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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY MARTIN O'ROURKE FOR JUDICIAL REVIEW

O'Rourke's Application [2009] NICA 31

Before Kerr LCJ, Coghlin LJ and Gillen J

KERR LCJ

Introduction

[1] Queen's Counsel in Northern Ireland are appointed by Her Majesty the Queen, on the recommendation of the Lord Chancellor. Until 2005, that recommendation was based on advice given to the Lord Chancellor by the Lord Chief Justice of Northern Ireland. In 2004 a working group comprising representatives of the Bar of Northern Ireland, the Bar of England and Wales and the Law Societies of both jurisdictions was established to design a new process for appointing Queen's Counsel. In April 2005 the Lord Chancellor accepted the recommendations of the group and at the same time he approved what became the Northern Ireland appointments process.

[2] The objectives of this process were stated to be the promotion of fairness, objectivity, excellence and diversity. The selection procedure for appointment was 'competency-based'. An applicant guidance document was issued to those who wished to consider applying for silk. An annex to the guidance document, entitled the 'competency framework', specified seven requisite competencies. These were sub-divided into a total of 39 'behaviours'. Applicants were required to complete a written application form in which they were asked to describe how they met each of the seven competencies by giving examples of how they had demonstrated those abilities in the past. The following table sets out the competencies: -

Competency 1: Integrity;

Competency 2: Understanding and using the law;

Competency 3: Analysing case material to develop arguments and focus the issues;

Competency 4: Persuading;

Competency 5: Responding to an unfolding case;

Competency 6: Working with the client;

Competency 7: Working in the team.

[3] A company called Queen's Counsel Appointments (NI) Limited was established to administer the selection process. Ray Coughlin was chosen to be the company secretary. An appointments panel was selected. Its chairman was the Rt Hon Sir Liam McCollum, a former Lord Justice of Appeal in Northern Ireland. The other members were two experienced senior counsel, two leading solicitors and two lay persons. The panel was assisted by Mr Coughlin. It was decided that there was to be no appeal from the decisions of the panel but, if required, a complaints committee would be established to consider any complaint that a disappointed applicant wished to make. In the event, it proved necessary to establish such a committee and it considered a number of complaints.

[4] The panel deliberated on the procedure that it should follow and decided on a particular model. The application form and the references, which were to be submitted by judges, practitioners and clients, were to be considered separately by each member of the selection panel and a grade was to be awarded for each competency. An applicant could be awarded a maximum of 5 marks in each of these. In order to meet the 'standard of excellence' (*i.e.* the standard at which an applicant would be recommended for appointment) it was necessary to:

> (i) score a total of 28 or more when the scores for all seven competencies were aggregated;
> (ii) have a minimum score of 4 in competency 1;
> (iii) have a minimum score of 3 in each of competencies 6 and 7;
> (iv) not have a score of 2 or less in any of the competencies. [The need for this in light of (iii) above is not easily detected.]

[5] The individual scores of each panel member for a competency were to be added together and divided by seven (the number of panel members), producing an average score for each competency. These average scores were

then to be aggregated and if the total was 28 or above the candidate was considered successful.

[6] The panel also decided on a 'borderline standard', however. To qualify for this category, it was again necessary to score at least 4 in competency 1, and to have a score of more than two in all the other competencies. In what was described by Sir Liam McCollum (in an affidavit filed in the proceedings) as the panel's "preliminary view", the borderline standard would have been achieved if the total of the average scores fell between 24 and 27 inclusive. If a candidate was considered borderline, he or she would be invited for interview.

[7] It was claimed that this preliminary view was changed as a result of later contact with officials in the Department of Constitutional Affairs. The panel decided that in order to qualify as borderline and therefore be called for interview, a candidate had to reach a standard of excellence in at least five of the seven competencies. (It is to be remembered, of course, that a standard of excellence could be achieved by scoring 3 in competencies 6 and 7, provided there were compensating scores of at least 5 in other competencies). According to the Notice Party, this revised standard was consistently applied throughout, both at the preliminary consideration of the applications and the re-evaluation of applicants following the complaints committee's report.

[8] The purpose of the interview was to allow the candidate to demonstrate possession of the qualities needed to fulfil the competencies in which they had been judged to have fallen short. Scores for these could be increased depending on performance at interview and if the standard of excellence was thereby reached, the candidate would be successful. A number of candidates qualified for recommendation by the panel in this way.

[9] The panel invited applications for Queen's Counsel on 6 June 2005. These were to be submitted by 30 September 2005. Martin O'Rourke, a junior barrister in practice in Northern Ireland for a number of years, was one of several applicants for silk. His application form was submitted on the closing date. The panel did not recommend his appointment and it was duly rejected by the Lord Chancellor on 6 June 2006. In a feedback letter of 9 June 2006, Mr Coughlin informed Mr O'Rourke that, after due consideration of the application form and references, the panel had been unable to "find sufficient evidence which demonstrated [his] personal performance in competencies 1, 3, 4, 5, 6 and 7 to a standard of excellence necessary for Queen's Counsel". It was also pointed out that, contrary to explicit instructions given to applicants, Mr O'Rourke's answers in various sections of the form had exceeded 400 words and that those sections contained in the excess portions had not been taken into account.

[10] Mr O'Rourke complained about his rejection to the complaints committee. He also launched judicial review proceedings. After considering the appellant's complaints and those of a number of other unsuccessful applicants, the complaints committee found that, at the initial grading, references had not been properly taken into account by the panel members. It decided that, since the references were part of the evidence on which fulfilment of the competencies should be judged, they ought to have been considered concurrently with the application form in the initial assessment and grading exercise. The committee also found that final decisions were reached when some members of the selection panel had not read a number of the references on some of the candidates. The complaints were therefore upheld and the cases of all who had complained were referred back to the full selection panel to assess and grade the application forms and the references concurrently and to determine whether in any case a candidate should be interviewed or the award made.

[11] Following reconsideration of his case, the panel again concluded that Mr O'Rourke had not reached the required standard and again on 1 May 2007 the Lord Chancellor refused his application for silk. A further feedback letter was sent on 18 July. In this letter it was stated: -

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

[12] Mr O'Rourke amended his judicial review proceedings in order to challenge both decisions of the Lord Chancellor. Although the focus of his claim was on the way that the panel had treated his application, he has chosen not to seek judicial review of its decisions. The panel has therefore been, throughout these proceedings, a notice party to the application for judicial review rather than a respondent. Following a protracted hearing, punctuated by various interlocutory applications, Weatherup J, on 21 April 2008, dismissed Mr O'Rourke's application for judicial review. This appeal is taken against that dismissal.

The judicial review challenge

[13] As Weatherup J observed in his judgment, the grounds on which the decisions of the panel were challenged were extensive but they have been helpfully condensed by Mr Larkin QC (who appeared on behalf of the appellant) to the following propositions: -

1. The appointments procedure was procedurally unfair or improper;

2. The Secretary of State unlawfully fettered or abdicated his discretion in relation to his recommendations to the Queen;

3. The decision not to recommend Mr O'Rourke for appointment was irrational in substance or because of a failure to take into account relevant considerations; and

4. Given the circumstances of his application, Mr O'Rourke had a legitimate expectation that he would be called for interview by the panel.

Procedural unfairness

[14] The deficiencies in the procedure alleged by the appellant took a number of forms. In the first instance, Mr Larkin claimed that the guidance to candidates failed to make explicitly clear that applicants were required to provide evidence of every behaviour within each competency, rather than of the competency itself. He suggested that there was a significant contrast between the guidance given on this issue to candidates in Northern Ireland and that provided in England and Wales where candidates were told that the standard of excellence required "*that all behaviours defining a competency are evident*".

[15] The second criticism made of the panel's approach was that it did not follow its proposed method of considering references. The design of the assessment of candidates' applications included the following: -

> "Grading and interviews
>
> Each application, with all references and information about integrity from judges, will be read by a sub-committee of the Selection Panel comprising three of its members (one lay, one solicitor and one barrister).
>
> …
>
> The sub-committee will grade each candidate.
>
> The full Selection Panel will then conduct a review of these initial grades. There will then be collective moderation and scrutiny of borderline cases."

[16] Mr Larkin claimed that this did not happen. The panel as a whole undertook what it described as a preliminary reading and then split into two sub-committees. These considered the references separately. Each sub-committee looked at one half of the successful candidates and one half of

those who had been deemed unsuccessful. The references were not considered as a whole by a specifically designated sub-committee.

[17] A further criticism of the panel's approach to the references was that it had merely regarded them as a potential fillip to the assessment that had been based on the application form, rather than as providing evidence which called for individual marking. Such individual marking was necessary, it was claimed, in order to fulfil the scheme as designed. The references should not have been treated as some sort of "vague extra" that would have an undefined effect (if any at all) on the marks awarded on the application form. Mr Larkin argued that proper use of the references would have involved their being examined to see if they might supply vital material that had been omitted from the application form. This was clear from the manner in which referees had been asked to prepare the references. Details of cases in which candidates had appeared before particular referees had been sent to them. It was expected, therefore, that referees would draw on the experience of those cases in order to provide valuable information on the various competencies. Moreover, there was provision for further contact with the referees if required. As well as this, in any case in which it appeared to the sub-committee that there was a significant difference of opinion between two judicial referees, it was entitled to seek a third confidential judicial reference. All these factors spoke strongly to the importance of the references as part of the appointments process, Mr Larkin said, and were powerfully indicative of the need to mark references separately in relation to each of the behaviours required in order to make up the ultimate competency score.

[18] Finally, three discrete, but loosely related complaints were made: it was claimed that the failure to interview the appellant was unfair; that he should have been given the opportunity to make representations to the Secretary of State following the recommendation of the panel; and that there was no effective complaints procedure. As a sub-text to the last of these, the appellant suggested that the panel's reconsideration of his application following its referral by the complaints committee was infected by the appearance of bias.

Was the appellant adequately informed?

[19] The application form that was supplied to each candidate was divided into eight sections, one of which was entitled, 'self assessment form'. This section contained the following guidance: –

> "Section B – Self Assessment
>
> This is a crucial part of your application. The information you provide will inform the Selection Panel about your suitability for the award of

> Queen's Counsel, It is therefore essential that you read the guidance for applicants before completing this section.
>
> In order to consider your application for the award of Queen's Counsel, you are asked to provide evidence of the seven required competencies.
>
> In this self assessment, we ask you — for each competency — *to consider all the behaviours for the competency and then to decide the best example(s) of you demonstrating the behaviours at work. You must give specific examples of your behaviours, ensuring you give evidence for all the behaviours under each competency.* You may refer to as many examples as necessary to cover the competency, but your response must be confined to 400 words for each competency. Any information beyond 400 words will not be considered.
>
> For each example, please provide an outline of the context and then describe what you did that is evidence of the competency." [Emphasis supplied]

[20] Each of the competencies was broadly defined and then a list of specific behaviours was provided. Candidates were instructed to "give evidence in no more than 400 words that [they were] able to demonstrate the competency … as defined above by the broad definition and the specific behaviours." They were reminded of the importance of providing specific examples and it was emphasised that only the first 400 words of an answer would be considered.

[21] The first argument of the appellant (that he was not given sufficient warning of the need to supply examples of performance in each behaviour) is simply untenable in light of these explicit instructions. The sentence, "You must give specific examples of your behaviours, ensuring you give evidence for all the behaviours under each competency" could not be more unambiguous. While it may not have been stated, as it was in England and Wales, that to achieve the standard of excellence, all behaviours defining a competency must be evident, candidates in Northern Ireland were told that evidence for all behaviours was required. They must surely have understood that this instruction was included for a purpose. It was expressed in mandatory terms. Any careful reader of the instruction cannot have failed to realise that omitting to comply with it would carry a sanction. It required no imagination – much less deductive analysis - to understand that evidence that a candidate possessed a particular competency depended on his having

demonstrated that he had performed well in all the behaviour areas and that failing to provide evidence of having done so would lead to a failure to show that he had that specific attribute. This was an application to become Queen's Counsel. Anyone aspiring to that rank must be capable of carefully reading and accurately absorbing instructions as to how the form should be completed. We find it difficult to understand how it could be claimed that applicants did not realise that, if they were to demonstrate that they possessed a particular competency, they should give examples of all the behaviours. We reject the appellant's argument on this ground.

Consideration of the references by a sub-committee

[22] The claim that the panel did not follow the prescribed method of considering the references (by a sub-committee) is based entirely on the complaints committee's report and, therefore, by definition, cannot refer to the reconsideration of the appellant's application. On that ground alone, the claim must fail since the appellant's application for relief must ultimately depend on the assertion that his references were not adequately considered.

[23] In any event, the suggestion that they were not considered by the panel cannot survive scrutiny of the contemporaneous evidence. It is abundantly clear that the references were considered by the entire panel on several occasions. The number of times that the panel moderated the appellant's score is not entirely clear but it appears that this happened on at least three occasions. His references were taken into account on each occasion.

Mapping across

[24] The expression 'mapping across' featured prominently in the appeal. It has two applications. Firstly, in the use of answers in relation to one competency to compensate for or cure deficiencies in the response to another; secondly it is employed to refer to the use of references to boost the score of an applicant based on his or her application form. The complaints committee criticised the panel for its lack of an audit trail that would demonstrate its having used mapping across in the manner of the first application described. It did not suggest, however, that the panel had failed to do this and the available evidence does not support the conclusion that the panel had omitted to map across between the answers to the various competency questions.

[25] Ironically, in light of its currency in the appeal, the expression 'mapping [or mapped] across' appears only once in all the voluminous material submitted by the parties. On 11 October 2005, before the panel began considering the applications, they received training from DCA officials on how to set the standard of excellence and in current human resources methods for assessing evidence against the standard. Chris Lowe was one of those who provided training. In a note dated 12 October 2005, he described

the training that had taken place in the morning session on the previous day. This note contains the following passage: -

> "As a general principle, it is important that evidence of behaviours found outside … the appropriate competency paragraph be mapped across to other competencies so that the application is considered as a whole. This would to some extent mitigate … the limited amount of information that can be provided by the applicant on the form."

[26] It is important to note that this was expressed as a "general principle". It would be surprising if such a fundamental rule was ignored by the panel members when they came to mark the responses contained in an application form. But it is inconceivable, in light of the explicit identification of the principle at the training session, that it would be ignored not only by individual panel members as they marked the scores but also by the panel collectively when they moderated the appellant's scores, as they did on a number of occasions. It has not been established that the panel failed to map across in this sense.

[27] The second application of the expression requires rather fuller consideration. From the outset, the possible frailties in the system of obtaining references were recognised. At the training session on 11 October 2005, for instance, the observation was made that references "might not be to the standard expected". This forecast proved, unfortunately, to be all too accurate.

[28] In the minutes of the meeting of the panel on 25 January 2007, the following statement appears, "By and large judicial references provided little more than a general impression". In a paper that was annexed to the minutes, the chairman of the panel reflected on the deficiencies that had been discovered in the references generally. He said this: -

> "It has not proved possible to derive specific scores relating to particular behaviours or competencies from the content of the references.
>
> Some referees simply ticked boxes, often with maximum marks, without any supporting evidence or comments. The panel did not consider that this could be regarded as strong evidence of anything more than a general approval by the referee and that it fell short of evidence of excellence in the competency addressed.

…

> The only available evidence of the full range of behaviours was contained in the candidates' application forms which therefore necessarily formed the basis for marking applications.
>
> While examination of the references preceded reassessment of the application forms it was not possible or practical to award marks for behaviours or competencies on the basis of the references. Review of the application forms was conducted on the basis of their content and the preliminary marks awarded and also taking into consideration the content of the references. It was not considered practicable to amend scores for individual behaviours even where complete omission of mention of a particular behaviour in the application form was repaired by specific evidence in a supporting reference. However all evidence in the references was taken into account in agreeing the score for the relevant competency.
>
> In the majority of cases the information in the references tended to conform with the impression created by the application form and did not lead to any substantial alteration in the marks assessed on the basis of the application. The evidence provided by the references was fully considered and in appropriate cases led to substantial readjustment of the marking of the application forms."

[29] The statement that "it was not considered practicable to amend scores for individual behaviours even where complete omission of mention of a particular behaviour in the application form was repaired by specific evidence in a supporting reference" initially gave rise to concern on our part. As Mr McGleenan (who appeared for the panel) submitted, however, the question to be posed in reviewing the panel's approach here was 'what does fairness require, when one is considering a bespoke selection process involving two sources of information [the application form and the references] when one of those sources [the references] is found to be of variable quality'. Fairness is, as Mr McGleenan pointed out, an elastic concept which must reflect the circumstances in which it is used in order to test the propriety of the decision. Ultimately, the crucial question is whether *all* the available material was considered for all the candidates in the course of the process. From the penultimate paragraph of the chairman's paper quoted above, it is clear that all available material was considered.

[30] Presented with references of uneven quality, the panel faced a dilemma. While it owed a duty to an individual applicant not to neglect material that might be of benefit to him, there was also an issue of equity for all thirty six candidates. It would be inequitable to use reference material in relation to behaviours for some candidates where it was available for them and to thereby improve their scores, while omitting to do so for other candidates whose references were of insufficient quality to allow that type of specific adjustment to be made. The quality of the material contained in the references was not the responsibility of the individual applicants. This depended on the diligence of the referees. The panel had to manage the tension between giving due weight to effective references for individual candidates and avoiding unfairness to those whose referees had not completed the reference forms properly. It does not appear to us that the manner in which they chose to do so can be condemned as unfair.

[31] There was a range of options available to the panel. They could ignore the references entirely. They could cherry pick material from those references for individual candidates at the expense of others where the material was missing. Or they could have regard to the references on a general basis. The last of these is clearly the approach that they took. In the circumstances, we consider that this was a perfectly fair choice to make.

[32] In any event, the appellant has not demonstrated that he was penalised by the strategy chosen by the panel. From such evidence as we have on the judicial references given for the appellant it is far from clear that these would have made any difference to his scores on the competencies if they had been used in the manner that Mr Larkin claims they should have been. Although they were described as 'excellent' in one letter, comments in the minutes of the meetings of the panel suggest that their capacity to provide concrete evidence of his performance in the various behaviours was, at least, questionable. In the minutes of the meeting of 25 January 2007 it was stated that, "there was a view that the judicial references were mixed and would not have enabled a finding of excellence to be made".

[33] The appellant applied for discovery of the references. Weatherup J ruled on this on 13 November 2007 and, while refusing to order discovery of the references on the grounds of 'statutory confidentiality', he observed that the appellant could obtain the documents from the authors of the references if they consented. He stated that he had been informed that "most of them do" consent. No satisfactory explanation has been given as to why the appellant failed to obtain the references in this way. In their absence, we are driven to the conclusion that, even if he was correct in his claim that they ought to have been scored in the same way as the application form, the appellant's challenge on this ground would have had to fail because it has not been shown that

such an approach would have made any difference to the outcome of his application.

Should the appellant have been interviewed?

[34] We propose to deal in this section of the judgment with both aspects of the appellant's complaints on this ground. The first of these is the appellant's assertion that the panel should have interviewed him if it had properly applied the standard that it had devised for borderline candidates. It is now known that when the appellant's application was reconsidered by the panel after it had been referred back to them by the complaints committee, he had scored 25. His claim is that, on the basis of the panel's original decision about borderline scores, he was entitled to an interview. On the second complaint, the appellant has claimed that he had, in any event, an enforceable legitimate expectation that he would be interviewed.

[35] It is important to recognise from the outset that a centerpiece of the appellant's case on the first of these arguments is that the panel had fixed on *and maintained* a formula which, if applied to the appellant's case, would have resulted in his being interviewed. Indeed, the appellant unreservedly declares that this court should reject the affirmation by the panel members that this was not the finally decided upon formula. To properly examine this daring claim, it is necessary to trace in a little detail the history of the panel's consideration of how the borderline standard should be chosen.

[36] It is clear that the complaints committee believed that the borderline standard had been applied on the originally proposed basis. In its report the committee recorded that it had been agreed at the meeting of the panel on 30 November 2005 that a borderline candidate must score 24 marks and above across all seven competencies; have a minimum of four in competency 1; and not have a score of 1 or 2 in any of the other competencies. At no time was the committee notified by the panel that its view as to candidacy for borderline status was inaccurate. Moreover, on 14 December 2006, the chairman of the panel wrote to the appellant's solicitors saying that reconsideration of his application would take place in accordance with the complaints committee's recommendations and he did not correct the misapprehension which the panel now says that the committee had laboured under *viz* that the originally formulated basis for borderline status still applied. Since the complaints committee had said in its report that it was "a matter for the selection panel whether [the appellant's] scores would have reached 24 or above for purposes of interview", the failure of the panel to notify either the committee or the appellant of the claimed alteration was especially significant, Mr Larkin argued, not least because this section of the committee's report had been sent to the appellant's solicitors with the letter of 14 December 2006. But these omissions must be viewed against trenchant

statements by panel members to the effect that there had indeed been an alteration to the basis on which borderline candidates would be identified.

[37] The first of these is to be found in Sir Liam McCollum's affidavit of 27 November 2007 in which he stated that a letter sent that day by the panel's solicitors to the Crown Solicitor's office correctly stated the position about the change in the fixing of the borderline score. This letter set out to correct the Secretary of State's understanding of the basis on which the borderline standard had been fixed by the panel (an understanding, incidentally, which was also based on the complaints committee's report). The letter contained the following passage: -

> "It would appear that the complaints committee have taken this information [about the score of 24] from examining the minutes of a selection panel meeting of 30 November 2005. These minutes record the selection panel's preliminary view on the approach to be adopted in relation to selection standards. This was prior to the examination of any application form or references. Subsequently, the selection panel decided to modify the approach to selection standards following communications with officials at the Department of Constitutional Affairs in December 2005 and January 2006.
>
> Regrettably, the minutes of the panel meetings fail to record that there was this change in approach to the question of borderline candidates. The panel decided that in order to qualify as a borderline case, a candidate has as a minimum to reach a standard of excellence in five of the seven competencies and only fail to reach that standard in no more than two competencies. Following this change in approach aggregate scores over all the competencies were not used as a measure. It is correct, of course, that a candidate who was recommended for selection would have a minimum aggregate score of 28 based on the individual competency markings. However, the panel did not approach selection or selection for interview in that way.
>
> The panel decided that the standard of excellence could be met where a candidate scored no less that 3 in competences [6 and 7] but only in

> circumstances where that candidate had scored a compensating 5 in other competencies. The panel decided that candidates who had dropped below the standard of excellence in only two competencies would be considered borderline and would be invited for interview. Those candidates would be interviewed specifically in relation to those competencies in which they had fallen short.
>
> No candidate, either in the original selection round, or at the review, was interviewed on more than two competencies. The panel decided that candidates who dropped below the standard of excellence required in three competencies would [not] be considered borderline and would not be invited for interview. This approach was applied consistently at the original selection and upon the subsequent review.
>
> The Secretary of State should note that the complaints committee did not invite any explanation from the selection panel of the approach that was actually adopted in relation to borderline cases and interviews. The complaints committee appears to have relied upon a consideration of the minutes of 30 November 2005. This may have given rise to the present misunderstanding."

[38] Affidavits sworn by Tony Caher, one of the solicitor members of the committee, Alan Henry, a lay member, Mervyn Morrow, one of the QC members, and Ray Coughlin supported the claim made by Sir Liam as to the accuracy of the letter from the panel's solicitors.

[39] In response to these assertions, Pearse MacDermott, the appellant's solicitor, in a replying affidavit, pointed out that if the classification of borderline status was applied as outlined in the letter of 27 November 2007, it would be possible to qualify for interview by scoring 4 in five competencies and 1 in the remaining two. The Notice Party's rejoinder to this was contained in a final affidavit from Sir Liam McCollum in which he stated that, in order to qualify as a borderline candidate to be interviewed, it was necessary to score 4 in five competencies and 2 in the remaining two. This had not been made clear in the letter of 27 November.

[40] Mr Larkin invited us to conclude that the assertions now made on behalf of the panel were, at best, an *ex post facto* rationalisation of its position or a

profound error of memory. He argued that the contemporaneous evidence strongly favoured the conclusion that the original formula had been applied and that no change to the score had ever been agreed. In support of this claim, he pointed out that both the complaints committee and the Secretary of State had been given that impression; that the complaints committee's description of how borderline candidates were identified had never been challenged or corrected; that email exchanges with DCA officials failed utterly to inform them in advance that the panel had modified the manner of classifying borderline candidates, despite encouragement from them that the panel should do so; on the contrary, emails from Mr Coughlin suggested that no change would be effected; and that the supposedly final formulation of the panel's position in the letter of 27 November had failed to fully and accurately state what was now claimed to be the basis on which borderline candidates were categorised.

[41] With hindsight, it is unfortunate that the Secretary of State was not informed until the letter of 27 November that a change to the manner of identifying borderline candidates had been made. It is doubly unfortunate that this was not recorded in any minutes of meetings of the panel. It is also surprising that the misapprehension of the committee on this subject was not corrected, particularly when the appellant's solicitors were told that a reconsideration of his case would proceed on the basis of the committee's recommendation. But we are unable to ignore the unequivocal statements by the panel members that a change had been made. Nor can we leave out of account the fact that Mr Caher offered to make himself available for cross examination on this point but the appellant's advisers (although originally pressing for this) declined the offer. We do not believe that any adverse inference is to be drawn from the fact that a final explanation and refinement of the letter of 27 November was required. We are satisfied that the panel did change the basis on which borderline candidates were to be selected and we reject the appellant's arguments on this ground.

[42] We are likewise of the view that the appellant cannot sustain his claim that he had a legitimate expectation that he would be interviewed if he scored 24 or more. The letter to his solicitors of 14 December 2006 did not contain the prerequisite, unmistakable assurance that this would be so. On the contrary, it did not refer at all to the basis on which borderline candidates would be identified. The complaints committee had made it clear that its view as to the manner in which borderline candidates were to be chosen was based exclusively on its own interpretation of the minutes of the meeting of 30 November 2005. This is a slender edifice on which to seek to construct a claim that the appellant believed that a score of 24 would guarantee an interview. In any event, no such undertaking was given by the panel, the only agency which could have generated the avowed expectation. This claim must also be rejected.

The lack of opportunity to make representations to the Secretary of State and fettering of discretion

[43] These two topics are closely linked and can conveniently be considered together. The appellant contends that the Secretary of State "blindly accepted" the recommendations of the selection panel without satisfying himself that they had carried out their responsibilities in accordance with the goals that he had set *viz* that the process would be transparent and fair and that the recommendations would be evidence based. He suggests that the Secretary of State ought to have taken a far more intrusive role than that which he was prepared to perform. Moreover, he should have given the appellant an opportunity to make representations about his candidacy. This might have mitigated the failings of the selection process but it was, in any event, required so that the Secretary of State could be personally satisfied that the appellant's application had been properly considered. Scrutiny of the strength of individual applications was required in order to fulfil the Secretary of State's obligation to test the effectiveness of the process. By abdicating that role and, effectively, handing it over to the selection panel, he had fettered his discretion.

[44] Sean Langley was the principal official in the Department of Constitutional Affairs responsible for the policy in relation to the QC scheme in Northern Ireland. He gave affidavit evidence and oral testimony in the hearing before Weatherup J. He described the Secretary of State's role as one of ensuring that the process operated in accordance with the manner in which it had been designed (incorporating the elements of fairness, transparency and evidence based selection). If a departure from the strict provisions of the design was detected, it was then the purpose of the Secretary of State to make sure that this did not impinge on these fundamental and over-arching objectives.

[45] Although, according to Mr Langley, the Secretary of State required to be satisfied that the recommendations were reasonable and consistent with the process, it was no part of his function to evaluate the merits of individual applications. To do so would not only duplicate the work of the panel but it would compromise the independence of its role which was an essential underpinning of the entire procedure. The reason for establishing an independent panel was to ensure that the selection of QCs in Northern Ireland would be independent of government. It was therefore necessary to recognise that the true nature of the relationship between the Department and the panel did not involve regulation of one by the other. The Department's role was to agree the process within which the panel and the limited company were to operate and to ensure that the scheme was implemented in accordance with that process.

[46] We consider that the stance taken by the Secretary of State to his role reflected the stated intention of government (in 2004) that Ministers should no longer be involved directly in the identification of senior advocates and that, in general, professional bodies should have complete independence from government. The only reason for the residual but limited part that the Secretary of State played in the process was to allow the title of Queen's Counsel to be retained. Queen's Counsel is a Royal appointment and only Ministers can advise Her Majesty on appointments to that rank. But the government had determined that there should not otherwise be any ministerial involvement in substantive decisions as to who should become Queen's Counsel. To that end, the Secretary of State had decided that he would not assess applications himself nor would he add or remove names from the list of those to be appointed silk.

[47] We are of the opinion that the government was entitled to decide that it should remain aloof from the actual process of selection. Indeed, there are obvious policy reasons that it should do so. The independence of the legal profession requires that progress within it should not be under the direct control of the government. The Lord Chancellor, while head of the judiciary before the Constitutional Reform Act 2005, could legitimately claim a role in maintaining a standard of excellence for advocates. Since he no longer occupies that position, however, we consider that the Lord Chancellor was right to recognise that he should stand at one remove from the process.

[48] Unsurprisingly, perhaps, the line between affording the panel full independence and ensuring that a robust process was devised and implemented was not always easy to define. There was obvious scope for what Weatherup J described as 'tensions' between the Secretary of State's oversight of the process and the supposedly autonomous role of the panel in deciding who should be recommended for appointment to silk. The officials in the Department of Constitutional Affairs expressed a preference for the standard of excellence that had been devised for the silk exercise in England and Wales. They indicated that what they regarded as the less arduous requirements in Northern Ireland would have to be justified.

[49] Weatherup J also referred to queries raised at the time that the panel first reported to the Secretary of State as to whether it had sufficiently demonstrated that its recommendations were soundly based on evidence. Evidence to verify this was sought. Candidates' grades for each competency had been included in the papers, but there was no explanation as to how the panel came to reach particular scores. The Secretary of State's officials suggested initially that this made it difficult for the Department to determine whether the process had operated correctly. On further reflection, however, it was decided that to require the panel to set out the detailed evidence on which it had been concluded that a particular candidate had failed to reach the required mark in each competency would be tantamount to the Secretary

of State re-evaluating the merits of individual applications and this would involve substituting his decisions for those of the panel.

[50] Further inquiries were made about the second report of the selection panel on its reconsideration of the applications following the complaints committee's report. These related to the final number of complaints, however, and the format in which the results were be presented so as to demonstrate that they met the objectives of transparency, fairness and being evidence based. We are satisfied, as was Weatherup J, that these exchanges related to process rather than assessment.

[51] Even if the Secretary of State's officials strayed beyond the remit of the Department in the inquiries that were directed to the panel, this cannot, in our opinion, expand the legal obligation of the minister to review the work of the panel. He had set himself limits that were consonant with the government's position on the need for the process to be conducted by an independent agency. He was legally entitled so to confine his role. Whether he drifted beyond those confines is neither here nor there in an examination of his legal duty to oversee the work of the committee. Having concluded that his role should be one of ensuring that the process operated in accordance with the manner in which it had been designed, his duty is satisfied if he did what was sufficient to achieve that objective. We are satisfied that he did. We reject the suggestion that he should have drawn onto himself a more intrusive role. It follows that it would have been entirely inappropriate for the Secretary of State to have given the appellant the opportunity to make representations to him about the findings of the panel since this would have involved, in effect, a second-guessing of their decision. By the same token, no fettering of discretion arises. The decision to leave the assessment of the merits of applications to an independent agency defines the extent of the discretion to be exercised by the Secretary of State. He did not fail to exercise his discretion and did not fetter it. These arguments are dismissed.

Inadequacy of the complaints procedure and appearance of bias

[52] The appellant's criticism of the complaints procedure resolves to the claim that its findings were not binding on the selection panel; that there was no defined procedure by which it was to operate; and that it could not compel the panel to co-operate with it or to provide it with documents or information. He has not suggested, however, that these deficiencies – if, indeed, they be deficiencies – had any adverse impact on the way that his complaint was processed. And, of course, the panel *did* reconsider the appellant's application as the complaints committee suggested it should. In these circumstances, we do not consider that any viable judicial review challenge can be made on this ground.

[53] The appellant claimed, however, that the fact that the panel was not required to reconsider his application after his complaint had been upheld, when allied to its statement (*per* Mr Langley's evidence) that the panel did not believe that reconsideration of any candidates was strictly necessary gave rise to the appearance of bias on its part. In the course of the hearing of the appeal Mr Larkin raised a further matter on this subject which had not been canvassed before Weatherup J nor had it featured in the skeleton argument submitted on behalf of the appellant. He said that the panel had indicated to another applicant whose complaint had been upheld that it would not proceed with reconsideration of his case until proceedings in the Industrial and Fair Employment tribunal (which that applicant had launched) had been completed. This amounted to victimisation, Mr Larkin claimed, and provided further evidence of the appearance of bias by the panel.

[54] The leading authority on the issue of apparent bias remains *Porter v Magill* [2002] 2 AC 357. The essence of the principle is encapsulated by Lord Hope of Craighead in paragraph 103 of his opinion where he said: -

> "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."

[55] Applying this principle in the case of *Re William Young* [2007] NICA 32, this court said: -

> "[6] The notional observer must therefore be presumed to have two characteristics: full knowledge of the material facts and fair-mindedness. Applying these qualities to his consideration of the issue, he must ask himself whether there was a real possibility that the decision-maker was biased. In this context, it is pertinent to recall Lord Steyn's observation in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, quoting with approval Kirby J's comment in *Johnson v Johnson* (2000) 201CLR 488 at 509 that 'a reasonable member of the public is neither complacent nor unduly sensitive or suspicious.'
>
> [7] Subsequent decisions have followed the general approach outlined in *Porter v Magill* and have examined various types of situation that might give rise to the conclusion that there was a real possibility of bias on the part of the tribunal whose decision is challenged. Thus, for instance, in *Feld v The London Borough of Barnett* [2004] EWCA Civ 1307 the Court of

> Appeal in England rejected the suggestion that a review officer who conducts successive reviews of a decision concerning homeless persons has the appearance of bias. Ward LJ described (at paragraph 44) how the informed observer of this situation should be considered to have approached his task: -
>
> > 'In judging whether that is a real as opposed to a fanciful risk the informed observer will bear in mind that this is an administrative decision which by the will of Parliament is placed in the hands of a senior officer of the local housing authority who has been trained to the task and brings expert knowledge and experience of the local housing authority's work to bear on the decision making process'."

[56] In the present case, the fact that the panel not only reconsidered all the applications that it was asked to by the complaints committee but also recommended for silk six candidates who had previously been unsuccessful would have to be carefully examined by the notional informed and fair-minded observer. The composition of the panel, drawn as it was from various backgrounds, would also have to be taken into account, as would the fact that the various applications under reconsideration were moderated a number of times. Finally, and critically so far as the appellant is concerned, the fact that his marks were increased would be, in our judgment, a telling factor.

[57] The circumstance that the panel was chaired by a distinguished former judge is not insignificant. In *Davidson v Scottish Ministers* 2004 SLT 895, Lord Bingham of Cornhill stressed that earlier judicial pronouncements would not normally give rise to an appearance of bias where a judge was called upon to consider the same legal issue. At paragraph 10 of his opinion he said: -

> "Rarely, if ever, in the absence of injudicious or intemperate behaviour, can a judge's previous activity as such give rise to an appearance of bias. Over time, of course, judges acquire a track record, and experienced advocates may be able to predict with more or less accuracy how a particular judge is likely to react to a given problem. Since judges are not automata this is inevitable, and presenting a case in the way most likely to appeal to a particular tribunal is a skill of the accomplished advocate. But adherence

> to an opinion expressed judicially in an earlier case does not of itself denote a lack of open-mindedness; and there are few experienced judges who have not, on fresh argument applied to new facts in a later case, revised an opinion expressed in an earlier. In practice, as the cases show, problems of apparent bias do not arise where a judge is invited to revisit a question on which he or she has expressed a previous judicial opinion, which must happen in any developed system, but problems are liable to arise where the exercise of judicial functions is preceded by the exercise of legislative functions."

[58] These constitute powerful factors, in our opinion, for forthrightly rejecting the suggestion of apparent bias. We do not consider that the panel's disinclination to deal with another applicant's case until proceedings before the industrial tribunal were finalised can displace or offset our conclusion in this regard. While, of course, it is possible to cast a sinister interpretation on this, it appears to us that the intimation that the panel did not intend to deal with the application is just as consistent with a reasonable desire to have the challenges to the panel's decision completed before a proper reconsideration took place as it is with any less worthy motive. We therefore reject the argument founded on apparent bias.

Irrationality

[59] Mr Larkin submitted that the appellant's application form was an unassailably strong one. He referred to the complaints committee's observation that the appellant had "dealt with each competency in his application form and did so with good examples of cases in which he has appeared, many of which were cases of importance or sensitivity and which raised difficult issues". Mr Larkin also relied on the later comment of the committee that the appellant "could not have conducted the number and type of cases cited in his application form without having the competencies required" and suggested that this was a strong indication that the complaints committee had formed the view that the appellant was a worthy candidate.

[60] On the subject of the appellant's references, Mr Larkin claimed that they had been "variously described as excellent". The complaints committee had so stated and the selection panel itself had noted that "the referees returned an exceptionally strong set of references, all very favourable". Counsel argued that, having regard to the manner in which the reference forms were set out, it was clear that an "*exceptionally strong*" set of references would have stated that most, if not all, of the required behaviours were strongly evident.

[61] On the basis of the complaints committee's statements about the appellant's application form and the comments about his references, it was submitted that there was sufficient evidence for this court to conclude that the failure to recommend the appellant for appointment to silk was *Wednesbury* unreasonable. The judge at first instance was wrong, Mr Larkin argued, to show such deference to the decision of the selection panel since an assessment of the qualifications for silk was a matter on which a court has an exceptionally strong expertise and that this court should not feel constrained from taking its own view and finding that the conclusion of the panel was unreasonable.

[62] The fundamental purpose of a competence based scheme such as was involved here is to require candidates to provide *evidence* on which a selection panel can *make its own judgment* on whether they have the necessary attributes for appointment. Thus, a statement by a candidate that he has been involved in a large number of difficult cases or even a description of the issues that arose in such cases will not suffice. The candidate must describe how he or she dealt with the issues so that the panel can bring its own judgment to bear on whether the necessary behaviours have been demonstrated. In so far as the complaints committee suggested that the appellant had done this, we are unable to agree. Moreover, the statement that the appellant 'could not have conducted the number and type of cases cited in his application form without having the competencies required' may, we fear, be based on a misunderstanding of the nature of a competence based appointments process. Such a process is designed to avoid precisely the type of assumption that this statement contains.

[63] On the subject of the strength of the references, as we have already observed, it is difficult to make a definitive judgment because we have not seen them. But one must be astute not to confuse excellent references (in the sense that all attest to the ability of the appellant) with references on which one can act (*i.e.* those which supply material to the panel on which it can reach a view as to how well the appellant had performed in the various behaviours). It is entirely possible that the references were excellent in the first sense described above but utterly valueless for the panel's purposes. Indeed, the statement in the minutes of the meeting of 25 January 2007 referred to in paragraph [32] above would appear to indicate that this was the case.

[64] We have concluded therefore that there is no basis on which it may be said that the panel's decision on the appellant's application was irrational and his arguments on this ground must also fail.

Conclusions

[65] None of the grounds advanced on the appellant's behalf on this appeal has succeeded. The appeal must be dismissed.