EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Nimmo Smith
Lord Kingarth
Lord Kirkwood

[2007] CSIH 5
P2135/05

OPINION OF THE COURT

delivered by LORD NIMMO SMITH

in

PETITION

of

FATIMA HELOW

Petitioner;

to the *nobile officium* of the Court of Session

and

ANSWERS

for

(1) THE ADVOCATE GENERAL FOR SCOTLAND and (2) THE LORD ADVOCATE

Respondents:

_____

Act: O'Neill, Q.C., Blair; Drummond Miller (Petitioner)
Alt: Tyre, Q.C., Carmichael; Office of the Solicitors to the Advocate General (Respondent - Advocate General): Moynihan, Q.C.; Office of the Solicitors to the Scottish Executive (Respondent - Lord Advocate)

16 January 2007

Introduction

[1] This an application to the *nobile officium* of this court, in the exercise of its supervisory jurisdiction, to set aside an interlocutor of Lady Cosgrove ("the judge") dated 24 November 2004, refusing an application by the petitioner for statutory review under section 101 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). It is alleged that the interlocutor was vitiated by apparent bias and want of objective impartiality on the part of the judge. Answers have been lodged on behalf of, first, the Advocate General for Scotland, as representing the Secretary of State for the Home Department and, second, the Lord Advocate as a Scottish Minister with responsibility for the administration of the courts in Scotland and also as representing the public interest. Each member of the court has contributed to this Opinion.

[2] The *nobile officium* is a jurisdiction which, in a civil case, may only be exercised by the Inner House of the Court of Session. It is

> "the power of the Court of Session to create and exercise a remedy or grant relief in circumstances in which there is no statutory or common law provision which provides such a remedy or relief, but where the remedy or relief is obviously necessary and not contrary to the existing law":

Stair Memorial Encyclopaedia, volume 4, paragraph 4, *s.v.* "Civil Jurisdiction". As Lord Hope of Craighead said in *Davidson* v *Scottish Ministers (No. 2)* 2005 SC (HL) 7 at paragraph [64]:

> "The general rule is that the power may be exercised in exceptional or unforeseen circumstances to provide a remedy which will prevent the oppression and injustice which would otherwise result from the lack of any other remedy."

The judicial oath

[3] The judge was, on 24 November 2004, a Senator of the College of Justice, that is to say, a judge of the Court of Session and the High Court of Justiciary. All Senators are, on appointment, installed at a sitting of the Full Bench, in a short but impressive public ceremony, at which emphasis is placed on all the essential features of the office upon which they are entering. As part of the ceremony, the Lord President of the Court of Session administers two oaths, to which each new Senator assents, and in addition signs the parchments which are used on such occasions. (In the expression "oath" we include affirmation, for those who prefer to affirm: see the Oaths Act 1978, section 5(1).) The first is the oath of allegiance to Her Majesty Queen Elizabeth, her heirs and successors according to law. The second is the judicial oath, which is in these terms:

> "You swear that you will well and truly serve Her Majesty Queen Elizabeth in the office of Senator of the College of Justice, and that you will do right to all manner of people after the laws and usages of this realm without fear or favour, affection or ill-will. So help you God."

The statutory provisions

[4] The statutory provisions in force at the time of the judge's interlocutor were contained in the 2002 Act, and so far as relevant were in these terms:

> **"82 Right of appeal: general**
>
> (1) Where an immigration decision is made in respect of a person he may appeal to an adjudicator.
>
> (2) In this Part 'immigration decision' means-
>
> ...

(h) a decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (c. 77) (control of entry: removal)...

84 Grounds of appeal

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds-

...

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;

...

(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights ...

101 Appeal to Tribunal

(1) A party to an appeal to an adjudicator under section 82 ... may, with the permission of the Immigration Appeal Tribunal, appeal to the Tribunal against the adjudicator's determination on a point of law.

(2) A party to an application to the Tribunal for permission to appeal under subsection (1) may apply ... to the Court of Session for a review of the Tribunal's decision on the ground that the Tribunal made an error of law.

(3) Where an application is made under subsection (2)-

(a) it shall be determined by a single judge by reference only to written

submissions,

(b) the judge may affirm or reverse the Tribunal's decision,

(c) the judge's decision shall be final ...

102 Decision

(1) On an appeal under section 101 the Immigration Appeal Tribunal may-

(a) affirm the adjudicator's decision;

(b) make any decision which the adjudicator could have made;

(c) remit the appeal to an adjudicator;

(4) In remitting an appeal to an adjudicator under subsection (1)(c) the Tribunal may, in particular-

(a) require the adjudicator to determine the appeal in accordance with directions of the Tribunal;

(b) require the adjudicator to take additional evidence with a view to the appeal being determined by the Tribunal.

103 Appeal from Tribunal

(1) Where the Immigration Appeal Tribunal determines an appeal under section 101 a party to the appeal may bring a further appeal on a point of law-

(a) where the original decision of the adjudicator was made in Scotland, to the Court of Session ...

(2) An appeal under this section may be brought only with the permission of-

(a) the Tribunal, or

(b) if the Tribunal refuses permission, the court referred to in subsection (1)(a) ...

(3) The remittal of an appeal to an adjudicator under section 102(1)(c) is not a determination of the appeal for the purposes of subsection (1) above."

[5] It should be noted that by section 26(5)(a) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, sections 100 to 103 of the 2002 Act no longer have effect. By article 7 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (Commencement No. 5 and Transitional Provisions) Order 2005 (SI 2005/565), however, an application to the Court of Session under section 101(2) of the 2002 Act which was pending immediately before commencement of the relevant provisions of the 2004 Act is to continue after commencement as if that section had not been repealed. The result, for present purposes, is that if the judge's interlocutor were to be set aside by us, the petitioner's application would still be pending and available for consideration by another judge of the Court of Session, who would in that event have the powers provided by article 7(3) of the 2005 Order, which include power to order the Asylum and Immigration Tribunal (which has replaced the Immigration Appeal Tribunal) to reconsider the adjudicator's decision on the appeal.

The facts averred by the petitioner:

(1) The background

[6] The following narrative is derived from the averments in the petition. Except in respect of procedural matters these averments are not admitted by either respondent. We do not need to decide whether or not they are true: it is sufficient for us to treat them *pro veritate* at this stage.

[7] The petitioner has claimed asylum in the United Kingdom in terms of the Geneva Convention Relating to the Status of Refugees 1951 as applied in terms of the New York Protocol of 1967. Her claim for asylum and her claim for protection in

terms of Article 3 of the European Convention on Human Rights and Fundamental Freedoms 1950 ("ECHR") was refused by the Secretary of State by letter of 11 September 2003.

[8] It is averred that the background to the claim of the petitioner for asylum and ECHR protection is as follows. The petitioner is of Palestinian ethnicity. Her family were supporters of the Palestinian Liberation Organisation ("PLO"). She lived in the Sabra/Shatila refugee camp for Palestinian refugees located in the southern outskirts of West Beirut, Lebanon. In June 1982 Israeli forces invaded Lebanon seeking to expel the PLO and in late August 1982 the PLO agreed to leave Lebanon under international supervision. Israel agreed not to advance further into Beirut and to guarantee the security of Palestinian civilians left behind in the refugee camps, including in Sabra/Shatila. In September 1982 the Israeli forces entered and occupied the predominantly Muslim West Beirut and were deployed around the Sabra/Shatila camp. Ariel Sharon was then Israel's Minister of Defence and had overall responsibility for the conduct of the Israeli Defence Force in southern Lebanon. In this capacity, Ariel Sharon invited Lebanese Phalangist militia units - allied to and trained and equipped by Israel - to enter the Sabra and Shatila camps so as to "clean out the [remaining PLO] terrorists". Israeli soldiers surrounded and controlled the perimeters of the refugee camp and were instructed to provide logistical support to the Phalangists who would enter the camps, find the PLO fighters and hand them over to Israeli forces. The instructions to the Phalangists emphasised that the Israeli military was in overall command of all the forces in the area. The Israeli military had set up on the roofs of nearby tall buildings observation posts over the camp. On the evening of 16 September 1982 the Phalangist militia, under the command of Elie Hobeika, entered the camps. For the next 36 to 48 hours, the Phalangists carried out a massacre

on the civilian inhabitants of the refugee camps. Many Palestinian refugees, including the petitioner's grandmother, aunt and uncle, cousin and her husband, cousin and son in law of that cousin and another cousin were killed. A daughter of one of her cousins was raped. No individuals were handed over by the Phalangists to the Israeli forces.

[9] It is further averred that subsequent to the massacre - and in response to claims that the Israeli Defence Force bore responsibility for the events at Sabra and Shatila - the Israeli Government set up a Commission of Inquiry, under the chairmanship of Israel's former Supreme Justice Kahan. The report included evidence from Israeli army personnel, as well as from political figures and Phalangist officers. In the report, published in Spring 1983, the Kahan Commission stated that it had found no evidence that Israeli units had taken any direct part in the massacre and that it was the "direct responsibility of Phalangists". However, the Kahan Commission recorded that Israeli military personnel were aware that a massacre was in progress without taking serious steps to stop it, and that reports of a massacre in progress were made to senior Israeli officers and to an Israeli cabinet minister. The Kahan Commission concluded that, in its view, Israelis bore some "indirect responsibility" for the massacre. Prominent among individuals whom the Kahan Commission considered to be implicated in this "indirect responsibility", was Ariel Sharon whom the Kahan commission concluded bore "personal responsibility", and recommended that if Ariel Sharon did not resign the Prime Minister should remove him from office. Ariel Sharon resigned as Defence Minister following the Kahan Commission report but remained in the Israeli Cabinet as Minister Without Portfolio.

[10] Finally, it is averred that Ariel Sharon subsequently became Prime Minister of Israel in 2001. After his election to the post of Prime Minister, a lawsuit was filed by relatives of the victims of the massacre in Belgium alleging his personal responsibility

for the massacres, under a 1993 Belgian law giving the courts in Belgium universal jurisdiction in relation to war crimes and crimes against humanity. The Belgian Supreme Court ruled on 12 February 2003 that Ariel Sharon, among others, could be indicted in Belgium under this procedure. The Government of Israel claimed that the lawsuit was initiated for political reasons and demanded that it be dismissed as an abuse of legal process. As a result of the international controversy surrounding this case, Belgium subsequently amended its law to require that human rights complaints could only be filed if the victim or suspect was a Belgian citizen or long-term resident at the time of the alleged crime. Accordingly on 24 September 2003 Belgium's highest court dismissed the war crimes complaints against Ariel Sharon, ruling there was no longer a jurisdictional basis for the lawsuit to continue.

(2) The history of the petitioner's application for asylum and ECHR protection

[11] The essence of the claim of the petitioner for asylum and ECHR protection is averred to be as follows. One of the war crime complaints brought in the Belgian courts against Ariel Sharon was taken in the name of Miss Souad Sorour, a friend of the petitioner who had been a neighbour of the petitioner at Sabra/Shatila. The lawyers acting for Miss Sorour contacted the petitioner seeking her assistance with the case. In particular she was asked to collect statements from surviving eye-witnesses in the camp. The petitioner actively assisted in the preparations for this criminal prosecution and did so, by investigating matters as requested, identifying witnesses, and collating the evidence from the survivors of the massacre in co-operation with the Belgian lawyers pursuing the claim. The principal Belgian lawyer for Miss Sorour, Maître Mehdi Abbes, *Avocat,* visited the petitioner in Lebanon and was assisted by

the petitioner in arranging meetings with these witnesses. There was intense international publicity and media interest in the case; the petitioner appeared on television and gave statements to newspapers. As a result of her participation in this matter, her publicly stated views in relation to who was responsible for the massacre and the evidence she had uncovered and collated in relation to the massacre, she states that she now considers that she is at risk of harm from Israeli agents. She considers herself also to be at risk from Syrian and Lebanese agencies. She fears the Lebanese because she has named the Lebanese army as also being involved in the massacre. She fears Syrian agencies because of her links with the PLO.

[12] It is further averred that the petitioner lodged an appeal against the refusal of her claim for asylum and ECHR protection, in terms of section 82 of the 2002 Act. (So far as we can tell, the appeal was against a decision under section 82(2)(h) of the 2002 Act, *viz.* a decision that the appellant was to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971, and the grounds of appeal were those provided by paragraphs (c) and (g) of section 84(1) of the 2002 Act, *viz.* (c) that the decision was unlawful under section 6 of the Human Rights Act 1998 and (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.) The appeal was heard before Mr KR Forbes, an adjudicator. His determination was promulgated on 27 May 2004. In the determination it is narrated that the petitioner's family has links with the Palestine Liberation Organisation. She gave evidence that she was featured in Belgian, Dutch and Lebanese television programmes about the massacre. In addition, it is noted, she

claimed to have been involved with the criminal complaint lodged in Belgium against Ariel Sharon, naming Ariel Sharon as an individual who had involvement in the massacre and that she claimed asylum and ECHR protection on account of: her Palestinian ethnicity; her religion as a Muslim; her sex as a woman who feared that she might be raped in order to bring dishonour on her family and to trigger her own "honour killing"; her express political opinion as a supporter of the PLO; and the hostile characterisation of the political opinions imputed to her by various State authorities as being anti-Israel, anti-Lebanese and anti-Syrian. She claimed asylum on the basis of a fear of persecution from the Israeli, Syrian and Lebanese authorities as well as from anti-Arafat Palestinian factions and fundamentalist Islamic groups should she be required to return to Lebanon. The adjudicator heard evidence from the petitioner, from Maître Abbes and from a Mr Assaf, a journalist who also spoke to the activities of the petitioner in connection with the Sharon case on 22 March 2004. These other witnesses also lodged written statements. The adjudicator directed that the hearing be adjourned to 13 April 2004. Further evidence was heard on that day and also on 17 May 2004. Before the adjudicator were the documents referred to at paragraphs 3 and 4 of the determination. The adjudicator also had before him the video of the Dutch TV programme in which the petitioner had been interviewed about the massacre. The formal complaint made in the Belgian process against Ariel Sharon was also produced to the adjudicator at the hearing and is referred to in paragraph 3 of his determination. At paragraph 33 of the determination the adjudicator considered the claim that the petitioner was liable to harm at the hands of "the Israelis, their authorities and the secret service agents." In particular the adjudicator held at paragraph 33 of his determination that the petitioner was incredible because of her failure to mention until her last statement that she had taken part in a TV programme

with Elie Hobeika, by then a Lebanese government minister, and Chibli Mallat, a solicitor who had raised the criminal complaint in Belgium. The adjudicator refused the appeal. He did not find the petitioner to be credible. He reached adverse findings on the matter of the credibility and reliability of the petitioner and her supporting witnesses notwithstanding that the credibility of the evidence brought in support of the petitioner's claim was not challenged by the Secretary of State.

[13] It is further averred that on 11 June 2004 an application for leave to appeal to the Immigration Appeal Tribunal ("IAT") against this decision was lodged by the petitioner's solicitors detailing the grounds on which the adjudicator had erred and seeking permission for the petitioner to lodge further evidence to counter certain findings of fact and assumptions made by the adjudicator. The application for leave to appeal contained 30 grounds. This reflected the fact that the issues in the appeal were many. The account of the petitioner was complex. The determination of the appeal itself was lengthy. It took three days of evidence and the consideration of lengthy documentary and video evidence. The determination itself ran to some 45 paragraphs and 17 pages. In the letter of 11 June 2004, the agents explained that they were lodging new evidence to deal with a point made by the adjudicator relative to Hickman Rose, Solicitors and asked for this to be considered. They also explained that a video tape of the television programme involving the petitioner, Mr Hobeika and the solicitor who made the complaint, in relation to which the adjudicator had held that the petitioner had not appeared, would be lodged when it arrived from Lebanon along with a translation. In a subsequent letter of 22 July 2004 the agents lodged with the IAT: (1) a letter from NBN network Beirut confirming that there had been a TV programme involving Mr Hobeika and Mr Mallat on 8 August 2001; (2) a video tape of the programme; (3) the transcript of that programme; (4) a letter from Dr

Banuscher, Fernbank Medical Centre, 29 June 2004; (5) a letter from Dr Payne to Dr Ali dated 19 and typed 22 August 2002; and (6) a statement from the petitioner explaining why the video had not been produced before, commenting on the transcript of the programme, and commenting on the letters from Drs Payne and Banuscher. The letter of 22 July 2004 from the agents explained why the letters from the doctors had not been lodged before.

[14] On 29 September 2004 Mr Allan Mackey, a Vice President of the IAT, made a decision to refuse the petitioner permission to appeal. This decision was notified to the petitioner by letter dated 13 October 2004. It is averred that the petitioner was advised that this decision could only then be challenged by an application to the Court of Session for statutory review. A petition seeking such statutory review was then prepared by counsel, in terms of section 101 of the 2002 Act. The productions lodged with the petition included the whole productions before the adjudicator and thereafter the IAT. The facts of the claim as set out in the petition narrated the essence of the petitioner's claim to asylum and ECHR protection all as set out above. Consideration of the petition was then allocated by Scottish Court Service personnel to the judge. When an application seeking statutory review is presented to the court the agent is not advised which judge the case is to be sent to. The judge makes a decision on papers only and there is no opportunity for counsel to appear and make oral submissions, or indeed any motion for recusal of the judge (section 101 of the 2002 Act). On 24 November 2004 the judge determined the petition. She dismissed it and affirmed the refusal of leave to appeal. In terms of Section 101(3)(a) of the 2002 Act a statutory review "shall be determined by a single judge" and in terms of subsection 3(c) "the judge's decision shall be final".

The judge's decision

[15] A copy of the judge's decision is before us. Since no suggestion is made on behalf of the petitioner that, as a decision, it is in any way open to criticism, we see no need to make extensive reference to its terms. What is clear is that the judge carefully considered all the information contained in the papers sent to her. We have not been asked to consider these papers, and parties proceeded before us on the basis that the papers contained the information set forth in the averments in the present petition, repeated at paragraphs [7] to [14] above. It is also clear that in considering this information the judge correctly directed herself as to the approach she required to adopt in applying the provisions of the 2002 Act. She concluded:

> "I find myself quite unable to hold that the Tribunal erred in the exercise of its discretion or erred in law in refusing permission to appeal. Further, I consider that the reasons given by the Tribunal for its decision are sufficient and adequate."

The judge's membership of the International Association of Jewish Lawyers and Jurists

[16] Upon receiving intimation of the judge's decision, those representing the petitioner chose, for whatever reason, to make further inquiry about the judge. By means of the Internet search engine Google they discovered information about her which was (and is) publicly available on various websites. One such website was that of The International Association of Jewish Lawyers and Jurists ("the Association"), www.intjewishlawyers.org. The Association has members in several countries, including the United Kingdom. Many of them have agreed to their names and contact details being given on the website. One of them is the judge, who has been a member

since the Scottish branch of the Association was inaugurated on 30 November 1997. Other prominent members of the Scottish judiciary who became members at that time were Lord Caplan and Sheriff (now Sir Gerald) Gordon. The Rt. Hon. The Lord Woolf is an Honorary Deputy President of the Association.

[17] The petitioner alleges that, by reason of her membership of the Association, when she pronounced her interlocutor of 24 November 2004 the judge lacked the necessary appearance of impartiality in her participation in the determination of the petitioner's application. We shall discuss this allegation more fully in due course. At this stage, we propose to set out the material, all derived from the Association's website, on which this allegation is based. It may be divided into the following categories.

Membership

[18] Under the heading "Membership" this statement appears:

> "Membership in the International Association of Jewish Lawyers and Jurists is by direct individual membership. Lawyers and Jurists who share the aims of the Association as described on this site, are invited to join the IAJLJ by filling out the enclosed membership form and mailing it to us together with the annual membership fee for the current year."

A person wishing to become a member is invited to fill out a form, containing this declaration:

> "I hereby apply to become a member of The International Association of Jewish Lawyers and Jurists. I declare that I approve the aims and objects of the Association and undertake to comply with the Articles and Rules of the Association."

The objects of the Association

[19] The aims and objects of the Association may be discovered from the home page of its website, where the following information is given, under the heading "Pursuing human rights":

> "The International Association of Jewish Lawyers and Jurists strives to advance human rights everywhere, including the prevention of war crimes, the punishment of war criminals, the prohibition of weapons of mass destruction, and international co-operation based on the rule of law and the fair implementation of international covenants and conventions.
>
> The Association is especially committed to issues that are on the agenda of the Jewish people, and works to combat racism, xenophobia, anti-Semitism, Holocaust denial and negation of the State of Israel.
>
> IAJLJ was founded in 1969. Among its founders were Supreme Court Justices Haim Cohn of Israel, Arthur Goldberg of the United States and Nobel Prize laureate René Cassin of France. Our membership comprises lawyers, judges, judicial officers and academic jurists in more than 50 countries who are active locally and internationally as the need arises. Membership is open to lawyers and jurists of all creeds who share our aims.
>
> The Association has Category II Status as a non-governmental organization (NGO) at the United Nations, enabling it to participate in the deliberations of various UN bodies. In this capacity, the representative of the Association has been actively involved in the work of the Commission on Human Rights in Geneva and of related bodies, and will now be engaged with the work of the United Nations Human Rights Council, which has replaced the Commission on Human Rights.

The Association also publishes [the magazine] **Justice...**which examines a variety of relevant issues and current topics and is mailed to thousands of lawyers and jurists throughout the world..."

Policy Statements

[20] The Association has published on its website various documents under the heading "Policy Statements". The petition quotes extensively from such of the documents as had been published before the date of the judge's interlocutor, 24 November 2004. We do not think it desirable or necessary to repeat these quotations here, not least because the debate before us ultimately concentrated on other, more specific material. The extracts would in any event require to be read in the full context from which they are quoted. It is enough to notice that they are taken from statements made at conferences and the like by individuals apparently invited or otherwise mandated to represent the Association, statements made by the Association's president for the time being and statements made jointly by the Association and certain other bodies.

[21] It is also averred in the petition:

"15. As noted above, the Association also publishes *Justice*, a quarterly magazine which contains various legal and political articles. As a member of the Association, the [judge] will have received issues of *Justice*. Much of the material published therein is more consistent with an organisation which, when viewed reasonably, appears to have a political campaigning agenda going beyond the publication of articles on purely legal issues. The tone of language that is used is not that which one normally associates with an academic legal journal, notwithstanding that many of the contributors bear to

be legal practitioners and academics. Although each edition of *Justice* carries with it the following disclaimer: 'Views of individuals and organizations published in *Justice* are their own, and inclusion in this publication does not necessarily imply endorsement by the Association', the tenor of the message from the President of the Association - which is contained at the start of each issue of *Justice* - characteristically expresses strongly worded views on such issues as the need to protect Israel, the criticism of the international community if it is critical of Israel, and the view that the Middle East situation is the 'fault' of the Palestinians. For example in Issue 30 of Winter 2001 in the President's Message at the Jerusalem conference the theme is how risk to State of Israel is a risk to the future of Jews as a people. Page 5 of the editorial refers to the Sabra/Shatila trial of Ariel Sharon in Belgium in condemnatory terms. In particular the Belgian case is held up as an example of discrimination against Jews. Page 6 refers to the possible need to use 'military force and to perpetuate our struggle with 3 million hostile Palestinians, most of whom from birth are conditioned to hate Jews'. Page 8 confirms that Ariel Sharon attended the Association conference where he made comments about defending Israel with the sword and that defending Israel is a responsibility owed to Jews everywhere as Israel is the ultimate refuge of all Jews. Pages 16 to 21 contain an article on 'Anti-Israel Bias in the International Arena: Politicization of International Criminal Law'. This was a paper delivered at the Association's conference. It discusses the Belgian case against Ariel Sharon. The paper asserts that the prosecution is politically motivated and is abusive. At pages 26-28 there is published an article and paper critical of the Durban Conference on Racism. It contended that politics manipulates this form of legal process.

Justice magazine has published a number of other articles which deal with the specific issue of Sabra/Shatila and the proceedings brought in Belgium against Ariel Sharon. Thus most of Issue 35 of Spring 2003 is devoted to 'Belgium's Justice', and the Ariel Sharon trial. Page 5 of the President's Message says that the events in Belgium are of great interest to the Association. An article which starts on page 20 discusses the case and asserts that the political nature of the prosecution was obvious. Page 24 states that the case shows how 'the law could be exploited and diverted from its true objectives' and of how victims could be 'manipulated and exhibited for political aims'. The Belgian law in this case is held up as an example of 'a tool for propaganda' on page 24. An article on page 28 on the lawsuit against Ariel Sharon refers to the trial as a 'propagandist attempt' to blame Israel. *Justice* Issue 39 of Summer 2004 continued the coverage and dealt with the 12th International Congress in Israel, which was addressed by Mr Joseph Lapid, the Israeli Justice Minister. His article and conference paper appears at pages 4 to 7 and is called 'The Exposure of the Free World to Terrorism Motivated International Litigation'. The article in effect asserts that terrorists use politically motivated litigation against Ariel Sharon. The Belgian Sharon case is given specific mention at page 6. Mr Lapid refers to the lawsuit as being 'unfounded and duplicitous' and as 'politically motivated'."

[22] It should be noted that, beyond the above excerpts, we were not invited by Mr O'Neill to consider in any detail the passages from *Justice* founded on by the petitioner, although copies of the magazine have been lodged as productions. Mr Tyre drew attention to the President's Message in issue no. 23 for Spring 2000, which

enlarged on the aims of the Association, and contained the statements "We are hoping for an ongoing dialogue between ourselves and the Council of Europe...", and:

> "[T]he law is a powerful weapon, and we, men and women of the law, are sworn to uphold the law, to find ways and means of securing public order and protecting the rights of the individual, within the rule of law."

The President's Message in issue no. 30 for Winter 2002 contained (at page 5, referred to, at least in general terms, in statement 15 in the petition, quoted above at paragraph [21]) the statement:

> "[A]bsent in the Belgian dock are those who actually committed the murders in Sabra and Shatila. The only one they propose to place in the dock is the Israeli Prime Minister. One group of Arabs killed another group of Arabs in a most brutal massacre, and I did not hear of the Lebanese government setting up a public committee of inquiry, as did Israel, or being censured in the United Nations, let alone being accused in a criminal court."

Counsel also drew attention to an article in issue no. 35 for Spring 2003 by Prof Yoab Gelber, Head of the School of History, Haifa University, entitled "The Lawsuit Submitted against Ariel Sharon in Belgium: Historical Background", which concluded (at page 28, again referred to in general terms in statement 15 of the petition):

> "The lawsuit submitted in Belgium is no more than a propagandist attempt-using a very peculiar situation that Belgian law has created-to blame Israel for a domestic Lebanese act of revenge and to remind a forgetful world of their continued existence in their camps."

The authorities

[23] We propose at this stage to set out the principal authorities to which reference was made in the course of the hearing. We shall divide them into two categories, decisions of the House of Lords and the Privy Council in the United Kingdom, and decisions of courts in other jurisdictions. In each category, we shall set them out in chronological order.

Decisions of the House of Lords and the Privy Council

[24] (1) In *Porter* v *Magill* [2001] UKHL 67, [2002] 2 AC 357, the House of Lords had to consider the formulation for the test of apparent bias as applied to a local government auditor. Lord Hope of Craighead said:

> "99. The test for apparent bias which the auditor sought to apply to himself, and was applied in its turn by the Divisional Court, was that which was described in *R v Gough* [1993] AC 646 by Lord Goff of Chieveley where he said at p 670:
>
> 'I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily have been available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those

circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him...'

100. The 'reasonable likelihood' and 'real danger' tests which Lord Goff described in *R v Gough* have been criticised by the High Court of Australia on the ground that they tend to emphasise the court's view of the facts and to place inadequate emphasis on the public perception of the irregular incident: *Webb v The Queen* (1994) 181 CLR 41, 50 per Mason CJ and McHugh J. There is an uneasy tension between these tests and that which was adopted in Scotland by the High Court of Justiciary in *Bradford v McLeod*, 1986 SLT 244. Following Eve J's reference in *Law v Chartered Institute of Patent Agents* [1919] 2 Ch 276 (which was not referred to in *R v Gough*), the High Court of Justiciary adopted a test which looked at the question whether there was suspicion of bias through the eyes of the reasonable man who was aware of the circumstances: see also *Millar v Dickson* 2001 SLT 988, 1002L-1003B. This approach, which has been described as 'the reasonable apprehension of bias' test, is in line with that adopted in most common law jurisdictions. It is also in line with that which the Strasbourg court has adopted, which looks at the question whether there was a risk of bias objectively in the light of the circumstances which the court has identified: *Piersack v Belgium* (1982) 5 EHRR 169, 179-180, paras 30-31; *De Cubber v Belgium* (1984) 7 EHRR 236, 246, para 30; *Pullar v United Kingdom* (1996) 22 EHRR 391, 402-403, para 30. In *Hauschildt v Denmark* (1989) 12 EHRR 266, 279, para 48 the court also observed that, in considering whether there was a legitimate reason to fear that

a judge lacks impartiality, the standpoint of the accused is important but not decisive:

'What is decisive is whether this fear can be held objectively justified.'

101. The English courts have been reluctant, for obvious reasons, to depart from the test which Lord Goff of Chieveley so carefully formulated in *R v Gough.* In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, 136A-C Lord Browne-Wilkinson said that it was unnecessary in that case to determine whether it needed to be reviewed in the light of subsequent decisions in Canada, New Zealand and Australia. I said, at p 142F-G, that, although the tests in Scotland and England were described differently, their application was likely in practice to lead to results that were so similar as to be indistinguishable. The Court of Appeal, having examined the question whether the 'real danger' test might lead to a different result from that which the informed observer would reach on the same facts, concluded in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 477 that in the overwhelming majority of cases the application of the two tests would lead to the same outcome.

102. In my opinion however it is now possible to set this debate to rest. The Court of Appeal took the opportunity in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 711 A-B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in *R v Gough* had not commanded universal

approval. At p 711B-C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review *R v Gough* to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp726H-727C:

'85 When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.'

103. I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to 'a real danger'. Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered

the facts, would conclude that there was a real possibility that the tribunal was biased."

[25] (2) In *Lawal* v *Northern Spirit Ltd* [2003] UKHL 35, [2003] ICR 856, Lord Steyn, delivering the opinion of the Appellate Committee of the House of Lords, said:

"14. In *Porter v Magill* [2002] 2 AC 357 the House of Lords approved a modification of the common law test of bias enunciated in *R v Gough* [1993] AC 646. ... In the result there is now no difference between the common law test of bias and the requirements under Article 6 of the Convention of an independent and impartial tribunal, the latter being the operative requirement in the present context. The small but important shift approved in *Porter v Magill* [2002] 2 AC 357 has at its core the need for 'the confidence which must be inspired by the courts in a democratic society': *Belilos v Switzerland* (1988) 10 EHRR 466, 489, para 67; *Wettstein v Switzerland* (Application No. 33958/96), para 44; *In Re Medicaments and Related Classes of Goods (No 2)* [2001] ICR 564, 591, para 83. Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53, by Kirby J when he stated that 'a reasonable member of the public is neither complacent nor unduly sensitive or suspicious'."

[26] (3) In *Davidson* v *Scottish Ministers (No 2)* 2005 SC (HL) 7 the House of Lords upheld a decision of the Second Division of the Court of Session (2003 SC 103)

that since Lord Hardie had, as Lord Advocate, made statements in Parliament about the effect of certain legislation, he ought not to have sat as a member of an Extra Division of the Court of Session to decide a case in which the effect of that legislation was under consideration. Lord Bingham of Cornhill said:

> "7. Very few reported cases concern actual bias, if that expression has to be used, and it must be emphasised that this is not one of them. Both before the Second Division and before the House, counsel for Mr Davidson were at pains to disclaim any challenge to the personal honour or judicial integrity of Lord Hardie. They are not in question. It has however been accepted for many years that justice must not only be done but must also be seen to be done. In maintaining the confidence of the parties and the public in the integrity of the judicial process it is necessary that judicial tribunals should be independent and impartial and also that they should appear to be so. The judge must be free of any influence which could prevent the bringing of an objective judgment to bear or which could distort the judge's judgment, and must appear to be so. Following some divergence of view between the courts of England and Wales and Scotland on the correct formulation of the correct test (see *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, paragraph 16), the Scottish test has come to be accepted. In *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, 494, paragraph 103, my noble and learned friend Lord Hope of Craighead expressed the test in terms accepted by the Second Division and by both parties to this appeal:
>
> 'The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'

That, it is agreed, is the test which must be applied to the facts of this case.

...

17. ... [I]t is difficult, if not impossible, to lay down hard-edged rules to distinguish a case where apparent bias may be found from one where it may not. Much will turn on the facts of the particular case.... I am...of the clear opinion that its [the Second Division's] conclusion was justified by the nature and extent of Lord Hardie's involvement in the passage of the Scotland Act. The fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that Lord Hardie, sitting judicially, would subconsciously strive to avoid reaching a conclusion which would undermine the very clear assurances he had given to Parliament.

18. In reaching this opinion I do not overlook or disparage the significance of the judicial oath. The Lord Justice Clerk, in para 33 of his judgment, went too far when describing this as 'beside the point'. Primarily, I agree, the judicial oath is relevant to a complaint of actual bias, with which this case is not concerned. But the fair-minded and informed observer, who is 'neither complacent nor unduly sensitive or suspicious' (*Johnson v Johnson* (2000) 201 CLR 488, 509, para 53), would be aware in general terms that judges take an oath and would accept that judges try to live up to the high standard which it imposes. Such an observer would, I think, regard the judicial oath as 'an important protection' (as Lord Reed called it in *Starrs v Ruxton* 2000 JC 208, 253) but not as 'a sufficient guarantee to exclude all legitimate doubt' (*ibid.*)"

[27] Lord Hope of Craighead said:

"45. ... I have to confess that, while I am persuaded that on the facts of the case this decision is inevitable, I regard it with little enthusiasm.

46. It would be easy, were we permitted to take a more robust view, to deplore a system which permits an unsuccessful litigant to challenge a judge's decision that has gone against him by searching after the event for previously undiscovered material, like a needle in a haystack, that might be thought to undermine his objectivity. One might think that the cost and delay of rehearing the case would only be justified if there was a real possibility that the wrong decision had been reached because of the alleged bias. But that is not the approach that we are required to take by article 6(1) of the European Convention on Human Rights and Fundamental Freedoms, which requires the tribunal to be independent and impartial, and by the Strasbourg authorities. And by long tradition in our own country the rule has been that justice must not only be done, it must be seen to be done. So it is not to the determination itself that one looks, or to the question whether there has in fact been a fair trial, but to the tribunal: *Millar v Dickson* 2002 SC (PC) 30, para 65. Its independence and impartiality is the subject of a separate guarantee in article 6(1): *Porter v Magill* [2002] 2 AC 357, 496-497, paras 108, 109. This is a necessary element in the fairness, or justice, of the determination. The means by which the information that casts doubt on its independence or impartiality came to the attention of the person who claims that it was unfair are unimportant. The court's duty is simply to examine the information that is put before it and to assess its consequences."

[28] (4) In *Meerabux* v *Attorney General of Belize* [2005] UKPC 12, [2005] 2 AC 513, Lord Hope of Craighead, delivering the judgment of the Judicial Committee of the Privy Council, explained the circumstances thus:

"1. The appellant is a former justice of the Supreme Court of Belize. On 18 September 2001 following complaints of misbehaviour filed by the Bar Association of Belize and by an attorney at law...he was removed from office by the Governor-General on the advice of the Belize Advisory Council ('the BAC'). ...

2. The appellant's case is that the decision of the BAC that he misbehaved while performing his duties as a judge and its advice to the Governor-General that he should be removed from office were fundamentally flawed for two reasons. The first is that Mr Ellis Arnold, who presided over the proceedings in his capacity as the Chairman of the BAC, was also a member of the Bar Association of Belize by which the majority of the complaints of misbehaviour had been made. It is said that he was automatically disqualified from taking any part in these proceedings by reason of his membership of the Bar Association, or alternatively that a fair-minded and informed observer would have concluded that there was a real possibility that he was biased. ..."

[29] On the question of apparent bias, Lord Hope said:

"21 The decision of the House of Lords in the *Pinochet (No.2)* case [*R* v *Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119] to apply the rule which automatically disqualifies a judge from sitting in a case in which he has an interest to the situation in which Lord Hoffmann found himself appears, in retrospect, to have been a highly technical one. There was, of course, ample precedent for the proposition that the rule that no one may be a judge in his own cause is not confined to cases where the judge is a party to the proceedings. It extends to cases where it can be demonstrated that he has a personal or pecuniary interest in the outcome,

however small: *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759; *Sellar v Highland Railway Co*, 1919 SC (HL) 19. The extension of the rule was taken one step further when Lord Hoffmann was held to have been disqualified automatically by reason of his directorship of a charitable company. That company was not a party to the appeal, nor had it done anything to associate itself with those proceedings. But the company of which he was a director was controlled by Amnesty International, which was a party and which was actively seeking to promote the case for the extradition and trial of Senator Pinochet on charges of torture. Lord Browne-Wilkinson said that there was no room for fine distinctions in this area of the law if the absolute impartiality of the judiciary was to be maintained: p 135E-F.

22 One of the undercurrents in that case, which can be seen from comparing the speeches of Lord Browne-Wilkinson at p 136 and Lord Hope of Craighead at pp 141-142, was whether the test of apparent bias laid down in *R v Gough* [1993] AC 646 needed to be reviewed in the light of subsequent decisions in Canada, Australia and New Zealand to bring it into line with the test which, following earlier English authority, had been applied in Scotland. The House found it unnecessary to conduct this review in the *Pinochet* case, as it felt able to apply the automatic disqualification rule to its circumstances which were, as Lord Browne-Wilkinson acknowledged at p 134C, striking and unusual. But the review which was so obviously needed was not long in coming. The Court of Appeal took the opportunity which presented itself in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 to consider the whole question of apparent bias and how its presence was to be tested. The adjustment of the test in *R v Gough* which was described by Lord

Phillips of Worth Matravers MR at pp 726-727 laid the basis for the final stage in the formulation of the objective test which is set out in *Porter v Magill*, para 103: whether the fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased. As Lord Steyn said in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2003] ICR 856, para 14, public perception of the possibility of unconscious bias is the key. If the House of Lords had felt able to apply this test in the *Pinochet* case, it is unlikely that it would have found it necessary to find a solution to the problem that it was presented with by applying the automatic disqualification rule.

...

25 The issue of apparent bias having been raised, it is nevertheless right that it should be thoroughly and carefully tested. Now that the law on this issue has been settled, the appropriate way of doing this in a case such as this, where there is no suggestion that there was a personal or pecuniary interest, is to apply the *Porter v Magill* test. The question is what the fair-minded and informed observer would think. The man in the street, or those assembled on Battlefield Park to adopt Blackman J's analogy, must be assumed to possess these qualities. The observer would of course consider all the facts which put Mr Arnold's membership of the Bar Association into its proper context. But the facts which he would take into account go further than those described in the previous paragraph. They include the nature and composition of the tribunal, the qualifications which a person must possess to be appointed Chairman, the fact that the first proviso to section 54(11) of the Constitution directs the Chairman to preside where the BAC is convened to discharge its

duties under section 98 and the fact that this direction is subject only to the special provision which the second proviso makes for what is to happen if the BAC is convened to consider the Chairman's removal. Their Lordships are inclined to agree with Carey JA that, if he had taken these facts into account, the fair-minded and informed observer would not have concluded that Mr Arnold was biased."

[30] (5) In *Gillies* v *Secretary of State for Work and* Pensions [2006] UKHL 2, 2006 SC (HL) 71, in considering the question whether the fact that a medical practitioner who was a member of a disability appeal tribunal also acted as an examining medical practitioner ("EMP") on behalf of the Benefits Agency gave rise to apparent bias on her part, Lord Hope of Craighead said at paragraph 17:

"The critical issue is whether the fair-minded and informed observer would conclude, having considered the facts, that there was a real possibility that Dr Armstrong would not evaluate reports by other doctors who acted as EMPs objectively and impartially against the other evidence. The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed, as Kirby J put it in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53, that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant."

[31] Baroness Hale of Richmond said at paragraph 39:

> "The 'fair minded and informed observer' is probably not an insider (ie another member of the same tribunal system). Otherwise she would run the risk of having the insider's blindness to the faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair minded. She is, as Kirby J put it in *Johnson v Johnson* (2000) 2001 CLR 488, 'neither complacent nor unduly sensitive or suspicious'."

Decisions of courts in other jurisdictions

[32] (1) In *R* v *S. (R.D.)* [1997] 3 S.C.R. 484, the Supreme Court of Canada had to consider an argument that certain remarks made by the judge of first instance raised a reasonable apprehension of bias. The court held by a majority that they did not. In the course of their reasons for so holding, L'Heureux-Dubé and McLachlin JJ said:

> "II. The Test for Reasonable Apprehension of Bias
>
> 31 The test for reasonable apprehension of bias is that set out by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: see, for example, *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267. De Grandpré J. stated, at pp. 394-95:
>
> '. . . the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.... [T]hat test is 'what would an informed

person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.' The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience'.

32 As Cory J. notes at para. 92, the scope and stringency of the duty of fairness articulated by de Grandpré depends largely on the role and function of the tribunal in question. Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because judges 'are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances': *United States v. Morgan*, 313 U.S. 409 (1941), at p. 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in *Commentaries on the Laws of England*, Book III, cited at footnote 49 in Richard F. Devlin, 'We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S.' (1995), 18 *Dalhousie L.J.* 408, at p. 417, 'the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea'. Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing

evidence to that effect: *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.), at pp. 60-61.

33 Notwithstanding the strong presumption of impartiality that applies to judges, they will nevertheless be held to certain stringent standards regarding bias - 'a reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification': *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833, at pp. 842-43.

34 In order to apply this test, it is necessary to distinguish between the impartiality which is required of all judges, and the concept of judicial neutrality. The distinction we would draw is that reflected in the insightful words of Benjamin N. Cardozo in *The Nature of the Judicial Process* (1921), at pp. 12-13 and 167, where he affirmed the importance of impartiality, while at the same time recognizing the fallacy of judicial neutrality:

'There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them -- inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs.... In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.

Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and

habits and convictions, which make the [person], whether he [or she] be litigant or judge.'

35 Cardozo recognized that objectivity was an impossibility because judges, like all other humans, operate from their own perspectives. As the Canadian Judicial Council noted in *Commentaries on Judicial Conduct* (1991), at p. 12, '[t]here is no human being who is not the product of every social experience, every process of education, and every human contact'. What is possible and desirable, they note, is impartiality:

' ... the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.

True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.'

...

The judgment of Cory and Iacobucci JJ contained the following observations:

"(iv) <u>The Test for Finding a Reasonable Apprehension of Bias</u>

109 When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias. *Idziak, supra*, at p. 660. It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. See *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p. 636.

110 It was in this context that Lord Hewart C.J. articulated the famous maxim: '[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done': *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259. ...

111 The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394: '[T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is 'what would an informed person, viewing the matter realistically and practically-and having thought the matter through--conclude. . . .'

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram*, *supra*, at pp. 54-55; *Gushman*, *supra*, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including 'the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold': *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark*, *supra*, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal

awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

...

113 Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark, supra,* at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

114 The onus of demonstrating bias lies with the person who is alleging its existence: *Bertram*, *supra,* at p. 28; *Lin*, *supra*, at para. 30. Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.

115 ... All judges of every race, colour, religion, or national background are entitled to the same presumption of judicial integrity and the same high threshold for a finding of bias. Similarly, all judges are subject to the same fundamental duties to be and to appear to be impartial.

(v) Judicial Integrity and the Importance of Judicial Impartiality

116 Often the most significant occasion in the career of a judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realization of the onerous responsibility that goes with the office. The taking of the oath is solemn and a defining moment etched forever in the memory of

the judge. The oath requires a judge to render justice impartially. To take that oath is the fulfilment of a life's dreams. It is never taken lightly. Throughout their careers, Canadian judges strive to overcome the personal biases that are common to all humanity in order to provide and clearly appear to provide a fair trial for all who come before them. Their rate of success in this difficult endeavour is high.

117 Courts have rightly recognized that there is a presumption that judges will carry out their oath of office. See *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.), and *Lin*, *supra*. This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with 'cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias. See *Smith & Whiteway*, *supra*, at para. 64; *Lin*, *supra*, at para. 37. The presumption of judicial integrity can never relieve a judge from the sworn duty to be impartial.

...

119 The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to

recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.

True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

(Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991), at p. 12.)"

[33] (2) In *President of the Republic of South Africa and Others* v *South African Rugby Union Football Union,* 1999 (4) SA 147; 1999 (7) BCLR 725 (CC) 72n, a decision of the Constitutional Court of South Africa on an application by a party to proceedings before the court for the recusal of certain of its members, including its President, on the basis of a 'reasonable apprehension' that they would be biased against the applicant, the court held in part at page 177, paragraph [48] that:

"[T]he correct approach to this application for the recusal of members of this Court is objective and the *onus* of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of the counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have

> a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

Discussion

[34] On the basis of these authorities, counsel were agreed, and we accept, that the test to be applied in the present case is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased by reason of her membership of the Association. We discuss below the facts which are of relevance in this particular case. At this stage we consider what approach a fair-minded and informed observer might adopt in considering the possibility of apparent bias on the part of a judge in the performance of his or her judicial duties, by reason of an extra-judicial activity or connection. We bear in mind that, as Lord Steyn said in *Lawal* v *Northern Spirit Ltd,* such an observer will adopt a balanced approach. As it was put in *Johnson v Johnson*, quoted in several of the above passages, "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious".

[35] We derive particular assistance for present purposes from the cases of *R* v *S. (R.D.)* and *President of the Republic of South Africa and Others* v *South African Rugby Union Football Union*, especially the former, from which we have set out an extensive quotation. This seems to us to express, better than we could do ourselves, what is entailed by the holding of judicial office. Mr O'Neill submitted that these

cases were of limited assistance, because they were decided before *Porter* v *Magill.* But, as is apparent, Canadian and South African courts did not follow the test described in *R* v *Gough*, in which the House of Lords stated that there must be a "real danger" of bias and rejected the test that the court should look at the matter through the eyes of a reasonable man. Instead, the test they (and Australian courts) applied was in line with that formulated in Scotland: see *Porter* v *Magill, per* Lord Hope at paragraph [100], and *Hoekstra* v *HM Advocate* 2000 JC 391, *per* Lord Justice-General Rodger at page 399, paragraph [17]. What we wish to emphasise is the significance of the judicial oath, which in its Scottish version is quoted above, at paragraph [3]. This was not only emphasised in the Canadian and South African cases, it was recognised as an important protection by Lord Bingham. Indeed it was Lord Bingham who, as Lord Chief Justice, in delivering the judgment of the Court of Appeal in *Locabail (UK) Ltd* v *Bayfield Properties Ltd* [2000] QB 451, said at page 479, paragraph [21], that there was force in the observations in *President of the Republic of South Africa and Others* v *South African Rugby Union Football Union* quoted above, including the statement that the reasonableness of the apprehension of apparent bias must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. The judicial oath is an important protection, not only against actual bias, but also against apparent bias, because it is not only in many ways definitive of a judge's duty, it also so imbues the judge that it becomes his or her second nature, unconsciously as well as consciously, to abide by it. Obviously, the judicial oath, and all that it carries with it, cannot serve as a complete guarantee of impartiality, but in our opinion the fair-minded and informed observer, taking account of these considerations, would give it great weight. Such an observer would also

recognise the desirability of a judge's keeping in touch with the world beyond the courts, and that his or her personal interests and experience may lead to membership of or involvement with external organisations.

The petitioner's case before this court

[36] In the present petition, the following averments appear:

> "17. That the determination of the petition for statutory review by the [judge] gives rise to legitimate doubts as to the apparent impartiality of the [judge] as a judge in relation to the issues before her. In particular, there are legitimate grounds for fearing that the [judge] may have been unconsciously or unwittingly influenced in her decision that the petition should be refused. The petitioner does not aver that the [judge] acted subject to any actual subjective bias on her part. However, the [judge] is a member of the Association. The appearance of independence and impartiality is just as important as the question of whether those qualities exist in fact. Justice must not only be done, it must be seen to be done. The function of the right to an independent and impartial tribunal is not only to secure that the court is free from any actual bias or prejudice. It requires that the matter be viewed objectively so as to exclude any legitimate doubt as to independence and impartiality. This is particularly important where, as with a petition for statutory review, proceedings do not take place in open court
>
> "18. That taking this approach to the matter, the petitioner avers that the test for apparent impartiality of the [judge] has been breached because:-
>
> (i) as a member of the Association she is a member of a body which maintains views which are actively condemnatory of, and hostile to,

persons and the views held by such persons in relation to the nature and causes of Arab-Israeli conflict and who are members of, or associated with the PLO, such as the petitioner and her family and who are reasonably likely to maintain views in opposition to those held by the Association and members of the Association;

(ii) that the promotion of these views appears to be an ongoing and central feature of the activities of the Association, both through statements made at the United Nations and through the medium of *Justice* and the provision of conference platforms to those advancing such views, including Ariel Sharon;

(iii) a material aspect of the case made by the petitioner is that Ariel Sharon had direct knowledge of and personal responsibility for the Sabra/Shatila massacre, that she has involvement in the Belgian proceedings brought against Ariel Sharon, and that she is at risk of targeting by Israeli forces as a result of her views and her involvement in the Belgian case;

(iv) in sharp contrast to the position of the petitioner, the Association through both the medium of *Justice* and at the said 12th International Congress has published articles and actively promoted the position that only the Lebanese Phalangists were responsible for the massacre and that the proceedings in Belgium against Ariel Sharon are to be condemned, in essence, as being unfounded, brought in bad faith, and as inspired by a propagandist attempt to blame Israel for the massacre;

(v) that as a member of the Association the [judge] may, quite unconsciously, have been influenced by the views advanced by the Association, particularly in relation to the criminal proceedings against

Ariel Sharon."

Submissions of counsel

Submissions for the petitioner

[37] On behalf of the petitioner Mr O'Neill, under reference to the test for apparent bias discussed in preceding paragraphs, and in supplement of the averments in the petition, submitted that the question was what a member of the public who was neither complacent nor unduly sensitive might think if they checked on the Internet and read what could be found on the Association's website. It was ultimately a matter of impression, which depended on the facts. The question was whether the facts as presented were such as to raise the possibility that justice might not be seen to be done. It always came down to the question of what it looked like. There was a need to exclude subjective unconscious bias.

[38] Counsel's objection was that the judge was a member of the Association. Her membership constituted a public statement of support for the aims of the Association. This was a campaigning group, and by joining it the judge had adopted a political viewpoint. Counsel stated, however, that there was nothing wrong with the aims of the Association. He would not complain about the aims in themselves. The question was how the aims were realised. This was a perfectly respectable political campaigning body, which had adopted a particular position in relation to the Israel/Palestine situation. A bystander would, however, think that a member of the Association approved of policy statements made on its behalf. These were strongly worded. The Association adopted a pro-Sharon approach. The magazine *Justice* was sent to members of the Association as a way in which the aims of the Association were realised. It contained the views of the Association's President in that capacity

and therefore might be taken as representing the policies of the Association. The tone in which these views were expressed was important. Publication by the Association on its website of statements by the President constituted approval of his message and tone. The Association only invited speakers with a particular point of view to speak at its conferences. It could be seen from its publications that the Association was a partisan campaigning body. It was not appropriate for the judge to determine the petitioner's application, as it raised issues in relation to which an informed member of the public would conclude that the judge, by reason of her membership of the Association, might show apparent bias.

Submissions for the Advocate General

[39] On behalf of the Advocate General, Mr Tyre started with a discussion of the factual background. He submitted that the petitioner asserted that the fact of membership of an international association of lawyers was sufficient for the fair-minded and informed observer to conclude that there was a real possibility of bias in a case concerning an individual likely to hold views opposed to those likely to be expressed on behalf of the Association by a person other than the judge herself. This went further than the authorities, and conflicted with some of them. There was nothing exceptionable about the aims of the Association, and Mr O'Neill had not founded on them. Counsel was ready to accept that the Association was likely to promote an Israeli point of view, which was sympathetic to Israel and unsympathetic to opponents of Israel. The published aims of the Association were all that a member would be taken to share. The magazine *Justice* contained a typical disclaimer, so it could not be asserted that any article published in it represented the views of the Association, let alone the views of an individual member reading the magazine. In any

event, counsel had read the copies of the magazine which had been lodged as productions, and had found only one article which came anywhere near the description given in Statement 18(iv) of the petition. (In the event, this was not, we think, disputed by Mr O'Neill.) This was the sentence in the article by Professor Gelber in the Spring 2003 issue quoted at paragraph [22] above. We were therefore concerned with one single sentence in one single article which related to the massacre in Lebanon. Mr O'Neill's submissions relating to statements on behalf of the Association were overstated. The issue of the massacre was mentioned once in these statements, *viz*. in the President's message in the Winter 2002 issue, also quoted at paragraph [22]. (This again was not, in the event, we think, disputed by Mr O'Neill.) This was nearly three years before the judge's consideration of the petitioner's application. The material before the court did not therefore support the assertion made in Statement 18(iv) of the petition. This accordingly affected the averment in Statement 18(v) that the judge may have unconsciously been influenced by the views advanced by the Association, particularly in relation to the criminal proceedings against Ariel Sharon.

[40] Counsel further submitted that the authorities demonstrated that to establish apparent bias it was not sufficient to demonstrate that a judge held or might possibly hold a particular opinion which might be adverse to the interests of a party. It was in the nature of the judicial function that a judge might bring to a case his or her own background experience and predispositions, but could nevertheless be expected to undertake an open-minded and dispassionate examination of the matter in question, consistently with the judicial oath. These were matters of which the fair-minded and informed observer would be aware in considering whether there was a real possibility of bias. No apprehension of bias could be founded on the religious or ethnic origin of

a judge. Nor could it be founded on the mere fact of membership of a professional organisation. Membership of an association on whose behalf opinions were expressed on a relevant political issue did not of itself give rise to an apprehension of bias. Having a known political affiliation was not of itself a ground of apparent bias. This was sufficiently broad to cover membership of an international association of lawyers which furthered its aims by political means. It was significant that this was a professional organisation. There was nothing to suggest that the membership endorsed every statement made on behalf of the Association. All that could be said of the judge in the present case was that at the time she decided the petitioner's application she was a member of an association which on one occasion about 18 months previously had published, subject to a disclaimer, an article by an academic whose view of the Israeli involvement in the Sabra/Shatila massacre was opposed to that of the petitioner, and whose president for the time being had on one occasion almost three years previously delivered a speech which was published in the magazine and included the expression of views which did not seek to exculpate Israel in relation to the massacre, but which noted that its position alone had been the subject of investigation and accusation . Given this tenuous link between the judge and these views, no fair-minded observer would conclude that there was a real possibility that she might be unable to fulfil her judicial function in accordance with her oath, or that she might be predisposed in late 2004 to decide that the IAT had made no error of law, whatever might have been the strength of any argument to the contrary. It would be unduly sensitive or suspicious to conclude that she might be disabled from fairly deciding the petitioner's appeal.

Submissions for the Lord Advocate

[41] On behalf of the Lord Advocate, Mr Moynihan adopted Mr Tyre's submissions in their entirety. He added that in *Pinochet* Lord Hope had regarded the crucial factor

as being that Amnesty had been a party to the proceedings. That constituted a greater degree of proximity than any aspect of the present case. Authorities such as *Hoekstra (No.2)* 2000 J.C. 391 and *Montgomery* v *H.M. Advocate* 2001 S.C.(P.C.) 1 supported the proposition that there could be confidence that a jury in a criminal trial would act in accordance with the directions of the judge and their oath. There was an analogous presumption in the case of judges. The degree of impartiality expected of juries, that they were able to ignore even current media publicity, could be reciprocated: the public, from whom jurors were selected, could expect the same level of detachment in a judge, even when sitting in chambers.

Discussion

[42] In our approach to the question whether, by reason alone of her membership of the Association, and on consideration of its published material set out above, the fair-minded and informed observer would conclude that there was a real possibility that the judge was biased, albeit unconsciously, in deciding to refuse the petitioner's application for statutory review under section 101 of the 2002 Act, we take into account the authorities discussed above at paragraphs [24] to [35]. The petitioner expressly, and rightly, disavowed any argument based on the fact that the judge is Jewish. We bear in mind that, apart from her decision on the petitioner's application, the judge is not said to have expressed, either publicly or privately, directly or indirectly, any opinion about any of the issues relevant to consideration of the application. It is not suggested, nor could it be, that it is inappropriate for a judge to be a member of a professional association of lawyers and jurists, and in particular of the Association, or that the members of the Association are other than they appear to be, distinguished (in the United Kingdom at least, some highly distinguished) members of

their professions. Moreover, no criticism is directed at the aims and objects of the Association, as set out at paragraph [19], which its members, including the judge, may be taken to share by virtue of the fact of membership.

[43] Apart from the President's Messages in the issues of the magazine *Justice* which have been brought to our attention, we have no reason to think that the contents of the magazine are such that a fair-minded and informed observer would conclude that there was a real possibility of bias on the part of the judge by reason of their publication and, it may be, of the judge's having read them. Every issue of the magazine carries a disclaimer, in commonplace terms, making it clear that the views of contributors are not necessarily those of the Association. Readers are free to agree or disagree with what they read, and may be expected to make up their own minds. It would be naïve to attribute to a reader, let alone a member of the Association who may not have read it, the views expressed in any particular article. As Mr Tyre pointed out, there is in any event only one article, that by Professor Gelber, which mentions the Belgian proceedings, and this was published some time before the judge's decision in the present case. It cannot therefore be said that there was a steady stream of recent criticism of these proceedings which might unconsciously have influenced the judge. We therefore leave articles by contributors to the magazine out of account.

[44] This leaves for consideration the statements made on behalf of the Association and published on its website, and the President's Messages published in *Justice*. While it may, of course, be reasonable to assume that all members of the Association have necessarily subscribed to its stated aims and objects, we do not accept that it could reasonably be assumed by any fair-minded and informed observer that every member of this apparently very large and widely-based international organisation (with wide

and generally-expressed aims which are beyond criticism) would necessarily share all the views apparently expressed by its representatives in the ways, and on the occasions, referred to. It is, we think, the universal experience of members of any large organisation of independent professionals, on whose apparent behalf views may be expressed by representatives at conferences and the like, that they do not always agree with what may be said on any particular occasion, not only as regards form of expression but also in respect of content. It must not be forgotten that, although the concentration in the hearing before us was necessarily on certain views apparently expressed on particular matters (especially on what was said to be the "material aspect of the case", the question of Israeli responsibility in respect of the Sabra/Shatila massacre), these represented only a very small proportion of the many views expressed on diverse and varying issues over many years. We imagine that that is why, after an apparently exhaustive trawl through the Association's material, and no doubt after much careful thought, the high point of the case in the averments made in the petition is not that it would be thought that the judge necessarily shared the views referred to, but that she may have been "influenced" by them. We see no reason to suppose that any intelligent and independent-minded judge of the Court of Session - having taken the judicial oath and being well able to form her own views - would be influenced in this way. She would in any event be in no different a position from that of anyone who read the statements in question, even if not a member of the Association. Be that as it may, as the argument developed the suggestion appeared to be that it could reasonably be taken that the statements did indeed represent her views. Even if that were so, we think it notable that while the statements generally demonstrate sympathy for the Israeli position, the clear emphasis (albeit often strongly expressed) is on a desire that Israel be accorded fair treatment vis-à-vis

Palestine in the United Nations and in the courts. It is not suggested that Israel has done no wrong. It is to be noted that the one statement by the Association's president which referred to the Sabra/Shatila massacre (that quoted at paragraph [22] above) did not, on a fair reading, seek to suggest that there had been no Israeli complicity in what had been done on the ground by others; rather it noted that Israel's position alone had been the subject of investigation and accusation. The fair minded and informed observer might therefore take the view that the judge, by reason of her membership of the Association, was likely to be sympathetic to the Israeli position and to desire fair treatment for Israel. It would, however, in our opinion be unduly sensitive to conclude that there was a real possibility of bias on the part of the judge in determining the petitioner's application.

[45] For these reasons, we are not satisfied that the averments in Statement 18 of the petition, quoted at paragraph [36] above, have been made out.

Result

[46] We shall accordingly refuse the prayer of the petition.