DAVIDSON v SCOTTISH MINISTERS (No 2)

No 2
15 July 2004

Lord Bingham of Cornhill, Lord Woolf
Lord Nicholls of Birkenhead,
Lord Hope of Craighead and
Lord Cullen of Whitekirk

SCOTT DAVIDSON, Petitioner (Respondent and cross-appellant)—
O'Neill QC, Collins
SCOTTISH MINISTERS, Respondents (Appellants and cross-respondents)—
Brailsford QC, Mure

Administrative law – Constitutional law – Judicial review – Nobile officium – Apparent bias and want of impartiality – Judge's statements to Parliament – Leave to appeal to House of Lords – Crown Proceedings Act 1947 (cap 44), secs 21, 38(2) – European Convention on Human Rights and Fundamental Freedoms, Art 6(1)

Section 21 of the Crown Proceedings Act 1947 provides, *inter alia*, that in any proceedings against the Crown, the court shall not make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and that the court shall not in any civil proceedings make any order against an officer of the Crown if the effect would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown. Section 38(2) provides that ''officer'' in relation to the Crown includes a member of the Scottish Executive. Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms provides, *inter alia*, that in the determination of his civil rights and obligations everyone is entitled to a fair and public hearing by an independent and impartial tribunal.

The petitioner, a remand prisoner in HMP Barlinnie, lodged a petition in the Court of Session under the judicial review procedure. He sought a declarator that the conditions of his detention were incompatible with Art 3 of the European Convention on Human Rights and Fundamental Freedoms, an order ordaining the Scottish Ministers to secure his transfer to conditions which would comply with Art 3, and damages. The Lord Ordinary refused the application on the ground, among others, that sec 21 of the 1947 Act had the effect of preventing the court from making an order for specific performance against the Scottish Ministers. The petitioner reclaimed. An Extra Division, which included Lord Hardie, refused the reclaiming motion. Leave to appeal to the House of Lords was refused. The petitioner then presented a petition to the *nobile officium* asking the court to hold that the interlocutors of the Extra Division were vitiated for apparent bias and want of impartiality, because Lord Hardie had made statements while he was Lord Advocate about the effect of sec 21 of the 1947 Act on the remedies that might be available to the courts in Scotland after devolution against the Scottish Ministers. The petitioner sought to have the matter determined by the House of Lords. The Second Division granted the petition and set aside the interlocutors of the Extra Division, but appointed the reclaiming motion against the interlocutor of the Lord Ordinary to the summar roll for rehearing. The Scottish Ministers appealed to the House of Lords. The petitioner cross-appealed.

Held that: (1) it was difficult, if not impossible, to lay down hard-edged rules to distinguish a case where apparent bias may be found from one where it may not, but a risk of apparent bias is liable to arise where a judge is called upon to rule judicially on the effect of legislation which he or she has drafted or promoted during the parliamentary process and the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that Lord Hardie, sitting judicially, would subconsciously strive to avoid reaching a conclusion which would undermine the very clear assurances he had given to Parliament (paras 17, 22, 23, 25, 45, 56–58, 78–81); (2) it was not open to the House of Lords either to grant leave to appeal or to direct the Inner

House that it should do so, but the question at issue between the parties was a question of general public importance which was appropriate for consideration by the House of Lords and it would be unfortunate if litigants were deprived of the opportunity of appealing to the House of Lords against decisions at the interlocutory stage under the judicial review procedure on the grounds that answers had not been lodged and there remained other questions that had yet to be decided at first instance, and the question whether leave to appeal should be given ought to be re-examined by the Inner House (paras 21, 22, 25, 65–75, 78); and appeal *dismissed* and cross-appeal *allowed* and question whether leave to appeal to the House of Lords should be given *remitted* to the Inner House for further consideration.

Observed that: (1) it was routine for judges, before or at the outset of a hearing, to disclose a previous activity or association which would or might provide the basis for a reasonable apprehension of lack of impartiality; it was important that proper disclosure should be made in such cases; and proper disclosure at the outset is itself a badge of impartiality (paras 19, 54); and (2) there was no fundamental objection to members of either House of Parliament serving as a member of a court; arguments based on the theory of separation of powers alone would not suffice; it all depended on what they said and did in Parliament and how that related to the issue they had to decide as members of the tribunal (para 53).

SCOTT DAVIDSON brought a petition under the judicial review procedure for declarator and for an order for his transfer to other conditions of detention. The Scottish Ministers were called as respondents. The petitioner moved for an interim order for such transfer. On 26 October 2001 the Lord Ordinary (Lord Johnston) refused the motion. The petitioner reclaimed. On 30 October 2001 an Extra Division of the court appointed the case to the summar roll for a hearing on the matter of competency.

The cause called before an Extra Division comprising Lord Marnoch, Lord Hardie and Lord Weir for a hearing, on 21 and 22 November and 4, 5, 6, 7 and 11 December 2001. The court allowed the petitioner to amend the petition by inserting certain declarators sought and pleas in law. At advising on 18 December 2001 the court refused the reclaiming motion: 2002 SC 205. On 20 December 2001 the court refused leave to appeal to the House of Lords.

The petitioner then brought a petition to the *nobile officium* of the Court of Session craving the court to set aside the decisions of the Extra Division on 18 and 20 December 2001.

The cause called before the Second Division comprising the Lord Justice-Clerk (Gill), Lord Kirkwood and Lord Philip for a hearing on the summar roll, on 11 and 12 July 2002. At advising, on 11 September 2002, the court granted the prayer of the petition to the extent of setting aside the interlocutors of 18 and 20 December 2001 and appointed the reclaiming motion to the summar roll for a rehearing by a new Division: 2003 SC 103.

The respondents appealed to the House of Lords.

The petitioner presented an incidental petition seeking dismissal of the appeal because it sought to proceed without prior leave of the Inner House. The incidental petition was referred to an Appeal Committee. The incidental petition was considered by an Appeal Committee comprising Lord Bingham of Cornhill, Lord Hoffmann and Lord Hope of Craighead on 31 July 2003. A draft Report was laid before the Committee by Lord Hope of Craighead. *Eo die* the Committee announced that it would recommend to the House that the petition to dismiss the appeal be dismissed: 2005 SC (HL) 1.

Cases referred to:

Bradford v McLeod 1986 SLT 244; 1985 SCCR 379

Brown v Hamilton District Council 1983 SC (HL) 1; 1983 SLT 397

Costain Building and Civil Engineering Ltd v Scottish Rugby Union 1993 SC 650; 1994 SLT 573; 1994 SCLR 273

Davidson v Scottish Ministers 2002 SC 205; 2002 SLT 420

Davidson v Scottish Ministers (No 2) 2003 SC 103; 2002 SLT 1231
Dyer v Watson 2002 SC (PC) 89; 2002 SLT 229; 2002 SCCR 220; [2004] 1 AC 379; [2002] 3 WLR 1488; [2002] 4 All ER 1
Frame v Caledonian Ry Co 1914 SC 93; 1913 2 SLT 368
Girvan v Inverness Farmers Dairy 1998 SC (HL) 1; 1998 SLT 21; 1998 SCLR 72
Humphries v X and Y 1982 SC 79; 1982 SLT 481
Johnson v Johnson (2000) 201 CLR 488
Kartinyeri v Commonwealth of Australia (1998) 156 ALR 300
L, Petr 1993 SLT 1310; 1993 SCLR 693
Laird v Tatum 409 US 824 (1972)
Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 2 WLR 870; [2000] 1 All ER 65
M v Secretary of State for the Home Office [1994] 1 AC 377; [1993] 3 WLR 433; [1993] 3 All ER 537
McDonald v Secretary of State for Scotland 1994 SC 234; 1994 SLT 692; 1994 SCLR 318
McGonnell v UK (2000) 30 EHRR 289
McIntosh v British Railways Board 1990 SC 338; 1990 SLT 637
Millar v Dickson 2002 SC (PC) 30; 2001 SLT 988; 2001 SCCR 741; [2002] 1 WLR 1615; [2002] 3 All ER 1041
Pabla Ky v Finland App No 47221/99, 22 June 2004, unreported
Panton and Panton v Minister of Finance and Attorney-General [2001] UKPC 33
Porter v Magill [2001] UKHL 67, [2002] 2 AC 357; [2002] 2 WLR 37; [2002] 1 All ER 465
Procola v Luxembourg (1995) 22 EHRR 193
R, Petr 1993 SC 417; 1993 SLT 910
Rojas v Berllaque [2004] 1 WLR 210
Ross v Ross 1927 SC (HL) 4; 1927 SLT 2
S (Minors) (Care Order: Implementation of Care Plan) (Re) [2002] UKHL 10; [2002] 2 AC 291; [2002] 2 WLR 720; [2002] 2 All ER 192
Sellar v Highland Ry Co 1919 SC (HL) 19; 1919 1 SLT 149
Starrs v Ruxton 2000 JC 208; 2000 SLT 42; 1999 SCCR 1052
West v Secretary of State for Scotland 1992 SC 385; 1992 SLT 636; 1992 SCLR 504
Whitehill v Corporation of Glasgow 1915 SC 1015; 1915 2 SLT 174

The appeal was heard in the House of Lords before Lord Bingham of Cornhill, Lord Woolf, Lord Nicholls of Birkenhead, Lord Hope of Craighead and Lord Cullen of Whitekirk, on 16 and 17 June 2004.

At delivering judgment, on 15 July 2004—

LORD BINGHAM OF CORNHILL— My Lords,

[1] Before the House are an appeal by the Scottish Ministers and a cross-appeal by Mr Davidson. The cross-appeal raises a procedural issue which arises only if the appeal fails. The appeal raises an important question of substance. It is whether the Second Division of the Court of Session (the Lord Justice-Clerk (Gill), Lord Kirkwood and Lord Philip), in its decision of 11 September 2002 (2003 SC 103), was right to set aside decisions made by an Extra Division of the Court of Session (Lord Marnoch, Lord Hardie and Lord Weir) on 18 and 20 December 2001 on the ground that those decisions were vitiated by apparent bias and want of objective impartiality on the part of one member of the court.

[2] The facts relevant to the present appeal are not in dispute. From about 2 April 2001 until 18 August 2001 Mr Davidson was detained as a remand prisoner in C Hall of HMP Barlinnie. Thereafter he was detained as a convicted prisoner in E Hall. He complained of the conditions in which he was held, contending that they breached Art 3 of the European Convention on Human Rights, and requested a transfer, but was not at that stage transferred. On 24 October he lodged a petition for judicial review before the Court of Session seeking (1) declarator that the conditions of his

detention were incompatible with Art 3 of the European Convention; (2) an order ordaining the Scottish Ministers to secure his transfer to conditions which would comply with Art 3, and for such an order to be made *ad interim*; and (3) damages. On 26 October 2001 the Lord Ordinary, Lord Johnston, refused to make interim orders against the Scottish Ministers on the ground, among others, that sec 21 of the Crown Proceedings Act 1947, properly interpreted, precluded the grant of any coercive order against the Scottish Ministers. He also declined to make any order declaratory of the rights of the parties *ad interim*. He granted Mr Davidson leave to reclaim.

[3] The reclaiming motion was heard by the Extra Division already referred to over seven days in November to December 2001. Although other issues were raised, the focus of the argument was on the competency of granting an interim order of specific performance against the Scottish Ministers. On 18 December the Extra Division refused Mr Davidson's reclaiming motion (2002 SC 205). Mr Davidson sought leave to appeal to the House against this interlocutor, but on 20 December 2001 a majority of the Extra Division (Lord Marnoch and Lord Hardie; Lord Weir dissenting) refused leave.

[4] Mr Davidson later became aware that Lord Hardie had, when holding the office of Lord Advocate in Her Majesty's Government and in the context of piloting and promoting the Scotland Bill in the House of Lords, advised the House on the effect of sec 21 of the Crown Proceedings Act 1947 on the remedies which might be available to the courts in Scotland against the Scottish Ministers. The statement of facts agreed between the parties for purposes of this appeal records the active part played by Lord Hardie during the passage of the Bill through the House of Lords and continues:

> 'In the context of his promoting the Scotland Bill, Lord Hardie as Lord Advocate had, in October and November 1998, assured Your Lordships' House in recommending rejection of certain Opposition amendments to the Scotland Bill, that the effect of section 21 of the Crown Proceedings Act 1947 was to prevent the courts in Scotland from making any order for specific performance against the Appellants as part of the Crown. In the course of the above mentioned reclaiming motion and motion for leave, Lord Hardie at no time adverted to his previously expressed views to the Westminster Parliament as Lord Advocate on the issue of the effect of section 21, and made no offer to recuse himself from the court hearing the reclaiming motion on this matter or on the hearing of the subsequent application for leave to appeal. In these circumstances, the Respondent was apprehensive that, as a result of the participation of Lord Hardie therein, the Extra Division which pronounced the said interlocutors of 18 and 20 December 2001 did not have the appearance of impartiality.'

[5] On 17 May 2002 Mr Davidson lodged a petition to the *nobile officium* of the Court of Session, asking the court to set aside the interlocutors of 18 and 20 December 2001 on the ground that the decisions of the Extra Division were vitiated for apparent bias and want of objective impartiality on the part of the court as a result of Lord Hardie's participation in them. In its decision now under appeal the Second Division unanimously set aside the interlocutors of 18 and 20 December 2001, and ordered that the reclaiming motion be reheard by a different division of the Inner House. It refused Mr Davidson's prayer that he be granted leave to appeal to the House against the interlocutor of 18 December 2001. Mr Davidson himself was released from HMP Barlinnie nearly two years ago, but it was not suggested that the House should, on that ground, decline to decide this appeal, and leading counsel for the Scottish Ministers expressly recognised the constitutional

importance of the underlying issue as to the effect in Scotland of sec 21 of the 1947 Act and the permissibility of coercive orders against the Scottish Ministers.

[6] The rule of law requires that judicial tribunals established to resolve issues arising between citizen and citizen, or between the citizen and the state, should be independent and impartial. This means that such tribunals should be in a position to decide such issues on their legal and factual merits as they appear to the tribunal, uninfluenced by any interest, association or pressure extraneous to the case. Thus a judge will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorised as one of actual bias. But the expression is not a happy one, since 'bias' suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment.

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

[8] In their judgments under appeal the Lord Justice-Clerk and Lord Kirkwood considered with some particularity the amendment to sec 38(2) of the 1947 Act which Lord Hardie successfully moved and the two amendments which he successfully resisted. The amendment to sec 38(2) extended the definition of 'officer' to include a member of the Scottish Executive, an amendment which may scarcely have been necessary given the clause which became sec 117 of the Act. The two amendments successfully resisted related to the power of the Secretary of State under what became sec 58 and to the introduction or making of legislation (a new clause proposed to be inserted between what are now secs 107 and 108): in neither instance was the court to have power to compel. The particularity of their Lordships' consideration enabled senior counsel for the Scottish Ministers to submit that these were not the points which fell to be decided by the Extra Division. There is force in this criticism. But it is in my opinion necessary to adopt an altogether broader approach. The fair-minded and informed observer who has considered the facts is not to be credited with mastery of the minutiae of drafting. Such an observer

will pay attention to the wood, not the trees. The wood is represented by two statements of Lord Hardie. The first was on 28 October 1998 (*Hansard*, HL vol 593, col 2044): 'I would remind your Lordships that Scottish Ministers will be part of the Crown and will be protected by the provisions of the Crown Proceedings Act 1947, which at present ensures that the Crown cannot be subject to such orders [ie orders for specific performance]. Instead, all that the courts can do is to issue a declarator.' The second was on 2 November 1998 (*Hansard*, HL vol 594, col 105): 'The answer to it is the Crown Proceedings Act 1947, which prevents the court from making an order for specific performance against the Crown. The Scottish Executive will be part of the Crown.' Whether the court could order the Scottish Executive to transfer Mr Davidson was, it will be recalled, the very issue which the Lord Ordinary and the Extra Division were called upon to decide.

[9] Senior counsel for the Scottish Ministers submitted that Lord Hardie's statements to the House were a bona fide expression of his personal opinion, reflecting the law of Scotland as it was then settled. This may be readily accepted. In *McDonald v Secretary of State for Scotland* a claim for interdict against the Secretary of State as representative of the Crown had been held to be incompetent. There is no reason to doubt that Lord Hardie's opinion was orthodox, and when the point comes to be finally decided it may be held to be correct. The question is not, however, whether Lord Hardie's statements were reasonable and proper but whether the fair-minded and informed observer, having considered them and the circumstances in which they were made, would conclude that there was a real possibility that he was biased in the sense that, having made these statements, he would be unable to bring an objective and undistorted judgment to bear on the issue raised by Mr Davidson in his reclaiming motion.

[10] Rarely, if ever, in the absence of injudicious or intemperate behaviour, can a judge's previous activity as such give rise to an appearance of bias. Over time, of course, judges acquire a track record, and experienced advocates may be able to predict with more or less accuracy how a particular judge is likely to react to a given problem. Since judges are not automata this is inevitable, and presenting a case in the way most likely to appeal to a particular tribunal is a skill of the accomplished advocate. But adherence to an opinion expressed judicially in an earlier case does not of itself denote a lack of open-mindedness; and there are few experienced judges who have not, on fresh argument applied to new facts in a later case, revised an opinion expressed in an earlier. In practice, as the cases show, problems of apparent bias do not arise where a judge is invited to revisit a question on which he or she has expressed a previous judicial opinion, which must happen in any developed system, but problems are liable to arise where the exercise of judicial functions is preceded by the exercise of legislative functions.

[11] In *Procola v Luxembourg* a dairy association complained of four milk quota orders made with retrospective effect pursuant to a domestic regulation and a domestic statute. The regulation had been submitted in draft to the Conseil d'Etat, which had advised that a statute was necessary to give retrospective effect to the proposed new rules and had drafted a single clause bill which had been enacted as the statute. The association's challenge to the four orders, based on their retrospective effect among other things, came before the Judicial Committee of the Conseil d'Etat, four of whose five members had previously taken part in drawing up the Conseil d'Etat's opinion on the draft regulation and framing the bill. The association's challenge was dismissed, and it complained that the Judicial Committee was not an independent and impartial tribunal and that its rights under Art 6 of the

European Convention had been violated. A majority of the Commission held that there had been no violation of Art 6, but a minority dissented, holding that, having regard to the importance of appearances and the increased concern of the public that the fair administration of justice should be guaranteed, the association could legitimately fear that its case would not be heard by an independent and impartial tribunal (p 203). The court unanimously upheld this dissent. In its judgment it said (paras 44, 45):

> '44. The only issue to be determined is whether the Judicial Committee satisfied the impartiality requirement of Article 6 of the Convention, regard being had to the fact that four of its five members had to rule on the lawfulness of a regulation which they had previously scrutinised in their advisory capacity.
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> 45. The Court notes that four members of the *Conseil d'Etat* carried out both advisory and judicial functions in the same case. In the context of an institution such as Luxembourg's *Conseil d'Etat* the mere fact that certain persons successively performed these two types of function in respect of the same decisions is capable of casting doubt on the institution's structural impartiality. In the instant case, Procola had legitimate grounds for fearing that the members of the Judicial Committee had felt bound by the opinion previously given. That doubt in itself, however slight its justification, is sufficient to vitiate the impartiality of the tribunal in question, and this makes it unnecessary for the Court to look into the other aspects of the complaint.'

[12] Article 6 of the European Convention was again invoked in *McGonnell v UK*. The applicant in that case applied to the Island Development Committee of Guernsey for permission to develop his property and was refused because the proposed development did not conform to a detailed development plan. That plan had been adopted some years before by the States of Deliberation, over which the Deputy Bailiff had presided. The applicant appealed to the Royal Court against the refusal of permission and the appeal was heard by the Bailiff, who had been the Deputy Bailiff when the plan had been adopted, and seven Jurats. The appeal was unanimously dismissed. The Commission held, by 25 votes to 5, that Art 6 had been violated, ruling (pp 300, 301):

> '61. The position in the present case was therefore that when the applicant appeared before the Royal Court on 6 June 1995, the principal judicial officer who sat on his case, the Bailiff, was not only a senior member of the judiciary of the Island, but was also a senior member of the legislature — as President of the States of Deliberation — and, in addition, a senior member of the executive — as titular head of the administration presiding over a number of important committees. It is true, as the Government points out, that the Bailiff's other functions did not directly impinge on his judicial duties in the case and that the Bailiff spends most of his time in judicial functions, but the Commission considers that it is incompatible with the requisite appearances of independence and impartiality for a judge to have legislative and executive functions as substantial as those in the present case. The Commission finds, taking into account the Bailiff's roles in the administration of Guernsey, that the fact that he has executive and legislative functions means that his independence and impartiality are capable of appearing open to doubt.'

The court was unanimously of the same opinion (pp 307, 308):

> '55. The participation of the Bailiff in the present case shows certain similarities with the position of the members of the Conseil d'Etat in the case of *Procola*. First, in neither case was any doubt expressed in the domestic proceedings as to the role of the impugned organ. Secondly, and more particularly, in both cases a member, or members, of the deciding tribunal had been actively and formally

> involved in the preparatory stages of the regulation at issue. As the Court has noted above, the Bailiff's non-judicial constitutional functions cannot be accepted as being merely ceremonial. With particular respect to his presiding, as Deputy Bailiff, over the States of Deliberation in 1990, the Court considers that any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue. In the present case, in addition to the chairing role as such, the Deputy Bailiff could exercise a casting vote in the event of even voting and, as the Bailiff stated in the *Bordeaux Vineries* case, there was no obligation on him to exercise his casting vote against a proposition before the States where that vote impinged on his conscience. Moreover, the States of Deliberation in Guernsey was the body which passed the regulations at issue. It can thus be seen to have had a more direct involvement with them than had the advisory panel of the Conseil d'Etat in the case of *Procola* with the regulations in that case.
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> 56. The Court also notes that in the case of *De Haan*, the judge who presided over the Appeals Tribunal was called upon to decide upon an objection for which he himself was responsible. In that case, notwithstanding an absence of prejudice or bias on the part of the judge, the Court found that the applicant's fears as to the judge's participation were objectively justified.
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> 57. The Court thus considers that the mere fact that the Deputy Bailiff presided over the States of Deliberation when DDP6 was adopted in 1990 is capable of casting doubt on his impartiality when he subsequently determined, as the sole judge of the law in the case, the applicant's planning appeal. The applicant therefore had legitimate grounds for fearing that the Bailiff may have been influenced by his prior participation in the adoption of DDP6. That doubt in itself, however slight its justification, is sufficient to vitiate the impartiality of the Royal Court, and it is therefore unnecessary for the Court to look into the other aspects of the complaint.'

In a short separate opinion Sir John Laws (p 309) based his concurrence solely on the coincidence of the Bailiff's presidency over the States in 1990 and over the Royal Court in 1995.

[13] It was at once recognised that the decision in *McGonnell* threw doubt on the Lord Chancellor's historic dual role as both legislator and judge. Giving his written answer to a parliamentary question on 23 February 2000 (*Hansard*, HL vol 610, WA 33), Lord Irvine of Lairg LC declined to step down as head of the judiciary and distinguished his role from that of the Bailiff of Guernsey, but added: 'The Lord Chancellor would never sit in any case concerning legislation in the passage of which he had been directly involved nor in any case where the interests of the executive were directly engaged.' This response was consistent with a response made by the Lords of Appeal in Ordinary to an invitation to publish a statement of the principles they intended to observe when participating in debates and votes in the House of Lords and when considering their eligibility to sit on related cases. On 22 June 2000, in the course of the Law Lords' collective reply, they stated (*Hansard*, HL vol 614, col 419): 'As full members of the House of Lords the Lords of Appeal in Ordinary have a right to participate in the business of the House. However, mindful of their judicial role they consider themselves bound by two general principles when deciding whether to participate in a particular matter, or to vote; . . . secondly the Lords of Appeal in Ordinary bear in mind that they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which might later be relevant to an appeal to the House.'

[14] After the conclusion of argument, the attention of the House was drawn to the recent decision of the Strasbourg Court in *Pabla Ky v Finland*. In that case a

member of the Finnish Parliament who also sat as an expert member of the Court of Appeal was said to lack independence. The Strasbourg Court rejected that complaint, and also found no objective justification for the applicant's fear as to a lack of independence and impartiality of the Court of Appeal resulting from the dual role of the expert member. In distinguishing *Procola* and *McGonnell*, the court pointed out (para 34) that the expert member 'had not exercised any prior legislative, executive or advisory function in respect of the subject-matter or legal issues before the Court of Appeal for decision in the applicant's appeal'.

[15] In *Kartinyeri v Commonwealth of Australia* objection was taken to the participation of a judge in a High Court decision on the constitutionality of a Commonwealth statute. The ground of objection was that the judge, as counsel, had given an opinion on the point. The judge concluded that he should not disqualify himself. He held (para 24):

> 'I do not think that the expression of an opinion as to a legal matter, whether as a practising lawyer or as a judge on a prior occasion, will ordinarily of itself give rise to a reasonable apprehension of bias according to the relevant test. Mason J in the passage I have already quoted [*Re JRL, ex p CJL* (1986) 161 CLR 342, 352] points out that the making of a previous decision by a judge on issues of fact and law, although perhaps generating an expectation of a particular outcome, does not mean that the judge will not be impartial and unprejudiced in the relevant sense.'

He also held (para 33):

> 'Some members of this court have come to it directly from a career in politics and in government. Inevitably, in Cabinet and in the Party room, they must have had a very close association with members of the government whose legislation they have had from time to time to interpret. Sometimes the legislation may be in implementation of long-standing policy to which the former politician has subscribed and has perhaps even advocated. A particular association of itself, and even a current, proper one which observes the punctiliousness required in respect of a case and issues actually before, or which may be before, the court should not ordinarily give rise to a reasonable apprehension of bias.'

But, relevantly to the present case, he also said (para 29):

> 'My position is, I think, quite different from that of a person who, before coming to the bench, has been directly involved in the preparation of legislation that has to be construed by the court, and who has taken active steps as principal law officer of the Commonwealth to seek to ensure the passage of a bill and to propound to the Governor-General the Senate's failure to pass it as a basis for a double dissolution. These were some of the circumstances that led Murphy J to stand aside in *Victoria v Commonwealth and Connor* [(1975) 134 CLR 81]. There were other closely related steps taken by his Honour there when he was the Attorney-General concerning that Act.'

[16] Counsel for the Scottish Ministers drew attention to some observations of Rehnquist J in *Laird v Tatum* (p 835, para 6), when denying a motion to recuse himself on the ground of his previous activity as an expert witness and an Assistant Attorney-General, but little assistance is to be gained from this authority, first, because the matter was governed by statute and, secondly, because the judgment was not directed to the appearance of bias. More pertinent is the decision of the Privy Council in *Panton and Panton v Minister of Finance and the Attorney-General*. The appellants had challenged the constitutionality of a Jamaican statute and had failed

before the Constitutional Court and the Court of Appeal. Rattray P had presided in the Court of Appeal, and after the hearing it had come to the appellants' notice that he had, as Attorney-General, certified that in his opinion the statute which the appellants sought to challenge was not contrary to the Constitution. It was a pro forma certificate given before the statute was presented to the Governor-General for the royal assent. It appears to have been a formal step by the Attorney-General and the Board observed (para 9):

> 'It is not obvious that the Attorney-General would himself have applied his mind to every aspect of the Act and examined its constitutionality in every detail. Doubtless members of his office would advise him on the matter and from all that appears he may well have relied on his departmental advisors in putting his signature to the certificate. It is a statement of his opinion. But it is not evident that it took any account of the particular issue which has now been raised by the appellants.'

On these facts the Board found no appearance of bias. Nor did it in the fact that the President had, when the statute was passed, been a Member of Parliament and Minister of Justice as well as Attorney-General. The Board said (paras 13, 14):

> '13. But there is nothing to show that he was actively engaged in the promotion of the Bill, indeed there is nothing to show that he took any part in the process of its passing at all. He may well have voted for it as a member of the government whose Bill it was but there is nothing on which the appellants found as demonstrating any particular participation in the legislative process. Had he introduced the Bill, or campaigned for it, been responsible for securing its passage through Parliament, or adopted it as a particular cause which he was determined to promote, there might have been some material on which the appellants could have founded an argument. But, apart from the matter of the certificate, they look only to the fact of his membership of the government and the Parliament when the Act was passed. That cannot be sufficient to constitute a disqualification from his sitting as a judge on the issue of constitutionality which has now arisen. His past political history is, as was pointed out in the passage in *Locabail* ([2000] QB 451, 480, para 25) quoted earlier, not ordinarily a ground for disqualification.
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> 14. The absence of any significant role played by Mr Rattray in the passing of the legislation is a point of some importance.'

[17] The judgment of the Board in *Panton* makes clear that it is difficult, if not impossible, to lay down hard-edged rules to distinguish a case where apparent bias may be found from one where it may not. Much will turn on the facts of the particular case. But the judgment also holds, consistently with authority cited above, that a risk of apparent bias is liable to arise where a judge is called upon to rule judicially on the effect of legislation which he or she has drafted or promoted during the parliamentary process. Since in the present case there is no issue as to the facts, no issue as to the legal test to be applied and (in my opinion) no significant misdirection by any member of the Second Division, I should for my part be very reluctant to disturb its unanimous decision. I am however of the clear opinion that its conclusion was justified by the nature and extent of Lord Hardie's involvement in the passage of the Scotland Act. The fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that Lord Hardie, sitting judicially, would subconsciously strive to avoid reaching a conclusion which would undermine the very clear assurances he had given to Parliament.

[18] In reaching this opinion I do not overlook or disparage the significance of the

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

[19] Where a judge is subject to a disqualifying interest of any kind ('actual bias'), this is almost always recognised when the judge first appreciates the substance of the case which has been assigned. The procedure is then quite clear: the judge should, without more, stand down from the case. It is rare in practice for difficulties to arise. Apparent bias may raise more difficult problems. It is not unusual for a judge, at the outset of a hearing, to mention a previous activity or association which could not, properly understood, form the basis of any reasonable apprehension of lack of impartiality. Provided it is not carried to excess, this practice is not to be discouraged, since it may obviate the risk of misunderstanding, misrepresentation or misreporting after the hearing. It is also routine for judges, before or at the outset of a hearing, to disclose a previous activity or association which would or might provide the basis for a reasonable apprehension of lack of impartiality. It is very important that proper disclosure should be made in such cases, first, because it gives the parties an opportunity to object and, secondly, because the judge shows, by disclosure, that he or she has nothing to hide and is fully conscious of the factors which might be apprehended to influence his or her judgment. When such disclosure is made, it is unusual for an objection to be taken. The ordinary course is exemplified in the opinion of Lord Mackay of Clashfern in *Re S (Minors) (Care Order: Implementation of Care Plan)* (p 327, para 108):

> 'Since I had a part in the process of enacting the Children Act 1989 [cap 41] and in a public lecture I had suggested that the idea of starring stages of a care plan should be considered so that the court might have an opportunity of considering whether to intervene if the plan was not being carried out, I feel it appropriate to add some observations. At the start of the hearing I invited counsel to say whether any party had any objection to my sitting and I was glad to be told on behalf of all parties they had no such objection.'

There are of course a number of entirely honourable reasons why a judge may not make disclosure in a case which appears to call for it, among them forgetfulness, failure to recognise the relevance of the previous involvement to the current issue or failure to appreciate how the matter might appear to a fair-minded and informed observer who has considered the facts but lacks the detailed knowledge and self-knowledge of the judge. However understandable the reasons for it, the fact of non-disclosure in a case which calls for it must inevitably colour the thinking of the observer.

[20] The office of Lord Advocate has traditionally been held by practitioners commanding very high professional and personal respect, who have thereafter, in the ordinary course, become judges, often holding the highest judicial offices in Scotland and elsewhere. Nothing in this opinion should be understood to suggest that former Lord Advocates should, because of their previous involvement in the preparation and promotion of legislation, be ineligible to become judges or to hear a

very wide range of cases. There will be cases where disclosure is called for, but objection will not frequently be taken. Where it is, and the judge thinks it right to stand down, the loss is justified by the need to maintain full confidence in the integrity of the judicial process.

[21] For these reasons (and also those given by my noble and learned friends Lord Hope of Craighead and Lord Cullen of Whitekirk) I would dismiss this appeal with costs. The procedural consequences of that dismissal are the subject of Mr Davidson's cross-appeal. For the reasons given by Lord Hope, with which I am in full agreement, I would dispose of the cross-appeal as he proposes.

LORD WOOLF— My Lords,

[22] I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Cullen of Whitekirk and I am in complete agreement with them. For the reasons they give I would dismiss this appeal and in respect of the cross-appeal make the order proposed by Lord Hope.

[23] The apparent bias relied on in this case differs from that in other situations. This is because it depends not only on what Lord Hardie said in the House of Lords during the passage of the legislation but the capacity in which he made the remarks that are relied upon by Mr Davidson. He did so as a Government Minister promoting the legislation on the very question which is at the heart of a fundamental issue in Mr Davidson's litigation as to the effect of the same legislation. This is a matter which I, like Lord Bingham (para 16) and Lord Cullen (para 81) would stress. The impartiality here could be said to have the 'structural' quality referred to in a different context in the judgment in *Procola v Luxembourg* (p 206, para 44).

[24] If Lord Hardie was acting in a personal capacity or stating an opinion as to the desirability of the legislation and not as to its effect, the outcome could be different.

LORD NICHOLLS OF BIRKENHEAD— My Lords,

[25] I have had the advantage of reading in draft the speeches of all your Lordships. For the reasons set out in those speeches, with which I agree, I would dismiss this appeal and in respect of the cross-appeal make the order proposed by my noble and learned friend Lord Hope of Craighead.

LORD HOPE OF CRAIGHEAD— My Lords,

[26] The background to this case has been described in the Seventieth Report from the Appeal Committee of 31 July 2003. It is not necessary to repeat these details. But a little more does need to be said about the question which lies at the heart of the dispute between the parties. It is whether, in view of sec 21 of the Crown Proceedings Act 1947, Scott Davidson ('the petitioner') could competently obtain an order for specific performance against the Scottish Ministers or whether his remedy was restricted to an order which was declaratory of his rights.

Crown Proceedings Act 1947

[27] Section 21 of the Crown Proceedings Act 1947 provides:

'(1) In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that:–

(a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of an injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(b) in any proceedings against the Crown for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof.

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.'

[28] Section 38(2) of the 1947 Act contains the following definitions of the expressions 'civil proceedings' and 'officer':

'''Civil proceedings'' includes proceedings in the High Court or the county court for the recovery of fines or penalties, but does not include proceedings on the Crown side of the King's Bench Division; ...

''Officer'', in relation to the Crown, includes any servant of His Majesty, and accordingly (but without prejudice to the generality of the forgoing provision includes a Minister of the Crown [and a member of the Scottish Executive].'

The words which I have placed in square brackets at the end of the definition of 'officer' were inserted by the Scotland Act 1998 (cap 46), sec 125 and para 7 of sch 8. I shall have to return later to the circumstances in which this amendment came to be made in your Lordships' House during the passage of the Scotland Bill.

[29] Part 5 of the 1947 Act deals with the application of the Act to Scotland. Section 43(a) provides that in the application of the Act to Scotland for any reference to the High Court (other than a reference to that court as a prize court) there shall be substituted a reference to the Court of Session; that for any reference to the county court there shall be substituted a reference to the sheriff court; and that the expression 'plaintiff' means pursuer. It may have been thought that the insertion of these routine provisions into the Act would have enabled it to be applied and interpreted in the same way in Scotland as in England. In the event that has proved not to be the case.

[30] In *McDonald v Secretary of State for Scotland* the pursuer was serving a sentence of imprisonment at HMP Glenochil. He claimed that he had been repeatedly searched without lawful authority, warrant or justifiable cause. He raised an action of reparation in the sheriff court in which he sought damages from the Secretary of State for each illegal search. He also sought interdict against him from carrying out any searches without lawful authority, warrant or justifiable cause and interim interdict. The sheriff refused to grant interim interdict. He held that the crave for interdict was incompetent by virtue of sec 21 of the 1947 Act. He also expressed the opinion that it appeared that the pursuer was challenging standing orders and that

this was a matter which would require to be made the subject of judicial review in the Court of Session.

[31] The pursuer then appealed to the sheriff principal, who refused the appeal. In the note attached to his interlocutor the sheriff principal referred to *M v Home Office*, in which it was held that sec 21 of the 1947 Act did not prevent an injunction being granted in a situation in which it could have been granted prior to the Act and that sec 31(2) of the Supreme Court Act 1981 (cap 54) gave jurisdiction to the court on applications for judicial review to grant injunctions, including interim injunctions, against ministers and other officers of the Crown. The leading speech was delivered by Lord Woolf, who said that in broad terms the effect of the Act was that it is only in those situations where prior to the Act no injunctive relief could be obtained that sec 21 prevents an injunction being granted (p 413B–C). This, he said, was the least that could be expected from legislation intended to make it easier for proceedings to be brought against the Crown. The sheriff principal said that in his opinion the decision in that case did not alter the situation in Scotland.

[32] The pursuer then appealed to the Court of Session. The case was argued before the Second Division with the benefit, as the pursuer had been representing himself throughout these proceedings, of submissions from an *amicus curiae*. It was held that the action which the pursuer had raised as an ordinary action in the sheriff court was an action against the Crown, that sec 21 of the 1947 Act applied and that the crave for interdict was incompetent. At p 239 Lord Justice-Clerk Ross said that one effect of the 1947 Act was to deprive litigants in Scotland of the right which they previously had to obtain interdict and interim interdict against the Crown, with the result that orders to that effect could not be pronounced in either the sheriff court or the Court of Session. At p 243 he said that it appeared to him that there were formidable difficulties in the way of a submission to the effect that the decision in *M v Home Office* could be followed in Scotland, on the view that application to the supervisory jurisdiction of the Court of Session in an application for judicial review under r 260B of the Rules of the Court of Session 1965 (SI 1965/321) (now chap 58 of the Rules of the Court of Session 1994 (SI 1994/1443)) did not constitute civil proceedings within the meaning of sec 21. But it was not necessary to determine that point in that process, as the action had been raised in the sheriff court.

[33] That was the state of the law in Scotland when in May 1997, following the election of the Labour Government, Lord Hardie succeeded Lord Mackay of Drumadoon as Lord Advocate.

Scotland Act Bill

[34] One of the steps that was necessary, as part of the process of devolution to Scotland, was to replace the previous system whereby executive powers exercisable in Scotland were vested in the Secretary of State for Scotland by vesting those powers in the Scottish Ministers. This was achieved by sec 44 of the Scotland Act 1998 which provides that there shall be a Scottish Executive and that the members of the Scottish Executive are referred to collectively as the Scottish Ministers. The Secretary of State for Scotland was a Minister of the Crown and, as such, in relation to the Crown an 'officer' within the meaning of sec 38(2) of the 1947 Act. One of the issues which had to be considered during the drafting of the Scotland Bill was whether that definition was to be applied also to the Scottish Ministers. When the Bill reached the House of Lords it contained a provision in general terms in cl 109

(now sec 117 of the Act) for the modification of pre-commencement enactments to accommodate the transfer of powers from Ministers of the Crown to the Scottish Executive. This clause provided that they should be read as if references to Ministers of the Crown, however described, included references to the Scottish Ministers.

[35] The Ministers who were responsible for the passage through the House of Lords of the Scotland Bill were Lord Sewell, an Under-Secretary of State at the Scottish Office, and Lord Hardie, as Lord Advocate. But the principal architect of the Bill, which had begun its life in the House of Commons, was Donald Dewar MP, the then Secretary of State for Scotland. He was assisted as to the details by a team of civil servants and parliamentary draftsmen. In accordance with the usual practice the Ministers in the House of Lords had the benefit of that assistance during the debates on the Bill in this House. Lord Hardie was, of course, answerable to the House as to matters falling within his interest as the senior government law officer on questions of policy.

[36] It was in that capacity that, on the last day of the Committee Stage of the Bill on 8 October 1998, Lord Hardie moved amendment no 292ZNA in which it was proposed that there be inserted at the end of the definition of 'officer' in sec 38(2) of the 1947 Act the words 'and a member of the Scottish Executive'. He explained the Government's reason for wishing to make this and a number of other amendments to the 1947 Act in a single sentence (*Hansard*, HL vol 593, col 650):

> 'The Government consider it necessary that these amendments should be made on the face of the Bill rather than under clause 96 [the power to make subordinate legislation] because they make clear the status which we intend the Scottish administration should have: a part of the Crown separate and distinct from the UK Government, in effect Her Majesty's Government in Scotland in relation to devolved matters.'

It is reasonable to assume that this was a quotation from the brief provided to him, in accordance with the usual practice, by the parliamentary draftsmen. But it was obviously a statement about the government's policy.

[37] There was no discussion, on 8 October 1998, about the way in which this amendment was likely to affect proceedings against the Scottish Ministers. This topic was however the subject of debate during the report stage, in the context of amendments moved by Lord Mackay of Drumadoon from the Opposition front bench.

[38] On 28 October 1998 Lord Mackay of Drumadoon moved a group of amendments to cl 54 (now sec 58 of the Act) giving power to the Secretary of State to intervene in action taken or proposed to be taken by a member of the Scottish Executive if he has reasonable grounds to believe that it would be incompatible with any international obligations. They included amendment no 146E, which was to the effect that in any such proceedings the court shall not make an order for specific performance or any other like order against a member of the Scottish Executive but may instead make a declarator. Lord Mackay explained the thinking behind this group of amendments (*Hansard*, HL vol 593, col 2043). He said that, as he saw it, the Secretary of State would have two alternatives: either to go to the court for a ruling or to make his own order, which would be subject to judicial review.

[39] Lord Hardie set out in his reply the view that the Government took of this amendment (*Hansard*, HL vol 593, col 2044):

> 'Amendment No 146E seeks to protect members of the executive from being subject to orders for specific performance. I would remind your Lordships that Scottish Ministers will be part of the Crown and will be protected by the provisions of the Crown Proceedings Act 1947, which at present ensures that the Crown cannot be subject to such orders. Instead, all that the courts can do is to issue a declarator. Therefore, in our view, the amendment is not necessary.'

Lord Mackay accepted Lord Hardie's explanation as to the effect of the 1947 Act and did not ask for this amendment to be voted on. The words 'at present' which Lord Hardie used when he was describing its effect were, of course, well chosen and entirely accurate. The question had already been the subject of a decision in the Inner House (*McDonald v Secretary of State for Scotland*). But that was a case about the effect of the Act on proceedings in the sheriff court. The observations that were made about its effect on proceedings for judicial review in the Court of Session were obiter. Lord Hardie was making a statement about the present state of the law in Scotland.

[40] The topic came up again a few days later when on 2 November 1998 Lord Mackay of Drumadoon moved amendment no 192E by which he sought to insert a new clause in the Bill after cl 94 (now sec 101 of the Act) to the effect that no court should pronounce any order requiring a member of a Scottish Executive to introduce a Bill to the Parliament or to make, confirm or approve of any provision of subordinate legislation. He repeated concerns that he had expressed earlier that steps might be taken by the UK government to obtain an order from the court against a member of the Scottish Executive, the effect of which would be to draw the court into the controversy. Again, speaking for the Government, Lord Hardie said in a brief reply that the amendment was unnecessary (*Hansard*, HL Debates vol 594, col 105): 'The answer to it is the Crown Proceedings Act 1947, which prevents the court from making an order for specific performance against the Crown. The Scottish Executive will be part of the Crown.' In view of that reply Lord Mackay withdrew his amendment.

[41] There was nothing remarkable about these exchanges. They were typical of the routine that is conducted day and daily in the House of Lords as it performs its functions as a revising chamber. They were not brought to the attention of the public by the media. But they were a matter of public record, as they were reported in *Hansard*.

Proceedings in the Court of Session

[42] Three years later in October 2001 Lord Hardie was asked to sit with Lords Marnoch and Weir as a member of an Extra Division in the Court of Session in *Davidson v Scottish Ministers*. He had been appointed to the bench on 18 February 2000. In accordance with the usual practice the judicial oath was administered to him in public by the Lord President at a sitting of the whole court in the First Division courtroom. The case had come before the Inner House as a reclaiming motion in a petition for judicial review by the petitioner against the Lord Ordinary's interlocutor. The issue which the court had to decide was an issue of competency. It was about the effect of sec 21 of the Crown Proceedings Act 1947 in relation to the seeking of an order for specific performance against the Scottish Ministers.

[43] No mention was made by anybody before the hearing began of the part that Lord Hardie had played in debates in the House of Lords about the effect of sec 21

of the 1947 Act in the light of the provisions of the Scotland Act 1998 on the Scottish Ministers. He did not raise the issue himself as a possible ground of objection to his taking part in the reclaiming motion, and no objection was taken to his taking part by counsel for the petitioner. On 18 December 2001, for reasons given by each of the judges in three separate opinions, the Extra Division unanimously refused the reclaiming motion. The petitioner then sought leave to appeal to this House. He needed leave, as the interlocutor of 18 December 2001 was an interlocutory judgment of the kind referred to in sec 40(1)(b) of the Court of Session Act 1988 (cap 36). On 20 December 2001, by a majority (Lord Weir dissenting), the Extra Division refused leave.

[44] Section 40 of the 1988 Act does not provide for an appeal against an interlocutor of the Inner House of the Court of Session refusing leave. So the petitioner had to look elsewhere for a remedy against the refusal, which had denied him the opportunity of having the interlocutor of 18 December 2001 reviewed by this House. In the event, after what senior counsel for the petitioner admitted had taken a good deal of reading to produce this result, his counsel found a basis for attacking the decisions that had gone against him in the pages of *Hansard*. On 17 May 2002 the petitioner presented a petition to the *nobile officium* in which he asked the Inner House to set aside the interlocutors of 18 December and 20 December 2001 on the ground that they had each been vitiated for apparent bias and to grant him leave to appeal to the House of Lords against the interlocutor of 18 December 2001. On 11 September 2002 the Second Division (the Lord Justice-Clerk (Gill) and Lords Kirkwood and Philip) held that a fair minded and informed observer would have concluded that there was real possibility that Lord Hardie was biased and that the interlocutors of the Extra Division must be set aside and that the reclaiming motion should be reheard.

The appeal

[45] Senior counsel for the petitioner has made it plain on several occasions that what he wished to achieve was a decision from this House on the issue about the effect of sec 21 of the 1947 Act. It was necessary for him to advance the argument that Lord Hardie was disqualified from sitting for apparent bias in order to achieve this aim. I admire his ingenuity in finding a basis for this argument in what Lord Hardie is recorded as having said in *Hansard*. For the reasons given by my noble and learned friend Lord Bingham of Cornhill, with which I agree, the appeal against the decision of the Second Division on this issue must be refused. But I have to confess that, while I am persuaded that on the facts of the case this decision is inevitable, I regard it with little enthusiasm.

[46] It would be easy, were we permitted to take a more robust view, to deplore a system which permits an unsuccessful litigant to challenge a judge's decision that has gone against him by searching after the event for previously undiscovered material, like a needle in a haystack, that might be thought to undermine his objectivity. One might think that the cost and delay of rehearing the case would only be justified if there was a real possibility that the wrong decision had been reached because of the alleged bias. But that is not the approach that we are required to take by Art 6(1) of the European Convention on Human Rights and Fundamental Freedoms, which requires the tribunal to be independent and impartial, and by the Strasbourg authorities. And by long tradition in our own country the rule has been that justice must not only be done, it must be seen to be done. So it

is not to the determination itself that one looks, or to the question whether there has in fact been a fair trial, but to the tribunal (*Millar v Dickson*, para 65). Its independence and impartiality is the subject of a separate guarantee in Art 6(1) (*Porter v Magill* (2002), pp 496, 497, paras 108, 109). This is a necessary element in the fairness, or justice, of the determination. The means by which the information that casts doubt on its independence or impartiality came to the attention of the person who claims that it was unfair are unimportant. The court's duty is simply to examine the information that is put before it and to assess its consequences.

[47] The word 'bias' is used as a convenient shorthand. But it would be a mistake to approach it in this context as if its only meaning were pejorative. The essence of it is captured in the Convention concept of impartiality. An interest in the outcome of the case or an indication of prejudice against a party to the case or his associates will, of course, be a ground for concluding that there was a real possibility that the tribunal or one of its members was biased (eg *Sellar v Highland Ry Co*, *Bradford v McLeod*). But the concept is wider than that. It includes an inclination or predisposition to decide the issue only one way, whatever the strength of the contrary argument. A doubt as to whether this is the case is enough, so long as it can be justified objectively.

[48] In *Procola v Luxembourg* it was held that because of their previous involvement in drawing up the Conseil D'Etat's opinion and framing the bill Procola had legitimate grounds for fearing that the members of the Judicial Committee felt themselves 'bound by the opinion previously given' (para 45). In *McGonnell v UK* the Bailiff's direct involvement of the legislation in the legislation when presiding over the States of Deliberation was sufficient to cast doubt on his judicial impartiality when he was sitting, as the sole judge of the law in the case, in McGonnell's planning appeal (para 57). A doubt as to whether there was a predisposition or inclination to favour the position that he had previously adopted, however slight its justification, was sufficient to vitiate the court's impartiality.

[49] The concepts that are demonstrated by these cases need to be handled with some care. In *Dyer v Watson* (p 108, para 52) Lord Bingham said that the threshold of proving a breach of the reasonable time requirement in Art 6(1) is a high one, not easily crossed (see also pp 115, 116, paras 80–85). I would apply that reasoning in this context too. The word 'real' in the phrase 'real possibility' needs to be emphasised. The individual's rights are not enjoyed in a vacuum, as Lord Bingham put it (p 108, para 51). The quashing of decisions on the ground of apparent bias leads to delay and increased costs and puts at risk the virtue of finality. A balance has to be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights — between holding and applying the principle and allowing it to run out of control.

[50] Further guidance as to the approach which is to be taken to this issue is to be found in the judgment of the Strasbourg Court in *Pabla Ky v Finland*. The case is important because of the light that it sheds on the decisions in *McGonnell* and *Procola* and how doubts as to the 'structural' impartiality of a tribunal are to be dealt with. The court said (paras 26, 27):

> '26. In order to establish whether a tribunal can be considered ''independent'' for the purposes of Art 6(1), regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence.
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> 27. As concerns ''impartiality'', there are two aspects to this requirement.

> First, the tribunal must be subjectively free of 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. Under the objective test, it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings (see *Morris v the United Kingdom*, no 39884/97, para 58, ECHR 2002-I).'

[51] In that case the applicant complained about the lack of independence of one of the members of the Housing Court Division of the Court of Appeal who was also at the time of its decision on 11 December 1997 a member of the Finnish Parliament. He had been an expert member of the Court of Appeal since 1974. He had been a member of Parliament from 1978 to 1990 and was re-elected to the Parliament on 19 March 1995. Commenting on this situation, the court said (paras 29, 30):

> '29. The case also raises issues concerning the role of a member of the legislature in a judicial context. Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the court's case-law (see *Stafford v United Kingdom* [GC], no 46295/99, para 78, ECHR 2002-IV), neither Art 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction. The question is always whether, in a given case, the requirements of the Convention are met. As in the other cases examined by the court, the present case does not, therefore, require the application of any particular doctrine of constitutional law. The court is faced solely with the question whether, in the circumstances of the case, the Court of Appeal had the requisite ''appearance'' of independence, or the requisite ''objective'' impartiality (see *McGonnell v United Kingdom*, no 28488/95, ECHR 2000-II, para 51; *Kleyn and Others v Netherlands* [GC], nos 39343/98, 39651/98, 43147/98 and 46664/99, ECHR 2003-VI, para 192).
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> 30. Lastly, it should be borne in mind that in deciding whether in a given case there is a legitimate reason to fear that these requirements are not met, the standpoint of a party is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see, *mutatis mutandis*, *Hauschildt v Denmark*, judgment of 24 May 1989, series A no 154, p 21, para 48).'

[52] The court noted that two expert members sat alongside a majority of three judges in the composition of the Court of Appeal in such cases, that there was no indication that the MP's membership of a particular political party had any connection or link with any of the parties in the proceedings or the substance of the case before the Court of Appeal. Nor was there any indication that he had played any role in respect of the legislation which was in issue in the case. Distinguishing the case from *Procola* and *McGonnell*, the court said that he had not exercised any prior legislative, executive or advisory function in respect of the same subject matter or legal issues before the Court of Appeal for decision in the applicant's case (para 34): 'The judicial proceedings therefore cannot be regarded as involving ''the same case'' or ''the same decision'' in the sense which was found to infringe article 6.1 in the two judgments cited above. The court is not persuaded that the mere fact that the MP was a member of the legislature at the time when he sat on the applicant's appeal is sufficient to raise doubts as to the independence and impartiality of the Court of Appeal. While the applicant relies on the theory of separation of powers, this principle is not decisive in the abstract.'

[53] Applied to our own constitutional arrangements, *Pabla Ky v Finland* teaches

us that there is no fundamental objection to members of either House of Parliament serving, while still members of the House, as members of a court. Arguments based on the theory of the separation of powers alone will not suffice. It all depends on what they say and do in Parliament and how that relates to the issue which they have to decide as members of that tribunal. The requirement which the Strasbourg Court stressed in para 30 of its judgment that the fear that the tribunal was not impartial must be justified objectively is an important safeguard against abuse of the objection. What is decisive is whether the fear is based on an objective appraisal (see *Rojas v Berllaque*, per Lord Hobhouse of Woodborough, p 211, para 32, and Lord Rodger of Earlsferry). This enables account to be taken of all the surrounding circumstances. The need for a proper understanding of the issues that are involved is another safeguard. This is because, as the court explained in paras 29 and 34 of its judgment in *Pabla Ky*, the objection has to be justified on the facts of the case, not by relying on a theoretical principle. There must a sufficiently close relationship between the previous words or conduct and the issue which was before the tribunal to justify the conclusion that when it came to decide that issue the tribunal was not impartial or, as the common law puts it, that there was a real possibility that it was biased (see also *Locabail (UK) Ltd v Bayfield Properties Ltd*, p 480, para 25).

[54] But the best safeguard against a challenge after the event, when the decision is known to be adverse to the litigant, lies in the opportunity of making a disclosure before the hearing starts. That is the proper time for testing the tribunal's impartiality. Fairness requires that the quality of impartiality is there from the beginning, and a proper disclosure at the beginning is in itself a badge of impartiality.

[55] How then does the position of Lord Hardie stand up to examination in this context? In the Second Division the Lord Justice-Clerk said that the court first had to decide whether his involvement in the Scotland Bill had any material bearing on the question before the Extra Division (2003 SC 103, p 110, para 28). I think that there were two ways of looking at this question. One is more precise than the other. On a close examination it would have been possible to say that the issues were not the same. Lord Hardie was being asked to deal with the possibility that the UK Ministers might try to obtain a coercive order against the Scottish Ministers. He was not being asked to deal with the particular issue that needed to be resolved in this case, which is whether such an order could be made in judicial review proceedings against decisions taken by the Scottish Ministers.

[56] But the fair-minded and informed observer is unlikely to conduct such a precise analysis. He would appreciate that a predisposition of the kind that that puts the judge's impartiality at issue is not confined within such clearly-defined limits. He would prefer to look at the matter more broadly, and on a broad view of the matter the conclusion which the Lord Justice-Clerk reached, with which Lord Kirkwood and Lord Philip both agreed, seems to me to be unassailable. Lord Hardie was not simply promoting a relatively routine amendment. He committed himself to the view, which in the Extra Division the Scottish Ministers too were advocating, that the effect of sec 21 was that they were subject only to orders which were declaratory of the parties' rights.

[57] As for the wider circumstances, there are several factors that might be said to point against the conclusion that there was a real possibility that Lord Hardie was biased. He was now a judge, no longer a law officer. His translation from one position to the other was a public act. He had taken the judicial oath in public. He had been a judge for three years. The events of October and November 1998 were far behind him. But there are other factors. When he was Lord Advocate

Lord Hardie was actively promoting the legislation on behalf of the Government in Parliament. The question as to the effect of sec 21 of the 1947 Act was not just a matter of passing interest to him. It was of interest and importance to all those who were to become Scottish Ministers, including the Lord Advocate (see sec 44(2) of the Scotland Act 1998). That was why sec 38(2) of the 1947 Act was amended, to put their position beyond all doubt. It was not possible for the fair-minded and informed observer to say how closely associated Lord Hardie was with this decision from the facts that were available. But he would appreciate the importance of the issue to the Government's principal law officer.

[58] In these circumstances I agree that the test which was set out in *Porter v Magill* (para 104) was satisfied and that the Second Division were entitled to conclude that the decisions of the Extra Division were vitiated. I use the word 'decisions' in the plural, because the decision to refuse leave is as vulnerable to attack on this ground as the decision on the main issue. Lord Weir's dissent is a good indication of the intensity with which this point was argued. It was particularly important for all members of the court to approach this issue impartially and to be seen to do so.

The cross-appeal

[59] Having decided that the interlocutors of 18 and 20 December 2001 were vitiated, the Second Division had to provide the respondent with an effective remedy. The remedy which the respondent sought was set out in the prayer of the petition. Senior counsel for the petitioner asked the court to grant him leave to appeal to the House of Lords against the interlocutor of 18 December 2001. But he had to accept that it was open to it instead to remit the case for a rehearing before a properly constituted division of the Inner House. In the event the Second Division decided to adopt the latter alternative. It is against that decision that the respondent has cross-appealed.

[60] The Lord Justice-Clerk said that, assuming that it would be competent to grant leave to appeal to the House of Lords, that course would not be appropriate (2003 SC 103, p 113, para 39). He gave two reasons for taking this view: (a) no answers to the petition had yet been lodged; and (b) as the decision was confined to only one of several preliminary questions, it did not exhaust the issues between the parties. There remained other questions of relevancy as well as the substantive human rights question which had yet to be decided at first instance. Lord Kirkwood and Lord Philip agreed that the appropriate course was for the reclaiming motion to be reheard.

[61] Senior counsel for the petitioner submitted that the Second Division had not taken account of all the relevant factors when it was deciding which of these two courses to adopt. He invited your Lordships to reverse its decision either by granting the respondent leave to appeal to this House or by directing the Inner House of the Court of Session to do so. He made it clear that his preferred alternative was that your Lordships should grant leave. He said that it was open to this House to do this in the exercise of the *nobile officium* as the circumstances were unforeseen and extraordinary. But he also submitted that it would have been competent for the Second Division to do so in the exercise of the same power.

[62] It is convenient to deal first with the question whether either of the two remedies which senior counsel seeks would be competent. Section 40 of the Court of Session Act 1988 provides that it shall be competent to appeal from the Inner House

to the House of Lords against any interlocutory judgment, other than one where there is a difference of opinion among the judges or where the interlocutor is one sustaining a dilatory defence and dismissing the action, 'with the leave of the Inner House' (see sec 40(1)(b)). There is no provision for an appeal to this House against the refusal of leave by the Inner House. Nor is there any provision which would entitle this House itself to grant leave.

[63] Senior counsel sought to overcome the provisions of the statute by appealing to the *nobile officium*. There is no precedent for exercise of the *nobile officium* of the Court of Session by this House. But I do not regard that point in itself as a fundamental objection to what your Lordships are being asked to do. The effect of an appeal is to open up the interlocutors appealed against, and all prior interlocutors, to review by this House. It is then open to the House to make such orders in the case as the Court of Session could have made which it thinks appropriate. The point of objection comes when one examines the scope of the *nobile officium*.

[64] The authorities were reviewed in *R, Petr* (p 421) and *L, Petr* (pp 1314, 1315) with particular reference to cases where provision for an appeal is made by statute (see also *Humphries v X and Y*, per Lord President Emslie, pp 82, 83). It is necessary only to give a brief summary. The general rule is that the power may be exercised in exceptional or unforeseen circumstances to provide a remedy which will prevent the oppression and injustice which would otherwise result from the lack of any other remedy. If the intention of a statute is clear but the statute lacks the machinery that is needed for carrying it out in these exceptional or unforeseen circumstances, the power may be used to provide that machinery. But it cannot be used to defeat a statutory intention, express or implied, or to extend the scope of an Act of Parliament. So where an application is made in the context of a statutory procedure, as it is here, the first thing that must be done is to examine that procedure and see what limits have been set to it by Parliament.

[65] Section 40(1)(b) of the 1988 Act says that it shall be competent to appeal against any interlocutory judgment other than one falling within para (a) with the leave of the Inner House. It is now beyond question that this means that the right to give leave to appeal against an interlocutory judgment of the Court of Session belongs to the Inner House only, and that its exercise of the discretion as to whether or not to grant leave cannot be controlled by this House (*Ross v Ross*, per Viscount Dunedin, p 6). That being so, the short answer to senior counsel's argument is that it is not open to your Lordships either to grant leave or to direct the Inner House that it should do so. To do this would be in conflict with what has been provided by Parliament. The matter is one for the Inner House alone in terms of the statute. The Inner House is not subject to direction by your Lordships as to what it should do.

[66] But I do not think that it would be right to end the matter there. The prospect of a re-hearing of the point in the Inner House is unattractive, bearing in mind the fact that it is unlikely to achieve finality. I would hold that, as the statute has committed the question whether leave should be given to the Inner House of the Court of Session, the Inner House has power in the exceptional and unforeseen circumstances that have arisen in this case to provide the remedy which the petitioner seeks. I turn to the question how this can be achieved in the exercise of the *nobile officium*.

[67] What the petitioner seeks, in terms of the prayer of the petition, is (a) a finding that the interlocutors of 18 and 20 December 2001 were each vitiated by apparent bias and want of objective impartiality and the setting aside of 'the said

interlocutors', and (b) the granting of leave to appeal to this House against the interlocutor of 18 December 2001. There is, of course, a mutual inconsistency between these two craves. If the interlocutor of 18 December 2001 is set aside, all that will remain will be the interlocutors that were pronounced in the Outer House. No interlocutor will be left which can be appealed from to this House, as only interlocutors pronounced in the Inner house are appealable under sec 40 of the 1988 Act. The form of petition of appeal which is set out in Append C to the House of Lords Practice Directions and Standing Orders (November 2002) requires the petitioner to set forth the interlocutor or interlocutors which are being appealed from to the House in the schedule to the petition (see also practice direction 9.1).

[68] So if the remedy which the petitioner seeks is to be granted to him it will be necessary for the interlocutor of 18 December 2001 to be left standing. All that is needed by way of a preliminary step is the recall of the interlocutor of 20 December 2001. That having been done, it will be competent for the Inner House to give leave to appeal to the House of Lords against the interlocutor of 18 December 2001. The Second Division have already considered this option and rejected it. But in my opinion it is open to your Lordships to ask the Inner House to take a fresh look at this matter. I would give two reasons in support of this view.

[69] The first reason is that the question which was at issue between the parties in the reclaiming motion in the judicial review proceedings is a question of general public importance which is appropriate for consideration by this House. It has always been appreciated that it would not be right to give leave to appeal to the House of Lords if the point at issue is one of Scottish practice or Scottish procedure, as it so often is in interlocutory matters. In *Frame v Caledonian Ry Co*, where leave was refused, the question was whether the case was appropriate for proof rather than jury trial. As Lord Justice-Clerk Macdonald said (p 95), the question at that stage related to procedure and to procedure only. In *Whitehill v Corporation of Glasgow*, where leave was also refused, the question was one relating to the recovery of documents. Lord Strathclyde said (p 1020) that the subject-matter was Scottish procedure and Scottish procedure only. In *McIntosh v British Railways Board* the question was whether the case should be remitted from the Court of Session to the sheriff court. The Lord President (Hope) said (p 346) that the question was concerned intimately with matters of Scottish practice and procedure and that he did not think that it was for the House of Lords to give directions to the Court of Session in matters of that kind (see also *Girvan v Inverness Framers Dairy*, p 21C–21G). This case is not of that character.

[70] Leave was also refused by a court of five judges in *Costain Building and Civil Engineering Ltd v Scottish Rugby Union*, where there had been arrestment on the dependence and the defenders' motion was for recall of the arrestment. The reason for this decision were given by the Lord President (p 663H):

> 'Your Lordships decided that we ought not to grant leave in this case. The ground on which we have held the arrestment to be incompetent is well settled. No new point of difficulty or importance has arisen which would make it appropriate for our decision on this interlocutory matter, which is a unanimous decision of a court of five judges, to be reviewed by the House of Lords. It would also be inappropriate for the very large sum which was arrested in the hands of the defenders' bankers to remain subject to the arrestment for the substantial time required for any appeal to the House of Lords to be finally disposed of. In our opinion it is in the interests of justice that the arrestment which we have held to be incompetent should be recalled without any further delay.'

[71] Delay in the giving of a remedy is not a factor in this case. The petitioner was transferred long ago from the conditions which formed the basis of his complaint, and he was released from HMP Barlinnie nearly two years ago. The case has a wider significance. As Lord Weir noted in the Extra Division, it had been described as a test case, the result of which would affect other similar cases which were awaiting a hearing and might have important implications in the field of administrative law (2002 SC 205, p 223). It is clear from the opinions that were delivered in that case that all three judges were uneasy about the way in which the question as the effect of sec 21 of the 1947 Act had been brought before them. But they proceeded nevertheless to deal with this issue and to pronounce judgment on it. As Lord Bingham has already said (para 5), counsel for the Scottish Ministers expressly recognised the constitutional importance of the issue as to the effect in Scotland of sec 21 of the 1947 Act.

[72] The second reason is that the grounds on which the Second Division refused leave (that no answers had yet been lodged and, more importantly, that there remained other questions that had yet to be decided at first instance (2003 SC 103, p 113, para 39) were directed to features of this case which are to be found in most, if not all, cases that are brought before the court under the judicial review procedure which is provided by chap 58 of the Rules of Court (see, eg *West v Secretary of State for Scotland*). Answers had been lodged in that case. But the debate was directed solely to the issue of competency, leaving aside all questions of relevancy.

[73] The whole point of the judicial review procedure is that it is intended to eliminate the procedural timetable which applies in the case of an ordinary action. It does this by enabling the petitioner to focus on the particular point at issue and bring it before the court for a decision and for the provision of a remedy as soon as possible. A decision can be obtained from the court within a very short time by concentrating on a point of competency or relevancy which will make further proceedings in the case pointless or unnecessary. The issues which are decided by the court in this way are typical of those which arise in administrative law. They are often of general public importance, as they affect cases other than those which are of immediate concern to the petitioner.

[74] It was concern about the time taken to achieve this result under the ordinary procedure that led Lord Fraser of Tullybelton to suggest that there might be an advantage in developing a special procedure in Scotland for dealing with questions in the public law area, comparable to the English prerogative orders (*Brown v Hamilton District Council*, p 49). It would be unfortunate if the effect of that procedure, which has been of such obvious benefit to the exercise by the Court of Session of its supervisory jurisdiction, were to have the effect of depriving litigants of the opportunity of appealing to the House of Lords against its decisions at the interlocutory stage under that procedure. That however is what the reasons which were given for refusing leave in this case would be likely to do if they were to be followed in other cases.

[75] For these reasons I think that the question whether leave to appeal should be given in the exercise of the *nobile officium* ought to be re-examined by the Inner House. But it must be understood that the decision as to whether leave should be given resides there. It would be open to the Inner House to refuse leave if it is persuaded that that there are good grounds for doing so.

Conclusion

[76] I would dismiss the appeal and I would allow the cross-appeal. For the reasons which I have already given, the interlocutor of the Extra Division of

18 December 2001 must be left standing so that the petitioner can appeal against that interlocutor if he is given leave. The Second Division set aside that interlocutor as well as the interlocutor of the Extra Division of 20 December 2001. So it will be necessary for your Lordships to set aside the Second Division's interlocutors of 11 September 2002. I would remit the question whether the petitioner should be given leave to appeal to the House of Lords against the interlocutor of the Extra Division of 18 December 2001 to the Inner House of the Court of Session for further consideration in the exercise of the *nobile officium*.

[77] The Second Division pronounced two interlocutors on 1 October 2002 against which the respondents have also appealed. They were concerned only with the question of expenses. As the respondents were unsuccessful in their appeal and also in the cross appeal, I would not disturb those interlocutors. The respondents must pay the costs which the petitioner has incurred in the proceedings before this House.

LORD CULLEN OF WHITEKIRK— My Lords,

[78] I have had the advantage of reading in draft the speeches of the noble and learned Lord Bingham of Cornhill and Lord Hope of Craighead. For the reasons which they give, and with which I agree, I would dismiss the appeal, and in respect of the cross-appeal make the order proposed by Lord Hope of Craighead.

[79] I would add a few observations of my own. In considering whether a fair-minded and informed observer would conclude that there was a real possibility that by reason of past words or conduct a judicial tribunal was unable to decide an issue impartially, it is necessary to consider the relationship between that issue and what happened in the past. The members of the Second Division evidently were concerned principally with the view which Lord Hardie had expressed during the discussion of the proposed amendments to the Scotland Bill to which reference has been made. Thus the Lord Justice-Clerk observed (para 28) that in exercising his functions as Minister and legislator Lord Hardie did not simply promote an amendment to the 1947 Act that would extend to the Ministers in the devolved government the protection of sec 21, leaving aside all questions as to the extent of that protection. He then said: 'He went further by committing himself to the view that under sec 21 the Crown was subject only to orders declaratory of the parties' rights and that the protection which he sought for the Scottish Ministers would therefore be such that they would not be subject to coercive orders of the courts. That of course was the central issue before the Extra Division'

[80] It might be objected that the arguments before the Extra Division were not about whether the Scottish Ministers were in general immune from orders for specific performance: and that the main issue before that court was whether the expression 'civil proceedings' in sec 21 covered applications to the Court of Session for the exercise of its supervisory jurisdiction. On the other hand, it is plain, on closer examination of the proceedings before this House, that the proposed amendments which led to Lord Hardie expressing his view related to the possibility of proceedings being taken against the Scottish Ministers for judicial review, that is to say by way of application to the Court of Session for the exercise of its supervisory jurisdiction. Accordingly the application of Lord Hardie's remarks to the type of application which was before the Extra Division was far from being an academic question.

[81] As regards the past words and conduct to which reference has been made in the present case, I would give them a different emphasis from that of the Second

Division. The fact that Lord Hardie expressed an opinion as to the effect of sec 21 is not in itself decisive. What he said cannot be considered in isolation: he said it in the context of his role as a Government Minister in promoting the Bill, including its provision for the extension of the protection of sec 21 to the Scottish Ministers. It follows that as a Government Minister, and presumably in the light of considerations of policy, he was promoting the protection of Scottish Ministers from judicial review. It was the exercising of that role, rather than simply his expressing of an opinion about the effect of sec 21, that persuades me that Lord Hardie was disqualified from sitting as a member of the Extra Division. I am in full agreement with the noble and learned Lord Bingham of Cornhill and Lord Hope of Craighead as to the significance of that role. There is nothing which I wish to add to their analysis of it.

THE COURT dismissed the appeal, allowed the cross appeal and remitted the question whether leave to appeal to the House of Lords should be given to the Inner House for further consideration.

Balfour & Manson (for Taylor & Kelly, Coatbridge) – Treasury Solicitor