Home Department [1993] 3 All ER 92, p. 106e). In making this judgment, the court will apply good sense and practical wisdom. Ultimately, the court's sense of fairness, as this concept has been explained above, and its grasp of realities and perceptions will be determinative.*"

The final noteworthy passage in Jones is the following:

> *"[17] In every context, the test for apparent bias requires consideration of a possibility, applying the information known to and attributes of the hypothetical observer. Some reflection on the attributes of this spectator is appropriate. It is well established that the hypothetical observer is properly informed of all material facts, is of balanced and fair mind, is not unduly sensitive and is of a sensible and realistic disposition. Such an observer would, in my view, readily discriminate between a once in a lifetime jury and a professional judge. The former lacks the training and experience of the latter and is conventionally acknowledged to be more susceptible to extraneous factors and influences. Moreover, absent actual bias (a rare phenomenon), the proposition that a judge will, presumptively, decide every case dispassionately and solely in accordance with the evidence seems to me unexceptional and harmonious with the policy of the common law.*"

[149] The latter observation may be linked with the judicial oath of office. This is statutory in nature. By section 19 of the Justice (NI) Act 2002 every person appointed to a judicial office specified in Schedule 6 must, as a pre-condition of appointment, either swear or affirm that he/she –

> "*….. will well and faithfully serve in the office of* [name] *and that I will do right to all manner of people without fear or favour, affection or ill-will according to the laws and usages of this realm.*"

It may be said that while the oath, or affirmation, has several identifiable components that which shines brightest is the solemn undertaking of judicial impartiality. While the statutory oath (or affirmation) is not determinative of recusal issues, I consider that it must, nonetheless, rank as a factor of some potency, though not a complete answer. This was acknowledged in Davidson v Scottish Ministers [2004] UKHL 34 at [] and [57].

[150] In *Smith v Kvaerner Cementation Foundations and Bar Council* [2006] 3 All ER 593, the central issue was that of waiver of objection by a litigant to a part-time judge trying his case. The Court of Appeal held that an effective waiver had not been made. Delivering the judgment of the Court of Appeal, Lord Phillips CJ cited an earlier decision of the Court in *Jones v DAS Legal Expenses Insurance* [2004] IRLR 218:

> *"[35] (i) If there is any real as opposed to fanciful chance of objection being taken by that fair-minded spectator, the first step is to ascertain whether or not another judge is available to hear the matter. It is obviously better to transfer the matter than risk a complaint of bias. The judge should make every effort in the time available to clarify what his interest is which gives rise to this conflict so that the full facts can be placed before the parties.*
>
> *(ii) Some time should be taken to prepare whatever explanation is to be given to the parties and if one is really troubled perhaps even to make a note of what one will say.*
>
> *(iii) Because thoughts that the court may have been biased can become festering sores for the disappointed litigants, it is vital that the judge's explanation be mechanically recorded or carefully noted where that facility is not available. That will avoid that kind of controversy about what was or was not said which has bedevilled this case.*
>
> *(iv) A full explanation must be given to the parties. That explanation should detail exactly what matters are within the judge's knowledge which give rise to a possible conflict of interest. The judge must be punctilious in setting out all material matters known to him. Secondly, an explanation should be given as to why the problem had only arisen so late in the day. The parties deserve also to be told whether it would be possible to move the case to another judge that day.*
>
> *(v) The options open to the parties should be explained in detail. Those options are, of course, to consent to the judge hearing the matter, the consequence being that the parties will thereafter be likely to be held to have lost their right to object. The other option is to apply to the judge to recuse himself. The parties should be told it is their right to object, that the court will not take it amiss if the right is exercised and that the judge will decide having heard the submissions. They should be told what will happen next. If the court decides the case can proceed, it will proceed. If on the other hand the judge decides he will have to*

stand down, the parties should be told in advance of the likely dates on which the matter may be re-listed.

(vi) The parties should always be told that time will be afforded to reflect before electing. That should be made clear even where both parties are represented. If there is a litigant in person the better practice may be to rise for five minutes. The litigant in person can be directed to the Citizen's Advice Bureau if that service is available and if he wishes to avail of it. If the litigant feels he needs more help, he can be directed to the chief clerk and/or the listing officer. Since this is a problem created by the court, the court has to do its best to assist in resolving it."

The Lord Chief Justice also observed:

"[29] *This is useful guidance but, as the court made plain, it should not be treated as a set of rules which must be complied with if a waiver is to be valid. The vital requirements are that the party waiving should be aware of all the material facts, of the consequences of the choice open to him, and given a fair opportunity to reach an un-pressured decision.*"

[151] In the *Smith* case [*supra]*, the issue concerned the composition of an employment tribunal. In the judgment of the Court of Appeal, one finds the following passage:

"[28] …(*vi) Without being complacent nor unduly sensitive or suspicious, the observer would appreciate that professional judges are trained to judge and to judge objectively and dispassionately. This does not undermine the need for constant vigilance that judges maintain that impartiality. It is a matter of balance. In Locabail , paragraph 21, the court found force in these observations of the Constitutional Court of South Africa in President of the Republic of South Africa & Others v South African Rugby Football Union & Others 1999 (7) BCLR (CC) 725, 753:−*

'The reasonableness of the apprehension [for which one must read in our jurisprudence "the real risk"] must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or pre−dispositions. At the same time, it must

> *never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial'*
>
> *vii) Moreover, in this particular case, the charge of impartiality has to lie against the tribunal and this tribunal consisted not only of its chairman but also of two independent wing−members who were equal judges of the facts as the chairman was. Their impartiality is not in question and their decision was unanimous.*"

[152] Also noteworthy is the statement in *Re Medicaments* [2001] 1 WLR 700:

> *"*[86] *The material circumstances will include any explanation given by the judge under review as to his knowledge or appreciation of those circumstances. Where that explanation is accepted by the applicant for review it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the viewpoint of a fair−minded observer. The court does not have to rule whether the explanation should be accepted or rejected. Rather it has to decide whether or not the fair−minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced."*

It has also been said that while the properly informed hypothetical observer is presumptively aware of the legal traditions and culture of the United Kingdom, he will be neither complacent nor unduly sensitive or suspicious. Finally, I draw attention to the words of Lord Hope in *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 751:

> "[17] *The fair-minded and informed observer can be assumed to have had access to all the facts that were capable of being known by members of the public generally, bearing in mind that it is the appearance that these give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed … that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant*".

[153] There is one further consideration worthy of highlighting which, in my view, has not been sufficiently emphasized in the leading cases in this field. It is that no litigant has a right to select or dictate the composition of the court or tribunal in the litigation in which he is involved. The corollary of this is that in every case where a question is raised about the impartiality of the judge or tribunal, a point of substance is necessary

and the objection must be substantiated. I consider that this flows from the statement of Laws LJ in ***Her Majesty's Attorney General v Pelling*** [2006] 1 FLR 93:

> "[18] *In determining such applications, it is important that judicial officers discharge their duty to do so and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge they will have their case tried by someone thought to be more likely to decide the case in their favour*".

There may be cases where, either in the context of an objection or of the court's own motion, no further enquiry is necessary because the fact or factor giving rise to concern is so plainly potent. In passing, it was not submitted by the moving party that this was such a case. It seems to me that paragraph [25] of ***Locabail*** can be readily linked to the exhortation of Laws LJ in ***Pelling,*** that, in circumstances of this kind, the court must be alert to ensure that its process is not the subject of "*manipulation and contrived delay*".

[154] I consider it uncontroversial that in every case where a recusal issue arises, the judicial office holder concerned will take into account the following factors, amongst others:

(a) The presumed independence of the judiciary.

(b) The statutory judicial oath of office.

(c) The crucial distinction between a part time judge in legal practice and a full time professional judge.

(d) The passage of time separating the relevant previous event/s from the date upon which the recusal issue arises (some 16 years in this instance).

(e) The likely impact on the hypothetical observer of my reactions and replies in open court, in response to the issues as they were raised by the moving party of the Judge's initial response and reaction to any suggestion of recusal.

(f) Any evidence assembled relating to the Judge's reputation and standing generally.

(g) The character of judicial review litigation, which involves no *lis* inter-partes.

(h) Linked to (g) whether the case to be tried will involve the resolution of disputed factual issues or credibility assessments or fact finding.

(i) The over-riding objective.

(a) (Self-evidently) the contours of the principle of apparent bias and its title deeds, namely fairness to all parties.

(b) Finally, the intrinsically fact sensitive matrix of every case.

[155] What is rehearsed in [154] above will be a useful checklist in many cases. It does not purport to be an exhaustive menu and will require some adaptation in differing litigation contexts. The present context is one of judicial review proceedings involving, at heart, pure questions of law: the interpretation of the Ombudsman's report, the construction of certain statutory provisions and the determination of whether certain undisputed conduct has lain within the confines of the relevant legal powers (also undisputed) or, in certain specific respects, has infringed the common law requirement of procedural fairness.