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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Belfast International Airport Ltd's Application (Leave Stage) and Belfast City Airport Watch Ltd's Application (Leave Stage) [2011] NIQB 34

IN THE MATTER of an Application by Belfast International Airport Limited for Leave to Apply for Judicial Review

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IN THE MATTER of an Application by Donald Martin Melrose and Belfast City Airport Watch Limited for Leave to Apply for Judicial Review

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McCLOSKEY J

[1] The events which occurred at a preliminary stage of these proceedings raise two not insignificant points of practice, relating to:

(a) The manner whereby a non-party should seek to intervene in judicial review proceedings.

(b) The procedure which should be followed where it is desired to make representations that a particular judge should not be assigned to try a given case. The circumstances in which these two issues arose are outlined in the following paragraphs.

[2] As appears from the title hereto, there are extant two applications for leave to apply for judicial review. In the first ("*the BIA case*") the subject matter is quickly gleaned from the primary form of relief sought in the revised Order 53 Statement:

> "*An order of certiorari to … quash the decision of the Minister of the Environment … made on or about 6th December 2010 whereby he decided to remove the seats for sale restriction … contained within the extant Planning Agreement dated 14th October 2008 regulating George Best*

Belfast City Airport and made between Belfast City Airport Limited and the Department of the Environment."

The subject matter of the second application for leave to apply for judicial review: ("*the Belfast City Airport Watch case*") is the same. It is unnecessary, at this stage, to conduct any analysis of the grounds on which these applications are pursued. It suffices to record that each application challenges the same ministerial determination.

[3] In the BIA case, the papers were filed in court on 23rd February 2011. This stimulated a series of written directions from the court, dated 1st March 2011. These related mainly to the formulation of the Order 53 Statement, compliance with the Pre-Action Protocol and the issue of delay. One of these directions recited:

> "*All papers (both extant and to be generated, pursuant to these directions) must be served by the Applicant on Belfast City Airport. The court will consider any application to intervene by this party.*"

An *inter-partes* leave hearing was directed, to take place on 24th March 2011. At that stage, the court was unaware of the second application for leave to apply for judicial review.

[4] The papers in the second application, the Belfast City Airport Watch case, were filed in court on 4th March 2011. The court gave written directions on 8th March 2011, which compared closely with those given in the first application. The directions stated, *inter alia*:

> "*Both parties should address the issues raised above by 21st March 2011. I shall then be pleased to reconsider the papers and give further directions.*"

At that stage, the court was unaware of a letter dated 4th March 2011 from the solicitors representing the Applicants in the second case. This is a short formal letter, containing the following sentence:

> "*It appears to our clients that the Honourable Mr. Justice McCloskey should not hear this case as he acted for the Department in a judicial review in which we were instructed by residents' groups.*"

This letter came to my attention shortly afterwards, at the stage when the Applicants' solicitors purported to comply with the court's initial directions. This occurred on 21st March 2011 and further written directions, dated 23rd March 2011, materialised in consequence. One of these was couched in the following terms:

> *"Finally, any objection to the composition of the court should be made formally, by letter and will doubtless take into account arguable the leading authority,* ***Locabail –v- Bayfield Properties*** *[2000] 1 All ER 65 and, in particular, the statement of Lord Bingham LCJ (at p. 66):*
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> > *'It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided.* ***We cannot, however, conceive of circumstances in which an objection could be soundly based …at any rate ordinarily …on … previous judicial decisions …or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him …'.***
>
> *[Emphasis added]."*

These directions also contained the following:

> *"Provided that there is full compliance with the above directions by midday on 28th March 2011 at latest, this case can be listed as a leave hearing on 29th March 2011."*

These directions were made, coincidentally, on the eve of the date scheduled for the *inter-partes* leave hearing in the BIA case. The court was entirely content to process the two applications separately at this stage, since the grounds of challenge in the second case had still not been formulated to the court's satisfaction and it would make eminent sense to consider these in the wake of the court's determination of the first leave application, bearing in mind the obvious imperative of avoiding unnecessary duplication and minimising costs.

[5] On the morning of 24th March 2011, when the BIA leave application was listed, it became apparent that the legal representatives of the Applicants in the Belfast City Airport Watch case were in attendance **and** were objecting to the composition of the court. This elicited some surprise on my part, for two main reasons. Firstly, they had not sought any right of audience in the first judicial review leave application. Secondly, they had not formulated a recusal request in **their** case with any particularity. There appeared to be an assumption that they enjoyed a right of audience for the asking and did not need to notify the court or any of the principal parties in advance. The court takes the opportunity to correct this wholly erroneous assumption. In judicial review proceedings, intervention is a privilege, not a right, conferred at the discretion of the court. As an elementary requirement, a request for intervention must be made in writing, in a timeous way. It should set out fully the proposed intervening party's interest in the proceedings

and the grounds on which the privilege of intervention is requested. A simple, properly formulated letter to the Court Office, copied to the principal parties, suffices. This has been the practice in this jurisdiction for many years. Regrettably, it was not observed in the present case. As will become apparent, this had several undesirable consequences.

[6] At the outset of the leave hearing, the court required the Applicants in the second judicial review application and the other putative interested party (BCA) to apply for permission to intervene. Permission was duly granted. The legal representatives of the Applicants in the second judicial review then proceeded to object to the composition of the court. They had not given advance notice of this course to either the court or the principal parties. At this stage, four legal teams – consisting of five senior counsel, two junior counsel and four firms of solicitors – together with representatives of the parties concerned - were assembled in court. In the submissions which followed, there appeared to be an assumption on the part of the moving party that recusal would be granted more or less for the asking. For reasons which I shall develop, this betrays a fundamental misconception. Having first ascertained that no other judge was available – unsurprisingly, given the abject absence of notice - bearing in mind the over-riding objective, I decided that the best use of court time and resources and the minimisation of costs would be achieved by hearing the parties' arguments on the objection to the composition of the court. All parties duly addressed the court thereafter.

[7] It became abundantly clear from the submissions made that the legal representatives of the moving party had taken no steps in pursuance of their objection beyond the single sentence in the aforementioned letter of 4th March 2011. It appeared that they had made no enquiries and had taken no steps to assemble relevant information or materials. The court was informed that the moving party was, in effect, the Applicant in the 2004 judicial review application mentioned in the aforementioned letter of 4th March 2011, reconstituted under a different guise. This was news to me. None of the papers relating to those proceedings were produced. No attempt was made to lay before the court, for example, the pleadings or skeleton arguments. One of the many speculative submissions canvassed in argument was that I might have provided some written advice to the proposed Respondent in relation to one or more of the issues reappearing in these two further applications some four years later. A simple enquiry of the Departmental Solicitor's Office would have elicited a reply to this conjecture. This would have entailed no breach of legal professional privilege. However, this elementary step had not been taken. Following the hearing, the Departmental Solicitor's Office confirmed my recollection, which was that I had *not* done so. Many of the questions raised by the court, all of them obvious and predictable in nature, elicited the response "*My clients do not know …*". If they did not know, this was because simple and inexpensive steps to equip themselves with the necessary information had not been taken. All of this was suggestive of an assumption that recusal would be a mere formality and would be granted for the asking, without prior notice to the court or the principal

parties, in circumstances where the moving party had no standing of any kind until the court required an application for permission to intervene to be moved.

[8] I have no independent recollection of the 2007 judicial review application, except of the most general nature. This would have been apparent to all parties in my spontaneous responses to many of the submissions advanced on behalf of the moving party. Ultimately, the submissions of the moving party resolved to the proposition that, as judge, I should take active steps to recover the brief and all associated papers pertaining to the 2007 judicial review *and* declare to the parties any advice given by me to the Respondent bearing on any of the issues arising in the two new applications. This would embody advice on issues such as environmental impact, consultation and the Article 40 Planning Agreement. None of the parties had any objection to the court making direct contact with the relevant member of the Departmental Solicitor's Office – who is also the instructing solicitor for the proposed Respondent in each of the new judicial review applications – for this purpose. In my view, the impropriety and undesirability of this course are palpable. It would also be entirely unbecoming, for the most obvious of reasons. A further objection of substance is that it would require the court to expend time, energy and cost in steps which should have been taken by the moving parties' legal representatives long ago.

Governing Principles

[9] 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:*
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> > *'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**'".*
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> *[Emphasis added].*
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> *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.*
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> *[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."*

The judgment then considers the extensive treatise of this topic in ***Locabail –v- Bayfield Properties*** [2000] 1 All ER 65 and, in particular, the following passage:

> *"25. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or*

*advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (**KFTCIC v Icori Estero SpA** (Court of Appeal of Paris, 28 June 1991, **International Arbitration Report**. Vol 6 #8 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see **Vakauta v Kelly** (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. 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*** continues:

"… 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."*

[10] 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 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.*"

[11] In the ***Jones*** 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:−*
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> *'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'*
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> *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.*"

Also noteworthy is the statement in ***Re Medicaments (etc.)*** [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."*

Furthermore, it has been said that while the properly informed hypothetical observer is presumptively aware of the legal tradition 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.*"

[12] 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 plainly meritorious. It was not submitted by the moving party that this was such a case. When the letter containing the bare statement mentioned in paragraph [4] above came to my attention, my immediate reaction was to flesh out the substance of the objection. As the written direction of the court makes clear, I did so in circumstances where I was aware of Lord Bingham's exhortation that, ordinarily, the mere fact that a judge has at some stage in the past received instructions to act for or against a party to proceedings before him is insufficient to warrant recusal: ***Locabail,*** paragraph [25]. 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*".

[13] I observe that it should not have been necessary for the court to request that the substance of the objection be provided in the present case. However, there was no option since the representation contained in the moving party's letter was as bare and unparticularised as it could conceivably be. In my opinion, if the court had failed to take this course it would have been acting in dereliction of its duty. I note that the course which I opted to take falls fully within paragraph 35(i) of ***Jones*** viz. the judge making every effort in the time available to clarify the nature of the alleged conflict so as to ascertain the material facts. As a first step, it seemed to me that this had to entail eliciting from the moving party the substance and particulars of the objection. The second positive step taken by the court in the present context also accorded with the ***Jones*** guidance: prior to the hearing on 24th March 2011, on learning of the non-party's intention, not previously notified, to raise the objection, I ascertained whether any other judge might be available to hear the case. None was available. In any event, the nature of the BIA leave application is such that an alternative judge would have had no time whatsoever for advance reading and preparation. In the event, the moving parties' solicitors did not respond to the court's direction that they set out the detail and substance of their application in writing. Rather, having regard to the sequence of events set out above, the response made by the moving party materialised in the form of counsel's submissions on the date fixed for the hearing of the leave application in the BIA judicial review, on 24th March 2011.

[14] If I were seised of a properly formulated and particularised recusal application in the present case, I would, giving effect to the governing principles rehearsed extensively above, take into account the following factors, amongst others:

(a) The presumed independence of the judiciary.

(b) The statutory judicial oath.

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

(d) The passage of time (some four 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.

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

(g) The over-riding objective.

[15] However, for the reasons already explained, I do not have a complete application upon which to adjudicate. Furthermore, I have determined that the course suggested by the moving party is entirely inappropriate. In addition, the further steps likely to be involved in such course would be plainly inimical to the over-riding objective. In particular, they would be likely to occasion unnecessary delay in this important litigation. In these circumstances, the administration of justice is, in my view, best served by transferring the two judicial review leave applications to another judge, without more.

[16] I would add the following. It is the experience of this court that where applications to intervene in judicial review proceedings are received from a non party, they are made in a timely manner, in writing, and they generally set out the substance and grounds. This is the long settled practice in this jurisdiction. Regrettably, this did not occur in the BIA judicial review. Secondly, courts in Northern Ireland have become accustomed to receiving properly formulated and particularised requests raising any objection to the composition of the court or tribunal concerned. Unfortunately, a failure in this respect also occurred in these proceedings. Both are well established practices and practitioners will doubtless take note.

[17] To conclude, the manner in which the moving party conducted the two applications which it ultimately made to the court was regrettable and unacceptable. It gave rise to a discourtesy to the court and the two principal parties. It was also antithetical to the over-riding objective and, in my view, has given rise to wasted costs. The court will undoubtedly give consideration to the exercise of its powers under Order 62, Rules 10 and 11 of the Rules of the Court of Judicature, irrespective of whether any of the parties formally moves any application. I shall leave this discrete issue to the judge who becomes seised of these cases.

[18] In the interests of expedition and saving costs, this judgment is promulgated electronically only.