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16 February 2000 **No. of pages including this one: 16**

To:	**HQ**	**From:**	**Belfast**
For:	**Gary Ansbro**	**From:**	**Val O'Donnell**

Subj: QC Declaration case

I attended the resumed hearing of the above case in the High Court on 16 February. You will be aware from Bill Nolan's reports that the presiding judge (Judge Kerr) was due to give his decision on Mr Lavery's application to cross examine the Lord Chancellor on the affidavit which he has agreed to submit to the court, in the light of his judgement on 14 February.

At the outset today Judge Kerr, who had reserved his decision overnight, announced that he was refusing the application to cross-examine the Lord Chancellor, but said he would keep his decision under review.

I had a word with Angela Ritchie, the applicants' solicitor, after the hearing today. She told me that they have not seen the Lord Chancellor's affidavit yet. They understand it is being drafted at the moment but that it is unlikely to contain any material of use to the applicants. She thought that it would be confined to, and closely reflect, the parts of the affidavit sworn by the Legal Secretary to the Lord Chief Justice, which were declared inadmissible by the judge on 14 February (see Bill Nolan's report Sfax 130 of 14 February).

Following the judge's decision on the cross-examination issue, the hearing of the substantive issues in the case resumed before Judge Kerr and continued until the court rose at 12.30 p.m.

The complete session was devoted to arguments of Mr Lavery on behalf of the applicants and was based on the skeletal arguments submitted on behalf of the applicants (copied attached) transmitted already with Sfax 3 of 4 January.

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The main points argued by Mr Lavery were:

- Legality of transfer of prerogative powers

  Mr Lavery argues that the purported transfer of the prerogative powers from the Secretary of State for Northern Ireland to the Lord Chancellor in May 1998 was illegal. He developed arguments based on alleged confusion over who exercises the prerogative powers. He argued that this confusion arises from the difference in nature between the executive powers that were invested in the Secretary of State for Northern Ireland when the Northern Ireland Temporary Provisions Act, 1972 (Section (1) (i) was enacted, and the prerogative powers. He argued that the prerogative powers consist only of substituting as a delegate of the monarch for the monarch's function. In this case, this function is confined to (simply) implementing the wishes of the Lord Chief Justice as regards both the nominees for appointment as silks and any requirement to make a declaration. He is arguing that the effective decision- maker on both counts was, and remains, the Lord Chief Justice. He is taking issue with the line which appears in correspondence between the Lord Chief Justice and others, to the effect that the declaration is a matter for the Secretary of State. In essence he is saying that there were no powers of decision-making which could have been transferred by the Secretary of State to the Lord Chancellor in May 1998.

- Absence of requirement to make a declaration in the formal warrant of appointment of Silks

  Mr Lavery made much of this point developing his arguments from the skeletal argument (see paragraph 6). He argues that if a declaration were to be a legal requirement that it should necessarily be contained in the legal warrant of appointment. The absence of a requirement to make a declaration in the warrant of appointment merely underlines the fact that it is purely ceremonial in nature and without a legal basis as such. In interventions by the judge he queried this argument, and there was a certain amount of debate around the possibility that the Lord Chancellor as an officer who has executive as well as judicial functions could place a legal requirement on persons taking silk requiring them to take a particular declaration, without this being specified in the warrant signed on behalf of the monarch.

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The legal positions which applied before Partition, where the functions were carried out by the Lord Lieutenant and Lord Chancellor for Ireland, and the position that applied after partition involving the Governor for Northern Ireland and the Lord Chief Justice for Northern Ireland was also examined. The judge was interested in seeing the warrants of appointment made in those two earlier periods but, none was available though they may be submitted to the court subsequently. The judge was obviously interested to see whether they contained the requirement to make a declaration.

- The position of Queen's Counsel

Developing the argument in paragraph 16 of the skeletal argument, Mr Lavery developed his point that the position of Queen's Counsel is not an office in any meaningful sense. He argued that there are no duties or ties with the monarch and that the modern position is to the effect that Queen's Counsel is a working rank in the profession of barrister. It is taken up by a private individual following a private profession. It follows, he argued, that when the Lord Chief Justice is making his decision to recommend silks, the only criterion that may be followed is whether an individual has reached a certain standard in the exercise of his professional duties. By extension it is the profession itself, consisting of the practicing bar and its machinery, including the benchers and education committee, which regulate the matter. But he also conceded (following interventions by the judge) that judges themselves, including the Lord Chief Justice have a role also in deciding whether an individual barrister is fit to take silk. He conceded that judges always have had a legitimate role in deciding who has a right of audience before the courts.

- Equal opportunity, culture and identity

Mr Lavery developed arguments around paragraph 10 - 14 of his skeletal argument. Here he traced more recent developments in Northern Ireland relating to such issues as the right to equal opportunity, mutual respect for the ethos of the two communities, parity of esteem, anti-discrimination legislation and the recent establishment of a Human Rights Commission to protect the rights of all people in Northern Ireland.

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He went on to introduce particular arguments relating to parity of esteem based on the Good Friday Agreement (see paragraph 13 of the skeletal argument). He said that the effect of these changes were that both the UK and Irish Governments were saying to the people of Northern Ireland that they can be British, or Irish, or both.

He also made the point that this parity of esteem for both communities was also recognised in the Elliot Report on the matter of the declaration to be taken by silks. (See paragraph 15 of the skeletal arguments.)

Finally, he said that Mr John Larkin BL will deal further with the human rights equality and anti-discrimination aspects of the applicants case, when the hearing resumes. He told the judge that at least two hours more of argument would be required from his side. The judge then decided that he would sit all day on Thursday and Friday, if necessary, to finish the hearing of the case.

Val O'Donnell
16 February 2000

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

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

SKELETON ARGUMENT FOR THE APPLICANTS

1. In Ireland before the Government of Ireland Act 1920 the grant of silk was made by the Lord Chancellor of Ireland who was a member of the Government of the United Kingdom.

2. The process of selection and appointment of senior counsel in Ireland at that time appears to have been different from England and Wales. The Lord Chancellor of England had no role or function in the appointment of Irish silks. The prerogative was exercised by or on the advice of the Irish Lord Chancellor. After the Government of Ireland Act 1920 the functions of the Irish Lord Chancellor were transferred to the Governor of Northern Ireland and the Lord Chief Justice of Northern Ireland.

3. At no time, however, did the Governor of Northern Ireland possess independent prerogative powers: he was simply the representative of the Queen and exercised prerogative powers (as does the Queen) on the advice of ministers or other office holders. As appears from the materials exhibited to Master Wilson's the call arrangements have been altered apparently unilaterally in 1922 and 1939 by the then Lord Chief Justice. In the case of senior counsel the Governor of Northern Ireland therefore had no power to reject the recommendation of the Lord Chief Justice of Northern Ireland. To have done so would have been unconstitutional.

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4. By virtue of section 1 of the Northern Ireland (Temporary Provisions) Act 1972 the functions of the Governor were transferred to the Secretary of State for Northern Ireland. That transfer was continued by virtue of section 42 of the Northern Ireland Constitution Act 1973. As appears from paragraph 3 above the only power that could have been exercised by the Secretary of State would be to formally appoint (by way of warrant) on the recommendation of the Lord Chief Justice of Northern Ireland. In the absence of any statutory interference with section 42 of the 1973 Act the respective constitutional roles of the Secretary of State and the Lord Chief Justice remain legally unchanged, and it was therefore incorrect of the latter to say (as appears by paragraph 2 of his secretary's affidavit : page 242 of the book) that the declaration was not a matter for him.

5. It is stated in paragraph 7 of Master Wilson's affidavit that from 31st March 1999 the Queen exercised the Prerogative directly through the office of the Lord Chancellor. This also appears in paragraph 4 of Glenn Thompson's affidavit but there is no indication how this was formally effected. Since prerogatives can be diminished and altered by statute (**De Smith & Brazier Constitutional and Administrative Law (7th ed) page 140**), the power to exercise this aspect of the prerogative could not simply be transferred by an administrative act of some kind without amending legislation. There was then nothing that the Secretary of State could lawfully transfer to the Lord Chancellor in 1999. The purported transfer was made under a fundamental misunderstanding of the law. Accordingly the Lord Chancellor has no prerogative functions with respect to the appointment of silks in Northern Ireland, and his actions in purporting to appoint or (in constitutional convention to recommend the appointment) of Northern Ireland silks and a fortiori to prescribe conditions, is ultra vires.

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6. If, contrary to the submission, advanced above the Lord Chancellor has acquired prerogative powers in relation to Northern Ireland silks, then the appointment of the applicants as Queen's Counsel was completed and perfected on November 24 1999 under the general warrant of appointment, and the letters patent that exemplify on an individual basis that general grant. The bald assertion in the affidavits filed on behalf of the respondent that the appointment of a Queen's Counsel is not complete until a number of stages (including the taking of a declaration) are achieved is unsupported by any reason or evidence and is belied by the unqualified text of the warrant and letters patent. In particular, there is nothing to support the proposition that the Letters Patent are issued "on the understanding that and conditional upon the appointee making the declaration of office which is required on the exercise of the Prerogative" (paragraph 7). It was certainly not the Applicants' understanding and there is no reference in the Guide to Applicants to any such conditions. See pages 10-13 of the Book.

7. The mere fact that it may have been the practice to have a ceremony involving the taking of a declaration or call cannot make that ceremony an essential step or requirement unless this is recited in the warrant as a condition precedent of appointment. This is reflected in the practice that the Crown has adopted in relation to the Letters Patent. The Letters Patent confirming the Applicants' appointment have already been signed and sealed. This was done before 21st December 1999 and, if the Letters Patent issued in respect of their appointment are the same as those issued in respect of the other appointees, they are unqualified and unconditional. In England, as appears from exhibit JWW5, the Letters Patent are presented to Queen's Counsel after the Declaration, whereas they are given to Counsel here before the Declaration is administered. There is no indication that as the Letters Patent are handed over to the appointees it is suggested that they must be given back or that they will have no effect if the Counsel in question does not then go on to

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make the Declaration. Those taking part in the call ceremony are referred to as "appointees", rather than applicants or candidates, since they have already been appointed. The exhibit JWW5 re the practice in England also refers to those taking part in the ceremony as Queen's Counsel (even before the formalities have been completed). The warrant might easily have made the taking of a declaration or oath a condition of appointment, as indeed appears to have been the case in the past (see page 51 of the book). It is absurd to suggest that the Lord Chancellor, pretending to a power greater than his Sovereign, could attach a condition to the perfected grant of the Queen so as to render that grant nugatory or ineffective.

8. In paragraph 4 of his first affidavit in the Philip Magee case, Master Wilson sought to characterise the oath and declaration as part of the "customs and practices" which had evolved over several centuries and were part of the traditional ceremony of appointment in Northern Ireland. However, it is clear from the two affidavits adopted and from the current affidavit that, far from being cast in stone as established custom and practice, they have, in Northern Ireland at least, been introduced, abolished and revised in a manner that makes it clear that they are neither part of custom and practice nor an essential part of the process nor necessarily an exercise of the Royal prerogative at all. It is unnecessary to emphasise how great the difference in conditions is or may be between England and Northern Ireland. It is clear that the literature descriptive of the English practice indicates that individuals are no longer candidates when they present themselves to take the declaration but have in fact been appointed. The fact that after being 'called' by the Lord Chief Justice of England silks can present themselves for call within the bar in other courts and the Strand indicates that these calls are not essential to the appointment, but are purely ceremonial. It is understood that until comparatively recently the practice was

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for all silks to proceed to such other courts, thereby indicating that the "Call" added nothing to the appointment perfected by the Royal grant.

9. It we are wrong in the submission set out at paragraphs 6 to 8 above and the Lord Chancellor had the formal power to require the making of the impugned declaration as a condition of appointment as Queen's Counsel then this was an unlawful exercise of his powers.

10. In Northern Ireland since the foundation of the state the use of symbols, ceremonies and rituals connected with the Sovereign has been controversial. These symbols have been claimed by one side in Northern Ireland as their own. They have been used in a political way to assert, inter alia, the fundamentally unionist character and ethos of the state. They were used in a triumphalist and supremacist manner to remind the nationalist minority within Northern Ireland that it had failed in its political aims and to oblige it to submit to the indignity of acknowledging something that it did not regard as legitimate and which had been imposed upon it against the will of the majority of the Irish people. There can have been no other purpose in requiring nationalists to take an oath of allegiance for the most menial of jobs in the public service. It is well known that nationalists found these requirements humiliating and undignified.

11. Since 1973 it has been progressively realised that nationalists should not be forced to what they regard as humiliation and indignity. The Northern Ireland Constitution Act 1973 (section 21) outlawed the tendering of oaths as a condition of public service employment.

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12. Anti-discrimination legislation since then has recognised that nationalists were entitled to a 'neutral' workplace. 'Neutral' in this context means the absence of symbols etc that might in another society be regarded as appropriate and normal. Unionists in the main were content that their nationalist fellow citizens should not be subjected to what nationalists regarded as indignities although unionists themselves might not necessarily agree that they were in fact indignities.

13. The basis of the Good Friday Agreement was that nationalists, in return for accepting the wish of the Irish minority to retain Northern Ireland as part of the United Kingdom for as long as they might wish, would have equality in all aspects of life extended to them. It constituted a recognition that making nationalists comfortable with the state was of enormous benefit to everyone in the state and that the removal of symbolism considered objectionable was an important part of that process. The Good Friday Agreement provides for equality and that people in Northern Ireland could embrace Irish or British nationality (or both). This International agreement brought into being a novel approach to citizenship and constitutionalism for this part of the United Kingdom.

14. The words of the declaration resonate with a loyalist rhetoric that has historically been used in a triumphalist and supremacist way. A barrister represents a client and professional services are not provided in a 'servile' manner. The language of the declaration suggests that the advocate is a "servant of the Queen" and makes a distinction between the Queen (who is served) and those other clients that one may be called upon to serve. It is disingenuous, to say the least, that in the context of Northern Ireland this language is not capable of affronting the principles and sensibilities of some nationalists. It should be noted also that in 1972 the declaration was amended by adding a reference to other clients in order to make it more modern.

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15. This was clearly recognised by the Elliott committee in its report which decided that the impugned words should form no part of any declaration (see page 34 of the book). This decision was not taken without good reason. The Bar of Northern Ireland did not wish to see imposed on any of its members a ritual that a member would find offensive. Throughout the 'troubles' the Bar of Northern Ireland has enjoyed uniquely good internal relations which cut across any political or religious division. Tolerance and independence have been its hallmarks. The Bar was conscious of the serious risk that the imposition of such a declaration might have for the unity of the Bar and provided a declaration that was acceptable to all and gave offence to no-one.

16. The position of Queen's Counsel is not an office in any meaningful sense of the word. There are no official duties or rights. The Guide for Applicants indicates that silk is "first and foremost a working rank in the profession of barrister". The position is also set out in the Elliott Report (See page 34 of the Book). There can be no reason why any condition not related to fitness can be properly attached to advancement as Queen's Counsel whether or not it is offensive.

17. It is difficult to understand the point being made about the Bar failing to make specific representations to the Lord Chancellor. The Lord Chancellor was aware of the clear views of the Bar on the question of a declaration. The Bar and the applicants as members thereof are entitled to assume that their representations (contained in the Elliott report) will be judged on their merits and that any disagreement by the Lord Chancellor will be drawn to the attention of the Bar and sustained by an adequate platform of reasons. It is not to be supposed that a representation is only entitled to have consideration in proportion to the clamour or fuss generated by it. Neither at the time nor since has the

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Lord Chancellor carried out a fair consultation process and he still has not given adequate reasons for rejecting the proposals of the Bar.

18. It is submitted also that the action of the Lord Chancellor is discriminatory and contrary to the Fair Employment and Equal Treatment (Northern Ireland) Order 1998.

(i) "Qualification" is defined in Article 2(1) of the 1998 Order and it has been interpreted as conveying the idea of some sort of status conferred on a person in relation to his actual or proposed work, trade profession or calling : see **Bone v Department of the Environment** (15th September 1993, unreported, CANI), **Loughran v Northern Ireland Housing Executive** [1997] NI125 at 131, CANI and [1998] NI240 (HL).

(ii) It is not necessary to prove a discriminator intention or motive on the part of the Respondent; **James v Eastleigh Borough Council** (1990) 2AC 751, [1990] 2AllER 607.

(iii) In deciding whether a person has been treated "less favourably", mere words or acts of discouragement can amount to less favourable treatment: see **Simon v Brimham Associates** [1987] IRLR 307 CA (England).

(iv) Note also that in the context of subjecting an applicant or employee "to any other detriment within the meaning of Article 19(1)(b)(iii) of the 1998 Order, this does not mean anything more than "putting under a disadvantage". **Jeremiah v Ministry of Defence** [1979] IRLR 436, CA (England) and **De Souza v Automobile Association** [1976] IRLR 103. Sexual harassment is a form of detriment, the essential characteristic of which is that it is words or conduct which are unwelcome to the recipient and it is for the recipient to decide what is acceptable and what is offensive: see **Reed & Bull Information Systems Ltd v**

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Stedman (11th February 1999, EAT, reported at (1999) Equal Opportunities Review No 86 page 46).

(v) The meaning of "political opinion" was considered by the Court of Appeal in Northern Ireland in McKay v NIPSA [1994] NI 103.

(vi) Authorities on the meaning of section 76(1) of the Northern Ireland Act 1998 (and its predecessor section 19 of the Northern Ireland Act 1973) include Re **Hartley's Application** [1998] NIJB 159; **In Re R (a minor)** (1997) 2BNIL 29; **Re Lavery** (13th May 1994, unreported); **Re McLaughlin** [1990] 6NIJB 41 and **Purvis v Magherafelt DC** [1978] NI26. It is only direct discrimination that is rendered unlawful by this section.

(vii) Discrimination contrary to Article 25 of the 1998 Order can be indirect as well as direct. The phrase "can comply" in Article 3(2)(b)(I) means can *in practice* or can consistently with the customs and cultural conditions of the group in question, as opposed to can *physically* so as to indicate a theoretical possibility: **Mandla v Dowell Lee** [1983] IRLR 209, HL. Judicial notice can be taken of certain self-evidence facts without the need for elaborate statistical evidence: **Meade - Hill v British Council** [1995] IRLR 478, CA (England).

(viii) Likewise, in determining whether the relevant proportion is "considerably smaller", a court is not debarred from taking account of its own knowledge and experience: **Briggs v North Eastern Education & Library Board** [1990] IRLR 181. The burden of proving that the requirement or condition is justifiable rests upon the person applying the condition. The test is objective. The court must balance the discriminatory effect of the requirement against the reasonable needs of the person applying the requirement and only if the discriminatory effect can be objectively justified by those needs is the requirement justifiable: **Briggs v North Eastern Education & Library Board** [1990] IRLR 181.

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It is clear therefore that what the Lord Chancellor has done is that he has required the Applicants to submit to a detriment namely acting contrary to their political beliefs and conscience. It is irrelevant that the deponents on behalf of the Lord Chancellor disavow any discriminatory impact. They are (unlike the applicants) unable to depose as to the impact of the Lord Chancellor's decision. Discrimination contrary to Article 25 of the Fair Employment and Equal Treatment (NI) Order 1998 can be indirect as well as direct. A condition has been imposed on the applicants with which as a matter of political conscience and integrity they cannot comply. The continued insistence upon a condition that is not objectively justifiable is a breach of Article 25.

19. Insofar as spectral reasoning is to be detected in the affidavits filed on behalf of the Lord Chancellor it appears as follows:

(a) **the declaration is simply an innocuous form of words betokening an intention to give good service to a potential client.** If this were so it would not have been necessary for the Bar Council to reject an anodyne declaration and replace it with yet another inoffensive text. The most rudimentary understanding of the Northern Ireland situation acknowledges that a formula that might be anodyne in England can yet be offensive to an Irish nationalist. If the Lord Chancellor were formerly ignorant of this the affidavits of the applicants ought to have increased his understanding by setting out the impact of his declaration on them yet he persists in insisting upon this offensive test.

(b) **No one else has objected to the declaration.** This is a particularly odious as well as illogical suggestion designed to impugn the good faith of the applicants. The mere fact that persons may take the declaration with varying degrees of contentment does not alter its potentially offensive impact on a section of Irish

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nationalist opinion. No criticism is made of those who are able to take the impugned declaration: the applicants merely object to a requirement that is politically offensive to them.

(c) the Lord Chancellor "considered it preferable when the two systems of appointment had come together through the Lord Chancellor to maintain an identity of declaration between England, Wales and Northern Ireland rather than create a different form of declaration in Northern Ireland". It would be difficult to articulate a reason with less substance for imposing this declaration. Volumes could be written on the differences socially, politically, economically, culturally and legally between Northern Ireland and England. The differences have been accepted and some of them have been referred to earlier in this Skeleton Argument. The contention would appear to be that the mere fact of the administration of two completely different systems by one individual makes the harmonisation of the two systems preferable even though it involves overruling the entire wishes of the Bar of Northern Ireland, putting at risk the good relationship and unity of the Bar, inflicting an unnecessary humiliation on nationalists, acting contrary to governmental policy and damaging community relations in Northern Ireland. If the Lord Chancellor was consistent his zeal for harmonisation should have made him require that would be appointees as Queen's Counsel should wear breeches (or in the case of women, if they so choose, a skirt, silk stockings and buckles) at their Call.

C M Lavery QC

J F Larkin

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

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

AUTHORITIES

1. DeSmith Judicial Review
2. De Smith & Brazier Constitutional and Administrative Law (7th ed) page 140
2. Northern Ireland Act 1998
3. Northern Ireland Constitution Act 1973
4. Northern Ireland (Temporary Provisions) Act 1972
5. Government of Ireland Act 1920 (as originally enacted)
6. Fair Employment and Equal Treatment (NI) Order 1998
7. Bone v Department of the Environment (15th September 1993, unreported, CANI)
8. Loughran v Northern Ireland Housing Executive [1997] NI125 at 131, CANI and [1998] NI240 (HL)
9. Simon v Brimham Associates [1987] IRLR 307 CA (England)
10. Jeremiah v Ministry of Defence [1979] IRLR 436, CA (England)
11. De Souza v Automobile Association [1976] IRLR 103
12. James v Eastleigh BC [1990] 2 AC 751 [1990] 2 All ER 607
13. Reed & Bull Information Systems Ltd v Stedman (1999) EOR 46
14. Mandla v Dowell Lee [1983] IRLR 209
15. Briggs v NEELB [1990] IRLR 181
16. McKay v NIPSA [1994] NI 103
17. Re Hartley's Application [1998] NIJB 159
18. Re R (a minor) [1997] 2BNIL 29
19. Re Lavery (13th May 1994 unreported)

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