Life on the bench revisited

Geoffrey Bindman provides an insider's perspective on a claim of judicial bias

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Alec Samuels' interesting article on judicial bias prompts reflection on an age-old dilemma ('Life on the bench', *NLJ* 15 February 2019). Those who ascend to judicial office have experiences and opinions—political and otherwise—which, can, if uncontrolled, distort the fairness, independence, and objectivity of their decision-making. What can be done to ensure judicial impartiality? Recent constitutional changes, such as the separation of the Supreme Court from the House of Lords and the abolition of the judicial role of the Lord Chancellor, have removed some anomalies, but it has to be primarily for the judge to take personal responsibility for—in Samuels' words—'suppressing, concealing, or ignoring any bias.'

The law has not entirely left the issue to the judge's conscience. It has ruled that the litigant is entitled to be tried by a judge who is not merely unbiased, but untainted even by the appearance or risk of bias. This was famously encapsulated by Lord Hewart CJ in *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256, [1923] All ER Rep 233: 'it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.

Seeking immunity

Samuels refers to one of the very rare cases where a judge was held to be disqualified by the appearance of bias. This was the challenge by the former Chilean dictator, Augusto Pinochet (pictured), to a request by the Spanish government in 1998 to extradite him from the UK—where he had been undergoing medical treatment—to face charges in Spain of torture and murder of Spanish citizens and others in Chile following the military coup led by him in September 1973. Pinochet had become head of state as a result of the coup and, until his arrest in London in October 1998, had escaped retribution for his leading role in the violent overthrow of the democratic government. Pinochet's lawyers busied themselves to find arguments which would allow him to return home to Chile. They claimed that as head of state when the events occurred, he was immune from prosecution. They succeeded in the High Court, but on appeal the House of Lords reversed the ruling by a majority of three to two. Lord Hoffmann was one of the majority.

Could anything else be done to stop the extradition? The home secretary had the power to block it. The Pinochet lawyers had heard that Hoffmann's wife was employed by Amnesty International, which had intervened in the appeal to the Lords. As Amnesty's solicitor, I was asked to confirm this. I did so—providing full details. Though it was a matter of public record, I also complied with a request to give details of Lord Hoffmann's position as director and chairman (unpaid) of a charitable company, Amnesty International Charity Limited, which carried out non-political activities of Amnesty, such as research and education, which were deemed charitable. Lord Hoffmann was not a member of Amnesty International and had no involvement in the Pinochet case or any other litigation (my letters are quoted verbatim by Lord Browne-Wilkinson in his speech in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, [1999] 1 All ER 577).

Pinochet's lawyers asked the home secretary to stop the extradition on the ground of Lord Hoffmann's apparent bias. The home secretary refused and authorised the extradition to proceed. Pinochet petitioned the Lords to reverse its decision on immunity on the ground of Lord Hoffmann's apparent bias. There was no precedent establishing its power to reverse its decisions.

Determining interest

A fresh panel of law lords was convened. Lord Browne-Wilkinson, the senior law lord, gave the leading judgment, with which all his colleagues agreed. He noted that the case had produced an unprecedented degree of public interest 'not only in this country but worldwide.' He held that the Lords had power to reverse its own decisions. He reviewed the authorities on judicial bias, the most celebrated of which was *Grand Junction Canal v Dimes* (1852) 3 HL Cas 759. Lord Chancellor Cottenham had sat on an appeal in which he affirmed a decision in favour of the canal company. It came to light afterwards that he had a large shareholding in the company which he said he had forgotten. The losing party appealed to the House of Lords alleging that Cottenham was disqualified by his conflict of interest. The Lords agreed. Lord Campbell delivered another famous dictum: 'it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest.'

Cottenham of course had a financial interest in the outcome of the case he was judging. Hoffmann did not, nor was he a party. What then was his interest, and did it disqualify him from adjudicating on whether Pinochet could claim head of state immunity? It had been widely believed that only a financial interest imposed an absolute disqualification.

Lord Browne-Wilkinson repeated the fundamental principle that a man may not be a judge in his own cause. But that principle,

he said, had two implications. Literally, if a judge has a financial or proprietary interest in the outcome of the case he is trying, he is judge in his own cause. This would cause automatic disqualification. Second, 'in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party.' This second situation would not give rise to automatic disqualification but would bring into play the test of apparent bias. In *R v Gough* [1993] AC 646, [1992] 4 All ER 481, that test was: is there in the view of the court a real danger that the judge was biased? Lord Browne-Wilkinson also cited decisions in Canada, Australia and New Zealand. In the Australian case of *Webb v R* (1994) 181 CLR 41, the High Court of Australia states the relevant test as 'whether the events in question gave rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge was not impartial'.

Automatic disqualification

Surprisingly, Lord Browne-Wilkinson concluded that the first of the two implications of 'judge in his own cause' was the right one: 'in my judgment, the relationship between Amnesty International, Amnesty International Charity Limited, and Lord Hoffmann leads to the automatic disqualification of Lord Hoffmann to sit on the hearing of the appeal'. The employment of his wife by Amnesty did not need to be considered. Yet Lord Hoffmann was neither a member of Amnesty International nor had any role in its non-charitable activities, including the Pinochet case. If Lord Browne-Wilkinson had opted for the second implication, could it seriously be claimed that there was real danger or suspicion of bias? Certainly none beyond the personal professional responsibility for, as Samuels says, 'suppressing, concealing or ignoring any bias'.

The first ruling having been set aside by the second panel, a third hearing became necessary. This time the same five lords who set aside the first ruling sat again, with two others who had not sat on the case previously. With some modifications, they upheld the rejection of Pinochet's immunity claim ordered by the first Lords panel. So, Pinochet was still on his way to Spain to face a trial. Or was he? His lawyers did not give up. This time they managed to persuade the home secretary with medical evidence that their client was unfit to stand trial and the home secretary (probably with a sigh of relief) allowed him to return to Chile. There a different view was taken of his medical condition and he only narrowly avoided trial. But that is another story.

The second and third hearings in the House of Lords cost a good deal of time and money and did nothing to change the outcome. No one at any stage has claimed that Lord Hoffmann was actually biased. Lord Hoffmann has given no public account of the matter but he must have believed, along with his colleagues, that under the law as generally understood at the time, there was no good reason for him to stand down. Yet it is understandable that Lord Browne-Wilkinson and those who sat with him felt under pressure, once the complaint of apparent bias had been made in a fanfare of international publicity, not to dismiss it out hand—even though those aggrieved by Lord Hoffmann's participation might not deserve to be called 'fair minded and informed members of the public'. And, apart from the diversions described here, the overall impact of the Lords' denial of immunity to Pinochet has been positive: encouraging the pursuit of legal remedies against the bloodiest dictators. **NLJ**

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