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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY SEAMUS TREACY AND BARRY MACDONALD FOR JUDICIAL REVIEW

KERR J

Introduction

Seamus Treacy and Barry Macdonald are members of the Bar of Northern Ireland. They applied in April 1999 to be admitted to the Senior Bar. In November 1999 they learned that they had been successful in their applications. Subsequently, they were informed that, before being called to the Senior Bar, they would be required to make a declaration in the following terms:-

> "I do sincerely promise and declare that I will well and truly serve Her Majesty Queen Elizabeth II and all whom I may be lawfully called upon to serve in the office of one of Her Majesty's Counsel learned in the law according to the best of my skill and understanding."

Both applicants objected to making this declaration. They claimed that the Lord Chancellor (whose decision it was to require the declaration to be made) had no power to impose such a requirement. Alternatively, they suggested that he was wrong to impose it. They also claimed that the matter of the declaration was one for the Lord Chief Justice of Northern Ireland. Finally they asserted that they were already Queen's Counsel by virtue of the Warrant of the Queen.

Background

Before the partition of Ireland, Queen's Counsel were appointed by the issue of a warrant by the Lord Lieutenant of Ireland, acting as the delegate of the Sovereign. The Lord Lieutenant acted on the advice of the Lord Chancellor of Ireland. It was a constitutional convention that the Lord Lieutenant would accept the Lord Chancellor's advice. This practice mirrored the position in England where the Lord Chancellor of England recommended to the Sovereign the names of those whom he considered should be appointed Senior Counsel and his recommendation was invariably accepted.

After 1920 the functions of the Lord Lieutenant were transferred to the Governor of Northern Ireland. In the matter of the appointment of Senior Counsel the Governor acted on the recommendation of the Lord Chief Justice for Northern Ireland. An Oath of Allegiance to the Sovereign was required of those who wished to become Senior Counsel. They were also required to make a declaration of office. It was in these terms :-

> "I do declare that well and truly I will serve the Queen as one of Her Counsel learned in the law and truly counsel the Queen in Her matters, when I shall be called upon so to do, and duly and truly administer the Queen's process after the course of the law, and after my cunning. I will duly in convenient time speed such matters as I may lawfully do which any person shall have to do in the law against the Queen. And in all other respects I will be attendant to the Queen's matters when I be called thereto."

In 1972 the functions of the Governor were transferred to the Secretary of State for Northern Ireland. When Senior Counsel were to be appointed, the Secretary of State, acting on behalf of the Queen and on the advice of the Lord Chief Justice, issued a warrant authorising their appointment.

In May 1995 Philip Magee, a member of the Bar of Northern Ireland, made an application for judicial review of the requirement to take the Oath of Allegiance and to make a declaration of office in the form then prescribed. The respondent in the judicial review proceedings was the Secretary of State for Northern Ireland. Before the application for judicial review was heard, however, it was concluded that the requirement to take the Oath of Allegiance was in breach of the Promissory Oaths Act 1868. This requirement was removed, therefore. At the same time the Secretary of State reviewed the form

of the declaration of office. He decided that in future the form of the declaration should be the same as that made in England and Wales. Accordingly, on 26 October 1995, the Clerk of the Crown wrote to the chairman of the Bar Council informing him that, on taking Silk, the oath would no longer be administered and that the declaration would be in the form used in England and Wales. This is the form of the declaration which is currently in use and to which the applicants object.

After the letter from the Clerk of the Crown was received, Mr Magee consented to his application for judicial review being dismissed. In April 1996 a notice signed by the Principal Secretary to the Lord Chief Justice inviting applications for Silk was screened in the Bar Library. This prompted Mr Magee to write to the chairman of the Bar Council and to the Principal Secretary making inquiry as to the form which the declaration would take. He was informed that this would be as outlined in the letter from the Clerk of the Crown. Solicitors acting for Mr Magee then wrote to the Principal Secretary and to the Secretary of State for Northern Ireland raising a number of queries. In particular they asked whether the making of the declaration was compulsory. On 22 April 1996 the Principal Secretary replied stating that the making of the declaration was not a matter for the Lord Chief Justice. Further correspondence on this topic passed between Mr Magee's solicitors and the Principal Secretary, in the course of which the Principal Secretary quoted the following exchange from Hansard of 13 June 1995:

> "Mr Peter Bottomley MP: To ask the Parliamentary Secretary, the Lord Chancellor's Department, who has discretion to modify the requirements of the oath and declaration required of Queen's Counsel.
>
> Mr John M Taylor MP: When in November [1972] the form of the declaration made by Queen's Counsel was last modified, Her Majesty approved the Lord Chancellor's recommendation made with the agreement of the Treasurers of the four Inns of Court and the chairman of the General Council of the Bar.
>
> …
>
> Any modification to the oath and declaration for Queen's Counsel of Northern Ireland would be made by my Right Hon Friend the Secretary of State for Northern Ireland in the exercise of the Royal Prerogative. He would be advised in the matter by the Supreme Court authorities after consultation with the General Council of the Bar of

Northern Ireland."

Further correspondence passed between Mr Magee's solicitors and the Principal Secretary and between Mr Magee himself and the chairman of the Bar Council but it is unnecessary to rehearse the contents of those letters here.

On 2 May 1996 the then Lord Chief Justice of Northern Ireland, Sir Brian Hutton (now Lord Hutton of Bresagh) wrote to the then Secretary of State for Northern Ireland, Sir Patrick Mayhew (now Lord Mayhew) referring to a meeting which they had had a few days previously. Lord Hutton repeated the view (which he had apparently expressed at the meeting) that the matter of the declaration was one for the Secretary of State. He suggested that the requirement to make the declaration could only be foregone by "a positive decision to remove it" on the part of the Secretary of State. Lord Hutton then said :

> "If you decide to remove the requirement for a declaration it will appear that you are either being influenced by political pressure to alter the procedure relating to an office which links Northern Ireland with the Crown, or you will appear to be accepting the allegation of Mr Magee (which I think is probably unsustainable on legal grounds and which you had already claimed in the earlier proceedings to be invalid)**
>
> This was a reference to the affidavit filed on behalf of the Secretary of State in Mr Magee's judicial review application that the requirement of a declaration is discriminatory. If you remove the requirement which you stated in the letter of the Clerk of the Crown dated 26 October 1995, it is probable that Mr Magee will claim that he has succeeded in striking down a discriminatory practice which had wrongfully been imposed for many years in the past."

Lord Hutton had also written to the Secretary of State in March 1996 about the question of the declaration. I shall refer to that letter below.

On 15 May 1996 the Bar Council set up a committee under the chairmanship of Fraser Elliott QC to investigate and report on all aspects of the appointment of Senior Counsel in Northern Ireland. The Committee sought the views of the judges of the Supreme Court. On 23 January 1997 Sir John MacDermott, then the senior Lord Justice of the Court of Appeal in Northern Ireland, wrote to Mr Elliott on behalf of the Lords Justices and the puisne judges. On the matter of the declaration he said:

> "A declaration is required of each appointee as Queen's Counsel, which is now in the same terms in Northern Ireland as it has been for some time in England and Wales. [Sir John then set out the terms of the declaration and continued]
>
> Sir Thomas Legg, Permanent Secretary of the Lord Chancellor's Department, has given the following opinion, which we believe to be correct:
>
> (a) The declaration is to be regarded as a declaration of office and not a test of allegiance
>
> (b) There is no reason why it should not properly be taken by any appointee, even a foreign national in practice at the English Bar (although at present only British subjects or nationals of member states of the European Union are eligible, this is under review).
>
> (c) The declaration is regarded as a mandatory requirement for taking Silk. No appointee has to the best of his knowledge ever declined to make the declaration."
>
> and
> "The Declaration
>
> This is the same as that used in England and Wales. It is a declaration of office and not of allegiance. We can see no rational objection to it and we are satisfied that it should be retained."

Before Mr Elliott's Committee reported, there was a call to the Senior Bar. This took place in September 1996. All those called made the declaration in the terms set out in the letter from the Clerk of the Crown.

In April 1997 Mr Elliott's Committee reported to the Bar Council. It recommended that the declaration should be modified. It proposed that the following be substituted for the declaration notified to the chairman of the Bar Council in October 1996:-

> "I do sincerely promise and declare that I will well and truly serve all whom I may lawfully be called to serve in the office of one of Her Majesty's Counsel learned in the law according to best of my skill and understanding."

The Bar Council accepted this recommendation at a meeting on 14 May 1997. The following day a

copy of the Elliott Committee report was sent by the chairman of the Bar Council to the Lord Chief Justice, Sir Robert Carswell. On 23 May 1997 the Lord Chief Justice replied to the chairman's letter and suggested to him that the report be published. The chairman and the Lord Chief Justice met on 6 June 1997 and, in the course of the meeting, Sir Robert informed the chairman that the issue of the declaration was not one on which he could comment since this was a matter for the Secretary of State.

The Bar Council did not send a copy of the Elliott Committee report to the Secretary of State or to the Northern Ireland Office nor did it at any time make representations to the Secretary of State about the form which the declaration should take. The Northern Ireland Office became aware of the report when, sometime in June 1997, a copy was received from the office of the Lord Chief Justice. The Secretary of State, Dr Majorie Mowlam, made no decision in relation to the declaration before 31 March 1999 when her responsibilities in the matter passed to the Lord Chancellor; nor is there any evidence that the matter was considered by her before that date.

On 11 June 1997 the Lord Chief Justice wrote to the Lord Chancellor. He enclosed a copy of the Elliott Committee report. He said that the "major matter raised" in the report was that of the declaration. He set out the recommendation of the Committee on the declaration and said:-

> "I have consulted my Supreme Court colleagues, and they are united in the view that the declaration should remain in its present form."

The Lord Chancellor believed that this referred to the views held by the judges of the Supreme Court *after* the Elliott report had been produced. It is now clear, however, that, following the publication of that report, the judges had not expressed any view on the form that the declaration should take. The only view which the judges as a body had formed or expressed was that communicated to Mr Elliott by Sir John MacDermott on 23 January 1997, some three months before the Elliott report was published.

The letter of 11 June 1997 from the Lord Chief Justice to the Lord Chancellor continued:-

> "This view, [*i.e.* the view that the declaration should continue in its existing form] with which I fully agree, accords with that expressed by Brian Hutton in his letter of 21 March 1996 to the then Secretary

of State:

> 'I think the law is clear that the appointment of Queen's Counsel is an exercise of the Royal Prerogative and that the position of Queen's Counsel is in the nature of an office under the Crown. This is stated in the portion of the judgment of Lord Watson in Attorney General for Dominion of Canada v Attorney General for Province of Ontario [1898] AC 247 at 251 which I enclose. I have underlined the passages of particular relevance.

It is therefore inherent in the office of Queen's Counsel that the barrister who accepts that position also accepts that he receives an office under the Crown, and by the clearest implication owes a duty to 'serve Her Majesty Queen Elizabeth II and all whom I may lawfully be called upon to serve in the office of one of Her Majesty's Counsel learned in the law'. This is what is stated in the English Declaration, and I enclose a copy of it.

Therefore a situation in which a barrister wishes to become a Queen's Counsel but declines to acknowledge that he holds an office under the Crown with a consequent obligation to the Queen is a contradiction in terms. Such a person is not entitled to be a Queen's Counsel. It seems to me that a somewhat comparable position would be where a politician wishes to enhance his standing by having the title of Privy Counsellor but refuses to take the Privy Counsellor's oath.'

I also share Brian Hutton's view that the decision whether or not Queen's Counsel should be required to make a declaration and the form which that should take is one for the Secretary of State. Patrick Mayhew was a little reluctant to accept that the decision lay with him, and Brian [Hutton] set out his views cogently in a letter of 2 May 1996, a copy of which I enclose. The Secretary of State finally accepted this and decided that the new Queen's Counsel should be required to make the declaration. I agree also with Brian Hutton's observation made in his letter of 21 March 1996 :

> 'I think it is likely that if there is no longer a requirement that those who become Queen's Counsel make a Declaration to serve the Queen it could be argued that there is no longer any reason why they should be called Queen's Counsel.'

I have little doubt myself that this is all part of an ongoing politically-

> based campaign to have the office of Queen's Counsel replaced by a rank entitled Senior Counsel, or something to that effect."

A meeting between the Lord Chief Justice and the Lord Chancellor took place on 25 June 1997. The minutes of that meeting record the Lord Chancellor as stating that he agreed with the views that had been expressed by Lord Hutton on the duty owed by Queen's Counsel to the Crown. Sir Robert Carswell was recorded as saying that "the judges were unanimously of that view" *i.e.* that Queen's Counsel owed a duty to the Queen by dint of their office. As noted above, however, the judges had expressed no view about the declaration after the Elliott report was produced and their opinion, as expressed in the letter from Sir John MacDermott, was confined to the view that, since the declaration was merely a declaration of office and not one of allegiance, it was unobjectionable. There is no evidence that the Supreme Court judges were aware of the view expressed by Lord Hutton to Lord Mayhew that Queen's Counsel owed a duty to the Crown. (It is to be noted that during the hearing of this judicial review application, counsel for the respondents, Mr Weatherup QC, accepted that Queen's Counsel owed no duty to the Queen and were not obliged to accept instructions to appear on behalf of the Crown. Moreover, as we shall see below, the Guide to applicants for Silk describes the office of Queen's Counsel as "first and foremost a working rank" and makes no reference to a duty to the Queen or an obligation to act on behalf of the Crown).

According to the note of the meeting of 25 June 1997, it was agreed that the Lord Chief Justice would write to the chairman of the Bar about "Silk matters other than the declaration". It was also agreed that the Lord Chancellor would not rush to express any view on the question of the declaration. The note stated that "there were good reasons for putting this on the back burner".

On 10 February 1998 the Lord Chancellor wrote to the Lord Chief Justice. Dealing with the appointment of Queen's Counsel, he said:

> "It seems no more than a quirk of history that the Secretary of State has the responsibility for Silk appointments in Northern Ireland. She and I consider that the function fits more sensibly with the office of Lord Chancellor and provides a proper match with my responsibilities for judicial appointments in Northern Ireland. Accordingly, the Secretary of State has informally indicated her willingness to consider a transfer of this responsibility to me. If you

> are also in agreement, I believe that there are no legal, political or constitutional obstacles to proceeding in this way."

In this letter, the Lord Chancellor also said:

> "You are also aware of my support for your views on the question of the declaration, which at this point is a matter for the Secretary of State. I agree that it seems sensible for this to continue on the back burner for a further period."

On 16 October 1998 the Lord Chief Justice wrote to the chairman of the Bar Council, Brian Fee QC, informing him of a proposal to bring the arrangements for the appointment of Queen's Counsel in Northern Ireland more closely in line with those in England and Wales. He stated that the principal aspect of the proposed change would be that in future the power of appointing Queen's Counsel in Northern Ireland would be exercised by Her Majesty the Queen acting on the advice of the Lord Chancellor. The letter enclosed a paper which summarised the main features of the new appointment procedure and the Lord Chief Justice informed Mr Fee that it was envisaged that the paper would form part of an 'Information Pack' which would be made available to counsel wishing to apply for Silk. Neither the letter nor the paper which was enclosed with it made any reference to the matter of the declaration.

Mr Fee replied to the Lord Chief Justice's letter on 27 November 1998 and stated that the General Council of the Bar, having considered the matter at a meeting on 18 November 1998, was "generally in favour of the proposals". He raised a number of matters about the procedure by which applications for Silk would be made and considered. Mr Fee's letter did not refer to the question of the declaration.

On 22 March 1999 the Prime Minister approved the transfer of powers relating to the appointment of Senior Counsel from the Secretary of State to the Lord Chancellor and by letter of 31 March 1999 Her Majesty the Queen consented to the transfer of responsibilities. On 19 April 1999 the Lord Chancellor wrote to Mr Fee to tell him that the new arrangements were effective. Again no reference was made to the question of the declaration.

At the end of April 1999 applications for Silk were invited by the Lord Chief Justice. It

appears that, at about this time, the Lord Chancellor made a positive decision that the wording of the declaration should not be changed. He was aware of and, according to affidavits filed on his behalf, took account of the recommendation of the Bar Council but decided that the form of the declaration should remain as before. He has said that this decision was reached in order to preserve harmony between the systems in Northern Ireland and England and Wales. It is claimed that the Lord Chancellor did not consult because there was "no live controversy" about the issue of the declaration in April 1999. It was also stated on his behalf that the Lord Chancellor did not consider that the views of the judges of the Supreme Court were material to his decision. Again, he reached this view because he considered that there was no controversy relating to the declaration. It is claimed that if there had been any such controversy the Lord Chancellor would have consulted the Bar and would have taken account of the judges' views. It was suggested that, since he did not feel it necessary to do so, the fact that he mistakenly believed that the judges had confirmed their earlier view after the Elliott report had been published, made no difference to his decision.

When they applied to be appointed Senior Counsel, the applicants received a Guide which explained the arrangements for the appointment of Queen's Counsel. Paragraph 2 of the Guide stated:

> "Queen's Counsel form the senior rank of the profession of barrister in the three law districts of the United Kingdom. There is a corresponding senior rank at most other common law Bars. Although Silk may exceptionally be granted on an honorary basis … it is first and foremost *a working rank* in the profession of barrister and is regarded by the Lord Chancellor and the Lord Chief Justice as primarily a mark of distinction as an advocate." (emphasis added)

The Guide contained a section dealing with the appointment procedure. This described how applicants should apply, the consultation procedure which the Lord Chief Justice would follow and the manner in which recommendations would be made to the Lord Chancellor. It also stated that the instruments of appointment and "associated procedures of appointment" would be administered by the Crown Office in Northern Ireland. Nowhere in the Guide was any reference made to the declaration or to any duty owed by Queen's Counsel to the Crown.

When it was determined that twelve of the applicants for Silk should be admitted to the Inner Bar, the Royal Warrant was prepared and submitted for the signature of the Queen. It was received by the Lord Chancellor on 24 November 1999 and countersigned by him. It is in the following terms:

> "Elizabeth R
>
> Our will and pleasure is that this pass by immediate Warrant
>
> Elizabeth the Second by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Our other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith. To all to whom these Presents shall come Greeting. Know Ye that We of Our especial grace have constituted ordained and appointed
>
> Our trusty and well beloved
> Gerald Eric John Simpson Esquire
> [the names of the other applicants in sequence of seniority]
>
> to be Our Counsel Learned in the Law in Northern Ireland. And We have also given and granted unto them as Our Counsel aforesaid place precedence and preaudience in Our Courts next after Hugh Mark Orr Esquire in the order in which their names appear. And We also will and grant to them full power and sufficient authority to perform, do and fulfil all and every the things which any other of Our Counsel learned in the Law of Northern Ireland as Our said Counsel may do and fulfil. We Will that this Our grant shall not lessen any Office by Us or Our Ancestors heretofore given or granted. In Witness &c. Witness &c."

On 9 December 1999, the Clerk of the Crown wrote to the applicants outlining the arrangements for the Call to the Inner Bar which was due to take place on 21 December 1999. This referred to the making of the declaration of office before the Call ceremony but it did not give the terms of the declaration. The letter also stated:

> "Copies of the Royal Warrant (under which you and your colleagues are to be called to the Inner Bar) and of the declaration to be made by newly appointed Queen's Counsel, together with the Letters Patent by virtue of which you are to be admitted to the Senior Bar will be in a personal folder which will be handed to you at the rehearsal scheduled

for 10.15 am on the day in question."

Mr Macdonald had contacted Gareth Johnston, the Principal Secretary to the Lord Chief Justice some time before 9 December to inquire about the form of the declaration and on that date Mr Johnston wrote to Mr Macdonald enclosing a copy of the declaration and pointing out that this was the same as in England and Wales.

On 15 December 1999 Mr Treacy wrote to the chairman of the Bar Council, Mr Fee. He outlined the objections which he and Mr Macdonald had to the making of a declaration in the terms required and asked that the Bar Council support their request to be allowed to make the declaration of office in the terms recommended in the Elliott report. A meeting between Mr Fee and the Lord Chief Justice took place on 17 December 1999. Mr Fee informed Sir Robert that the Bar Council considered that the form of the declaration should be as recommended by the Elliott Committee. The Lord Chief Justice said that the wording of the declaration was a matter for the Lord Chancellor and that he had decided that the wording should be the same as in England and Wales.

In an affidavit filed in the proceedings on behalf of the Lord Chancellor, the Clerk of the Crown, Mr Wilson, described the historical evolution of the system of appointment of Queen's Counsel in Northern Ireland. The exercise of the Royal Prerogative for the appointment of Queen's Counsel was delegated to the Governor of Northern Ireland and then the Secretary of State for Northern Ireland, after the introduction of direct rule in 1972. The prerogative was exercised by the Warrant of the Governor and later by the Secretary of State on behalf of the Sovereign. By contrast, the exercise of the Royal Prerogative in England and Wales was not delegated but was exercised directly by the Sovereign by Royal Warrant and Letters Patent. From 31 March 1999 Her Majesty the Queen exercised the Royal Prerogative directly through the office of the Lord Chancellor. This brought the arrangements in Northern Ireland into line with England and Wales.

According to Mr Wilson, appointments are made under the authority of the Royal Warrant which authorises the issue of Letters Patent which are authenticated by the use of the Wafer Seal kept in the Crown Office in Northern Ireland. The Letters Patent are signed, sealed and delivered to the

appointee, on the understanding that and conditional upon the appointee making the declaration of office.

Mr Wilson explained that he played two distinct roles in the procedure for the appointment of Queen's Counsel. He represented the Crown Office by the delivery to the appointees of the Letters Patent. These were then produced to the Lord Chief Justice by the appointees. Mr Wilson then administered the declaration of office to each of the appointees in the presence of the Lord Chief Justice. This latter role was performed in his capacity as Clerk of the Crown. Similar arrangements are in place in England and Wales. Mr Wilson asserted on behalf of the Lord Chancellor that the declaration of office involved only a promise and declaration of service to the Queen as a client and that it did not, therefore, discriminate against any person on the grounds of religious belief or political opinion.

On 20 December 1999 the applicants obtained leave to apply for judicial review of the decision of the Lord Chancellor to require that the declaration be made. On 28 January 2000 the statement filed by the applicants under Order 53 of the Rules of the Supreme Court (Northern Ireland) 1980 was amended to allow them to seek a declaration that the content of any declaration which required to be taken by Senior Counsel in Northern Ireland was a matter for the Lord Chief Justice of Northern Ireland.

On the hearing of the substantive application I gave leave to the Executive Council of the Bar of Northern Ireland and the Human Rights Commission for Northern Ireland to make oral and written submissions.

The history of Silk

The first formal exercise of the Royal Prerogative to appoint King's Counsel appears to have been the appointment of Francis Bacon in 1604 by Letters Patent of King James I.[2] that the requirement of a declaration is discriminatory. If you remove the requirement which you stated in the letter of the Clerk of the Crown dated 26 October 1995, it is probable that Mr Magee will claim that he

[2] This was a reference to the affidavit filed on behalf of the Secretary of State in Mr Magee's judicial review application

has succeeded in striking down a discriminatory practice which had wrongfully been imposed for many years in the past."

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The Bar Council did not send a copy of the Elliott Committee report to the Secretary of State or to the Northern Ireland Office nor did it at any time make representations to the Secretary of State about the form which the declaration should take. The Northern Ireland Office became aware of the report when, sometime in June 1997, a copy was received from the office of the Lord Chief Justice. The Secretary of State, Dr Majorie Mowlam, made no decision in relation to the declaration before 31 March 1999 when her responsibilities in the matter passed to the Lord Chancellor; nor is there any evidence that the matter was considered by her before that date.

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> "I have consulted my Supreme Court colleagues, and they are united in the view that the declaration should remain in its present form."

The Lord Chancellor believed that this referred to the views held by the judges of the Supreme Court *after* the Elliott report had been produced. It is now clear, however, that, following the publication of that report, the judges had not expressed any view on the form that the declaration should take. The only view which the judges as a body had formed or expressed was that communicated to Mr Elliott by Sir John MacDermott on 23 January 1997, some three months before the Elliott report was published.

The letter of 11 June 1997 from the Lord Chief Justice to the Lord Chancellor continued:-

> "This view, [*i.e.* the view that the declaration should continue in its existing form] with which I fully agree, accords with that expressed by Brian Hutton in his letter of 21 March 1996 to the then Secretary of State:
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> > 'I think the law is clear that the appointment of Queen's Counsel is an exercise of the Royal Prerogative and that the position of Queen's Counsel is in the nature of an office under the Crown. This is stated in the portion of the judgment of Lord Watson in Attorney General for Dominion of Canada v Attorney General for Province of Ontario [1898] AC 247 at 251 which I enclose. I have underlined the passages of particular relevance.
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> It is therefore inherent in the office of Queen's Counsel that the barrister who accepts that position also accepts that he receives an office under the Crown, and by the clearest implication owes a duty to 'serve Her Majesty Queen Elizabeth II and all whom I may lawfully be called upon to serve in the office of one of Her Majesty's Counsel learned in the law'. This is what is stated in the English Declaration, and I enclose a copy of it.
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> Therefore a situation in which a barrister wishes to become a Queen's Counsel but declines to acknowledge that he holds an office under the Crown with a consequent obligation to the Queen is a contradiction in terms. Such a person is not entitled to be a Queen's Counsel. It seems to me that a somewhat comparable position would be where a politician wishes to enhance his standing by having the title of Privy Counsellor but refuses to take the Privy Counsellor's oath.'
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> I also share Brian Hutton's view that the decision whether or not Queen's Counsel should be required to make a declaration and the form which that should take is one for the Secretary of State. Patrick Mayhew was a little reluctant to accept that the decision lay with him,

> and Brian [Hutton] set out his views cogently in a letter of 2 May 1996, a copy of which I enclose. The Secretary of State finally accepted this and decided that the new Queen's Counsel should be required to make the declaration. I agree also with Brian Hutton's observation made in his letter of 21 March 1996 :
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> > 'I think it is likely that if there is no longer a requirement that those who become Queen's Counsel make a Declaration to serve the Queen it could be argued that there is no longer any reason why they should be called Queen's Counsel.'
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> I have little doubt myself that this is all part of an ongoing politically-based campaign to have the office of Queen's Counsel replaced by a rank entitled Senior Counsel, or something to that effect."

A meeting between the Lord Chief Justice and the Lord Chancellor took place on 25 June 1997. The minutes of that meeting record the Lord Chancellor as stating that he agreed with the views that had been expressed by Lord Hutton on the duty owed by Queen's Counsel to the Crown. Sir Robert Carswell was recorded as saying that "the judges were unanimously of that view" *i.e.* that Queen's Counsel owed a duty to the Queen by dint of their office. As noted above, however, the judges had expressed no view about the declaration after the Elliott report was produced and their opinion, as expressed in the letter from Sir John MacDermott, was confined to the view that, since the declaration was merely a declaration of office and not one of allegiance, it was unobjectionable. There is no evidence that the Supreme Court judges were aware of the view expressed by Lord Hutton to Lord Mayhew that Queen's Counsel owed a duty to the Crown. (It is to be noted that during the hearing of this judicial review application, counsel for the respondents, Mr Weatherup QC, accepted that Queen's Counsel owed no duty to the Queen and were not obliged to accept instructions to appear on behalf of the Crown. Moreover, as we shall see below, the Guide to applicants for Silk describes the office of Queen's Counsel as "first and foremost a working rank" and makes no reference to a duty to the Queen or an obligation to act on behalf of the Crown).

According to the note of the meeting of 25 June 1997, it was agreed that the Lord Chief Justice would write to the chairman of the Bar about "Silk matters other than the declaration". It was also

agreed that the Lord Chancellor would not rush to express any view on the question of the declaration. The note stated that "there were good reasons for putting this on the back burner".

On 10 February 1998 the Lord Chancellor wrote to the Lord Chief Justice. Dealing with the appointment of Queen's Counsel, he said:

> "It seems no more than a quirk of history that the Secretary of State has the responsibility for Silk appointments in Northern Ireland. She and I consider that the function fits more sensibly with the office of Lord Chancellor and provides a proper match with my responsibilities for judicial appointments in Northern Ireland. Accordingly, the Secretary of State has informally indicated her willingness to consider a transfer of this responsibility to me. If you are also in agreement, I believe that there are no legal, political or constitutional obstacles to proceeding in this way."

In this letter, the Lord Chancellor also said:

> "You are also aware of my support for your views on the question of the declaration, which at this point is a matter for the Secretary of State. I agree that it seems sensible for this to continue on the back burner for a further period."

On 16 October 1998 the Lord Chief Justice wrote to the chairman of the Bar Council, Brian Fee QC, informing him of a proposal to bring the arrangements for the appointment of Queen's Counsel in Northern Ireland more closely in line with those in England and Wales. He stated that the principal aspect of the proposed change would be that in future the power of appointing Queen's Counsel in Northern Ireland would be exercised by Her Majesty the Queen acting on the advice of the Lord Chancellor. The letter enclosed a paper which summarised the main features of the new appointment procedure and the Lord Chief Justice informed Mr Fee that it was envisaged that the paper would form part of an 'Information Pack' which would be made available to counsel wishing to apply for Silk. Neither the letter nor the paper which was enclosed with it made any reference to the matter of the declaration.

Mr Fee replied to the Lord Chief Justice's letter on 27 November 1998 and stated that the General Council of the Bar, having considered the matter at a meeting on 18 November 1998, was "generally in favour of the proposals". He raised a number of matters about the procedure by which

applications for Silk would be made and considered. Mr Fee's letter did not refer to the question of the declaration.

On 22 March 1999 the Prime Minister approved the transfer of powers relating to the appointment of Senior Counsel from the Secretary of State to the Lord Chancellor and by letter of 31 March 1999 Her Majesty the Queen consented to the transfer of responsibilities. On 19 April 1999 the Lord Chancellor wrote to Mr Fee to tell him that the new arrangements were effective. Again no reference was made to the question of the declaration.

At the end of April 1999 applications for Silk were invited by the Lord Chief Justice. It appears that, at about this time, the Lord Chancellor made a positive decision that the wording of the declaration should not be changed. He was aware of and, according to affidavits filed on his behalf, took account of the recommendation of the Bar Council but decided that the form of the declaration should remain as before. He has said that this decision was reached in order to preserve harmony between the systems in Northern Ireland and England and Wales. It is claimed that the Lord Chancellor did not consult because there was "no live controversy" about the issue of the declaration in April 1999. It was also stated on his behalf that the Lord Chancellor did not consider that the views of the judges of the Supreme Court were material to his decision. Again, he reached this view because he considered that there was no controversy relating to the declaration. It is claimed that if there had been any such controversy the Lord Chancellor would have consulted the Bar and would have taken account of the judges' views. It was suggested that, since he did not feel it necessary to do so, the fact that he mistakenly believed that the judges had confirmed their earlier view after the Elliott report had been published, made no difference to his decision.

When they applied to be appointed Senior Counsel, the applicants received a Guide which explained the arrangements for the appointment of Queen's Counsel. Paragraph 2 of the Guide stated:

> "Queen's Counsel form the senior rank of the profession of barrister in the three law districts of the United Kingdom. There is a corresponding senior rank at most other common law Bars. Although Silk may exceptionally be granted on an honorary basis … it is first and foremost *a working rank* in the profession of barrister and is regarded by the Lord Chancellor and the Lord Chief Justice as primarily a mark of

distinction as an advocate." (emphasis added)

The Guide contained a section dealing with the appointment procedure. This described how applicants should apply, the consultation procedure which the Lord Chief Justice would follow and the manner in which recommendations would be made to the Lord Chancellor. It also stated that the instruments of appointment and "associated procedures of appointment" would be administered by the Crown Office in Northern Ireland. Nowhere in the Guide was any reference made to the declaration or to any duty owed by Queen's Counsel to the Crown.

When it was determined that twelve of the applicants for Silk should be admitted to the Inner Bar, the Royal Warrant was prepared and submitted for the signature of the Queen. It was received by the Lord Chancellor on 24 November 1999 and countersigned by him. It is in the following terms:

> "Elizabeth R
>
> Our will and pleasure is that this pass by immediate Warrant
>
> Elizabeth the Second by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Our other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith. To all to whom these Presents shall come Greeting. Know Ye that We of Our especial grace have constituted ordained and appointed
>
> Our trusty and well beloved
> Gerald Eric John Simpson Esquire
> [the names of the other applicants in sequence of seniority]
>
> to be Our Counsel Learned in the Law in Northern Ireland. And We have also given and granted unto them as Our Counsel aforesaid place precedence and preaudience in Our Courts next after Hugh Mark Orr Esquire in the order in which their names appear. And We also will and grant to them full power and sufficient authority to perform, do and fulfil all and every the things which any other of Our Counsel learned in the Law of Northern Ireland as Our said Counsel may do and fulfil. We Will that this Our grant shall not lessen any Office by Us or Our Ancestors heretofore given or granted. In Witness &c. Witness &c."

On 9 December 1999, the Clerk of the Crown wrote to the applicants outlining the

arrangements for the Call to the Inner Bar which was due to take place on 21 December 1999. This referred to the making of the declaration of office before the Call ceremony but it did not give the terms of the declaration. The letter also stated:

> "Copies of the Royal Warrant (under which you and your colleagues are to be called to the Inner Bar) and of the declaration to be made by newly appointed Queen's Counsel, together with the Letters Patent by virtue of which you are to be admitted to the Senior Bar will be in a personal folder which will be handed to you at the rehearsal scheduled for 10.15 am on the day in question."

Mr Macdonald had contacted Gareth Johnston, the Principal Secretary to the Lord Chief Justice some time before 9 December to inquire about the form of the declaration and on that date Mr Johnston wrote to Mr Macdonald enclosing a copy of the declaration and pointing out that this was the same as in England and Wales.

On 15 December 1999 Mr Treacy wrote to the chairman of the Bar Council, Mr Fee. He outlined the objections which he and Mr Macdonald had to the making of a declaration in the terms required and asked that the Bar Council support their request to be allowed to make the declaration of office in the terms recommended in the Elliott report. A meeting between Mr Fee and the Lord Chief Justice took place on 17 December 1999. Mr Fee informed Sir Robert that the Bar Council considered that the form of the declaration should be as recommended by the Elliott Committee. The Lord Chief Justice said that the wording of the declaration was a matter for the Lord Chancellor and that he had decided that the wording should be the same as in England and Wales.

In an affidavit filed in the proceedings on behalf of the Lord Chancellor, the Clerk of the Crown, Mr Wilson, described the historical evolution of the system of appointment of Queen's Counsel in Northern Ireland. The exercise of the Royal Prerogative for the appointment of Queen's Counsel was delegated to the Governor of Northern Ireland and then the Secretary of State for Northern Ireland, after the introduction of direct rule in 1972. The prerogative was exercised by the Warrant of the Governor and later by the Secretary of State on behalf of the Sovereign. By contrast, the exercise of the Royal Prerogative in England and Wales was not delegated but was exercised

directly by the Sovereign by Royal Warrant and Letters Patent. From 31 March 1999 Her Majesty the Queen exercised the Royal Prerogative directly through the office of the Lord Chancellor. This brought the arrangements in Northern Ireland into line with England and Wales.

According to Mr Wilson, appointments are made under the authority of the Royal Warrant which authorises the issue of Letters Patent which are authenticated by the use of the Wafer Seal kept in the Crown Office in Northern Ireland. The Letters Patent are signed, sealed and delivered to the appointee, on the understanding that and conditional upon the appointee making the declaration of office.

Mr Wilson explained that he played two distinct roles in the procedure for the appointment of Queen's Counsel. He represented the Crown Office by the delivery to the appointees of the Letters Patent. These were then produced to the Lord Chief Justice by the appointees. Mr Wilson then administered the declaration of office to each of the appointees in the presence of the Lord Chief Justice. This latter role was performed in his capacity as Clerk of the Crown. Similar arrangements are in place in England and Wales. Mr Wilson asserted on behalf of the Lord Chancellor that the declaration of office involved only a promise and declaration of service to the Queen as a client and that it did not, therefore, discriminate against any person on the grounds of religious belief or political opinion.

On 20 December 1999 the applicants obtained leave to apply for judicial review of the decision of the Lord Chancellor to require that the declaration be made. On 28 January 2000 the statement filed by the applicants under Order 53 of the Rules of the Supreme Court (Northern Ireland) 1980 was amended to allow them to seek a declaration that the content of any declaration which required to be taken by Senior Counsel in Northern Ireland was a matter for the Lord Chief Justice of Northern Ireland.

On the hearing of the substantive application I gave leave to the Executive Council of the Bar of Northern Ireland and the Human Rights Commission for Northern Ireland to make oral and written submissions.

The history of Silk

The first formal exercise of the Royal Prerogative to appoint King's Counsel appears to have been the appointment of Francis Bacon in 1604 by Letters Patent of King James I.[1] According to a paper by Master Baker published in 1996 by Inner Temple, Queen's Counsel are granted "an office of service to the Crown" and since 1604 this has always been effected by Letters Patent.[2]

King's Counsel in Ireland date from the early seventeenth century, the first record of appointment being that of William Hilton who received Letters Patent dated January 1613-14 enabling him to plead and practise at the Bar.[3] In a Return of Offices or Employments granted by Patent under the Great Seal of Ireland or By Warrant of the Lord Lieutenant of Ireland 1 January 1800 to 1 June 1804 there are records of the appointment of King's Counsel by the Lord Lieutenant of Ireland by Royal Warrant.[4]

A dispute arose in 1671 as to whether the King's Counsel extraordinary should take precedence over serjeants even when not acting on behalf of the Crown. The King was advised that this was a matter for His Royal Prerogative and he could give precedence to whomever he pleased. He decided that King's Counsel should have precedence over serjeants at law who were not the King's serjeants.[5] Interestingly, as Mr Serjeant Waller noted, this did not settle the question of preaudience since the King could only settle questions of precedence under his prerogative powers. Baker records that as a matter of practice, however, King's Counsel enjoyed preaudience as well. The allocation of roles between the grant of office (for the Sovereign) and the grant of preaudience (for the judges) is not merely of historical interest. It illustrates the breakdown of responsibilities which has persisted to the present time. Thus, although Queen's Counsel are appointed by the Queen on the recommendation of the Lord Chancellor, in both England and Northern Ireland they are admitted to the Inner Bar by being called by the Lord Chief Justice.

[1] Holdsworth, History of English Law page 473
[2] On Taking Silk: 1594 to 1996 by Master Baker page 45
[3] Kenny, King's Inns and the Kingdom of Ireland
[4] 1805 Parliamentary Papers Volume 6
[5] Baker on Taking Silk *ibid.* page 44

An oath to the service of the Sovereign was required of King's Counsel until the Promissory Oaths Act 1868. In practice an oath of allegiance and an oath of office were taken. After 1868 these were replaced in England and Wales by a declaration of office. This was substantially the same as the declaration used in Northern Ireland before 1995 but it also included an undertaking that no fee would be taken in respect of any matter against the Sovereign.[6] By 1835 it was standard practice to issue on request a licence of dispensation under the Royal sign manual for King's Counsel to appear against the Crown. It is noteworthy that in 1840 it was held to be improper for Queen's Counsel to appear against the Crown before the Queen had signed the licence even though the requisite fee had been paid.[7] Until 1920 in England and Wales it was necessary to obtain a licence whenever Queen's Counsel was retained against the Crown. It would appear that this requirement was abolished in Northern Ireland in 1939.[8]

The declaration -a function of the prerogative?

As noted above, the origin of the declaration was as a replacement of the oath of office after the enactment of the Promissory Oaths Act 1868. Since the declaration was one of *office* and that office was conferred by the Crown it would be natural to assume that the requirement to make the declaration should be part of the prerogative functions. The applicants contended, however, that, as a matter of history, the requirement to make the declaration was imposed by the Lord Chancellor in Ireland to whose powers and functions the Lord Chief Justice had succeeded. In support of their claim that the power to require the making of a declaration now reposed in the Lord Chief Justice the applicants referred to an exchange of correspondence passing between the office of the then Lord Chief Justice and the Ministry of Home Affairs in June 1939. In a letter to the minister of 27 June 1939 the secretary to the Lord Chief Justice said:

> "There is one matter … which the Lord Chief Justice would like to draw your attention to. That is the Form of Declaration which is now made by King's Counsel in Northern Ireland. Some time ago the Chief Justice considered the matter of the oath formerly taken by King's

[6] For the full form of the declaration see Holdsworth, History of the English Law Vol VI page 682
[7] *R v Jones* (1840) 9 C&P 401
[8] Letter from Lord Chief Justice's Private Secretary to Minister for Home Affairs 27 June 1939, Exhibit JWW1

> Counsel in Ireland and came to the conclusion that it would be desirable to substitute for that Oath a Declaration on the lines of that taken in England. Accordingly, on the occasion of the last Call to the Inner Bar in Northern Ireland, a Declaration … was substituted for the former Oath."

The terms of this letter made it clear, the applicants claimed, that the Lord Chief Justice of the time considered that the matter of the declaration was one for him alone.

On the hearing of this application the Bar Council supported the applicants' argument that the Lord Chief Justice was responsible for deciding whether a declaration was required. They did so for somewhat different reasons from those advanced by the applicants. They submitted that rights of audience formed part of the inherent jurisdiction of the court and the granting or withholding of a right of audience was a judicial function. It was further contended by the Bar Council that since neither the Royal Warrant nor the Letters Patent referred to a declaration, it was to be assumed that the requirement to make the declaration was an element of the rights of preaudience conferred by the court.

There is no clear historical evidence as to who required the declaration to be made before 1920. The applicants argued that since the Lord Lieutenant was obliged, by constitutional convention, to accede to the Lord Chancellor of Ireland's recommendation on the matter of Silks and since he could not thwart the Lord Chancellor's proposals by imposing an additional requirement on those whom the Lord Chancellor had chosen, the responsibility for the declaration must have lain with the Lord Chancellor of Ireland. The respondents countered this argument by suggesting that the declaration was inextricably bound up with the conferment of the office and that it must therefore have been the responsibility of the Sovereign - or, in the case of Ireland, the Sovereign's delegate, the Lord Lieutenant - who conferred the honour.

It appears to me that the declaration was - and is - an incident of the office of Queen's Counsel. In *Attorney General for the Dominion of Canada v Attorney General for the Province of Ontario* [1898] AC 247, 252 Lord Watson, delivering the judgment of the Privy Council, said:

> "The exact position occupied by a Queen's Counsel duly appointed is a subject which might admit of a good deal of discussion. It is in the

> nature of an office under the Crown, although any duties which it entails are almost as insubstantial as its emoluments; and it is also in the nature of an honour or dignity to this extent, that it is a mark and recognition by the Sovereign of the professional eminence of the counsel upon whom it is conferred."

It is true that the position of Queen's Counsel has been described in the Guide for Applicants as "primarily a working rank" but that description owes more, in my opinion, to the effect of being appointed Queen's Counsel rather than the nature of the honour conferred. It is an office conferred by the Sovereign, albeit on the recommendation of the Lord Chancellor. It appears to me that the requirement to make a declaration of *office* is intimately connected with the conferring of the office and must be a matter for the person who makes the conferment.

The history of the office of Queen's Counsel and its origins as an appointment to act on behalf of the Sovereign are also consistent with the declaration being a matter for the Royal Prerogative. The undertaking not to take cases against the Crown, for instance, was made to the Sovereign in consideration of the honour that was bestowed by the King on those who became King's Counsel. The contemporary equivalent is the declaration of office. That declaration is made to the Sovereign in consideration of the Queen's conferring of the office of Queen's Counsel on the declarants.

The distinction which must be drawn between the office itself and the effect of achieving that office is also important in considering the argument advanced on behalf of the Bar Council. The consequence of being appointed Queen's Counsel is that one will be accorded preaudience before the courts. That is a matter for the judges but this is related to the *effect* of appointment rather than the appointment itself. It is for the Queen (on the advice of the Lord Chancellor) to decide who is to be appointed Queen's Counsel and what the conditions of appointment should be. It is for the judges to decide what privileges and preaudiences they will grant to reflect the eminence of those who are appointed to that office. I consider, therefore, that the requirement to make the declaration is a matter for the Royal Prerogative which the Sovereign or her delegate exercises on the advice of ministers.

Reserved matters

Even if I had not reached the conclusion that the declaration was a matter for the Royal

Prerogative, I would have decided that it could not have been the responsibility of the Lord Chief Justice of Northern Ireland at any stage because it was at all times a reserved matter *i.e.* a matter reserved to the British government.

Until 1920 the Lord Lieutenant of Ireland had exercised on behalf of the Sovereign prerogative powers granted under Letters Patent.[9] The Government of Ireland Act 1920 declared that executive power in Northern Ireland would continue to be vested in the Sovereign (Section 8(1)). Section 8(2) provided that in relation to "Irish services" the Lord Lieutenant was to exercise such prerogative power as was delegated by the Sovereign. Irish services were defined in Section 8 (8) as:-

> "all public services in connection with the administration of civil government in … Northern Ireland except the administration of matters with respect to which … the Parliament of Northern Ireland ha[s] … no power to make laws, including … all public services … declared to be reserved matters …"

By Letters Patent of 27 April 1921 the Lord Lieutenant was authorised and commanded to "do and execute all things which by the right, usage and custom of Ireland have heretofore appertained to the Office of Lord Lieutenant.[10] The office of Lord Chancellor of Ireland survived the passing of the Government of Ireland Act but by Section 44(2) the Lord Chancellor was stripped of all executive functions which were thereby transferred to the Lord Lieutenant.

In the absence of any provision about the exercise of the prerogative in relation to reserved matters, this remained vested in the Sovereign. Section 47 of the 1920 Act provided that all matters relating to the Supreme Court of Judicature in Northern Ireland were reserved matters. Part II of Schedule 7 to the 1920 Act made provision for the composition of that Court. Paragraph 4 of Part III of the same Schedule provided that all existing members of the Irish Bar would become members both of the Bar of Northern Ireland and the Bar of Southern Ireland. I am of the clear opinion, therefore, that the appointment of Silks, being a matter relating to the Supreme Court, was a reserved matter.

Since the effect of the 1920 Act was to make the appointment of Senior Counsel a reserved

[9] Quekett, The Constitution of Northern Ireland, Part III p84
[10] Quekett, *ibid.* p83

matter it was one on which neither the Lord Lieutenant nor the Lord Chancellor of Ireland could pronounce. It follows that, in altering the declaration in 1939, the then Lord Chief Justice was acting without legal authority. The transfer of the judicial functions of the Lord Chancellor of Ireland to the Lord Chief Justice did not convey to the latter any role in or responsibility for the making of the declaration.

By the Supreme Court of Judicature (Northern Ireland) Order 1921 references to the Lord Chancellor of Ireland were to be construed as references to the Lord Chief Justice of Northern Ireland and by paragraph 1(1) of Schedule 1 to the Irish Free State (Consequential Provisions) Act 1922 the Governor replaced the Lord Lieutenant. Part II of Schedule 2 to the 1922 Act abolished the office of the Lord Chancellor of Ireland. The executive powers of the Lord Chancellor (which, as noted above, had been transferred to the Lord Lieutenant under Section 44(2) of the Government of Ireland Act) were thus conveyed to the Governor. His judicial functions were transferred to the Lord Chief Justice.

The Governor was appointed by Letters Patent dated 9 December 1922 which authorised him to "do and execute in due manner as respects Northern Ireland all things which … belonged to the office of the Lord Lieutenant".[11] On the same date instructions were issued to the Governor by the King in which, among other matters, specific directions were given about the exercise of prerogative powers in relation to pardons and reprieves. No delegation was made in respect of reserved matters, however.

The Governor exercised powers in respect of the appointment of Silks on the recommendation of the Lord Chief Justice for Northern Ireland. It is not clear on what basis he purported to do so. Since it was a reserved matter, the power exercised by the Governor cannot have been by way of delegation from the Sovereign. It appears to me that the only legal authority for so acting was as representative of the Sovereign even though the discharge of this function by the Governor does not appear to have been expressly authorised.

By section 1 of the Northern Ireland (Temporary Provisions) Act 1972 the Secretary of State

[11] Quekett Part III *ibid.* p79

for Northern Ireland became the chief executive officer as respects Irish services instead of the Governor. The office of Governor continued to exist, however, and it is clear that the Governor retained residual powers. Shortly after the coming into force of the 1972 Act, a question arose as to who was responsible for the appointment of Silks. On 11 April 1972, the secretary to the then Lord Chief Justice wrote to the private secretary to the Governor explaining that a warrant authorising the call of Sir Peter Rawlinson[12] to the Inner Bar, which had previously been requested of the Governor, was no longer required. This was because the Lord Chief Justice had been advised by Sir Harold Black that the issue of warrants for Queen's Counsel was an Irish service and was therefore a matter for the Secretary of State. Counsel for the respondents in the present case submitted that this advice was misconceived and that the issue of the warrant ought to have been treated as a reserved matter. For the reasons that I have given earlier I accept that submission.

The office of Governor was abolished by Section 32 of the Northern Ireland Constitution Act 1973. Section 7(1) of that Act declared that executive power continued to be vested in the Sovereign and Section 7(2) provided:

> "As respects transferred matters the Secretary of State shall, as Her Majesty's principal officer in Northern Ireland, exercise on Her Majesty's behalf such prerogative or other executive powers of Her Majesty in relation to Nor4thern Ireland as may be delegated to him by Her Majesty."

By Letters Patent of 20 December 1973 the delegation of prerogative powers in respect of transferred matters to the Secretary of State was made. No provision was made either in the Act or Letters Patent for delegation of prerogative powers in relation to reserved matters.

Schedule 3 to the 1973 Act dealt with reserved matters. Paragraph 2 specified that all matters relating to the Supreme Court (other than the appointment and removal of judges and other judicial officers)[13] were reserved matters. This confirmed the position which already obtained under Section 47 of the Government of Ireland Act 1920. For the reasons which I have already given, I consider that

[12] The Attorney General of England and Wales who became Attorney General of Northern Ireland by virtue of Section 1(2) of the 1972 Act

[13] These were excepted matters under paragraph 9 of Schedule 2

"matters relating to the Supreme Court" included the appointment of Queen's Counsel and the declaration which appointees would be required to make is to the latter, however, this was put beyond doubt by paragraph 19 of Schedule 3 which provided that declarations were reserved matters. Even if, despite my earlier conclusions, the Lord Chief Justice had enjoyed any responsibility for the matter of the declaration of office on taking Silk, that role was undoubtedly brought to an end by paragraph 19.

The transfer of prerogative power

On 25 March 1999 the Lord Chancellor's secretary wrote to Sir Robin Janvrin, Private Secretary to the Queen, asking the Queen to approve the new arrangements for the appointment of Queen's Counsel in Northern Ireland. Instead of the Secretary of State exercising the Royal Prerogative on the advice of the Lord Chief Justice, it was proposed that Queen's Counsel in Northern Ireland should be appointed by the Queen on the recommendation of the Lord Chancellor. On 31 March 1999 Sir Robin replied that the Queen had approved the new arrangements.

The applicants argued that this exchange of letters was not effective to achieve the transfer of the prerogative powers to the Lord Chancellor because the powers had been granted to the Secretary of State by statute. The respondents' riposte to this argument was that, since the so-called 'grant' of prerogative powers to the Secretary of State was in respect of transferred matters and the appointment of Silks was a reserved matter, the transfer did not have to be by statute. Prerogative powers in relation to reserved matters were undertaken by "prerogative practice and without formal instrument". In any event, the respondents argued, prerogative powers had not been 'granted' by Section 7 of the 1973 Act; this provision had merely authorised the delegation of the powers. That delegation had been effected by Letters Patent, a prerogative action. The transfer of the powers to the Lord Chancellor could also be achieved by prerogative action.

If I had concluded that the letter from Sir Robin Janvrin purported to transfer the prerogative powers in relation to the appointment of Silks from the Secretary of State to the Lord Chancellor, I would have accepted the arguments made on behalf of the respondents about the validity of the transfer. But I do not consider that this was the effect of the letter. The Queen had been asked to

approve a change in the existing arrangements whereby the Secretary of State would no longer exercise the Royal Prerogative to appoint Queen's Counsel. But it was not proposed that the Lord Chancellor should assume that role. Rather, it was to revert to Her Majesty the Queen. The Secretary of State had acted on behalf of the Queen in this matter without formal delegation of powers, whether by way of statutory delegation or Letters Patent. In those circumstances the prerogative powers could be restored to the Queen without recourse to an Act of Parliament or statutory instrument.

The effect of the Royal Warrant

The applicants contended that their appointment as Queen's Counsel was completed and perfected by the Warrant of Appointment and took effect, therefore, by the issue of the warrant on 24 November 1999. The practice of having a ceremony which involves the taking of a declaration does not make the declaration a precondition of appointment, they argued. This was reflected, they suggested, in the practice adopted by the Crown in relation to the Letters Patent. They had been signed and sealed before 21 December 1999 and their terms were unconditional and unqualified. In Northern Ireland Letters Patent are handed to counsel before they make the declaration whereas in England they are received by counsel after the declaration has been administered. The presentation of Letters Patent before the making of the declaration was consistent, the applicants argued, with the irrevocable effect of the Warrant.

For the respondent it was contended that the warrant was authority for the making of the appointment but that, before the appointment could be perfected, the issue, sealing, signing and delivery of the Letters Patent and the making of the declaration were required. The warrant authorised the affixing of the Seal to the Letters Patent. The signing of the Letters Patent took place on 15 December 1999. It was backdated to the date of the receipt of the warrant (24 November 1999) but this did not signify that the declaration was not required before the rank of Queen's Counsel was bestowed on the applicants. The signing and sealing were conditional on the making of the declaration of office. The position was comparable to the delivery of a deed in escrow. The deed is not treated as an executed document until relevant conditions have been performed.

It appears to me that the issue of the warrant cannot be conclusive as to the rights of the applicants to practise as Senior Counsel. The warrant is certainly required before an aspirant to the rank of Queen's Counsel can undertake work as a senior but it is issued in the knowledge that a declaration of office will be made by those named in it before they are permitted to undertake work as Queen's Counsel. The warrant itself is not irrevocable.[14] It must be regarded as implicit, therefore, that a declaration will be made before those named in the warrant may assert their entitlement to be called and to practise as Queen's Counsel. The grant of the warrant is made on the recommendation of the Lord Chancellor who knows that a declaration is required of appointees before they are called to the Inner Bar. It would be anomalous that his recommendation to the Queen to issue the warrant should have the effect of frustrating his intention that a declaration should be made.

In any event, even if the warrant had that effect, the applicants, although they might enjoy the title of Queen's Counsel, would not automatically be entitled to practise as members of the Senior Bar. As I have said above, the conferment of the title of Queen's Counsel is a matter for the Sovereign, acting on the advice of her ministers. The precedence accorded to those who have been named in the Royal Warrant and the Letters Patent is a matter for the judges.

Does the requirement to make the declaration discriminate against the applicants?

For the applicants, Mr Lavery QC argued that the requirement to make a declaration discriminated against them contrary to the Fair Employment and Equal Treatment (Northern Ireland) Order 1998. Article 3(1) of that Order defines discrimination as:-

> "(a) discrimination on the grounds of religious belief or political opinion;
>
> or
>
> (b) discrimination by way of victimisation"

Mr Lavery submitted that the applicants were the victims of discrimination on the ground of their political opinion. They were denied a qualification (defined in Article 2 (2) of the Order as including

[14] Baker on Taking Silk *ibid* page 48

"authorisation, recognition, registration, enrolment, approval and certification") because they found the declaration politically unacceptable. They had therefore been treated less favourably by the Lord Chancellor than those who did not object to making the declaration. This was sufficient, he argued, to establish discrimination under Article 3 (2) of the Order. This provides:-

> "A person discriminates against any other person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of this Order if -
>
> (a) on either of [the grounds set out in paragraph (1)] he treats that other less favourably than he treats or would treat other persons"

Mr Lavery also argued that the requirement to make a declaration offended Section 19 of the Northern Ireland Constitution Act 1973 (and its successor Section 76 (1) of the Northern Ireland Act 1998) which render unlawful discrimination against any person on the ground of political belief by a Minister of the Crown in the discharge of his functions relating to Northern Ireland.

For the respondents Mr Weatherup submitted that discrimination under the 1998 Order could only occur if the power to confer a qualification arose in the context of employment. He referred to Article 25 (1) of the Order which provides:-

> " It is unlawful for a person who has power to confer on another a qualification which is needed for, or facilitates, his engagement in employment in any capacity, or in a particular employment or occupation , in Northern Ireland to discriminate against him -
>
> (a) by refusing or deliberately omitting to confer that qualification on him on his application; or
>
> (b) in the terms on which the person is prepared to confer it; or
>
> (c) by withdrawing it from him or varying the terms on which he holds it."

Mr Weatherup suggested that Article 25 did not apply to the present case because employment is not facilitated by appointment to the rank or office of Queen's Counsel when continued employment as a barrister remains unaffected. He further contended that the applicants had not been treated less favourably than others. All who wished to take Silk were required to make the declaration without

exception. The election by the applicants not to subscribe to a declaration which merely required them to serve the Queen in the same manner as any other client was not a matter of political opinion.

It is axiomatic that for a particular act to be discriminatory in effect it is not necessary to show that the discriminatory effect was intended - *James v Eastleigh Borough Council* [1990] 2 AC 751 (where it was held that it was discriminatory to allow persons free swimming when they reached pensionable age since men would not qualify until they were sixty five whereas women benefited at the age of sixty). In the present case the applicants argued, therefore, that it was irrelevant that the Lord Chancellor may not have intended to discriminate against them if his demand that they make the declaration had that effect.

In their claim to have been the victims of discrimination by the Lord Chancellor the applicants were supported by the Human Rights Commission. On behalf of the Commission, Miss Weir submitted that the requirement to make the declaration was not a neutral requirement. It was inevitable that such an "inherently non-neutral" requirement would be regarded as less palatable by those with nationalist views than those who were happy to declare allegiance to the Sovereign. It was suggested that the expression "political opinion" should be given a broad interpretation. It was sufficiently wide, Miss Weir argued, to encompass opinions relating to the monarchy in general and opinions about the constitutional status of Northern Ireland.

On this topic Mr Weatherup contended that a clear distinction had to be drawn between the circumstances of the present case and those which arose in the case of *James*. In the latter case the discriminatory effect was inevitable since men who reached the age of sixty did not benefit while women of similar age did. Thus the adverse effect on men aged between sixty and sixty five was inescapable. In the present case, however, where an avowed political opinion was involved, the alleged discrimination could not be said to be inevitable. This would give rise to "a self defining discrimination".

I do not accept the claim that the imposition of the declaration could not come within Article 25 of the 1998 Order. It is to be noted that paragraph (1) of the Article refers to facilitating

"employment … in any capacity". Employment as Queen's Counsel is quite different from employment as a junior barrister. The requirement that one make a declaration in order to qualify as Senior Counsel, if discriminatory, falls within Article 25 of the Order, in my opinion. I am also of the view that, if the requirement to make the declaration could be said to treat the applicants less favourably than others on the ground of their political opinion, it would be in breach of Section 19 of the 1973 Act and Section 76 (1) of the 1998 Act. (It should be noted, however, that the latter provision did not come into force until 1 January 2000).

The critical question on this aspect of the case is whether the requirement to make the declaration discriminates against the applicants on the ground of their political opinion. I agree with Miss Weir's submission that in this context "political opinion" should be given a broad meaning. But does the requirement to make the declaration treat the applicants less favourably than others because of their political beliefs? The applicants are content to be known as Queen's Counsel. They are prepared to accept appointment to that rank by Her Majesty the Queen. Indeed, they seek to rely on the Royal Warrant in support of the argument that they have already been appointed Queen's Counsel. Against this background it is difficult to identify the political opinion which the applicants claim is affronted by the requirement that they declare that they will render to the Queen, if they are asked and are prepared to accept instructions from the Crown, the same quality of service that they would provide to any other client. It is important to recognise that the applicants are not required to declare allegiance to the Queen. They are not required to undertake to appear on behalf of the Crown. They are merely required to undertake to render the same service to the Queen as they would to any other client, in the event that they agree to appear for the Crown.

In the field of discrimination, a different approach must be taken to the question of political opinion from that which is appropriate to deal with the immutable conditions of life such as race or gender. If it were otherwise, an unscrupulous person, claiming to be the victim of discrimination on the ground of political opinion, could adjust his professed belief in order to accuse the decision maker of inequality of treatment. In *James v Eastleigh* it was held that the test to be applied in gender based

discrimination was whether the complainant would have been treated differently but for his sex. Significantly, however, the authors of Harvey on Industrial Relations, in commenting on the *James* case, point out that it is wrong to assume that where the 'but for' test is satisfied, unlawful discrimination has been established (L/10 [41.02]). The applicant must show that the action was taken on the ground of sex. Thus, Mr James had to show that he obtained less favourable treatment because of his sex. He was able to do so readily because his pensionable age was greater than that of his wife - 65 as opposed to 60. The Borough Council knew that if they fixed the age for free admission at 'pensionable age' men were bound to be disadvantaged since they reached that stage later than women. The position is not so simple when one is dealing with political belief.

Any decision with political implications is virtually certain to be opposed by some members of the community and welcomed by others. Simply because such a decision is opposed does not mean that it discriminates against those individuals who are against it. It is impossible to cater for every brand of political opinion by anything other than the most bland political decisions. If, for example, an ardent monarchist held the firm political belief that, on taking Silk, everyone who was appointed ought to swear an oath of allegiance to the Queen, could it be said to be discriminatory of him to refuse to allow him to take such an oath?

The requirement to make a declaration must be seen in the context of the appointment being made by the Queen. It must also be viewed against the historical backdrop that this position has traditionally been an appointment under the Crown. The nature of the declaration *i.e.* a declaration of office, as opposed to a declaration of allegiance, is also relevant. These factors, together with the applicants' willingness to be described as Queen's Counsel and to be appointed by the Queen, lead me to the view that the requirement that the declaration be made cannot be said to be directly discriminatory of the applicants.

It was also argued that the decision to impose the declaration was indirectly discriminatory of the applicants in that it involved the application of a condition which had a disproportionate adverse impact on a particular group *viz* those of a nationalist disposition.

No evidence was adduced to support this claim. Again, the nature of the declaration is relevant. As I have already said, the declaration requires no statement of allegiance to the Queen nor does it require of any applicant for Silk that he give an undertaking that he will appear on behalf of the Crown. It merely requires that *in the event that he is briefed to appear for the Crown*, he will provide the same quality of service to the Queen as to any other client. There is nothing intrinsic in the declaration which makes it likely that this would have a disproportionate adverse impact on those who held nationalist views. Nor is there evidence that it was so regarded by any significant number of counsel other than the applicants themselves. I do not consider, therefore, that it has been established that the requirement to make the declaration was indirectly discriminatory.

Bias

Mr Lavery submitted that the decision to allow the matter of the declaration to remain "on the back burner" was deliberately taken in order to forestall any timely challenge to its retention in its current form. In this way, he argued, candidates for Silk would become aware of the decision not to accept the recommendations of the Elliott Committee only when the Silk ceremony was imminent. No effective action to challenge the decision would be possible before the call to the Inner Bar. Mr Lavery also suggested that the espousal by the Lord Chancellor of the views of Lord Hutton and the Lord Chief Justice that the proposal to change the wording of the declaration was part of a political campaign was relevant in this context. He suggested that the decision to retain the declaration in its present form was designed to frustrate what was believed to be a political campaign. The decision was unsustainable on that account, Mr Lavery argued. In the first place it was taken for an illegitimate, collateral purpose. Secondly, the true nature of the decision (*viz* the desire to thwart the political objective of those who proposed the change) betrayed the political bias which underlay it. Thirdly, there was no evidence that the movement to have the wording of the declaration changed was politically motivated.

This aspect of the applicants' challenge to the Lord Chancellor's decision rests on a claim of actual, rather than apparent, bias. It is suggested that he consciously acted in a biased manner and that

he sought to conceal his true motives in making the impugned decision. The Lord Chancellor, in the affidavits filed on his behalf, has trenchantly denied these allegations. He has asserted that he decided to retain the declaration in its present form in order that the position in Northern Ireland should be in harmony with that in England and Wales.

The claim that the Lord Chancellor not only manufactured this reason in order to conceal his true intention but that he sought to deceive this court is a bold one which would require compelling evidence. I am satisfied that the applicants have failed to produce such evidence and their arguments on this aspect of the case must be rejected.

Human Rights standards

The applicants claim that the decision of the Lord Chancellor to require them to make the declaration is in breach of human rights standards and that the failure to adhere to those standards renders the decision invalid.

In advancing this claim, Mr Larkin for the applicants relied on Articles 9 and 10 of the European Convention on Human Rights and Fundamental Freedoms. Article 9 of the Convention provides:-

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Mr Larkin argued that the requirement that the applicants make a declaration that they would serve the Queen was in breach of their right to freedom of belief. He relied on the decision of the European Court of Human Rights in *Buscarini and others v San Marino* (1999) 6 BHRC 638. In that case, under challenge was the requirement that all elected members of the General Grand Council of San Marino

swear to be faithful to and obey the Constitution of the Republic "on the Holy Gospels". The Court held that this infringed the applicants' rights under Article 9 and could not be regarded as "necessary in a democratic society".

Article 10 of the Convention provides:-

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

This Article was considered by the European Court of Human Rights in *McGuinness v United Kingdom* (unreported, 1999, European Court of Human Rights (3rd section), Application No. 39511/98). In that case the applicant challenged the requirement that, as a Member of Parliament, he should swear an oath of allegiance before being allowed to avail of the normal facilities afforded to MPs. Mr Larkin suggested that the Court in effect decided that there had been a breach of Article 10 but it found that a violation had not been established because the breach was "saved" by the provisions of Article 10(2). He submitted that the requirement to make the declaration in the present case was at least as great a breach of the applicants' right to freedom of expression but, unlike the case of *McGuinness*, there was no justification for the breach.

In supporting the applicants' claim that there had been a breach of human rights standards, Miss Weir, for the Human Rights Commission, submitted that those rights did not derive exclusively from the Convention. She suggested that freedom of expression was a right enshrined in common law - *R v Secretary of State for the Home Department ex parte Simms and another* [1999] 3 WLR 328. She also

argued that the requirement to make the declaration constituted a breach of Article 14 of the Convention. This provides:-

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Miss Weir suggested that Article 14 applied to the present case because there had been a difference in treatment of that group at the Bar which found the identification of the Queen as an individual client objectionable from those who had no such objection.

On behalf of the respondents Mr Weatherup submitted that there was no breach of human rights standards whether those rights derived from the Convention or any other source. The requirement to make the declaration that the Queen would be served *as a client* did not impinge on the freedom of thought, conscience or religion of the individual concerned nor did it inhibit his freedom of expression.

In *Buscarini and others* the applicants claimed that the obligation to swear on the Holy Gospels to be faithful to the Constitution of San Marino required them to profess a particular faith. That claim was accepted by the Court of Human Rights in the following passage :-

> "34. The Court reiterates that, "as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it" (see Kokkinakis v Greece judgment of 25 May 1993, Series A no. 260-A, p.17, *31). That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.
>
> In the instant case, requiring Mr Buscarini and Mr Della Balda to take an oath on the Gospels did indeed constitute a limitation within the meaning of the second paragraph of Article 9, since it required them to swear allegiance to a particular religion on pain of forfeiting their parliamentary seats. Such interference will be contrary to Article 9

> unless it is "prescribed by law", pursues one or more of the legitimate aims set out in paragraph 2 and is "necessary in a democratic society"."

The interference with the applicants' freedom of expression in that case plainly derived from the requirement that they "swear allegiance to a particular religion". By contrast, the applicants in the present case are not called upon to swear or declare allegiance to the Queen. Leaving aside the question whether a declaration of political allegiance involves an interference with freedom of thought or conscience, it is clear that no breach of Article 9 arises in the present case. By making a declaration that they will, if required to do so, render proper professional service to the donor of the office of Queen's Counsel, the applicants make no declaration of allegiance which compromises their political beliefs. The undertaking to provide proper professional service to the Queen is not inconsistent with a strongly held nationalist belief. The declaration merely requires that the service rendered to the Crown should be of the same quality as that delivered to any other client.

Article 10 of the Convention guarantees the right to freedom of expression. In *McGuinness v UK* the applicant was required to swear an oath of allegiance to the Sovereign before taking up his seat or availing of the facilities in the House of Commons. The European Court of Human Rights held that there had not been a breach of Article 10 because the rule that elected representatives take an oath of allegiance "forms part of the constitutional system of the … State which … is based on a monarchial mode of government". This was regarded by the Court as an affirmation of loyalty to the constitutional principles which support the workings of representative democracy in the United Kingdom. I do not, therefore, accept the claim that the Court, in effect, found that there had been a breach of Article 10 which had been "saved" by the application of paragraph 2 of the Article. This finding is incidental to my conclusion on the effect of Article 10 on the present case, however. In my view, the declaration which the applicants are required to take has no impact on their freedom of expression. They are not required to express or to refrain from the expression of any political view by making the declaration. They are merely required to confirm that they will supply a suitable professional service to the Queen if they choose to accept instructions from the Crown. This undertaking involves no expression of political opinion whatever. No breach of Article 10 arises,

therefore.

While it is not necessary that a breach of Articles 9 or 10 be established in order that Article 14 be engaged (see *Inze v Austria* [1988] 10 EHRR 394) the complaint of discrimination must come within the ambit of some provision of the Convention. For the reasons that I have given, I do not consider that the applicants' claim comes within the ambit of any of the Convention rights and I am satisfied, therefore, that there has not been a breach of Article 14. I am equally satisfied that there has not been any breach of the applicants' common law rights of freedom of expression or of the other international human rights standards referred to by counsel for the applicants.

My conclusion that there has not been a breach of the applicants' Convention rights renders unnecessary any consideration of the interesting question discussed in such cases as *R v Director of Public Prosecutions ex parte Kebeline and others* [1999] 3 WLR 972 and *R v North and East Devon Health Authority ex parte Coughlan* [1999] LGR 703 as to the effect of the failure of a decision maker to have regard to breaches of the Convention before the coming into force of the Human Rights Act, although I shall have to consider *Coughlan* in another context later.

Relevant considerations

The applicants claim that the Lord Chancellor failed to have regard to a number of highly relevant matters which might well have influenced him to a different decision on the matter of the declaration. In particular, they suggest (1) that he failed to have regard to the strong recommendation contained in the Elliott report, (2) that he failed to consider the implications of the decision to retain the declaration in respect of the Policy Appraisal and Fair Treatment provisions ('PAFT') (3) that he failed to consider and give effect to the Belfast Agreement which guaranteed equality to nationalists "in all aspects of life" and (4) that either he wrongly believed that the Supreme Court judges supported the retention of the declaration after they were aware of the Elliott report recommendations or he improperly failed to obtain the views of the judges.

The applicants also claim that the Lord Chancellor took into account matters which were clearly immaterial to the decision which he had to make *viz* (1) that the attempt to modify the

declaration was politically inspired (2) that the declaration should be retained because those who take Silk owe a duty to the Crown and (3) that he wrongly concluded that, at the time he decided to retain the declaration, there was no "live controversy" about the form which it should take. I will consider this last claim in conjunction with (4) above.

The suggestion that the Lord Chancellor did not have regard to the Elliott report recommendations is expressly refuted in the first affidavit of the Director of the Northern Ireland Court Service, Mr Glenn Thompson. In the same affidavit, Mr Thompson stated that although PAFT does not apply to the Lord Chancellor's Department, the Lord Chancellor applied PAFT to appointment of Queen's Counsel in Northern Ireland. On the argument relating to the Belfast Agreement (or, as it is more usually known, the Good Friday Agreement) Mr Weatherup made two points. Firstly, he said that the Treaty referred to in the Agreement did not come into force until after the Lord Chancellor's decision had been made. Secondly, he suggested that the Agreement did not purport to allow particular groups or individuals to "opt out" of their citizenship duties. Rather, the Good Friday Agreement was designed to encourage all citizens to participate inclusively in the civic life of Northern Ireland while not compromising their political convictions or aspirations.

In light of the unambiguous statement that the Lord Chancellor had regard to the recommendations in the Elliott report and to the requirements of PAFT, the claim by the applicants that he failed to take these into account must be rejected. I do not need to reach a decision on Mr Weatherup's first point on the effect of the Good Friday Agreement because I am satisfied that he is correct on the second. There are two facets of the Belfast Agreement - first, the Multi Party Agreement reached between the various pro-agreement parties and second, the Treaty between the Government of the United Kingdom and the Government of Ireland. The material provision of the Treaty is Article 1 (vi). It provides :-

> "The two Governments:
> ….
>
> (vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold British

> and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland."

There is nothing in the declaration which infringes the right of the applicants to identify themselves as Irish or which compromises their claim to assert that they are Irish citizens. I am satisfied, therefore, that this provision could have had no bearing on the decision of the Lord Chancellor.

The applicants argued strongly that the Lord Chancellor had adopted the suggestion that the proposal to change the declaration was politically motivated and that there was no evidence whatever to support that view. I am not in a position to make any judgment on whether those who advocated a change in the declaration did so for political reasons but I am not satisfied that the belief that they did played any part in the Lord Chancellor's decision. He had been told by the Lord Chief Justice that, in his estimation, this was part of an ongoing politically based campaign to have the office of Queen's Counsel replaced by the rank of Senior Counsel but there is no evidence that this consideration influenced the Lord Chancellor. He has said unequivocally that he decided to retain the existing declaration in order to preserve harmony between Northern Ireland and England and Wales. I have no reason to reject that statement.

Although the Lord Chancellor is recorded in the minutes of the meeting on 25 June 1997 as having stated that he agreed with the views of Lord Hutton "on the duty owed [by Queen's Counsel] to the Crown", on balance, I am not prepared to hold that this played any part in his decision to retain the declaration in its present form. According to the first affidavit of Mr Thompson, the reason that the Lord Chancellor decided that the declaration should be retained was that he believed that this was preferable when "the two systems of appointment had come together" through him. Indeed, as Mr Thompson makes clear in his second affidavit, the Lord Chancellor had formed this view as early as June 1997 before he had responsibility for making recommendations for Silk. The single reason consistently given by the Lord Chancellor for deciding to retain the declaration was his desire for harmony between the two jurisdictions. The fact that he expressed agreement with the views of Lord Hutton does not alone warrant the conclusion that it affected his decision not to alter the declaration.

On the claim that the Lord Chancellor had wrongly been influenced by his mistaken belief that the judges continued to support the declaration in its current form or that he had improperly failed to consult them, Mr Weatherup stated that the Lord Chancellor had not considered the judges' views to be a material factor. He conceded that the Lord Chancellor had *had regard* to what he believed were the views of the judges but, since he considered that there was no current controversy about the declaration, those views did not weigh with him in deciding that the declaration should not be changed. By the same token, the lack of controversy relieved the Lord Chancellor of the need to consult the judges or the Bar Council about the terms of the declaration.

The claim that there was no current controversy about the declaration was based on the averment in Mr Thompson's second affidavit to the effect that "there was no live controversy about the [declaration] in April 1999". I construe this statement to mean that the Lord Chancellor did not consider that a decision to retain the declaration in its current form would give rise to controversy. It must be presumed that if he believed that an announcement that the Elliott recommendation was to be rejected *would* give rise to controversy that he would not have suggested that there was no live controversy about the matter in April 1999.

The conclusion that there would be no controversy must be examined against the background that a firm recommendation had been made by the Elliott Committee (a recommendation which had never been withdrawn or modified) that the declaration should be changed. No reaction to the proposal in the Elliott report had been forthcoming although the matter of the declaration had been identified by the Lord Chief Justice in his letter to the Lord Chancellor of 11 June 1997 as the "major matter raised" in the report. While there may not have been actual controversy in the form, for instance, of an exchange of differing views between the Lord Chancellor and the Bar Council, it seems to me that the likelihood of controversy, once it became known that the declaration was to be retained, was obvious.

With hindsight, one may say that it is regrettable that the matter was not taken up with the Secretary of State or the Lord Chancellor by the Bar Council but this omission does not warrant the

conclusion that it was no longer the wish of the Bar Council that the declaration should be changed. The Elliott report had carefully considered the competing representations about the retention or the modification of the declaration. The recommendation about the alteration to the declaration was a thoughtful and reasoned one. It was adopted by the Bar Council and no change to the Council's position on the recommendation had ever been signalled to the Lord Chancellor. I do not consider that it could reasonably have been concluded that the absence of any representations from the Bar Council signified a change of view on the matter of the declaration. The principal - if not the sole - reason for the Bar Council's failure to make representations on the declaration between the time that the Elliott report was published and December 1999 was, in my view, the absence of any response to the proposal that the declaration be changed. Until it was made clear that this proposal was not going to be accepted, the occasion for controversy did not arise.

I believe that it should have been anticipated that, when it was made known that the recommendation would not be accepted, it was highly likely that there would be controversy. Indeed, the placing of the issue "on the back burner" is consistent with the expectation that controversy would arise as soon as the Bar Council discovered that the proposal which it had adopted had been rejected. I consider, therefore, that the view that the matter was free from controversy cannot be sustained. All the evidence suggested otherwise. A strong recommendation had been made by a Committee comprised of a broadly based group of members of the Bar. The Committee had been chaired by a highly experienced Queen's Counsel. It had canvassed views from a wide spectrum of opinion both within and outside the Bar. Its recommendation had been adopted by the Bar Council. The rejection of that recommendation, without any further discussion or even contact with the Bar, was bound to be controversial, in my opinion.

In this context the Lord Chancellor's belief as to the views of the judges is of importance. It has been suggested on his behalf that, because he believed that there was no "live controversy" about the declaration, he did not regard the opinion of the judges as material. If he had been aware that the judges had not expressed any view about the recommendation in the Elliott report, however, his

opinion as to whether the matter was free from controversy must have been affected. Expressed in another way, his conclusion that the matter of the declaration was uncontroversial must surely have been influenced by his understanding that the judges supported the retention of the existing declaration. The views of the judges, if they had changed since the publication of the Elliott report, were a possible source of controversy, at least. The conclusion that there was no controversy must, therefore, have depended to some extent on the Lord Chancellor's belief that the judges' views remained unaltered. His decision not to consult the Bar and the judges was underpinned by his belief that the matter was free from controversy. If he had realised that the judges had not expressed a view on the Elliott recommendation, it is at least likely that he would have consulted both the Bar Council and the Bench.

It is well settled that a decision taken under a misapprehension as to the true facts may be amenable to judicial review if the decision is based on the misapprehension - see de Smith, Woolf and Jowell's Principles of Judicial Review paragraph 12-021. In the present case, although the Lord Chancellor did not consider the views of the Supreme Court judges relevant to the *question of whether he should retain the declaration*, his conclusion that there was no live controversy about the matter must, as I have found, have been influenced by his belief that the judges were in favour of retention despite the Elliott recommendation.

Legitimate expectation

On behalf of the applicants Mr Larkin argued that they enjoyed a substantive legitimate expectation that the recommendation contained in the Elliott report concerning the amendment of the declaration would be accepted. Alternatively, he claimed that they were entitled to expect that the Bar Council would be consulted before the decision to retain the declaration in its present form was taken.

For the respondents Mr Weatherup suggested that there was no basis for an expectation that the recommendation would be accepted. The chairman of the Bar had been informed by the Lord Chief Justice that the declaration was a matter for the Secretary of State but the Bar Council failed to make contact with the Secretary of State or (after they became aware that he had taken over

responsibility for recommending appointments for Silk) with the Lord Chancellor. Mr Weatherup submitted, therefore, that neither the Bar nor the applicants had any reason to believe that the Elliott recommendation had been accepted. He further contended that it was in any event well established in Northern Irish law that the concept of substantive legitimate expectation had no place in judicial review. As to legitimate expectation of consultation he submitted that no express promise had been given to the Bar that they would be consulted on the matter of a change in the declaration nor was there a regular practice of consultation on topics of this type.

It has been stated that the scope of legitimate expectation is "still in the process of evolution".[15] One of the first cases in which the principle was recognised was *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. In that case at 408/9, Lord Diplock said:-

> "To qualify as a subject for judicial review the decision must have consequences which affect some person … It must affect such … person … by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given the opportunity to comment or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

In de Smith, Woolf and Jowell on Principles of Judicial Review it is suggested that Lord Diplock's reference to past advantage was unduly restrictive.[16] The expectation should extend to a benefit which had not yet been enjoyed but which had been promised. In *Coughlan* Lord Woolf MR suggested that an expectation might be the result of "a promise *or other conduct*" [17] (emphasis added). In cases involving expectation of consultation, it is well established that a former practice of consultation may give rise to a legitimate expectation that the affected party will be consulted. As a matter of logic there is no reason that legitimate expectation of a substantive benefit (if such a concept is recognised) should be confined to circumstances where that benefit has been promised.

[15] de Smith, Woolf and Jowell's Principles of Judicial Review, para 7-038
[16] para 7-042
[17] para 56

Recent judicial authority on the question of substantive legitimate expectation has been principally concerned with the frustration of an expectation as a result of a change in policy. Two competing theories emerge. In *R v Ministry of Agriculture, Fisheries and Food ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714, 731e, Sedley J said:-

> "… it is … the court's duty to protect the interests of those individuals whose expectation of different treatment has a legitimacy which in fairness out tops the policy choice which threatens to frustrate it."

This approach was expressly disapproved in *R v Secretary of State for the Home Department ex parte Hargreaves* [1997] 1 WLR 906, 921, Hirst LJ accepting Mr Beloff QC's description of it as "heresy". The Court of Appeal in *Hargreaves* considered that the decision to change the policy was *Wednesbury* unreasonable. Pill LJ said at page 924:-

> "The court can quash the decision only if, in relation to the expectation and in all the circumstances, the decision to apply the new policy was unreasonable in the *Wednesbury* sense. The claim to a broader power to judge the fairness of a decision of substance, which I understand Sedley J to be making in *R v Ministry of Agriculture, Fisheries and Food ex parte Hamble,* is in my view wrong in principle."

In de Smith, Woolf and Jowell on Principles of Judicial Review the authors refer to the two competing theories:-

> "…Laws J in *Secretary of State for Transport, ex p. Richmond upon Thames L.B.C.* [1994] 1 WLR 74 … felt that, because discretion could not be fettered, and therefore the decision-maker could always change a policy in the light of an overriding public interest, the courts would, in recognising the substantive legitimate expectation, have to be the judge of that public interest. This he said would wrongly involve the courts in evaluating the merits of such a policy. Sedley J departed strongly from this view, and accepted the existence of the substantive legitimate expectation in *R v MAFF ex p. Hamble Fisheries (Offshore Fisheries) Ltd* … The Court of Appeal resolved the difference against Sedley J and the *Hamble* case in *R v Secretary of State for the Home Department ex p. Hargreaves.* The applicants contended that their expectation to eligibility for home leave was frustrated by a change in policy. It was held that the lawfulness of the change of policy was to be assessed by means of the *Wednesbury* test. The matter may not, however, rest there. See, *e.g. Pierson v Secretary of State for the Home Department* [1998] AC 539, where it was held that the increase in sentence was unlawful for breach (Lord

Steyn at least) of the "substantive principle" of the Rule of Law."

This passage describes the background against which *Coughlan* was decided. In that case the applicant had been moved as a long term patient to a new, purpose-built facility, known as Mardon House. She and other residents had consented to the move because they had been assured that they would be able to remain there for as long as they wished and that, if they chose, it would be their home for life. In 1998 the health authority decided to close Mardon House because they considered that it was too expensive to run. The Court of Appeal accepted that the "home for life" promise had given rise to a legitimate expectation on the part of the applicant. It then considered the court's role in dealing with a dispute between a member of the public who has a legitimate expectation that he will be treated in one way and a public body which wishes to treat him in a different way. Delivering the judgment of the Court (to which, as he stated, all members of the Court had contributed) Lord Woolf MR said:-

> "57. There are at least three possible outcomes (a) the court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on *Wednesbury* grounds. This has been held to be the effect of changes of policy in cases involving the early release of prisoners (see *Re Findlay* [1985] AC 318; *R v Secretary of State ex parte Hargreaves* [1997] 1 WLR 906) (b) on the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it (see *A-G for Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires (c) where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.
>
> 58. The court having decided which of the categories is appropriate, the court's role in the case of the second and third

> categories is different from that in the first. In the case of the second category the court's task is the conventional one of determining whether the decision was procedurally fair. In the case of the third, the court has when necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised."

The Court of Appeal acknowledged that in many cases the difficult task would be to decide into which category the impugned decision fell. It said that most cases of an enforceable substantive benefit were likely to be where the expectation was confined to one person or to a few people, "giving the promise or representation the character of a contract"[18] In the third category of case, however, the Court of Appeal clearly considered that it was for the court to make the judgment as to whether the requirements of fairness were outweighed by the public interest in changing the policy. Inevitably, this would involve the court in evaluating the policy, an exercise Laws J was not willing to undertake in the *Richmond* case. Indeed it was that reluctance which prompted him to reject the notion of a substantive legitimate expectation.

The *Coughlan* decision has been the subject of a robust critique in the March 2000 edition of JR[19] by Mark Elliott. He suggests that it is incongruous that the courts, in advance of the coming into force of the Human Rights Act 1998, have been unwilling to abandon *Wednesbury* as "the organising principle" in cases where the substance of a decision is under attack on human rights grounds whereas, in cases falling into the third category of *Coughlan*, precisely such an approach has now been sanctioned by the Court of Appeal. He also points out that, even after the Human Rights Act is fully activated, it will be at least arguable that *Wednesbury* should still provide the guiding principle for the review of executive decisions where fundamental rights are not engaged. Mr Elliott accepts that the Act may have a "spill over" effect which might lead to the abandonment of rationality in favour, for instance, of proportionality as the means by which the merits of an executive decision is challenged but he suggests that this would have to be accompanied "by a thorough reworking of the philosophy on which the relationship between judges and decision-makers is based".

[18] para 59
[19] Vol. 5 Issue 1

It is neither necessary nor appropriate for me to attempt to defend the decision in *Coughlan* against the charge of incongruity. I will content myself with a few words on the topic. It seems to me that where a public body creates in the mind of an individual an expectation of the nature involved in the case of Miss Coughlan (as Lord Woolf put it, something akin to a contract), fairness demands that it should not be permitted to resile from its undertaking without having to justify that change of course before an independent arbiter. Such a decision is quite unlike the vast majority of executive or administrative decisions. In this type of case, the decision-maker has promised to do one thing, thereby generating in the minds and plans of those who are affected by it the expectation that it will be fulfilled. When the decision-maker subsequently resiles from the previously expressed firm commitment and proposes to frustrate the expectation which had earlier been created, it would be anomalous and repugnant to all notions of fairness that the decision-maker should be the sole judge of whether it was reasonable to do so, subject only to scrutiny or challenge on the grounds of irrationality.

It is unnecessary for me to embark on any more elaborate consideration of the *Coughlan* decision because it is quite clear that, whatever view one takes as to its correctness, the conditions required to create a substantive legitimate expectation are not present in this case. Neither the Lord Chancellor nor the Secretary of State gave any indication to the Bar Council that the recommendation contained in the Elliott report would be accepted. There is, therefore, no question of a change of policy, much less any change to a policy position previously notified to the Bar Council.

I should observe, however, that I do not accept that the courts in Northern Ireland have set their face against the concept of substantive legitimate expectation. In *Re Croft's application* [1997] NI 1 (cited by Mr Weatherup in support of his claim that the concept of substantive legitimate expectation had been rejected in Northern Ireland) Carswell LCJ said this at page 19a:-

> "It can be said … that on a head count of judicial dicta one may be able to find a balance of support for substantive legitimate expectation, and academic opinion seems to have adopted this as the high ground. The resolution of the issue may be a matter of judicial policy and choice and one may be fairly certain that the last word has not yet been said on the subject. I should not wish, sitting at first instance, to attempt to effect that resolution unless the case affirmatively required it."

The argument as to substantive legitimate expectation was not pursued before the Court of Appeal - see Girvan J's judgment at [1997] NI 487g.

The applicants have argued that, if they are not to be regarded as having a substantive legitimate expectation that the declaration would be modified in the way suggested by the Elliott report, they had at least a legitimate expectation that they or the Bar Council would be consulted before a decision on retention of the declaration was taken.

It is well established that a legitimate expectation must be induced by the conduct of the decision-maker. As de Smith, Woolf and Jowell put it, a legitimate expectation "does not flow from any generalised expectation of justice, based on the scale or context of the decision.[20] In general, the conduct of the decision-maker required to constitute the inducement of a legitimate expectation will be either an express promise to consult or an established practice based on the past actions or settled conduct of the decision-maker. Whether the representation is express or implied, it must be "clear, unambiguous, and devoid of relevant qualification" - *per* Bingham LJ in *R v Inland Revenue Commissioners ex parte MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545.

It has not been suggested by the applicants that the Lord Chancellor had undertaken to consult them or the Bar Council before deciding whether to retain the declaration. Nor was it claimed that there was an established past practice to consult before taking this type of decision. In the statement made by the minister to Parliament on 13 June 1985 he said that any modification to the declaration would be preceded by consultation with the General Council of the Bar. No undertaking was given that there would be consultation before deciding *not* to change the declaration. In these circumstances, I am bound to conclude that the applicants have not established that they had a legitimate expectation that they or the Bar Council would be consulted.

Conclusions

I have concluded that the view of the Lord Chancellor that a decision to retain the declaration would not give rise to controversy was unreasonable in the *Wednesbury* sense. I consider that he reached

[20] para 7-050

that view at least partly because he believed that the judges of the Supreme Court had been consulted about the matter after the Elliott report had been published, when in fact they had not been. His decision to retain the declaration in its current form was based on a mistaken understanding of the true facts. It is clear that if he had anticipated controversy, the Lord Chancellor would have consulted the Bar Council and the Supreme Court judges before deciding to retain the declaration in its present form. On these grounds only, his decision must be quashed.

The application for judicial review, in so far as it relates to the Lord Chief Justice, must be dismissed for the reasons which I have already given.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

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IN THE MATTER OF AN APPLICATION BY SEAMUS TREACY AND BARRY MACDONALD FOR JUDICIAL REVIEW

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J U D G M E N T

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KERR J

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