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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

APPLICATION BY MARTIN O'ROURKE
FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for judicial review of two decisions of the Secretary of State for Constitutional Affairs made on 6 June 2006 and 11 May 2007 accepting the advices of a Selection Panel not to recommend the applicant for appointment as Queen's Counsel. The Secretary of State is the respondent in the proceedings and the Selection Panel is a Notice Party. Mr Larkin QC and Mr Scoffield appear for the applicant, Mr McCloskey QC and Ms Murnaghan for the respondent and Mr McGleenan for the Notice Party.

[2] The structure of the appointments process for Queens Counsel was explained in the affidavit of Sean Langley, the lead official responsible for the policy in the Department. In 2004 a working party was established to design and implement a new process for selecting candidates for the position of QC in England and Wales and Northern Ireland. That group comprised representatives from the Bars and the Law Societies of England and Wales and Northern Ireland.

[3] The Secretary of State approved the Northern Ireland appointments process in April 2005. The process was explained in a number of documents that included the Queen's Counsel Selection Process Design Document and a guidance document, Applicant Guidance – Application Form. The objectives were the promotion of fairness, objectivity, excellence and diversity. The process used a competency-based methodology to determine which candidates met the requisite standard of excellence. A competency framework document was an annex to the Applicant Guidance. A number of competences were identified and within each competence a number of behaviours were identified. An applicant for appointment had to demonstrate through an application form and references that he or she met the requisite standard for appointment.

[4] The process involved the Bar Council and the Law Society establishing a limited company, Queen's Counsel Appointments (Northern Ireland) Ltd, to

administer the selection process. This company employed a Secretariat to service an independent Selection Panel. The Secretariat was headed by Mr Ray Coughlin. The Selection Panel was chaired by Sir Liam McCollum, a retired Lord Justice of Appeal in Northern Ireland and comprised representatives of the Bar, the Law Society and lay members. There were a total of seven members of the Panel.

[5] The Selection Panel was appointed to consider whether the applications were successful or unsuccessful and a list of candidates adjudged to be successful was recommended to the Secretary of State. Mr Langley states that if the Secretary of State agreed that the process had been operated correctly and fairly and that the recommendations were consistent with the scheme objectives he would transmit them to The Queen with a recommendation for appointment.

[6] This competence-based selection procedure involved seven competences labelled A to G. The competences were set out in the Competency Framework as Competency A, integrity, Competency B, understanding and using the law, Competency C, analysing case material to develop arguments and focus the issues, Competency D, persuading, Competency E, responding to an unfolding case, Competency F, working with the client and Competency G, working in the team. Within each of the seven competences a number of behaviours were identified, giving a total of thirty-nine behaviours. By way of example, in Competency B, understanding and use of the law, there were two behaviours. The first was stated as - Is up-to-date with law and precedent relevant to each case dealt with or will quickly and reliably make self familiar with new areas of law. The second behaviour was stated as - Draws on law accurately for case points and applies relevant legal principles to particular facts of cases.

[7] A candidate's application form and references from judges, practitioners and clients were forwarded to the Selection Panel and a grade was awarded for each of the competences. The Selection Panel would determine whether a candidate was successful, that is those who would be recommended to the Secretary of State, or borderline, that is those who would be interviewed to determine whether they should be regarded as successful or unsuccessful, or whether they were considered to be unsuccessful.

[8] The Selection Panel invited applications for Queen's Counsel on 6 June 2005 to be submitted by 30 September 2005. The applicant applied on 30 September 2005. He was not called for interview and received notice from the Secretary of State on 6 June 2006 that he had been unsuccessful. He applied for judicial review on 5 September 2006. In the meantime, on 3 July 2006, the applicant had lodged a complaint about the process. There were other complaints from unsuccessful candidates. The complaints went to a Complaints Committee chaired by Mr Justice Higgins and also comprising a member of the Bar, a Solicitor and a lay member. The Complaints Committee reported in November 2006, upholding certain of the complaints. The matters upheld in relation to the applicant included the finding that the Complaints Committee were not satisfied that references had been

taken into account at the initial grading of the competences. The design of the process required simultaneous consideration of application forms and references and the appearance was that there had been initial consideration of the application forms and subsequent consideration of the references. A second matter involved what was called "mapping across", namely a requirement that if there was evidence provided by candidates or their referees of a particular competence, which would also have been relevant to a different competence, any assessment should involve "mapping across" of the description, even though the material was not recited again in the description of the second competence. The Complaints Committee were not satisfied that mapping across had occurred. The result of the findings of the Complaints Committee was that the unsuccessful candidates were reconsidered by the Selection Panel. The applicant was reconsidered. He received a notice from the Secretary of State on 11 May 2007 that he had been unsuccessful. The two rejection decisions are the subject-matter of this application for judicial review.

[9] After the second rejection the application for judicial review was amended. There was disclosure of specific documents from the Secretary of State and the Selection Panel, either by agreement or by Order. There was further amendment of the application for judicial review. Issues arose about the manner in which the Selection Panel had assessed the candidates and eventually Orders were made for the limited cross-examination of Mr Coughlin from the Secretariat of the Selection Panel and of Mr Langley from the Department.

[10] The judicial review grounds were extensive. The final grounds were stated as follows -

> (a) The appointments procedure was procedurally unfair in the following manners:
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> > (i) The criteria to be applied to the applicant's application were not sufficiently explained to him in order to permit him a fair opportunity to present his application and, in particular (but without prejudice to the generality of the foregoing), the 'standard of excellence' criterion was insufficiently explained to the applicant.
> >
> > (ii) The applicant was not permitted an opportunity to attend for interview (and the attendant opportunity to supplement the evidence provided in his application materials) in circumstances where fairness required an interview to be granted to those refusal of whose applications the Panel was minded to recommend.
> >
> > (iii) The applicant was not permitted an opportunity to attend for interview (and the attendant opportunity to supplement the evidence provided in his application materials) in circumstances where other candidates were permitted such an opportunity.

(b) The Panel failed to 'map across' evidence from the applicant's self-assessment form and references adequately or at all and thereby left relevant considerations out of account and/or breached the applicant's legitimate expectation that the Panel would so map evidence across. Further (but without prejudice to the generality of the foregoing) the Panel unlawfully failed to give appropriate weight to the applicant's references in order to increase the scores awarded to the applicant for each behaviour (with a consequent effect on the scores awarded to the applicant in each competency); and/or unlawfully failed to seek further information from referees where this was required in order to properly take the content of references into account.

(c) The Secretary of State has fettered his discretion, has failed to discharge an appropriate duty of inquiry and/or has failed to properly exercise his constitutional function of advising Her Majesty and has done so, in particular, by:

(i) Accepting the recommendations of the Panel without applying his own mind to the merits of the applicant's application.

(ii) Failing to advise the applicant of the Panel's adverse recommendation and to permit the applicant an opportunity to make representations to him.

(iii) Failing to satisfy himself about the fairness of the procedure adopted by the Panel adequately or at all.

(iv) Failing to acquaint himself adequately or at all in relation to the 'borderline standard' applied by the Panel, of which the Secretary of State remained unaware throughout the entire process.

(v) Failing to ensure that the Panel applied a standard of excellence throughout the process which was acceptable to the Secretary of State (and, relatedly, failing to inquire into the scores awarded to applicants by the Panel in round 2 so as to satisfy himself that the unacceptable standard of excellence which the Panel had purported to apply was not in fact applied).

(vi) Concluding that the appointments process met the Secretary of State's goal of transparency when no reasonable Secretary of State properly advised and/or properly directing himself, could have reached that conclusion (particularly with respect to the setting of the standards by the Panel).

(d) The failure to provide a clearly set out and effective complaints system is a further instance of procedural unfairness and in breach of the applicant's procedural legitimate expectation engendered by the guidance for applicants.

(e) The Panel's decision not to advise that the applicant be recommended for appointment was irrational in the *Wednesbury* sense and was irrational, in particular, was irrational in failing to determine that the applicant attained the 'standard of excellence' having regard to the applicant's self-assessment form and references as a whole.

(f) The Panel's decision on reconsideration, following referral back by the Complaints Committee, was vitiated by both actual and apparent bias.

(g) Having regard to the findings of the Complaints Committee, it was irrational for the Secretary of State to continue to act upon the Panel's recommendations.

(h) The Secretary of State failed in his duty of reasonable inquiry in not obtaining and considering the full text of the Complaints Committee's report.

(i) The Secretary of State failed to ensure that the process, both preceding and following review by the Complaints Committee, and the reconsideration by the Panel would be procedurally fair.

(j) In the circumstances arising after production of the Complaints Committee's report, the Secretary of State failed to engage in a proper evaluation of the recommendations of the Panel and improperly bound himself to act on those recommendations, fettering his discretion in so doing.

(k) In the circumstances, refusal to grant an interview to the applicant was procedurally improper and/or unfair in that:

> (i) The applicant met the criteria for such an interview – whether on the basis of the initial borderline standard applied by the Panel (since the applicant achieved a score of more than 24 points in round 2) or on the basis of the altered borderline standard purportedly applied by the Panel (since the applicant could have attained the standard of excellence applied by the Panel had he been interviewed on only two competencies).
>
> (ii) Every candidate interviewed enjoyed an advantage over any candidate who was not interviewed.

(l) ….

(m) ….

(n) In relying on the Panel's recommendation, the Secretary of State took into account a legally irrelevant consideration, since the Panel's

recommendation was vitiated in law by virtue of the procedure adopted by the Panel which was irrational, procedurally improper and/or unfair. In particular, but without prejudice to the generality of the foregoing:

(i) The approach adopted by the Panel in round 2, whereby it merely adopted as a starting point the scores which it had given the applicant in round 1, was procedurally unfair and/or in breach of the applicant's legitimate expectation that, his application having been referred back to the Panel by the Complaints Committee, it would be looked at afresh and/or the product of the flawed consideration at round 1 would be left out of account.

(ii) The Panel purported to apply a standard of excellence which was not acceptable to the Secretary of State and which was, in fact, lower than that required by the Secretary of State as regards the standard to be attained in competencies F and G. This was such as to materially (and unlawfully) influence the scores awarded to candidates in those competences.

(iii) The Panel altered – or at least purports to have altered – the borderline standard after the assessment of applications had begun.

(iv) The Panel's approach was unlawful for the further reasons set out at paragraphs 3(a), (b), (e), (f) and (k) above.

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[11] It is proposed to address three general matters before turning to particular issues, the three matters being the borderline standard for interview, the role of the Secretary of State and the alternative remedy before the Complaints Committee. The first matter is the assessment method adopted by the Selection Panel in relation to the identification of borderline candidates for interview. There were two different standards applied at the interview stage and the recommendation stage. The standard of excellence was the standard that a candidate had to meet in order to be recommended for appointment. The borderline standard was the standard that had to be attained by a candidate who had not reached the standard of excellence, but who was to be interviewed to determine whether they might, through interview, reach the standard of excellence.

[12] Competences A to G were each graded 1 to 5, with 5 being the highest grade. In order to reach the standard of excellence the candidates had to attain certain grades across the different competences. It was the view of the Secretary of State that the standard of excellence required a grade of at least 4 against each of the seven

competences. This was the standard applied in England and Wales and it was the standard the Secretary of State preferred to apply to Northern Ireland.

[13] The Selection Panel considered what the standard of excellence should be at a meeting on 30 November 2005. The decision is minuted as follows:

> "The Panel agreed for a candidate to be successful he or she must
> - score 28 and above across all seven competences
> - have a minimum of 4 in integrity
> - have a minimum of two 3s in Competences F, working with the client, and H, working in the team
> - not have a score of 1 or 2 in any of the competences."

[14] The Secretary of State expressed reservations about the Selection Panel adopting a standard of excellence that included 3 for any of the competences. The Secretary of State required justification for any difference that was going to be applied in the standard of excellence in Northern Ireland. The Selection Panel required that there should be what were called "compensating 5s", namely if a candidate should score 3 in a competence the candidate would require a 5 elsewhere to compensate. In the event, when this process was completed, no candidate was put forward for recommendation to the Secretary of State who had a 3 in any grade, so the issue of justification for any lower standard of excellence did not arise. However the Secretary of State stated that the issue would be revisited for future processes.

[15] The Selection Panel also considered the borderline standard on 30 November 2005. The minutes of the meeting provide as follows:

> "Consensus was further reached on what constituted a borderline candidate and it was agreed that candidates must
> - score 24 marks and above across all seven competences
> - have a minimum of 4 in integrity
> - not have a score of 1 or 2 in any of the competences."

[16] The Complaints Committee report of December 2006 set out the above descriptions of the two standards as having been adopted by the Selection Panel. However, as this case developed in November 2007 it was discovered on disclosure of documents that the applicant had been awarded 25 marks by the Selection Panel on the reconsideration of his application. That score appeared to satisfy the borderline standard, but the applicant had not been interviewed. As a result the solicitor for the Secretary of State wrote a letter to the solicitor for the Selection Panel on 20 November 2007 pointing out the applicants score and asking whether it was proposed to interview the applicant. By a reply from solicitors on behalf of the

Selection Panel of 27 November 2007 it was stated that the borderline standard had been changed.

[17] Two particular aspects of any change in the borderline standard have been the subject of debate, namely the date of the change and the precise nature of the change. The letter of 27 November 2007 stated that the Selection Panel decided to modify the approach to selection standards following communications with officials at the Department of Constitutional Affairs in December 2005 and January 2006, attaching copy e-mails of 6 December 2005, a reply of 15 December 2005 and a further e-mail of 13 January 2006. Second, the change was stated to be that the Panel decided that in order to qualify as a borderline case a candidate had to reach a standard of excellence in five of the seven competences and only fail to reach that standard in no more than two competences. The Panel decided that the standard of excellence could be met where a candidate scored no less than 3 in Competences F and G, but only in circumstances where the candidate had scored a compensating 5 in other competences. Further, the Panel decided that candidates who had dropped below the standard of excellence in only two competences would be considered borderline and would be invited for interview. Those candidates would be interviewed specifically in relation to those competences in which they had fallen short.

[18] These changes were not minuted in the minutes of any of the meetings of the Selection Panel. The assessments of the candidates began at meetings on 20 December 2005 and continued on 6 January 2006, 16 January 2006 and finally 10 February 2006. If the Selection Panel decided to change the borderline standard after the e-mails of December 2005 and January 2006 that would have been an alteration made after the assessment of candidates had begun.

[19] Affidavits from a number of the members of the Selection Panel confirmed the changes that had occurred to the borderline standard. An affidavit from Mr Coughlin confirmed the change to the borderline standard, which he dated as being probably at the meeting of 20 December 2005 or 6 January 2006. Cross-examination of Mr Coughlin led him to confirm, initially, his view that the changes probably had occurred on 20 December 2005 or 6 January 2006.

[20] The e-mails to which reference was made in the solicitor's letter of 27 November 2007 began with that of 6 December 2005 from Mr Coughlin to the Department in which he set out the standard of excellence and the borderline standard that the Selection Panel had adopted, as they appear from the minutes of the meeting of 30 November 2005. The reply from the Department of 15 December 2005 expressed concern about the proposals of the Selection Panel, stating that QCs would have been expected to score 4 across the board. The biggest concern was stated to be the proposal to recommend for appointment a candidate with two 3s in the customer focussed competences and suggesting that a better option would be 4s across all the competences, with a candidate meriting a 3 in one or two competences being called for interview.

[21] This reservation from the Department was before the Selection Panel on 20 December 2005. The minutes record that the Selection Panel noted the Department's view and agreed to respond to that view. The response appeared in an e-mail of 11 January 2006, a document which was only produced during the evidence of Mr Coughlin. That e-mail stated the Selection Panel decision that the standards set out in Mr Coughlin's message of 6 December were appropriate for Northern Ireland and that the Panel had looked again at the matter and taken into account the Department's views and had decided not to alter the standards already agreed.

[22] Faced with the e-mail of 11 January 2006 Mr Coughlin changed his evidence. He agreed that changes in the borderline standard must have occurred after the email of 11 January 2006 and therefore had to have occurred at one or other of the meetings of 16 January or 10 February 2006. Faced with the point that this had involved a change in the middle of the assessment of the applications Mr Coughlin stated that all candidates had had their applications reviewed at the final meeting of 10 February 2006 and therefore all candidates had been assessed on the basis of a common borderline standard at the same time when the final decisions were made.

[23] Mr Tony Caher was a member of the Selection Panel and he filed an affidavit stating that the change of borderline standard was made on 20 December 2005. The applicant had indicated an intention to seek leave to cross examine Mr Caher but in the event did not proceed with that application.

[24] The Department's concern in the e-mail of 15 December 2005 appears to be about the standard of excellence rather than the borderline standard. While the email referred to standards in the plural the discussion appears to express a concern for the ultimate standard of excellence. The further e-mail of 13 January 2006 to Mr Coghlin again appears to be referring to the issue of the standard of excellence.

[25] The Selection Panel's reply of 11 January 2006 also appears to be referring to the standard of excellence rather than the borderline standard. Mr Coughlin, who was the author of the e-mail of 11 January 2006, thought otherwise when he was questioned about the email and changed his evidence to suggest that the change of borderline standard must have been made after 11 January 2006.

[26] I agree with Mr McGleenan's description of Mr Coughlin's evidence as having manifested "profound fragility". I conclude that Mr Coghlin was mistaken when he agreed that the email of 11 January 2006 was addressing the borderline standard rather than the standard of excellence. I conclude that the solicitor's letter of 27 November 2005 was mistaken in referring to the changes being introduced after the e-mail of 13 January 2006. I conclude that the e-mail of 11 January 2006 was a declaration that the Selection Panel has left unchanged the standard of excellence. I accept the evidence of the Selection Panel members that a change of borderline standard occurred. I accept Mr Caher's evidence that the change occurred at the meeting of 20 December 2005.

[27] It follows that the Selection Panel did not change the borderline standard during the course of the assessments. It is the case that Sir Liam undertook a preliminary consideration of the applications and the potential grades, but I conclude that the assessment of the candidates occurred at a series of meetings that began on 20 December 2005. I conclude further that the applicant did not meet the borderline standard because on reconsideration of his application he had three 3s in his assessment, being Competences C, F and G.

[28] A further issue arose in relation to the borderline standard when Mr Coughlin agreed that the applicant could have been interviewed on two competences, ie C and either F and G. An interview would have given him the opportunity to improve his grades in the two competences in which he was interviewed. The argument proceeds that the applicant could then have been recommended under the Selection Panel's version of the standard of excellence if he obtained a compensating 5 for a 3 in F or G. Again, I consider that this is but an illustration of the profound fragility of the evidence of Mr Coughlin. All the other indicators are that the interviews applied to those who had a shortfall in one or two competences only. By way of example I refer to the affidavit of Sir Liam, who addressed the issue indirectly in his affidavit of 21 December 2007, in response to the solicitor for the applicant Mr McDermott's suggestion that a candidate who scored 4 points in five competences and 1 point in two competences could have qualified for interview. Sir Liam stated -

> "I can confirm that such a candidate would not have been considered for interview by the Selection Panel. The Panel invited candidates for interview who had met the standard of excellence in five competences, but who had fallen short in two others by only one mark. That required a score of 4 in five competences and 3 in two others."

[29] I am satisfied that Mr Coughlin was mistaken when he interpreted the standards in the manner referred to above. I conclude as stated above that the applicant did not qualify for interview because he had three 3s.

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[30] The second general matter concerns the respective roles of the Secretary of State and the Selection Panel. The role of the Secretary of State was described by Mr Langley in his affidavit. He stated that the role was to ensure that the Selection Panel carried out its responsibilities in accordance with the objectives of transparency and fairness and that recommendations were based on evidence. The Secretary of State had to be satisfied that the process was operated in accordance with its design, or where there had been variations from the design that the over-

arching objectives were still met. Further, the Secretary of State had to be satisfied that the recommendations were reasonable and consistent with the process. It formed no part of the Secretary of State's function to evaluate the merits of individual applications, rather this was the task of the Panel. Mr Langley stated that at all times the purposes of establishing an independent Panel and the Queen's Counsel Appointments (Northern Ireland) Ltd was to ensure that the selection of QCs for Northern Ireland would be independent of the Government and that the Department did not regulate the Panel or the limited company but merely agreed the process, within which framework the Panel and the limited company were to operate.

[31] Further, Mr Langley stated that the Department played no role in preparing the content, layout or design of the application forms or the guidance and this was entirely consistent with the Panel's independence from Government. The relevant elements of concern were the competency framework, the spread of references, the means through which references would be obtained and an appropriate methodology. The Department was obliged to afford professional bodies complete independence from Government. The Secretary of State stated publicly in 2004 that in the Government's view Ministers should no longer be involved directly in the identification of senior advocates. Queen's Counsel remained the only kite mark in which a Minister took a role. There was no equivalent in other professions nor even in other types of legal practice than advocacy and there was no justification for what amounted to direct Government intervention in the legal services market. The Secretary of State agreed to remain in the process at the final recommendation stage to allow the title of Queen's Counsel to be retained. The reasons for this remaining involvement were because Queen's Counsel is a Royal appointment and only Ministers can advise Her Majesty on Queen's Counsel appointments. To avoid re-introducing direct Ministerial involvement in substantive decision-making the Secretary of State would not consider applications and would not add names of his own or remove names from the lists. The Secretary of State was to satisfy himself that the process met the goals that had been set and operated according to design and produced reasonable results.

[32] There were clearly tensions between the role of the Secretary of State in overseeing the process and the role of the Selection Panel in making the assessment. The applicant raises issues about the boundary between the two bodies. The applicant contends that the Secretary of State should have undertaken a more intrusive role in the assessment process and that, consistent with his constitutional position, he had a duty of inquiry into the workings of the Selection Panel that he failed to fulfil. Difficulties about the boundary between the respective roles did surface in the course of the process, for example, in relation to the setting of the standards, because the Secretary of State preferred a standard of excellence that had been applied in England and Wales and he required justification for a variation in Northern Ireland. The drawing of the boundary involved a recognition that the Secretary of State was not demanding complete identity with the English standard,

but was prepared to recognise the prospect of a variation in Northern Ireland, provided it could be justified and that standards were maintained.

[33] Another aspect of this boundary dispute would be the reports of the Selection Panel to the Department. After the first report of 5 April 2006 Mr Langley on behalf of the Secretary of State required clarification of certain issues in the process, namely the treatment of Competences F and G, whether the Panel had assessed the applications in any depth at the filter stage, how the Panel had chosen referees from the lists, confirmation of the reasons for not splitting into sub-committees, detailed questions about monitoring information and the description of candidates' practice and evidence provided alongside the list of non-recommended candidates.

[34] At the time of the first report from the Selection Panel there was also an issue as to whether the Secretary of State could be satisfied that the Panel had demonstrated adequately that its recommendations were squarely based on evidence and a request was made for such information. The candidates' grades for each competency were included in the papers, but not the evidence which had caused the Panel to reach that grade. The Secretary of State's official initially considered that this made it difficult for the Department to determine whether the process had operated correctly. However, on reflection he decided that to require the Panel to set out the detailed evidence for each candidate's failure to reach the required mark in each competency would invite the Secretary of State to reconsider the detail and the merits of individual decisions which would be akin to substituting his decisions for that of the Panel. It was concluded that this was not a legitimate option for the Secretary of State.

[35] In the second report of the Selection Panel on 2 April 2007 there was further scrutiny of the process and requests for clarification from the Panel. This concerned the Complaints Committee report, the final number of complaints and the format within which the results should be presented so that they could be assessed on whether they met the objectives of transparency, fairness and being evidence based.

[36] The exchanges related to concerns about process rather than assessment. Although, initially, Mr Langley was tempted into consideration of the evidence, he reflected that this would be to stray beyond the boundary of what he described as the legitimate options of the Secretary of State. Within the areas of enquiry undertaken on behalf of the Secretary of State, Mr Langley redrafted some parts of the Selection Panel's report before submission to the Secretary of State. The applicant was critical of that exercise. Mr Langley explained that a part of the redrafting related to presentation and style, but otherwise the changes addressed matters that it was felt were within the Secretary of State's remit but had not been addressed in the original report. I accept that this exercise was within the proper duties of the official briefing the Minister.

[37] I conclude that the Secretary of State was concerned with the process being applied according to the objectives of fairness, transparency and being evidence-based. In other words, the Secretary of State had an oversight role in the process and not a role in the assessment of candidates. He was satisfied on the objectives largely on the assurances of the Selection Panel. He was satisfied on an evidence-based approach on the basis of the description that was offered to him of what occurred rather than on the basis that he would receive the evidence and assess the evidence or call for the evidence in the individual cases. Similarly, the Secretary of State was assured of fairness by reference to knowledge of the design and a description of the procedures, without an examination of the detailed procedures. Whether there was procedural unfairness in the manner in which the Selection Panel dealt with the applications will be considered below. Equally, the Secretary of State was satisfied on the transparency of the process by reference to the design and the description offered by the Selection Panel. Issues relating to transparency will be considered below.

[38] In general I accept the outline given on behalf of the Secretary of State of his proper remit and the appropriate constitutional arrangements for the appointments. Accordingly the Secretary of State's oversight role was a limited role and any duty of inquiry into the process was correspondingly limited. From time to time the boundaries between the Selection Panel and the Secretary of State may not have been clear and it may be difficult to draw a precise boundary in all circumstances. There are no judicial review grounds on which to interfere in principle with the adoption of the limited role of the Secretary of State, as described and as justified for the constitutional reasons on which reliance has been placed. Whether in the event there were procedural irregularities or an absence of transparency in the process that was conducted by the Selection Panel and the effect on the role of the Secretary of State of any such procedural irregularity or lack of transparency are matters considered below.

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[39] The third general matter is the interaction of the judicial review and the complaints procedure provided in the design documents. The applicant complained to the Complaints Committee after the first assessment of his application and the report upheld some of his complaints. Notice of the findings was given to the applicant on 14 December 2006. Complaints were lodged after the results of the reconsideration of unsuccessful candidates were issued on 11 May 2007. The applicant did not complain on that occasion. The Complaints Committee did consider a number of other complaints and published a further report of its findings in 2008. That report was not in evidence in the judicial review so it is not known what issues were addressed in that report.

[40] However the applicant had an alternative remedy after 11 May 2007. The issues that developed in this judicial review led to these proceedings continuing despite the concurrent complaints procedure being underway and despite the applicant not having availed of the complaints procedure. The judicial review focussed on the decisions of the Secretary of State. Further issues emerged in relation to the Selection Panel. In the circumstances it was considered more effective to progress matters in the judicial review proceedings rather than requiring the applicant to return to the Complaints Committee with a new inquiry.

[41] At the hearing the respondent contended that any findings arising in the judicial review, that were in the nature of complaints that could have been referred to the Complaints Committee by the applicant, should not dealt with by the Court but should be referred to the Complaints Committee. I do not accept the respondent's contention that any matters in the nature of complaints should now be sent to the Complaints Committee. In the interests of dealing with matters effectively and efficiently I propose to reach a concluded view on all issues.

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[42] Against the above background I turn to the particular issues that were raised and propose to consider them under three areas, procedural fairness, fettering of discretion by the Secretary of State and irrationality. On the first area of procedural fairness, an issue arises as to the responsibility of the Secretary of State for any procedural shortcomings of the Selection Panel. One of the stated objectives of the process was to secure fairness. If the procedures adopted by the Selection Panel were unfair then the Secretary of State would have responsibility as overseer of the process, as would be the case if the procedures adopted by the Secretary of State were unfair.

[43] The first aspect of procedural unfairness concerns the clarity of the paperwork in relation to the behaviours that had to be demonstrated. The applicant complains that it was not adequately explained in the paperwork that the applicant should provide evidence of behaviours as opposed to evidence of the competences. Comparisons were made with the guidance issued in England and Wales.

[44] The Guidance for Northern Ireland deals in Section D with self-assessment and states -

> "For each competency it is essential that you consider all the behaviours for the competency and then decide upon the best examples of occasions when you demonstrated the behaviours. You must give specific examples of such occasions."

> "In this section it is important that you familiarise yourself with the behaviours for each competency. Think of examples that cover all behaviours."
>
> (Underlining added)

In the application form itself under Section B, self-assessment, it stated that:

> "This is a crucial part of your application and the information you provide will inform the Selection Panel about your suitability. It is essential that you read the guidance and then in this self-assessment we asked you for each competency to consider all the behaviours for the competency and then to decide the best example of you demonstrating the behaviours at work. **You must give specific examples** of your behaviours ensuring you give evidence of **all the behaviours** under each competency."

[45] I do not accept this complaint about the lack of clarity in the paperwork. It was made clear from the passages referred to that a candidate must give a description of the behaviours.

[46] Further the applicant contends that the criteria to be applied to the application were not sufficiently explained and in particular the standard of excellence was not explained. The Applicant Guidance explained that there would be grading of each application and that a standard of excellence was required. Reference was made to the Competency Framework which set out the competences and the behaviours, with a footnote confirming that the competences had to be demonstrated to a standard of excellence. Provision was made for a feedback process that would indicate those competences that a candidate had failed to demonstrate to the required standard. I am unable to accept that there was not such explanation of the scheme that prevented the applicant having a fair opportunity to present his application.

[47] The applicant's further point concerns the lack of definition of the behaviours. The behaviours are set out in the competency framework. I find that it has not been established that there was any ambiguity in relation to the behaviours. It was said that an indicator of the lack of clarity about the nature of the behaviours was the disparity in the marking that was accorded to behaviours by different members of the Selection Panel. It has not been established that any disparity that may have arisen was for that reason. It may have arisen from the interpretation of the material as opposed to the manner in which the behaviour was described. No doubt the behaviours could have been explained in a different manner and no doubt lessons have been learned from this process. Comparisons can be made with other schemes and there may be better schemes that can be devised and better descriptions that can be given. However the judicial review approach is not to ascertain whether there

might be a better scheme or a better description provided, but to ascertain whether the scheme provided or the description given offends any of the grounds for judicial review. It has not been established that there are judicial review grounds for interfering with the description of the behaviours.

[48] The second issue in relation to procedural fairness concerns the opportunity for interview. The applicant contends that fairness required an interview for all those who were not successful initially. The process involved the identification of three types of case initially, the successful, the borderline and the unsuccessful. This then translated, after the interview of borderline cases, into two types, successful and unsuccessful. The English system had a different approach as all candidates were interviewed. There is nothing inherently unfair in the three-type process. Issues about costs or administrative ease, if they were relevant to the decision making, do not render unfair that which would otherwise be fair.

[49] This point is further refined by the contention that it is unfair to be denied the opportunity for interview when others have been interviewed. The interview may allow them to improve their position. That would not invariably be so as the applicant contended, but the interview would afford the opportunity to improve the candidates position, although of course in the event the candidate might not succeed in improving their position.

[50] The three type approach was based on a certain standards being attained to determine into which of the three categories the candidates would be placed. Those not interviewed had not reached the required standard, ie the borderline standard. It is commonplace to set a standard for interviews in respect of appointments and to find that those who do not reach the standard are not interviewed and that is not a process that could be described as unfair. I am not satisfied that there was any procedural unfairness arising from the adoption of the three stage approach or from the absence of an interview for those failing to reach an interview standard.

[51] The next issue of procedural fairness concerns mapping across from one area to another. One of the grounds on which the Complaints Committee referred the unsuccessful candidates back to the Selection Panel for reconsideration was that they were not satisfied that there had been such mapping across. This reconsideration was to include the use of mapping across. There were different views about mapping across but it was found to be a part of the process and there was a doubt about its use on the first assessment of the candidates. It was stated to have been used on reconsideration of the unsuccessful candidates. The issue that arises is more refined and concerns what I might describe as mapping across for references. This is a point that arises out of the minutes of the meeting of 25 January 2007.

[52] At that meeting there was some concern expressed about the manner in which references would be utilised in the process. The Chairman tabled a paper at the meeting entitled "Evaluation of References". The paper is Appendix 1 to the minutes of 25 January 2007. The paper was adopted by the Selection Panel. It begins by

stating that it had not proved possible to derive specific scores relating to particular behaviours or competences from the contents of the references. A passage that drew criticism from the applicant appears towards the end of the paper. It states:

> "It was not considered practicable to amend scores for individual behaviours even where complete omission of a mention of a particular behaviour in the application form was repaired by specific evidence in a supporting reference. However, all evidence in the references was taken into account in agreeing the score for the relevant competency."

[53] The applicant's objection relates to the first sentence on the basis that it indicates an absence of mapping across from the references to the scoring, resulting in non-compliance with the design of the system.

[54] In the first sentence Sir Liam stated that it was not considered practicable to amend scores for individual behaviours. I understand the approach being described to be that where a candidate does not provide evidence of a behaviour in the application form, for which presumably the candidate scores nothing, but the referee addresses that behaviour, the Selection Panel did not score the candidate against that behaviour. In other words, in those circumstances, there was no mapping across from the reference to the scoring.

[55] However the second sentence quoted above states that all evidence in the references was taken into account in agreeing the score for the relevant competency. So, although the reference did not add to the score for the behaviour, it was taken into account in agreeing the score for the competency. Thus the references were not used to agree behaviour scores but they were used to agree competency scores. The assessment of a candidate was based on competency scores. The references were taken into account in agreeing the score for the competency. The competency scores were the basis of the decision whether the candidate was successful, borderline or unsuccessful. Therefore, when one reads the two sentences together, as must be done, one finds that there was mapping across of the references into the assessment of the competences. Accordingly I do not accept the applicant's objection.

[56] A further issue relating to referees is that the Selection Panel did not make a request for further information from the referees. The Applicant Guidance stated that further information or clarification could be sought from a referee and would be taken into account in the assessment and grading of the candidate. Such requests could have been made compatibly with the design of the process but were not made. It is not known to what extent such requests were considered. Sir Liam's paper and the minutes of the meeting suggest that many referees would have been affected by the issue he identified. Like so many of the decisions of the Selection Panel the question is not whether other steps could have been taken, but whether the steps that were taken offend any grounds for judicial review. A choice not to request

further information from referees is not one in respect of which there are judicial review grounds for setting aside the choice.

[57] The next issue on procedural fairness concerns the standard of excellence and its impact on assessments. The Secretary of State preferred 4s across the board and the Selection Panel was prepared to recommend 3s in F and G with compensating 5s. In the event all the candidates met the Secretary of State's standard of excellence and no issue arose. The applicant's contention was that the adoption of a different standard of excellence by the Selection Panel influenced the scoring by the Selection Panel. The parallel was drawn with marking examination papers and applying a different pass mark to the official pass mark, thereby, according to the applicant, being influenced by the different standard and distorting the assessment. This is a speculative argument and I do not accept that there is any basis for reaching such a conclusion as to the effect of adopting a different standard to that which the Secretary of State preferred.

[58] The next point in relation to the procedural fairness concerns the borderline standard. I have found that the change of borderline standard was made on 20 December 2005. The Secretary of State was not aware of this change until he received the letter from solicitors on 27 November 2007. The process involved the Secretary of State leaving to the Selection Panel the arrangement of interviews, determining the standard for interviews and who should be interviewed. In relation to standards the Secretary of State's concern was directed towards whether, at the outcome of the process, those who were being recommended had met the requisite standard of excellence. The Secretary of State did not become involved with the grades required for interview but with whether the standard was set at the start of the assessment and applied to all the candidates. That the Secretary of State was not aware of the change of the borderline standard until after the event does not bear on the selection standard because only those who met the requisite standard of excellence were recommended.

[59] The applicant alleges actual and apparent bias. The basis for this ground is that there was a reference back to the Selection Panel from the Complaints Committee after the adverse findings had been made in their report. First of all there is no evidence at all of actual bias. Apparent bias requires an objective test to be applied. The test was redefined by the House of Lords in Porter & Magill [2002] 2 AC 357. The Court must first ascertain all the circumstances that have a bearing on the suggestion that the decision-maker was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility the Tribunal was biased.

[60] The design of the scheme provided for the reference back from the Complaints Committee to the Selection Panel. The design was considered by the Department, the Bar and the Law Society. In the guidance to applicants it was stated -

> "In the event that the Complaints Committee upholds a complaint by an unsuccessful applicant the question whether the award should be made will be referred back to the Selection Panel for decision in light of the findings of the Complaints Committee. This will not interrupt the timetable for other applicants."

[61] It was made apparent to all from the design of the process that the scheme would involve a successful complaint being referred back to the Selection Committee. I am unaware of any objection being made by anyone to the complaints structure when the scheme was designed. This is a relevant matter to the objective assessment of apparent bias. In the context of a selection process for candidates for appointment, whether by competition or otherwise, a selection panel will make the assessment and a complaint or appeal may arise from interim decisions, such as selection for interview, with the matter referred back to the selection panel. Part of the process should be continuity in the system. The last sentence of the passage from the Applicant Guidance states that the complaints process "will not interrupt the timetable for other applicants". In other words the Selection Panel will continue conducting interviews for other candidates. It would obviously be desirable that the same Selection Panel should make the decisions on all of the candidates. Such an approach is commonplace and cannot be said to be unfair in principle, although it may become unfair and require change in particular circumstances. The grounds on which the Complaints Committee decided the complaints were not such as would have rendered it unfair for the existing Selection Panel to have completed the reconsideration. Nor would that process lead the fair minded and objective observer to conclude that there was a real possibility that the Selection Panel was biased.

[62] The applicant develops this ground further on the basis that the Selection Panel would tend to hold to the original decision. This amounts to a claim of predetermination in that the Selection Panel, having already decided that the candidate would be awarded a particular grade for a competency, would have a tendency to hold to that grade. The events may demonstrate otherwise. In the second round there were six further candidates who were successful out of twenty reconsidered, one being successful on reassessment, eight being borderline and invited for interview, of whom five were successful after interview. This countermands the suggestion of predetermination being built into the system. I am not satisfied that any aspect of the present case rendered it unfair to refer the matter back to the Selection Panel, or indicated a real possibility of bias.

[63] A further ground relates to the scoring of the candidates on reconsideration. The applicant's complaint is that the scores in round one became the starting point for the review in round two. The applicant's contention is that a new beginning should have been adopted. This is another species of procedural unfairness and predetermination, in that the Selection Panel, on reconsideration, having settled on the scores from the first round as the starting point, would have a tendency to hold to that score. Choices have to be made in these processes as to what approach is

taken. I do not see any objection in principle, whether on the basis of procedural unfairness of predetermination, to using round one as a starting point for round two. Of course, if the approach that was applied indicated such rigidity that there was little or no change being made then that approach might be shown to be restrictive and amount to predetermination. However the results point the other way. Changes were made and an additional six candidates were successful. I do not accept any of the arguments about apparent bias.

[64] However the applicant contends that the response of the Selection Panel to the reference back indicates predetermination in that Mr Langley reported that the Selection Panel had not thought that reconsideration of the unsuccessful candidates was strictly necessary. Whatever may have been the basis of such a belief I do not accept that it affected the reassessment of the unsuccessful candidates, as is evident from the significant alteration in the outcome.

[65] The applicant claims that there was an unclear and ineffective complaints process. The matters relied on relate to the absence of information about the remit of, the procedures that applied to, and the effect of the decisions of the Complaints Committee. The Applicant Guidance stated the existence of a complaints procedure through the Secretariat to a Complaints Committee within a specified time. The scope of the complaints procedure was stated widely as relating to "Concerns or complaints about the operation of the system…" There was no information sheet on the workings of the Complaints Committee. However it has not been established that the Complaints Committee failed to address the complaints made or adopted unfair procedures and in the event the Selection Panel and the Secretary of State accepted and implemented the recommendations of the Complaints Committee. Accordingly I have not been satisfied that there were shortcomings in the remit or the procedures or the effect of the decisions of the Complaints Committee.

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[66] The next area concerns the direct failings of the Secretary of State in the assessment process. This brings back into play the issue of the respective roles of the Secretary of State and the Selection Panel and the boundary between the two. The applicant makes complaints about the Secretary of State not considering the merits of the applicant's case and not receiving representations from the applicant as to whether he should be interviewed or recommended for appointment. As stated above the Secretary of State had an oversight role and was deliberately divorced from the assessment process and would not consider the merits of particular candidates. For the Secretary of State to consider the merits of the applicant's case would have run completely counter to the declared constitutional role. Similarly, representations from the applicant would have addressed the assessment of his candidacy, whether for interview or for success as the case may be, and would have transgressed the boundary that was drawn between the Secretary of State having an

oversight role and the Selection Panel having the assessment role. I do not accept the applicant's complaints that there were failings by the Secretary of State in not considering representations from the applicant or the merits of the application.

[67] A further ground is that the Secretary of State failed to ensure compliance with the objectives of the scheme, namely fairness, transparency and an evidence-based approach. In relation to the fairness issues I have not upheld the applicant's complaints of procedural unfairness by the Selection Panel for the reasons set out above.

[68] In relation to the evidence based approach the Secretary of State stepped back from examining the evidence and was satisfied to accept assurances of an evidence based approach. There are no judicial review grounds for setting aside the Secretary of State's conclusion that to do otherwise would have offended the logic of his position as an overseer and not an assessor.

[69] In relation to transparency, the applicant's complaint is that the Secretary of State should have been aware of the details of the Selection Panel's operation of various aspects of the process. This is another aspect of defining the respective roles of the Secretary of State and the Selection Panel. If transparency means that the Secretary of State should have been aware of all details of the assessments carried out by the Selection Panel then clearly that did not occur. The report from the Selection Panel to the Secretary of State of 2 April 2007 included biographical data on recommended candidates, a list of unsuccessful candidates and the reasons for non-recommendation, biographical data on non-recommended candidates and monitoring information on the recommended candidates. On behalf of the Secretary of State Mr Langley obtained clarification of certain matters from the Selection Panel. The Secretary of State was content that the scoring awarded to the applicant was based on evidence, was aware of the competences in which the applicant was below standard and did not consider it necessary to know the actual scores. The Secretary of State was made aware of the approach taken by the Selection Panel, but was he sufficiently aware of the details to comply with his oversight role?

[70] Some of the matters that have been complained about by the applicant were not known to the Secretary of State. One example is the starting point issue. The Secretary of State was unaware that the Selection Panel used the grades from the initial assessment as a starting point for the reconsideration of the grades. However I am satisfied that that lack of knowledge was a detail of the assessment method that did not affect the Secretary of State's overall role.

[71] A second aspect of transparency concerns the standard of excellence, namely that the Selection Panel were applying a different standard of excellence to that preferred by the Secretary of State. However this issue was transparent in the sense that the Secretary of State was aware of the approach of the Selection Panel. He might not have agreed with their approach and he required that the Selection Panel

would justify any divergence from the English standard. The position was made known to the Secretary of State.

[72] A third example relates to the scores for the competences. The scores of the applicant in the second round were not made known to the Secretary of State. He was otherwise satisfied as to the manner in which the process had been operated and as to the outcome. He did not have to monitor the individual scores of the candidates.

[73] A further aspect of transparency was the extent of the mapping across. The Secretary of State did not examine the papers in order to confirm the use of mapping across, although it is doubtful if that could have been done. However he did accept assurances about the use of mapping across.

[74] Another transparency example may concern the borderline criteria. It is quite clear that the Secretary of State was unaware of the changes that were made to the borderline criteria by the Selection Panel after 30 November 2005. It may be surprising that such a matter was not notified to the Secretary of State when reports were being forwarded about certain aspects of the process and the original borderline criteria had been notified. However in relation to the actual assessment of the candidates it was the standard of excellence that had to be attained that was the ultimate target of the Secretary of State rather than the intermediate standard to be attained to qualify as a borderline candidate for interview.

[75] On all of these issues about transparency I am not satisfied that any one of the matters of which the Secretary of State was unaware was a matter about which he ought to have been informed in order to carry out his role in the required manner. No aspect of the process, of which he ought to have been aware, was not transparent to the Secretary of State. Nor, indeed, do I consider insofar as transparency of a more general character might have been required, that the details of which the applicant was unaware required to be published to the candidates or to be published generally.

[76] The applicant advanced a number of objections concerning the Complaints Committee report. First of all the Secretary of State did not obtain a copy of the full report. The Secretary of State did receive information on the findings in the report such as to alert him to the issues that were addressed. The Secretary of State did address those issues with the Secretariat and received confirmation of compliance with the recommendations in that the process had been adjusted by the Selection Panel to take account of the Complaints Committee's findings.

[77] The second matter concerns the Secretary of State proceeding with the Selection Panel recommendations in the light of the Complaints Committee's findings. I am unable to accept that it could be said to be irrational to act on the recommendations that were made for appointment after the Complaints Committee report had been received. Those who were unsuccessful were reconsidered, the

issues raised in the report were addressed and the Secretary of State accepted the recommendations.

[78] The third matter concerns evaluation of candidates by the Secretary of State. Such evaluation of candidates would have been completely out of place for the reasons that I have given above.

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[79] Finally, it said that the decision not to recommend the applicant for appointment was irrational. The applicant contends that it was irrational not to find that the applicant met the standard of excellence. I would not attempt to complete an assessment of the applicant's application form and references against the standard of excellence. This is a matter of demonstration of competences for the Selection Panel and it is not for the Court to make that assessment. I have no basis for concluding that the outcome that was reached by the Selection Panel could be said to be irrational.

[80] For all of the above reasons I am not satisfied on any of the applicant's grounds for judicial review and the application is dismissed.