Case Ref: D2002/105

THE VISITORS TO THE INNS OF COURT
ON APPEAL FROM THE ORDER OF THE DISCIPLINARY
TRIBUNAL OF THE COUNCIL OF THE INNS OF COURT

Royal Courts of Justice
Strand, London WC2A 2LL

24 January 2005

Before:

The Hon Mr Justice Colman
Ms Julia Clark
Ms Sara Nathan

Between:
P, A Barrister

Appellant

And
The General Council of the Bar

Respondent

Decision of the Visitors of the Inns of Court

Mr A Speaight QC and Miss Kate Livesey for the Appellant
Mr M McLaren QC and Mr O Del Fabbro for the Respondent

Date of hearing: 19 November 2004 and 16 December 2004

APPROVED DECISION OF THE VISITORS

Mr Justice Colman, Ms J Clark and Ms S Nathan:

Introduction

1. By a decision of a Disciplinary Tribunal of the Council of the Inns of Court ("COIC") given on 27 February 2004 P, a barrister of Lincoln's Inn, was convicted of conduct that was dishonest or otherwise discreditable contrary to paragraphs 301(a)(i) and 901 of the Code of Conduct of the Bar. She was sentenced to be suspended from practice for a period of three months. She now appeals to the Visitors of the Inns of Court against both conviction and sentence.

2. This Visitor's Tribunal consists of one Judge of the High Court, one member of the Bar, Ms Julia Clark, and one lay member, Ms Sara Nathan, to whom we refer as Ms Nathan. The composition of Visitors panels to hear appeals is regulated by Rule 10 of the hearings before the Visitor's rules which provides as follows:

> "10(1) When a petition is served upon him (whether or not served in time), the Lord Chief Justice shall nominate the persons who are to hear the appeal.
>
> (2) An appeal against an order for disbarment or a decision of a tribunal presided over by a Judge of the High Court shall be heard by a panel comprised of:
>
> (a) three judges of the High Court or the Court of Appeal (one of whom may be a retired judge of the High Court or Court of Appeal, provided that he has not attained the age of 75 on the date set for the hearing of the appeal);
>
> (b) a Queen's Counsel; and
>
> (c) a lay representative;
>
> (3) Subject to paragraph (4), an appeal that is not of a type mentioned in paragraph (2) and is an appeal against a decision of a Disciplinary Tribunal shall be heard by a panel comprised of:
>
> (a) a Judge of the High Court or the Court of Appeal
>
> (b) a barrister; and
>
> (c) a lay representative.
>
> (4) An appeal that is not of a type mentioned in paragraph (2) and that is an appeal against a decision of a Disciplinary Tribunal may be heard by a Judge of the High Court or of the Court of Appeal sitting alone, if the Lord Chief Justice or the Directions Judge directs that the appeal relates solely to a point of law and is appropriate to be heard by a judge sitting alone.
>
> (5) Any other appeal shall be heard by a Judge of the High Court or the Court of Appeal.
>
> (6) No judge or barrister member of the panel shall be a Bencher of the appellant's or defendant's (as the case may be) Inn."

3. By Rule 2(2) a Lay Representative is defined as Rule

> "…..one of the lay persons appointed by the Bar Council to serve on Disciplinary Tribunals;"

4. The hearing by the Visitors of P's appeal was fixed to take place on 19 November 2004. Two days before the hearing counsel for the Appellant served submissions which raised objection to Ms Nathan participating as a member of the panel. The basic ground for this objection was that Ms Nathan was a member of the Professional Conduct and Complaints Committee of the Bar Council ("the PCCC") which is the body responsible under the Bar Council Code of Conduct for deciding whether to prosecute a number of the Bar against whom a complaint had been raised. Accordingly, Ms Nathan would be judge in her own cause. This would also be a situation of apparent bias for, although it was accepted that she had taken no part in the particular decision of the PCCC to prosecute the Appellant and that there was no actual bias on her party, there was nevertheless a real apprehension or danger or possibility or suspicion of bias by reason of her membership of the PCCC.

5. This point having been raised at a very late stage, we considered whether there might be real substance in the objection and, having decided that it was at least arguable, we invited Counsel for the Bar Council (Mr del Fabbro) to consider how this matter might most effectively and fairly be dealt with in the interests of both parties. In the course of discussions between the Visitors and counsel it emerged that, if the Appellant's objection were upheld, that decision would have far-reaching implications for the conduct of proceedings both before the Disciplinary Tribunals and the Visitors. Moreover, this being so, the Bar Council wished to have the opportunity to adduce evidence as to the working of the present system whereby key members of the PCCC were permitted to sit on Visitors' panels. Accordingly, it was decided that the hearing should be adjourned to enable the panel to hear the Appellant's objections as a preliminary issue. Directions were given for the filing of additional evidence and for the exchange of written submissions. The hearing was re-fixed for 16 December 2004.

6. Immediately before the adjourned hearing the Appellant raised a further objection to the composition of the panel. This related to the nomination as a panel member both of Ms Nathan and of Ms Julia Clark, the barrister member of the panel. Information as to their nomination emerged from the evidence which had been adduced in the witness statements recently served by the Bar Council. This was to the effect that barrister members and lay representatives were selected to serve on such panels by COIC. As appears from Rule 10(1) of the Visitors Rules set out above, the persons who are to hear the appeal are to be nominated by the Lord Chief Justice. It was submitted that at no time had the Lord Chief Justice delegated to COIC his powers of nomination under that Rule. Accordingly, the Appellant wished to submit that for this reason also the appeal could not be heard by the panel as presently constituted, there having been no nomination of Ms Clark or Ms Nathan by the Lord Chief Justice.

7. This was a completely novel point on which, not surprisingly, counsel representing the Bar Council wished to take further instructions. In the event, it was decided that in order to avoid further delay we should rule on this point with the assistance of written submissions to be served after the conclusion of the oral hearing.

8. We further record that by letter dated 22 November 2004 the Appellant informed the Clerk to the Visitors that she intended, after the determination of the issues as to the constitution of the panel, to raise a further ground of appeal, namely that Mr Richard Groom, a lay member of the Disciplinary Tribunal which had found the charges proved against the Appellant, was similarly disqualified from sitting to hear those charges, because he too was a number of the PCCC and therefore he ought to have been recused on the same grounds as were relied upon in relation to Ms Nathan as a member of the Visitors Panel. It was accepted by the Appellant that this ground of appeal was not to be

treated as having been formally raised at this stage and that accordingly it should not now be determined.

9. It will at once be apparent that if the Appellant's submissions as to the defects in the constitution of this panel are correct, its decision on those submissions or, indeed, any other issues would also be defective.

10. Consequently, at the outset of the adjourned hearing we raised with Mr Anthony Speaight QC, on behalf of the Appellant, whether the Appellant was prepared to be bound for the purpose of the hearing of the substantive appeal by this panel's determination of the issues as to the competence of the lay representative and barrister members of the panel to hear that appeal. The Appellant confirmed that she did agree so to be bound and the Bar Council adopted a similar position. The procedural effect is that if we conclude that the appointment of Ms Nathan or that of Ms Nathan and Ms Clark is defective, the hearing of the substantive appeal by this panel as currently constituted cannot proceed. Conversely, if we decide that both of Ms Nathan and Ms Clark are properly members of this panel, we should proceed to consider the substantive appeal.

11. Accordingly, we now have to determine whether the objections to constitution of this panel are well-founded. If they are, this Visitors panel as presently constituted cannot continue to hear this Appeal.

12. We consider first the position of Ms Nathan as lay representative and secondly the consequences of the method of nomination as panel members of Ms Nathan and Ms Clark by means of names put forward by COIC.

13. Before examining the Appellant's objections it is necessary to set out the structure of the Bar Council's disciplinary procedure.

<u>The Bar Council's Disciplinary Structure</u>

14. When a complaint is made as to the conduct of a member of the Bar, the applicable procedure is that set out in the Complaints Rules. The matter first has to be considered by the Complaints Commissioner, unless the complaint has been raised by the Bar Council, following investigation by the Secretary of the PCCC. If the Complaints Commissioner considers that on the information available to him the complaint discloses a prima facie case of professional misconduct or inadequate professional service, he may then refer the complaint to the PCCC. If not, he may dismiss the complaint or investigate it further. If the complaint is referred to the PCCC it must exercise its powers under paragraph 26 of the Complaints Rules, including the following:

> "The powers of the Committee shall be as follows:
>
> (a) to determine whether any complaint discloses a prima facie case of professional misconduct, and if so to deal with it in accordance with these Rules.
>
> (b) if it determines that no such prima facie case is disclosed, to determine whether the complaint discloses a prima facie case of inadequate professional service by the barrister concerned and if so to deal with it in accordance with these Rules.
>
> (c) to prefer charges of professional misconduct before the Disciplinary Tribunals (as provided by the Disciplinary Tribunals Regulations at Annex K to the Code of Conduct), to refer to such tribunals any legal aid complaint relating to the conduct of a barrister and to be responsible for prosecuting any such charges or legal aid complaints before such Tribunals.

(d) to prefer and deal summarily with charges of professional misconduct in accordance with the Summary Procedure Rules forming Annex L to the Code of Conduct.

(e) to take such other actions in relation to complaints as are permitted by these Rules.

(f) to make recommendations on matters of professional conduct to the Professional Standards Committee, as the Committee may think appropriate.

(g) to make rulings on matters of professional conduct when the Committee considers it appropriate to do so."

15. Paragraphs 27 and 28 of the Complaints Rules provide, as far as material, as follows:

"27. The Committee shall consider complaints and the results of investigations thereof referred to it by the Commissioner pursuant to paragraph 7 above, together with the Commissioner's comments thereon, in such manner as it shall see fit.

28. Upon considering any complaint and subject to the provisions of paragraph 28A below, the Committee may:

(a) dismiss the complaint provided that each of the Lay Members present at the meeting consents to such dismissal, whereupon the Secretary shall notify the complainant and the barrister complained against of the dismissal and reasons for it.

(b) determine that no further action shall be taken on the complaint.

(c) at any time postpone consideration of the complaint, whether to permit further investigation of the complaint to be made, or during the currency of related legal proceedings or for any other reason it sees fit,

(d) if the complaint does not disclose a prima facie case of professional misconduct (whether with or without inadequate professional service) but the barrister's conduct is nevertheless such as to give cause for concern, draw it to his attention in writing. The Committee may in those circumstances advise him as to his future conduct either in writing or by directing him to attend on the Chairman of the Committee or some other person nominated by the Committee to receive such advice, and may thereafter exercise the powers given to it by paragraph (e) below, or dismiss the complaint. If the Committee considers that the circumstances of the complaint are relevant to the barrister's position as a pupilmaster, it may notify the barrister's Inn of its concern in such manner as it sees fit.

If the complaint is dismissed the Secretary shall notify the complainant of the dismissal and the reasons for it.

(g) if a prima facie case of professional misconduct (whether with or without inadequate professional service) is disclosed but in the opinion of the Committee there are no disputes of fact which cannot fairly be resolved by a summary procedure, provided it is satisfied that the powers of a summary procedure are adequate to deal with the gravity of the issues, deal with the matter summarily in accordance with the Summary Procedure Rules (Annex L to the Code of Conduct).

(h) if a prima facie case of professional misconduct (whether with or without inadequate professional service) is disclosed in circumstances where in the opinion

of the Committee paragraph (g) above does not apply, direct that the complaint should form the subject-matter of a charge before a Disciplinary Tribunal."

16. If the PCCC decides that the complaint justifies the bringing of a charge against the barrister, it nominates one of its members (the PCCC Representative, to be responsible for the conduct of the proceedings. That person then settles the charge or arranges with the secretary or investigations officer for the appointment of counsel to settle the charge. Solicitors may also be appointed. Under Rule 35 the investigations officer at the Bar Council is then responsible subject to the supervision of the PCCC Representative and/or the PCCC for forwarding the charge to the Clerk to the Tribunal and for making "any necessary administrative arrangements for the summoning of witnesses, the production of documents, and generally for the proper presentation of the case on behalf of the PCC Representative before the Tribunal."

17. The composition of the membership of the PCCC is set out specifically in paragraph 40A of the Standing Orders for Committees and Sub-Committees of the Bar Council. Its members are appointed by the chairman of the PCCC and the Complaints Commissioner. The participation of lay representatives is specified in paragraph 45 which provides as follows:

> "Lay member representation at meetings of the Professional Standards Committee and the Professional Conduct and Complaints Committee shall be at least two lay members for each Committee. These lay representatives shall be selected from among the lay members from time to time attached to the Professional Standards and Legal Services Department, who shall, subject to the approval of the Chairman of the Professional Conduct and Complaints Committee and the Chairman of the Bar Council, be appointed by the Complaints Commissioner. The selection of lay members who are invited to attend a meeting of the Professional Standards Committee or the Professional Conduct and Complaints Committee shall be made by the Chairman (or in his absence the Vice-Chairman) of the committee."

18. Voting is by a majority of those present, subject to the special power of veto accorded by paragraph 28(a) to each Lay Representative present in respect of decisions to dismiss a complaint. The lay representatives, who are from time to time attached to the Professional Standards and Legal Services Department of the Bar Council, are selected by means of an elaborate vetting process aimed at achieving a membership with high calibre and integrity and wide experience of modern life. The criteria currently applied are set out in paragraph 4 of the evidence of Mr Michael Scott, the present Complaints Commissioner. They are such as to suggest that each lay representative could be relied upon to bring to bear on any decision which they were called upon to consider a high level of objectivity. Appointment is for an initial term of three years, renewable for a further three years.

19. Having selected a person as member of the PCCC, the Complaints Commissioner then provides a training programme for that person. This is a aimed at familiarisation with the workings of the profession and of its disciplinary procedures. Mr Scott describes the training process in paragraph 6 of his evidence, including the following passage:

> "They are encouraged to visit Chambers, and 'attach' themselves to a barrister for a day. I make it abundantly clear to them that, while they must invariably keep the complainant in the forefront of their mind, they are also there to be fair to the accused barrister. I stress to them that they must be utterly even handed, reject any inclination to bias and see themselves as tennis umpires, essentially bringing a commonsense, down to earth, lay perspective on the, sometimes, arcane reaches of the law and lawyers' practice."

20. However, because Ms Nathan commenced membership of the PCCC in 1998, before this training scheme was introduced, she has never taken part in the process which we have described.

21. According to Mr Scott's evidence, which we accept, there are currently some 28 names on the panel of lay representative recruited for PCCC membership and the description of their background experience set out in paragraph 3 of his evidence is indeed impressive. It includes a very wide range of disciplines, including the diplomatic service, the energy industry, academia, journalism, the NHS and financial services.

22. Members of the PCCC have three directly relevant functions. (i) They attend meetings of the PCCC. Such meetings usually involve consideration of whether charges should be brought in accordance with the recommendations of the Bar Council or the Complaints Commissioner. (ii) They act as panel members of Disciplinary Tribunals and (iii) they act as panel members of Visitors panels.

23. According to the evidence, which we accept, of Mr Mark Stobbs, now Deputy Chief Executive of the Bar Council and, until September 2004, Head of the Professional Standards and Legal Services Department of the Bar Council,

> "Although the Standing Orders indicate that attendance of lay representatives should be decided by the Committee Chairman, in practice, this decision has been delegated by the Chairman to the Complaints Commissioner. Arrangements for attendance at individual meetings of the PCC are co-ordinated annually by the latter's Personal Assistant. She sends out a list of meeting dates to lay representatives and invites them to indicate their availability. She then assigns them to particular dates with the aim of ensuring that all members attend an equal number of meetings."

24. The PCCC meetings take place every two weeks and on average each member of the PCCC attends about two meetings per year.

25. A lay member who is to attend a particular meeting receives only the papers relevant to the agenda for that particular meeting.

26. Selection of the lay representatives to participate on the panels of Disciplinary Tribunals is made by the administrator of the Disciplinary Tribunals who is an employee of COIC and not of the Bar Council and who holds no appointment in the office of the Lord Chief Justice. When the PCCC refers a charge to a Disciplinary Tribunal, the Bar council secretariat informs the administrator of the names of the lay representatives who attended the PCCC meeting at which the decision to charge the barrister was taken. The administrator then contacts the remaining lay members of the PCCC to ascertain which would be available on the date appointed for the hearing and selects two to sit on the panel. Those persons are then informed accordingly.

27. It is to be observed that this process of selection reflects in two relevant respects the requirements of Regulation 2(i) proviso (ii) of the Disciplinary Tribunal Regulations 2000 which provided:

> "no barrister or Lay Representative shall be nominated to serve on a Tribunal which is to consider a charge arising in respect of any matter considered at any meeting of the PCC which he attended."

28. It is thus clear from this wording that, whereas presence of a lay representative at the meeting or meetings at which the decision to charge the barrister was taken is a bar to sitting as a member of the Disciplinary Tribunal enpanelled to hear such charge, mere membership of the PCCC is not such a bar.

29. Further, it is not apparent from this or any other provision of the Tribunal Regulations or the Complaints Rules that the Lay Representative selected to sit on a Disciplinary Tribunal will necessarily be a member of the PCCC.

30. According to the evidence of Mr Stobbs and Mr Scott, whereas a lay representative on average attends no more than two or three PCCC meetings a year, such a person is likely to sit as a Tribunal member more frequently than this. However, the Regulations and the Complaints Rules contain nothing which limits the number of meetings of the PCCC which a member of that Committee is entitled to attend. That number is kept low as a matter of practicality, having regard to the total number of lay representatives available and to the need to keep available a sufficient number of lay representatives for participation on Disciplinary Tribunals and at Visitors hearings who have not been disqualified by being present at relevant PCCC meetings.

31. Appeals from decisions of Disciplinary Tribunals are heard by the Visitors. The procedure is prescribed in the Hearings before the Visitors Rules 2002. Those Rules are prefaced as follows:

> "We, the Judges of Her Majesty's High Court of Justice, in the exercise of our powers as Visitors to the Inns of Court, hereby make the following rules for the purpose of appeals to the Visitors from Disciplinary Tribunals of the Council of the Inns of Court and certain other appeals to the Visitors."

32. Rule 10 has been set out at paragraph 2 above. A "lay representative" is defined in Rule 2(3) as "one of the lay persons appointed by the Bar Council to serve on Disciplinary Tribunals". The effect of this provision is therefore that the lay representative can be but need not necessarily be a member of the PCCC. Taken literally this provision would have a meaning wide enough to include a lay representative assigned to the PCCC, whether or not that person had been present at a meeting which had decided to charge the appellant and whether or not that person had been a member of the Disciplinary Tribunal from which the appeal is to be heard. However, an implied limitation on those who can be nominated as lay representative which would exclude those falling into the above two categories is, in practice, observed in the process of selection of lay representatives. That process, which is not in the public domain, is as follows.

33. The petition of appeal is served on the Clerk to the Visitors at the Office of the Lord Chief Justice. The Clerk to the Visitors then arranges a suitable date for the hearing and identifies a High Court Judge or Judges available to sit as Visitor on that date. The Deputy Lord Chief Justice, to whom the Lord Chief Justice has apparently delegated his functions in relation to Visitors' matters, then considers nomination of the judge or judges concerned and writes to them personally inviting them to sit on the hearing in question. Once the judge or judges who have been approached have confirmed their willingness to

sit, the Office of the Lord Chief Justice then informs the parties of the name of that judge or those judges. The Office then informs COIC of the name of the nominated judge or judges and the date of the hearing. COIC then selects a Queens Counsel or barrister, according to whether the appeal falls within Rule 10(2) or (3) of the Visitors Rules, and a lay representative to sit on the Visitors hearing. The process of selection is carried out by the Tribunal Administrator employed by COIC in the same manner as the selection of lay representative to sit on Disciplinary Tribunals, save that any such person who has sat on the Tribunal from whose decision the appeal is advanced is also excluded. Neither the Lord Chief Justice nor the Deputy Lord Chief Justice plays any part in the process of selection of the barrister or lay representative members of the Visitors panel. Indeed, they have no contact with such persons. The only contact is by the Tribunal Administrator at COIC. Once the barrister and lay representative have been selected in this manner, COIC identifies them to the Clerk to the Visitors who then informs the parties of their names. This was the process of selection which resulted in Ms Nathan and Ms Clark participating as members of the Visitors panel in this case.

34. COIC is an unincorporated body separate and distinct from the Bar Council. It has its own constitution. Neither the Lord Chief Justice nor the Deputy Lord Chief Justice have any executive or ex officio position in COIC.

The Parties' Submissions as to Bias

35. It is firstly submitted on behalf of the Appellant that the consequence of the operation of this machinery is that a lay representative who is a member of the PCCC and who sits as a member of the Visitor's panel is judge in his own cause. That is because the PCCC is the distinct body to which the Bar Council has delegated the function of prosecuting charges against members of the Bar. The Lay Representatives are by virtue of their appointment full members of that body. They therefore constitute part of the prosecuting authority. The fact that in practice they participate in meetings only relatively infrequently does not detract from their attribute of membership. The further fact that they are precluded by the process of nomination actually adopted of participating in Visitors hearing in cases where they have been present at meetings of the PCCC at which the decision to prosecute was taken does not effectively insulate them from membership of the prosecuting body.

36. It is submitted that, as such, the participating lay representative would be acting contrary to the Common Law principle that no one should act as judge in his own case. We have been referred to numerous authorities in support of this general proposition going back to Dimes v. Proprietors of Grand Junction Canal (1853) 3 HLC 759 but Mr Speaight QC on behalf of the Appellant acknowledged that the relevant modern general principles were to be derived from the decision of the House of Lords in R v. Bow Street Magistrates ex p. Pinochet No. 2 [200] 1 A.C 119. In particular it was submitted on the basis of that authority that, although a judge might not be a party to the litigation before him, he could not properly hear the case if he had relevant links or any relevant association with a party to the effect that he shared the interest of that party in the outcome of the case. In such a case it would not matter that he could be shown personally to be impartial: the rule of disqualification operated automatically, regardless of objective suspicion of actual bias. Since the jurisdiction of the Visitors was derived from that of the judges as a regulatory tribunal in relation to barristers, the principles applicable by the judges at Common Law in the High Court should equally apply to the conduct of proceedings before the Visitors with regard to all members of a panel, including the lay representative.

37. Mr. Speaight QC submits in the alternative that Ms Nathan is disqualified by application of Article 6 of the European Convention on Human Rights. This provides as follows:

> "6.1 In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

38. It is submitted that proceedings, in which a person's right to practise in a profession is in issue, involve determination of that person's civil rights. Mr. Speaight QC relies on the decision of the European Court of Human Rights in Findlay v UK (1997) 24 EHRR 221 and on that passage in the judgment of Lord Hope in Porter v Magill [2002] 2 AC 357 at p489, in which he cited the following passage from the judgment in Findlay at para 73:

> "The court recalls that in order to establish whether a tribunal can be considered as 'independent', regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.
>
> As to the question of 'impartiality', there are two aspects of this requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.
>
> The concepts of independence and objective impartiality are closely linked …."

and then observed:

> "In both cases the concept requires not only that the tribunal must be truly independent and free from actual bias, proof of which is likely to be very difficult, but also that it must not appear in the objective sense to lack these essential qualities."

39. In reliance on these judgments the Appellant thus submits that if a member of a Visitors panel is also a member of the prosecuting authority (the PCCC) that member cannot appear to be independent. In this connection reliance was placed by the Appellant on the judgment of Lord Mackay of Drumadoon in the Outer House of the Court of Session in Tehrani v United Kingdom Central Council for Nursing etc (2001) SC 581, and in particular on paragraphs 85 to 87. We return to that judgment later in this Decision.

40. The Appellant submits in the further alternative that, if the submissions that Ms Nathan is automatically disqualified at Common Law is wrong and if she is "independent" within the meaning of Art. 6(1), she is nevertheless disqualified at Common Law by reason of her lack of objective impartiality. In support of this submission, Mr. Speaight relies on the observations of Lord Hope in Porter v Magill, supra, at page 444, paragraphs 102-103:

> "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 p711A-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 p711B-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 summarized the court's conclusions, at pp726-727:

> '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."

41. Lord Steyn, Lord Hobhouse and Lord Scott agreed with Lord Hope's reasons.

42. Reliance is further placed on certain passages in the judgments in the recent decision of the House of Lords in Laurel v Northern Spirit Ltd [2003] UKHL 35. That case was concerned with the issue whether there was apparent bias or failure to comply with the requirements of independence and impartiality in the participation of a lay member of the Employment Appeal Tribunal who had previously sat as a lay member with a Queen's Council sitting as recorder and part time judge in the EAT but who was in the instant proceedings appearing as counsel for a party. It was held unanimously that the practice was impermissible because a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the lay member might be unconsciously biased. Having referred to the passage from the judgment of Lord Hope in Porter v Magill, supra, at paragraphs 102-103 to which we have referred at paragraphs ( ) above, Lord Steyn observed at paragraph 14:

> "In the result there is now no difference between the common law test of bias and the requirements under art 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's case has at its core the need for 'confidence which must be inspired by the courts in a democratic society': Belilos v. Switzerland (1988) 10 EHRR 466 at 489 (para 67), Wettstein v. Switzerland [2000] ECHR 33958/96, Re Medicaments and Related Classes of Goods (No.2), [2001], ICR 564 at 591, [2001] 1 WLR 700 at 726 (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 at 509 (para 53), by Kirby J. when he stated that 'a reasonable member of the public is neither complacent nor unduly sensitive or suspicious."

43. Further at paragraph 21 Lord Steyn applied the test of a real possibility of unconscious bias in the following manner:

> "The principle to be applied is that stated in Porter's case, namely whether a fair-minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the tribunal was biased. Concretely, would such an observer consider that it was reasonably possible that the wing member may be subconsciously biased? The observer is likely to approach the matter on the basis that the lay members look to the judge for guidance on the law, and can

be expected develop a fairly close relationship of trust and confidence with the judge. The observer my also be credited with knowledge that a recorder, who is a criminal case has sat with jurors, may not subsequently appear as counsel in a case in which one or more of those jurors serve. Despite the differences between the two cases, the observer is likely to attach some relevance to the analogy because in both cases the judge gives guidance on the law to laymen. But the observer is likely to regard the practice forbidding part time judges in the employment tribunal from appearing as counsel before an employment tribunal which includes lay members with whom they had previously sat as very much in point. The editor of the Industrial Relations Law Reports has argued 'that a rule to the same effect is even more necessary in the EAT' (see [2002] IRLR 225). In favour of this view there is the fact that the EAT hears only appeals on questions of law while in the employment tribunal the preponderance of disputes involve matters of fact. The observer would not necessarily take this view. But he is likely to take the view that the same principle ought also to apply to the EAT."

44. A subsequent passage in the judgment is of some importance:

> "The informed observer of today can perhaps 'be expected to be aware of the legal traditions and culture of this jurisdiction' as was said in Taylor v. Lawrence [2002] EWCA Civ 90 at [61]-[64], [2002] 2 All ER 353 at [61]-[64], [2003] QB 528 per Lord Woolf CJ. But he may not be wholly uncritical of this culture. It is more likely that in the words of Kirby J. in Johnson v. Johnson (2000) 201 CLR 488 at 509 (para 53)) he would be 'neither complacent nor unduly sensitive or suspicious': compare also [2002] IRLR 225 (second column)."

45. Mr. Speaight QC further draws attention to a passage from the judgment of the Court of Appeal in Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] QB 451 at page 477 para 17. In that passage the court was concerned with the application of the "real danger" test for apparent bias identified by the House of Lords in Reg v. Gough [1993] AC 646. The Court of Appeal having referred to the reasonable suspicion or reasonable apprehension test, rejected by Lord Goff in that case, observed:

> "Nor need we consider whether application of the two tests would necessarily lead to the same outcome in all cases. For whatever the merit of the reasonable suspicion or apprehension test, the test of real danger or possibility has been laid down by the House of Lords and is binding on every subordinate court in England and Wales. This test appears to be reflected in section 24 of the Arbitration Act 1996: see Lake Airways Inc. v FLS Aerospace Ltd [1999] 2 Lloyd's Rep 45. In the overwhelming majority of cases we judge that application of the two tests would anyway lead to the same outcome. Provided that the court, personifying the reasonable man, takes an approach which is based on broad commonsense, without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well informed member of the public, there should be no risk that the courts will not ensure both that justice is done and that it is perceived by the public to be done."

46. The Appellant also relies on the decision of the Court of Appeal in Sengupta v. Holmes [2002] EWCA Civ 1104. The issue there was whether if a Lord Justice had refused permission to appeal on the initial paper application and permission had been subsequently granted by two other Lords Justices following an oral hearing, if the original Lord Justice were to be included as a member of the Court of Appeal constituted to hear the substantive appeal he should recuse himself on the grounds of apparent bias. In the

course of resolving this issue Laws LJ. investigated the state of knowledge to be imputed to the "fair-minded and informed observer" in the Magill v. Porter test. He referred to the decision of the Supreme Court of South Australia in Southern Equities Corp Ltd v. Bond [2000] SASC 450 and the following passage from the judgment of Bleby J.:

> "Judges are accustomed to defining standards of behaviour by reference to what would be done by a reasonable person. Most judges would claim to be reasonable people, and to be able to make such judgments on behalf of the community of which they are representatives. However, when one is required to assess the perceptions of a fair-minded lay observer, the judge is cast in a much more difficult role. Admittedly, the observer is observing a professional judge. But the judge deciding an apprehended bias claim is not and never can be a lay observer. In order to determine the likely attitude of fair-minded lay observer, the judge must be clothed with the mantle of someone the judge is not. One must avoid the natural temptation to view the judicial conduct, state of knowledge, association or interest in question through the eyes of a professional judge. An apprehension of bias by pre-judgment is based on a perception of human weakness. Given the double use of 'might' in the current formulation of the test for apprehended bias, one must be particularly careful not to attribute to the lay observer judicial qualities of discernment, detachment and objectivity which judges take for granted in each other."

47. Laws LJ. observed at paragraph 11

> "All of these observations are with respect useful and important. They demonstrate that in determining a claim of apparent bias on the part of a judge, it is not enough to show that those in the know would not apprehend any bias. Indeed, that would demonstrate little more than that in cases of the kind under consideration there is no actual bias; but that, in any event, is not suggested."

48. Having reviewed the relevant English and European Court of Human Rights decisions, Laws LJ. concluded:

> "35. But the ordinary case is far from those instances. It is of the kind that has happened here: the judge in question has not himself had to resolve the case's factual merits, and has not expressed himself incontinently. All he has done is conclude on the material before him that the result arrived at in the court below was correct. And he has done so in the knowledge that, at the option of the applicant, his view may be reconsidered at an oral hearing. In such a case is there a reasonable basis for supposing that he may not bring an open mind to bear on the substantive appeal if, after permission granted by another judge, he is a member of the court constituted to deal with it?
>
> 36. I consider, in line with a submission made by Mr Pollock, that an affirmative answer to this question would travel beyond whatever is the perception of our courts and judges that may be entertained by the fair-minded and informed observer, whoever he may be. It is not only lawyers and judges who in various states of affairs may be invited - they may invite themselves - to change their mind. Absent special circumstances, a readiness to change one's mind upon some issue, whether upon new information or simply on

> further reflection, and to change it from a previously declared position, is a capacity possessed by anyone prepared and able to engage with the issue on a reasonable and intelligent basis. It is surely a commonplace of all of the professions, indeed of the experience of all thinking men and women.

(6) *Who is the fair-minded observer?*

> 37. Our fair-minded and informed observer must surely have these matters in mind. That does not turn him into a notional lawyer. It merely reflects his fair-mindedness. However much we may in the name of the public confidence be prepared to clothe our observer with a veil of ignorance, surely we should not attribute to him so pessimistic view of his fellow-man's fair-mindedness as to make him suppose that the latter cannot or may not change his mind when f aced with a rational basis for doing so. That is, I think, what this case involves: not merely the ascription to the notional bystander of a putative opinion about the thought-processes of a judge, but the ascription of a view about how any thinking, reasonable person might conduct himself or herself when in a professional setting, he or she is asked to depart from an earlier expressed opinion. The view which Miss O'Rourke submits should be ascribed to the bystander does much less than justice, I think, to the ordinary capacities of such a person. In my judgment, therefore, it is not a view which the fair-minded and informed observer would entertain."

49. It is submitted on the basis of these authorities that the hypothetical observer's assumed knowledge for the purposes of applying the Porter v Magill real possibility test should be confined to that which is in the public domain, namely in the present case, the Bar Council's Code of Professional Conduct, the Complaints Rules, the Disciplinary Tribunal Regulations and the Hearings before the Visitors Rules. Since neither the method of selection of lay representatives to attend meetings of the PCCC and to take part in hearings before the Visitors nor the incidence of their attendance at PCCC meetings was in the public domain, that is not information which the court should attribute to the hypothetical member of the public when analysing his perception of the participation in the Visitors hearing of the lay representative who is also a member of the PCCC. Nor, for the same reason, should the court attribute to such a member of the public knowledge of the comprehensive training course provided to those who are to become members of the PCCC and therefore members of the panels of the Disciplinary Tribunals and Visitors hearing and which are designed to inculcate an appreciation of the needs for objectivity and impartiality. These matters would not be known to the fair-minded and informed observer who was outside the Bar Council and not exposed to its inner workings beyond what was to be gleaned from the publicly available documents. Indeed, in the present case the Appellant did not even know that Ms Nathan was a member of the PCCC until very shortly before the first hearing. With that limited information, the hypothetical lay observer, upon discovering that the lay representative on the panel of Visitors was also a member of the PCCC, would assume that, consistently with the Complaints Rules and the Disciplinary Tribunal Regulations, such person could attend any number of meetings of the PCCC at which decisions to prosecute were taken but would not attend the meeting at

which the decision to prosecute the Appellant was taken, would be at least sub-consciously prejudiced in favour of the prosecution by reason of a prosecution-minded culture of the PCCC. As such there would be apparent bias.

50. In response to a suggestion made by this Visitors panel at the initial hearing, evidence has been adduced as to the practice in respect of disciplinary proceedings in other professions. That evidence is relied upon by the Appellant as indicating that, with one possible exception, every other professional body investigated insulates those who sit on disciplinary tribunals from the body responsible for bringing charges against and prosecuting members of that profession.

51. Thus, as regards solicitors, complaints must be made to the Solicitors Disciplinary Tribunal created by Section 46 of The Solicitors Act 1974. Under Section 46 the members of the Tribunal are appointed by the Master of the Rolls and are to include solicitors and lay members. For the purpose of hearing and determining applications and complaints the Tribunal is to consist of three members of which one must be a lay member and the others solicitors. Under The Solicitors (Disciplinary Proceedings) Rules 1994, the Law Society can, but does not necessarily in all cases, act as prosecutor. A recent Annual Report states that it acts in the capacity of prosecutor in over 90 per cent of cases brought before the Tribunal. The Law Society acts as prosecutor through the Office for the Supervision of Solicitors. That Office is responsible to the Council of the Law Society for the investigation and prosecution before the Tribunal of complaints against solicitors. On the Law Society website it is stated that the solicitor members of the Disciplinary Tribunal must not be members of the Council of the Law Society, although it is unclear from the material before us what is the source of this requirement. We observe that it is to be inferred that the main reason for this requirement is to ensure that these disciplinary decisions by the Tribunal are not taken by those who are connected in any way with the administrative and prosecuting machinery of the Law Society. We further infer that it is for the same reason that, as appears from the Report of the Disciplinary Tribunal for 2003, the Master of the Rolls has convened a working party to consider the question of the Tribunal's administrative independence from the Law Society.

52. As regards the accountants, the prosecuting body is the Executive Council of the Accountancy Investigation and Discipline Board, which has the responsibility of administering the discipline of the various different professional bodies. There is a Panel of Tribunal members and complaints are determined by panels drawn from those members. Such panels have to include at least one lay person and one or two accountants. However, no officers or employee or serving member of the governing body of any of the accountancy professional bodies or of the Financial Reporting Council or of any of its operating bodies including the AIDB can be a panel member. Thus, those who serve on Tribunal panels cannot include those who are part of any body responsible for investigation or prosecution of complaints.

53. As for the medical profession, on 1 November 2004 the General Medical Council (GMC) introduced a new procedural regime which is set out in the General Medical Council (Constitution of Panels and Investigation Committee) Rule Order in Council SI2004 No. 2611 which provide at Rule 3 for the creation of two separate lists of lay and medical persons who are to be appointed by the General Council: (i) one list of those to act as members of an Interim Orders Panel, a Registration Appeals Panel or a Fitness to Practice Panel and (ii) one list of those who can be members of the Investigation Committee or a Registration Decisions Panel. By Rule 3(3) no person shall at any one time be included in both lists. By Rule 4(3) no panelist can act as such on a Panel or committee for the

Substantive hearing of a case that he has previously considered or adjudicated upon in any other capacity. It is the Investigation Committee, which prosecutes before the disciplinary panels.

54. With regard to architects, the Architects Registration Board is responsible under the Architects Act 1997 for the administration of professional discipline. An Investigations Committee examines complaints and decides whether to bring charges by means of a report to the Professional Conduct Committee. Under the Investigations Rules (Rule 4(a)) members of the Investigations Committee cannot be members of the Professional Conduct Committee.

55. We have also had the benefit of expert evidence in the form of a statement from Mr. J.R.S Egerton as to the disciplinary regime applicable in the Financial Services Industry. It is not necessary to set out the detail of this regime except to record that the Financial Services and Markets Act 2000 has the effect that the Financial Services Authority is the prosecuting body and that the Financial Services and Markets Tribunal is the disciplinary tribunal. The members of that Tribunal are appointed by the Lord Chancellor and not by the FSA. Whereas there is no statutory requirement that those appointed should have no connection with the FSA, membership of the Tribunal panel is in practice closed to FSA personnel.

56. Finally, the Royal Institution of Chartered Surveyors has a Professional Conduct Panel including lay members, and a Disciplinary Board and an Appeal Board also including lay members. The Chief Executive of the Institution is responsible for the investigation and prosecution of complaints before the Professional Conduct Panel or in certain circumstances the Disciplinary Board. Either that Panel or that Board have a punitive jurisdiction. The process of prosecution including investigation appears to be exclusively within the control of the Chief Executive. However, once he has referred a charge to the Professional Conduct Panel, that body may refer the matter to the Disciplinary Board, depending upon the nature of the case as it emerges from the evidence given before it. However, the process does not appear to involve the Panel taking on the role of prosecutor. It is expressly provided that any member of the Professional conduct Panel who considered the complaint or allegation will not be eligible to be appointed to the Disciplinary Board. There is a similar provision relating to membership of the Appeal Board. These provisions are not directed towards insulation of the disciplinary and appeal tribunals from the prosecuting authority, but towards securing that fresh members sit at each stage of the upper tiers of the disciplinary process. This regime therefore does effectively ensure that no member of the prosecuting body participates in the Professional Conduct Panel or the Disciplinary Board.

57. On behalf of the Bar Council Mr. Michael McLaren QC submits that it is the Bar Council, as distinct from the PCCC, that is the prosecuting body. In reliance on the following provisions of the constitution General Council of the Bar he submits that the PCCC has no legal personality but is a committee of the Bar Council to which the latter has delegated certain of its disciplinary functions. The members of that committee are appointed by its Chairman and the Complaints Commissioner but they do not thereby become members of the Bar Council. Further, prosecutions are conducted in the name of the Bar Council and not in the name of the PCCC. The latter is not a legal personality. The relevant provisions are:

58. Regulation 12(a) which provides:

"The Bar Council may delegate any of its functions and powers to any committee, and at any time revoke any such delegation."

59. Paragraph 21 of Standing Orders for Committees and Sub-Committees of the Bar Council which provides:

"Professional Conduct and Complaints Committee

21. The Terms of Reference of the Committee are:

(a) Considering, investigating, dealing with and advising upon representations and complaints relative to barristers, and

(b) Preferring when appropriate, a charge of professional misconduct or breach of proper professional standards against a barrister, and presenting such a charge before a Disciplinary Tribunal.

Note: The Lay Commissioner shall be entitled to attend meetings of, but shall not be a member of, the Professional Conduct and Complaints Committee."

60. Paragraph 42 provides:

"Committee members who are not members of the Bar Council (additional members) shall have the same powers and duties as other members, save that they may not serve as chairman of any of the Main Committees excepting the Professional Conduct and Complaints and Law Reform Committees, to which a Vice-Chairman who is a member of the Bar Council shall be appointed if the appointed Chairman is not a member of the Bar Council."

61. Further, paragraph 45 already set out above is repeated here as a matter of convenience:

"Lay member representation at meetings of the Professional Standards Committee and the Professional Conduct and Complaints Committee shall be at least two lay members for each Committee. These lay representatives shall be selected from among the lay members from time to time attached to the Professional Standards and Legal Services Department, who shall, subject to the approval of the Chairman of the Professional Conduct and Complaints Committee and the Chairman of the Bar Council, be appointed by the Complaints Commissioner. The selection of lay members who are invited to attend a meeting of the Professional Standards Committee or the Professional Conduct and Complaints Committee shall be made by the Chairman (or in his absence the Vice-Chairman) of the committee."

62. As appears from paragraph 45, the lay members are appointed by the Complaints Commissioner who is himself a lay person. Their function is to represent the public interest and have no interest in promoting the prosecution of charges and are thus not expected to identify with the complainant or the prosecutors. Accordingly this case is to be distinguished from the facts in Pinochet, supra, for in that case Lord Hoffman's link with Amnesty International ("AI") was such that the position which he held as a director and chairperson of its subsidiary, Amnesty International Charity Ltd ("AICL"), a company which had a common cause with AI in its intervention in the proceedings meant that he shared the cause which was being promoted by AI in as much as he had an interest that the outcome of the proceedings accorded with that of AICL which was the same as that of AI. By contrast, in the present case Ms Nathan's link with the Bar Council through her membership of PCCC did not involve that she had a common interest with the Bar Council in procuring the prosecution of the Appellant for she was there as an independent mind to protect the public interest in a fair determination of the charge.

63. As to independence within Article 6(1), Mr. McLaren QC submits that Ms Nathan's participation, as a panel member would appear judged objectively to be impartial to the effect that it offered sufficient guarantees to exclude any legitimate doubt as to impartiality. In particular Ms Nathan was not a member of the Bar Council or employed by it: she simply received a payment in the nature of an honorarium calculated by reference to the time spent attending the PCCC and sitting as a member of a Disciplinary Tribunal or a Visitors panel. The purpose of her appointment was to protect the public interest. She was appointed for a limited term (three years) and was of the highest personal calibre. Given this background, her role as a member of the PCCC in attending meetings concerned with the bringing of charges in other cases would not, judged objectively, compromise her independence.

64. It is further submitted that, even if Ms Nathan could be said to lack independence in the context of article 6(1), there could be no breach of the Convention because any objection to a decision of the Visitors would be capable of being cured by an application for judicial review. In support of this proposition reliance is placed on the judgment of Lord Hoffman in R (Alconbury Developments Ltd) v Secretary of State for the Environment (2003) 2 AC 295, particularly at paragraphs 86-88 for it is submitted that judicial review of a decision of the Visitors (which, it is common ground, would be available) would be the exercise of "full jurisdiction" to consider and determine the issue whether there was a lack of objective impartiality and therefore a lack of independence under Article 6(1). Reliance is also placed on the judgment of Lord Mackay of Drumadoon in the Outer House of the Court of Session in Tehrani v. United Kingdom Central Council for Nursing, supra, and on the decision of the Court of Appeal in Thompson v Law Society [2004] EWCA Civ 167, in particular paragraph 110. Since judicial review proceedings would be available to the Appellant in order to challenge any decision of the visitors on the grounds of lack of independence of a member of the panel, it could not be said, at least at this stage, that there had already been, any infringement of the Appellant's rights under Article 6(1). That argument held good both in relation to the Appellant's submission that there was a lack of independence under Article 6(1) and also that there was lack of objective impartiality under that provision.

65. As to the evidence of the disciplinary procedures of other professions, while it is conceded on behalf of the Bar Council that its procedures may now be unusual in allowing a lay representative to sit on disciplinary tribunals and appeals as well as being a member of a body whose function is to decide whether charges should be prosecuted, it is submitted that there is nothing structurally objectionable in this system. The procedures have been approved by the judges through the Lord Chancellor, the Lord Chief Justice and other Heads of Division. There are adequate controls to ensure that a member of the PCCC who has attended a meeting relating to the complaint may not sit on the Disciplinary Tribunal or, if there is an appeal, on the Visitor's panel. What other professions do is not logically relevant for they may have adopted an unnecessarily cautious approach.

66. With regard to Appellant's submission that, if Ms Nathan is not judge in her own cause and is indeed independent within Article 6(1), this is a case of apparent bias at common law and lack of objective impartiality under Article 6(1) the following submissions are made on behalf of the Respondent.

67. Ms Nathan's membership of the PCCC, contrary to the submission of the Appellant, could not be expected to give rise to any collegiate feeling which affected her impartiality. In particular, the lay representative represented the public interest and not the Bar Council and had no interest in an outcome favourable to either the prosecutor or the party charged.

The key representative would, by reason of the administrative arrangements already described in these terms, be likely to sit as a member of a Disciplinary Tribunal or a Visitors panel more frequently than attending PCCC meetings at which decisions to prosecute would be discussed. There would be no material opportunity for members of the PCCC to socialise. The functions of the PCCC extended beyond decision-taking as to charges and included the issue of rulings on the interpretation of the Code of Conduct and the granting of waivers of the provisions of the Code in appropriate cases. There was an effective system for insulation between the decision-taking processes of the PCCC in relation to whether charges should be brought and of a PCCC member in the hearings before the Disciplinary Committee and the Visitors and this system had operated in Ms Nathan's case. Members of the PCCC had access only to information about changes under consideration at meetings, which they attended.

68. Accordingly, if these facts were known to an outside observer, that person would be bound to conclude that the system which was in fact operated, preserved the impartiality of lay members of the PCCC who also sat as members of Disciplinary Tribunals and Visitors panels. In particular, information as to all the relevant procedural rules, including the Hearings before the Visitors Rules, the Disciplinary Tribunal Rules, and the Complaints Rules, were available from the Bar Council or could be accessed on the Internet. Accordingly, if it were material, to confine the basis of the test expressed by Lord Hope in Porter v Magill, supra – "whether all the circumstances which had a bearing on whether the judge was biased" would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased – to facts which were readily accessible, all the essential facts were indeed accessible and these facts would not suggest a real possibility of bias.

69. Mr McLaren QC has referred us to a number of authorities which in his submission indicate the proper approach to the question of apparent bias.

70. In R v. Council of the Inns of Court ex p Everest (1.11.95) Unrep. a barrister complained that under the disciplinary regime which then operated there was apparent bias on the part of one lay member of a disciplinary tribunal because of his membership of the Professional Conduct Committee. French J, sitting as a visitor on appeal from the decision of the Tribunal rejected this argument. The barristers then applied for judicial review. Following refusal by a single judge, there was an oral hearing at which Owen J also refused leave. On 1st November 1995 upon renewed application to the Court of Appeal the court referred leave. Russell LJ, with whom Thorpe LJ and Sir Ralph Gibson agreed, stated that the Court's discretion to grant leave should not be exercised. He observed:

> "The case of R v. Gough [1993] AC 646, [1993] 2 All ER 724 was referred to French J. as it was referred to us by Mr Everest this morning. We have read it and considered its implications. It is plain that any decision of a Tribunal may be flawed if, objectively, it gives the appearance that it might have been a decision influenced by bias on the part of one of the members taking the decision. We, however, must revert to the facts and it must be the case, in our judgment, that what happened was that Mr Everest's testimony to the Tribunal was disbelieved. Judicial review is a discretionary remedy; we have considered with great anxiety all the points that have been made by Mr Everest by way of an attack upon, not so much the decision of the Tribunal, as upon its constitution.
>
> Despite his persuasive arguments, for my part, I am not persuaded that we should exercise our discretion to grant leave."

71. It is to be noted that this conclusion could have been arrived at only if the court were of view that there was no arguable case for granting the relief claimed. Further, it is unclear from the report what, if any, was the degree of participation of the lay member in the Professional Conduct Committee and what at that time was the precise relationship between the Professional Conduct Committee and the proceedings. We further note that the party to the judicial review proceedings was not the Bar Council but the Council of the Inns of Court. It does not appear that it was suggested that the Professional Conduct Committee were the prosecuting authority. Further, the barrister relied on apparent bias founded both on membership of that Committee and on the undefined "close association" between the lay member and the secretary, who instituted the proceedings and gave evidence before the disciplinary tribunal. There are thus some indications that on its facts this was a stronger use on apparent bias than the present case. However, the facts are not adequately clear from the judgment and the test has applied that indicated in R v Gough [1993] AC 646 – as distinct from that which is now applicable in Porter v Magill, supra, set out in the judgment of Lord Hope at paragraph 102 (see para (6) above). Accordingly, we do not consider that great weight can be given to this decision in relation to the issue of apparent bias on the present facts.

72. It is to be observed that case was confined to an allegation of apparent bias and does not consider whether the lay member was acting as judge in his own cause.

73. In Preiss v General Dental Council [2001] 1 WLR 1926, the Privy Council had to consider an appeal from the decision of the Professional Conduct Committee of the General Dental Council that a dentist had been guilty of serious professional misconduct for which he should be suspended from practice for 12 months. The material issue for present purposes was whether the dentists' disciplinary regime had given rise to a breach of Article 6(1) because it gave an appearance and posed a risk of lack of independence and impartiality. It was held that in two respects the regime did give an appearance and posed a risk of lack of independence and impartiality. First, there was a predominance of members of the Council on whose behalf the charges had been brought on both the Preliminary Proceedings Committee, which had the function of deciding whether to bring professional conduct complaints referred to it before the Professional Conduct Committee, and the latter Committee whose function was to hear and determine such complaints and pass sentence if necessary. Secondly, the President of the Council had acted as preliminary screener performing the function of deciding whether the complaint should be presented and had also sat as chairman of the substantive hearing of the complaint before the Professional Conduct Committee. The cumulative effect of those two features was the appearance that the latter Committee lacked independence and impartiality.

74. Mr. McLaren draws attention to the fact that at paragraph 17 of the judgment it is stated that under the rules the Dentists Act 1984 the Preliminary Proceedings Committee should consist of the President and five other members of the Council and the Professional Conduct Committee should consist of the President and ten other members of the Council. However, the President did not sit in the Preliminary Proceedings Committee in that case as the evidence was that it had become the practice for him not to do so. Having referred at paragraph 13 to the decisions of the Court of Session in Tehrani, supra, which had been relied upon by the appellant in Preiss, and to the feature of the disciplinary regime there under consideration that members of the Preliminary Proceedings Committee and the Professional Conduct Committee could move backwards and forwards between than the rules, in paragraph 13 of the judgment in Preiss Lord Cooke observed that this interchange of roles "apparently could not occur in the dental disciplinary system." We infer that this

is a reference to the practice of the President never to participate in the Preliminary Proceedings Committee.

75. It is submitted on behalf of the Bar Council that in Preiss the Privy Council must either have implicitly viewed the dual role of the President as unobjectionable under Article 6(1) or have formed or expressed no view on whether it was.

76. In our view, the Privy Council must have regarded the practice of the President not to participate on the Preliminary Proceedings Committee as distinguishing Preiss from Tehrani on its facts and must have proceeded on the basis that because of that practice the objectionable feature identified by Lord Mackay in Tehrani was not present. It is to be noted that the judgment contains no suggestion that the analysis in Tehrani was wrong on the facts of that case. Accordingly, this approach suggests that the President's practice of not participating in the Preliminary Proceedings Committee was such as to provide sufficient insulation between that Committee and his role on the Professional Conduct Committee.

77. Before considering further the decision in Tehrani, supra, it is necessary to investigate a decision of the Divisional Court in relation to the same disciplinary regime, that in Brabazona-Drenning v. United Kingdom Central Council for Nursing Midwifery and Health Visiting (31.10.2000) Unrep. There were five grounds relied upon in support of an appeal against a decision of the Central Council determining that the appellant was guilty of misconduct and removing her from the register of nurses. The court having concluded in favour of the appellant on the first four points – expressed only a provisional view on the fifth point, namely the allegation that the fact that the membership of the Professional Conduct Committee which heard the charges was drawn from the Council and that the Chairman of that Committee was a member of the Council created an impression of bias and unfairness. It was apparently accepted that there were safeguards such as the use of a firm of solicitors as independent prosecutor and of a legal assessor who gave advice to the Committee before it reached its decisions. At paragraph 36 of his judgment, with which Rose LJ agreed, Elias J said this:

> "Mr Janner submitted that the perception will be that the Committee, because it is closely connected with the Council, will be seen as supporting the actions taken in the Council's name against individual professionals. I very much doubt whether this is correct. It seems to me that in the context of professional disciplinary bodies, it is highly desirable to have a profession regulate itself, subject to appropriate safeguards. My provisional view is that there were sufficient safeguards in place here to ensure that the perception would be one of independence and integrity."

78. He added that, in any event, European authorities established that in the context of the perceived independence and impartiality of tribunals in proceedings before professional bodies defects which might arise at the first level could be corrected if there were an appropriate appeal procedure. The existence of a right of appeal to the Divisional Court not confined to points of Law could be sufficient to remedy any defects in a decision on those grounds.

79. Rose LJ was also of the provisional view that there was no defect due to perceived lack of independence or impartiality.

80. In Tehrani, supra, decided on 25 January 2001, also in relation to a decision of the Professional Conduct Committee of the UK Central Council for Nursing etc, it was held that there could be no violation of the appellant's rights under Article 6(1) as to

independence and impartiality at that stage because of the availability of the appeal facility under which the Court of Session would conduct a re-hearing of the issues before the PCC. However, in a passage of the judgment of Lord Mackay of Drumadoon at paragraphs 85 to 88 he considered whether there was any substance in the appellant's submissions as to lack of independence and perceived lack of impartiality under Article 6(1). Although this part of the judgment is clearly obiter, it is directly relevant to some of the issues now to be decided Lord Mackay observed at paragraph 86:

> "Having considered the submissions I heard, I have reached the view that there is some basis for objective concern as to the independence and impartiality of the PCC. Had it been necessary for me to decide whether the PCC, viewed on its own, would constitute an independent and impartial tribunal, meeting all the requirements of art 6(1), I would have found for the petitioner on that issue. In my opinion, the fact that the same individuals sit on the PPC and the PCC is the factor of greatest significance. I accept, of course, that not individual member of the respondents takes part in the consideration of any particular case by both the PPC and the PCC. I accept that will no occur in the petitioner's case. Nevertheless I consider that any objective observer would consider it unusual that those involved, from time to time, in the taking of decisions to initiate disciplinary proceedings against members of the profession, are also involved, at other times, in adjudication upon such proceedings. The fact that the same individuals can move backwards and forwards between these two roles, throughout their terms of office, is of particular significance. There is also the point that it lies within the discretion of the respondents to determine whether all individual members of the respondents and of the two panels are actually invited to sit on the PCC. Whilst an official arranges who actually sits on the PCC when the committee is hearing disciplinary cases, there is no guarantee that all of the individual members of the respondents and the panels will actually be invited to sit from time to time."

81. Having considered the regime in operation for solicitors at the Scottish Law Society, he continued at paragraph 87:

> "Where the same members of the respondents and the same panel members are serving on both the PPC and the PCC (albeit not in connection with the same cases), there is in my opinion an objective basis for concern that members serving on the PCC will take into account, even if only subconsciously, their knowledge and experience of the current practices and policies of the PPC, as to when to commence prosecutions, influenced as those practices and policies may be, at least to some extent, by the policies of the respondents as a council. A further basis for concern is that prosecutions before the PCC take place in the name of the respondents. Moreover, a hearing before the PCC of a charge of misconduct may involve considering the extent to which the practitioner concerned has complied with a code made by the respondents. In my opinion, such factors detract from the PCC having an appearance of independence. Likewise, I consider that they give rise to concerns as to the PCC's impartiality. If the position of the PCC fell to [be] considered in isolation, I do not consider that the concerns would be met by the

guarantees upon which the respondents found, such as the fact that the prosecution case is presented to the PCC by the solicitor, the detailed nature of the adversarial procedure, as set out in the 1993 Rules, the giving of reasons by the PCC and the role of the legal assessor."

82. Mr. McLaren QC further relies on the reasoning of the Court of Appeal in Sengupta v Holmes, supra, to which we have already referred at paragraph 46 above. It is submitted that, in order to apply the Magill v Porter test, there must be imparted to the fair-minded and informed observer all the relevant information as to the Bar Council procedures which was obtainable by a member of the public who took the trouble to investigate how the regime was operated in practice and that would include the exclusion from sitting as a member of a panel any member of the PCCC who had attended a meeting concerning the charges as well as the infrequency of attendance at meetings of the PCCC answered with other disciplinary decisions.

Discussion: Automatic Disqualification at Common Law

83. The hearings before the Visitors of appeals from Disciplinary Tribunals of the Bar Council are conducted before tribunals created in order to carry out supervisory functions in respect of the members of Inns of Court which have formerly been exclusively the responsibility of the judges of the High Court. As such they are professional disciplinary tribunals to which standards of fairness, impartiality and justice no less than those to be expected in the conduct of proceedings in the High Court must apply. Although formerly exclusively the province of the judges, such tribunals now include barristers and lay representatives. The presence of the barrister reflects this concept of professional self-regulation. The presence of the lay representative reflects the concept that in-house self-regulation should in the public interest operate by reference to the view of outsiders unconnected with the legal profession as publicly to demonstrate that decisions of such tribunals are not the exclusive preserve of those with inside knowledge or connections. However, the introduction of members of tribunals who are not part of the judiciary does not dilute the standards of fairness, impartiality and justice to be expected from the Visitors. It follows that the Common Law principles of automatic disqualification by reason of being a judge in one's own cause and of disqualification on the grounds of apparent bias apply as fully to the members of such tribunals as they would apply to a High Court Judge hearing proceedings in court.

84. In determining whether in a given case a judge or tribunal member would act as judge in his own cause it is clear from Pinochet No 2, supra, that the following approach is required. (i) It is first necessary to ascertain whether he or she is a party to the proceedings or is so substantially a constituent of a party as to be presumed to partake of its purpose as a participant in the proceedings. (ii) If a member of a tribunal is not a party or one who is inseparable from a party in that sense, the question then arises whether he or she has a common interest with a party that the proceedings will have a certain outcome. (iii) The interest need not be a financial interest: the essence of common interest is an interest in the outcome, to the effect that a particular party will succeed in obtaining a particular decision. (iv) In such cases there will be automatic disqualification without investigation as to whether there was actual bias or suspicion of bias. We refer in particular to the following passages from the opinion of Lord Browne-Wilkinson:

85. At pages 132-133

"The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical

implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

In my judgment, this case falls within the first category of case, viz. where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see *Shetreet, Judges on Trial* (1976), p. 303; De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th ed. (1995), p. 525. I will call this "automatic disqualification."

At page 135

"That being the case, the question is whether in the very unusual circumstances of this case a non-pecuniary interest to achieve a particular result is sufficient to give rise to automatic disqualification and, if so, whether the fact that A.I.C.L. had such an interest necessarily leads to the conclusion that Lord Hoffmann, as a director of A.I.C.L., was automatically disqualified from sitting on the appeal? My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. Thus in my opinion if Lord Hoffmann had been a member of A.I. he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity. Indeed, so much I understood to have been conceded by Mr Duffy. Can it make any difference that, instead of being a direct member of A.I., Lord Hoffmann is a director of A.I.C.L., that is of a company which is wholly controlled by A.I. and is carrying on much of its work? Surely not. The substance of the matter is that A.I., A.I.L. and A.I.C.L. are all various parts of an entity or movement working in different fields towards the same goals. If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room

for fine distinctions if Lord Hewart C.J.'s famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done:" see Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, 259.

Lord Goff at pages 138 said this:

> "It is in these circumstances that we have to consider the position of Lord Hoffmann, not as a person who is himself a party to the proceedings or who has a financial interest in such a party or in the outcome of the proceedings, but as a person who is, as a director and chairperson of A.I.C.L., closely connected with A.I. which is, or must be treated as, a party to the proceedings. The question which arises is whether his connection with that party will (subject to waiver) itself disqualify him from sitting as a judge in the proceedings, in the same way as a significant shareholding in a party will do, and so require that the order made upon the outcome of the proceedings must be set aside.
> Such a question could in theory arise, for example, in relation to a senior executive of a body which is a party to the proceedings, who holds no shares in that body; but it is, I believe, only conceivable that it will do so where the body in question is a charitable organisation. He will by reason of his position be committed to the well-being of the charity, and to the fulfilment by the charity of its charitable objects. He may for that reason properly be said to have an interest in the outcome of the litigation, though he has no financial interest, and so to be disqualified from sitting as a judge in the proceedings.

and at page 139

> "The effect for present purposes is that Lord Hoffmann, as chairperson of one member of that organisation, A.I.C.L., is so closely associated with another member of that organisation, A.I., that he can properly be said to have an interest in the outcome of proceedings to which A.I. has become party. This conclusion is reinforced, so far as the present case is concerned, by the evidence of A.I.C.L. commissioning a report by A.I. relating to breaches of human rights in Chile, and calling for those responsible to be brought to justice. It follows that Lord Hoffmann had an interest in the outcome of the present proceedings and so was disqualified from sitting as a judge in those proceedings.
> It is important to observe that this conclusion is, in my opinion, in no way dependent on Lord Hoffmann personally holding any view, or having any objective, regarding the question whether Senator Pinochet should be extradited, nor is it dependent on any bias or apparent bias on his part. Any suggestion of bias on his part was, of course, disclaimed by those representing Senator Pinochet. It arises simply from Lord Hoffmann's involvement in A.I.C.L.; the close relationship between A.I., A.I.L. and A.I.C.L., which here means that for present purposes they can be regarded as being, in practical terms, one organisation; and the participation of A.I. in the present proceedings in which as a result it either is, or must be treated as, a party."

86. It is clear from the analysis of Lord Hoffmann's position that the key consideration for the purposes of automatic disqualification at common law in a case where the judge or tribunal member is not a party to the proceedings is the nature of that person's connection with or relationship to a party and in particular whether that connection or relationship is such that the person in question must be treated as if the "cause" of one of the parties was

also his "cause". The rationale for so treating such person is that by reason of the connection or relationship in question he is taken to share the interest of the party in a particular outcome. In applying this analysis it is, however, important not to confuse it with a relationship or connection which gives rise to mere apparent bias at common law, let alone to an inference of actual bias. The conclusion that would be derived by the fair-minded and informed observer by consideration of all the circumstances which had a bearing on whether there was a real possibility that the judge was indeed biased is therefore not the relevant test.. As Lord Nolan briefly put in Pinochet No.2 at page 139:

> "I would only add that in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality."

87. What matters is whether the appearance in the court of the relationship between the judge and a party indicates that they have a common interest.

88. The following facts are therefore material to application of this test in the present case.

    a. The PCCC is an unincorporated body which has the purpose of carrying out certain functions, including disciplinary functions on behalf of the Bar Council. Amongst those functions is the taking of decisions whether the facts of complaints presented to it by the Complaints Commissioner justify the prosecution of charges against members of the Bar: see those passages from Rules 26 to 28 of the Complaints Rules set out at paragraph 14 above.

    b. If the PCCC concludes that there is a prima facie case of professional misconduct, its duty is to nominate the PCC Representative from its members "to be responsible for the conduct of the proceedings on its behalf" (Rule 32). That Rule further provides:

    > "Where no further investigation is required, the PCC representative shall settle the charge having regard to the provisions of paragraph 34 below."

    Rule 33 provides

    > "Save in cases where the charges have been settled by the PCC Representative, the Secretary or investigations officer shall arrange for the appointment of counsel to settle the charge and to present the case before the Tribunal, and may arrange for the appointment of a solicitor or such other person as may be necessary to assist counsel and prepare the case."

    The Secretary referred to is the Secretary to the PCCC (Rule 3)

    c. The PCCC then has the duty to supervise the carrying out of the functions of the Bar Council's investigations officer under Rule 35 including

    > "any necessary administrative arrangements for the summoning of witnesses, the production of documents, and generally for the proper presentation of the case on behalf of the PCC Representative before the Tribunal."

    d. The PCCC is therefore the Bar Council's agent for the taking of decisions as to whether to prosecute and for the conduct of the prosecutor.

    e. Lay Representatives are appointed to membership of the PCCC for a period of three years renewable for a further three years. Thus at any one time there is a body of appointed members of the PCCC who are clearly identifiable.

f. The Lay Representatives in practice each attend an average of two meetings of the PCCC per year. For that purpose, they receive in advance the papers referable to the matters on the agenda for each such meeting and they take part in the decision taking and, if necessary, vote on decisions at that meeting, but they are not asked to prepare preliminary reports on complaints or recommendations as to charges against members of the Bar as are the barrister members of the PCCC. Nor do they play any part in the selection of barrister members who are to make such reports.

g. The Lay Representatives who are members of the PCCC are continuously members albeit they are remunerated on the basis of their individual attendances. That is to say they are not co-opted from a panel of names so as to become ad hoc members of the PCCC only for the duration or purpose of the meetings which they attend or for the duration or purpose of their sitting on Disciplinary Tribunals or Visitors' panels.

h. Barrister members of the PCCC are disqualified from sitting as members of Disciplinary Tribunals or Visitors Panels regardless of their non-attendance at meetings of the PCCC referable to a particular hearing.

89. The decision by the PCCC to institute proceedings against a barrister thus imposes upon the PCCC as agent for the Bar Council a duty to prosecute that person and, consistently with the applicable procedure, to present the case against the barrister in a manner designed to procure conviction. Whereas it is undoubtedly true that the proceedings in which the charges are prosecuted must be fairly and justly conducted, those representing the Bar Council have a duty as its agents to procure conviction or in the case of appeals before Visitors to defeat an appeal. They do not have the function of a neutral amicus. Their interest is conviction or dismissal of appeals.

90. To confine that interest to those members of the PCCC who participated at the meeting which decided that there was a sufficiently strong case of misconduct to justify the bringing of charges or to the PCCC Representative nominated to conduct the particular proceedings would be inconsistent with the express provisions of the Complaints Rules, particularly with Rule 35 set out at paragraph 16 above, for the PCCC is thereby made responsible by itself or through its Representative for the supervision of the investigations officer in making any necessary administrative arrangements for the proper presentation of the case on behalf of the PCCC Representative. That responsibility applies to the PCCC as an entire body and not merely to some of its members.

91. We therefore conclude that each member of the PCCC has in respect of each prosecution of proceedings a common interest with the PCCC as a whole in procuring the conviction of the barrister who has been charged and that, upon any such barrister's appeal before the Visitors, in procuring that the appeal should be dismissed.

92. In considering whether a lay representative on a Visitors Panel shares the interest of the PCCC, of which that person is a member, in the appeal being dismissed, an analysis of the quality of that particular member's ability to maintain objectivity is nothing to the point. Nobody called in question Lord Hoffmann's personal ability to be objective and impartial. Nor, in our judgment, does the fact that the purpose of including lay representatives on the PCCC and as members of the Visitors panel, have the effect of insulating such persons from having the appearance of sharing the interest of the PCCC as a prosecutor. Lord Hoffmann's judicial oath could provide no such insulation. Nor do we find that a lay representative's non-participation in meetings relating to the prosecution in question, cuts

off that person from the responsibility which, as a member of the PCCC, that lay representative bears together with its other members for taking forward and facilitating the prosecution. Lord Hoffmann was not a decision-taker at either Amnesty International or AICL with regard to participation in the proceedings.

93. For these reasons we conclude that when a lay representative who is a member of the PCCC sits as a panel member at the Visitors hearing, that person is acting as judge in his/her own cause at Common Law and is for that automatically disqualified. At the stage of objection prior to the commencement of the substantive hearing it follows that such a person must be recused.

94. In view of our decision on automatic disqualification, it is not necessary to dwell at length on the other grounds upon which the Appellant objects to Ms Nathan's participation as a member of the Visitors Panel. Accordingly, we briefly summarise our conclusions in the following sections of this Decision.

Lack of Independence under Article 6(1)

95. It is clear from the wording of Article 6(1) that the quality of the independence of the tribunal by which a person is to be entitled to have his civil rights determined is distinct from, although closely linked with, the quality of impartiality. In Findlay v. United Kingdom (1997) 24 EHRR 221 at p245. In that case the European Court of Human Rights stated at p244 by reference to its decision in Bryan v. United Kingdom (1996) 21 EHRR:

> "The Court recalls that in order to establish whether a tribunal can be considered as "independent", regard must be inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."

96. The approach of the Court in Findlay shows that the real substance of the concept of independence is both actual and apparent freedom from influence which might affect the decision of the tribunal.

97. In Porter v. Magill, supra, in the passage at para 88 which we have already cited at paragraph 38 above Lord Hope observed that not only must there be independence in fact but also the appearance of independence in the sense explained in Findlay.

98. Whereas we are firmly of the view that Ms Nathan has not in fact been exposed to relevant outside influence and will not be so exposed, given the method of selection of members of the PCCC to sit as panel members only in those cases in which they have not attended the meeting at which the decision to charge the Appellant was taken, we find more evenly balanced the question whether there is in this case a sufficient appearance of independence. This question depends on the extent of the information which it may be assumed is in the possession of the outside observer and in particular whether it is to be assumed that he will be aware of the method of selection of members of the PCCC to serve on the Visitor's panel and of the infrequency of actual attendance at PCCC meetings by its lay members.

99. We approach this issue on the basis, as explained later in this Decision, that it must be tested by reference to the fair-minded and informed observer's knowledge of all the information which could have been ascertained from the Bar Council or its publications by a fair-minded outside observer. We are satisfied that this would have included that part of the method of selection for panel membership as would have confined those eligible to

be selected to those who had not attended the PCCC meeting referable to the complaint in question, but we are not persuaded that it would also have included the attendance record at PCCC meetings of the lay representative. With reference to these facts, we find that the reasoning of Lord Mackay of Drumadoon in Tehrani in the passages from paragraph 87 and 88 of his judgment which we have cited at paragraph 80 above, albeit obiter, does indeed identify material deficiencies in the concept of the appearance of independence where there is role-changing of a tribunal member of the kind found in that case and in this. We are not persuaded that the decision of the Divisional Court in Brabazon-Drenning v. UK Central Council for Nursing, supra, discussed at paragraph 39, above compels any other approach.

100. Our conclusion is that, were this hearing to proceed with Ms Nathan as a panel member, this tribunal could not be said to be independent for the purposes of Article 6(1).

101. The Bar Council argues that, if the hearing proceeded with the Visitors Panel as presently constituted, its decision could be challenged by means of proceedings for judicial review before a court of full jurisdiction at least in respect of whether, by reason of Ms Nathan's membership, there had been a violation of the Appellant's rights. By reason of that right of challenge no such violation could exist as of now: see Thompson v. Law Society [2004] EWCA Civ 167. Therefore it is said, Ms Nathan should continue to sit.

102. We find this argument fundamentally flawed. Its application involves that, having concluded that the position of Ms Nathan is such that this tribunal is not independent within Article 6(1), it should nevertheless go on with the substantive hearing in the knowledge that by doing so and in reaching a conclusion that might involve dismissal of the appeal, its conduct would not involve an infringement of the Appellant's Article 6(1) rights because on judicial review the decision could be set aside. That would involve the risk of a profligate waste of time and money for all parties which could be wholly avoided if Ms Nathan were here and now to be recused. That course would be the commonsense way of avoiding the considerable delay and expense which might otherwise be incurred. We conclude that there is no reason as a matter of substantive law or the procedure of this tribunal why the risk of such expense and delay should be taken and why the course of immediate recusal should not now be adopted.

103. The Appellant's second ground therefore succeeds.

Apparent Bias at Common Law

104. As to apparent bias at Common Law, we must apply the test laid down in Porter v. Magill, supra, at paragraph 38 above. Are all the relevant circumstances such as would lead a fair-minded and informed observer to conclude that there was a real possibility of bias on the part of Ms Nathan?

105. If it be assumed that the observer knows that Ms Nathan attended only very few meetings of the PCCC at which decisions whether to prosecute on other cases were taken, although this is a finely balanced issue, a majority of us consider that there would not be sufficient perception that in the course of those meetings that she might have absorbed enough of the Bar Council's prosecution policy approach subsequently to be influenced by it, if only sub-consciously, when sitting as a Visitors Panel member. In arriving at that conclusion, we have taken into account the need to treat the observer as a person of ordinary commonsense and fair-mindedness identified by Laws LJ. in Sengupta v. Holmes, discussed in paragraph 46 above. We have also taken into account the strong

predisposition to objectivity which could be expected from a person of Ms Nathan's calibre and experience.

106. If one assumes that the information available to the observer did not include Ms Nathan's PCCC attendance record, our view is that the fair-minded observer would perceive a real risk that Ms Nathan might be influenced by what she had absorbed at PCCC meetings. After all, nothing in the Complaints Rules and in the other regulations prescribes how frequently a member of the PCCC can or should attend meetings. For all the fair-minded observer might know, a lay representative might attend very many meetings of the PCCC and thereby be frequently associated with its decision-taking. The more frequently it is assumed that she attended such meetings, the greater the basis of the fair-minded observer's perception of bias.

107. We have encountered some difficulty in identifying how much knowledge is to be ascribed to the hypothetical fair-minded observer. The passage from the judgment in Locabail, supra, cited at paragraph 45 above speaks of an approach based on broad commonsense "without inappropriate reliance on special knowledge the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well informed member of the public" (emphasis added). This approach suggests that the observer is not to be assumed to have access to precisely the same scope of information as would be available to a court or tribunal seized of the issue whether an inference of actual bias should be drawn. The reason for the more limited scope of knowledge which this passage from Locabail envisages is that what matters is the public perspective and not the perspective of an investigative judge or tribunal which has gone behind the scenes to evaluate circumstances which would be invisible to the outside observer: see the closing words of the passage – "there should be no risk that the Courts will not ensure both that justice is done and that it is perceived by the public to be done" (emphasis added). This underlying policy principle is clearly articulated by Lord Steyn's observations in Laurel v. Northern Spirit, supra, cited at paragraphs 42 to 44 above. Against this, the Porter v. Magill test appears to require evaluation of the fair-minded observer's response to all the circumstances relevant to the existence of bias. Although the position is in some doubt on the authorities, we consider that the narrower view as to the scope of assumed knowledge more effectively reflects the requirement of openness implicit in Article 6(1) to which the Common Law approach is now to be assimilated. Accordingly, the perception of impartiality is to be based on that which is open to view and, not on facts which would be hidden from an outside fair-minded observer.

108. If therefore one assumes that the scope of the hypothetical fair-minded observer's knowledge is confined to the Code of Conduct of the Bar, the Disciplinary Tribunal Regulations, the Complaints Rules and the Hearings before the Visitors Rules and does not extend to the methods of selection of members of the PCCC or, except in so far as they should not have attended the relevant meeting of the PCCC, the Visitors panels or to the attendance records of lay representatives at meetings of the PCCC, we consider that, even taking account of the high calibre of lay representatives generally and of their function in representing the public interest, there would be a perception to the fair-minded observer of a real possibility of subconscious lack of impartiality by reason of exposure to influence by such prosecuting policies as might exist amongst PCCC members generally.

109. Accordingly, had it been necessary to decide the apparent bias issue, we should have accepted the Appellant's submissions.

110. For similar reasons we consider that the same result follows in relation to the Appellant's submission that there would be a violation of her rights under Article 6(1) by reason of lack of apparent impartiality by a member of the Visitors panel.

111. It follows that on the grounds of being judge in her own cause and affected by apparent bias at Common Law and by reason of the fact that there would be a potential breach of the Appellant's rights to an independent and impartial tribunal under Article 6(1), were this hearing to proceed to a decision on any substantive issues on the appeal, which breach could not be cured except by means of prosecution of proceedings for judicial review, Ms Nathan must be recused.

112. That conclusion, does not in itself lead to the consequence that the other two members of the panel have also to be recused. At the stage when the question of Ms Nathan's being recused was first raised there had not yet been any hearing of the substantive appeal nor had the panel held any meeting to discuss the merits of that appeal. There would thus be no opportunity for the other members of the panel to be influenced by any view on the merits of the appeal expressed by Ms Nathan.

113. Before leaving this point it is to be observed that, as appears from our analysis of the evidence of the disciplinary regimes operated by other professions, the lack of insulation between participation in the activities of the prosecuting body and the activities of members of disciplinary and appeal tribunals to be found in the Bar Council's regime is unusual and may now have become unique. However, we have not attached great weight to what other professions have considered to be appropriate procedural structures. At the end of the day what matters is whether the Bar Council's regime is defective having regard to the relevant principles. In this connection, we record that this is a developing area of law which particularly in the last five years has been moving towards a somewhat stricter approach than previously.

The Nomination Issue

114. We were asked by Mr McLaren QC, on behalf of the Bar Council, to give a decision on this issue even if we had already reached the conclusion that Ms Nathan ought to be recused on other grounds.

115. It is submitted on behalf of the Appellant that the selection process for those members of Visitors Panels who are not judges, that is to say for the lay representatives and members of the Bar, does not involve their nomination by the Lord Chief Justice in accordance with Rule 10(1) of the Visitors Rules. Neither the Lord Chief Justice nor the Deputy Chief Justice, to whom the former has apparently delegated all his functions in relation to Visitors hearings, has played any part in the selection of such panel members. Accordingly, it is submitted that, as of now, neither Ms Clark nor Ms Nathan have been validly nominated and the hearing cannot proceed before this panel. Mr Speaight QC on behalf of the Appellant does, however, accept that this deficiency can be cured by valid retrospective nominations now being made.

116. Mr McLaren accepts that the appointments of Ms Clark and Ms Nathan are not in accordance with Rule 10 of the Visitors Rules. In this connection, we note that he does not submit that, when the Clerk to the Visitors Court informs the Appellant and the Bar Council of the names (put forward by COIC) of those who are to sit on the Visitors Panel, the Clerk to the Visitors Court nominates these persons on behalf of the Lord Chief Justice for the purposes of Rule 10. It is submitted, however, that the deficiency in the appointments is an administrative failing and not one which would render the appointment of the Visitors panel invalid. It does not affect the capacity of the respective members of

the panel to fulfil their function. No prejudice can possibly be caused since the persons so nominated are drawn from an accredited pool of potential Visitors whose identities and relevant background can be ascertained. The members involved, nominated as they are by COIC and drawn at random, are subject to the same careful scrutiny that applies to the COIC appointments to the Disciplinary hearings.

117. Consequently, this deficiency can still be cured before the end of the hearing by retrospective nominations.

118. In our view, the process of nomination contemplated under Rule 10(1) has two elements: (i) selection of a suitable and available judge, barrister and lay representatives and (ii) identification of the persons selected to the parties to the appeal. In order to comply with these requirements it is necessary that the Lord Chief Justice should approve the persons proposed to participate as panel members as suitable to do so and that the persons so selected should be identified to the parties by the Lord Chief Justice or his representative.

119. The mode of nomination actually adopted in this case does not involve a process of selection by or subject to the approval of the Lord Chief Justice except the selection of the judge concerned. Neither the Lord Chief Justice nor the Deputy Chief Justice have apparently exercised any judgment in selection with reference to the suitability of those concerned nor apparently appointed anyone else to do so. The identification of those concerned to the other parties has been a communication automatically relayed by the Clerk to the Visitors without reference to the Lord Chief Justice or the Deputy Chief Justice.

120. We therefore do not consider that either Ms Clark or Ms Nathan have so far been effectively nominated in accordance with Rule 10(1).

121. As we understand Mr Speaight QC to accept on behalf of the Appellant, it would still be open to the Lord Chief Justice to cure this defect retrospectively. That no doubt would be a course open to him in respect of Ms Clark. However, as regards Ms Nathan, the considerations which we have set out in the earlier part of this Decision would preclude her being validly nominated.

The Hon Mr Justice Colman

Ms Sara Nathan

Ms Julia Clark