



Neutral Citation Number: [2011] EWCA Civ 1168

Case No: C1/2010/2924

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
MR JUSTICE FOSKETT
CO/12227/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2011

Before :

LORD JUSTICE RIX
LORD JUSTICE SULLIVAN
and
LADY JUSTICE BLACK

Between :

The Queen (on the application of Darsho Kaur)

Claimant /
Appellant

- and -

(1) Institute of Legal Executives Appeal Tribunal
(2) The Institute of Legal Executives

Defendants /
Respondents

Mr Marc Beaumont (counsel instructed under the Bar Public Access scheme) for the
Appellant

Mr Gregory Treverton-Jones QC and Mr Kevin McCartney (instructed by **Russell-Cooke LLP**) for the **Respondents**

Hearing dates : Friday 15th July 2011

Approved Judgment

Lord Justice Rix :

1. Darsho Kaur was a student member of the Institute of Legal Executives (ILEX). In May 2007 she and other student members sat certain law and practice examinations set by the London College of Advanced Studies where she had undertaken her legal studies. The rules applicable to those examinations naturally precluded certain matters which can colloquially be described as cheating. Similarities in certain students' scripts led to suspicion falling on her and a number of other candidates, as a result of which their papers were examined by ILEX. Following investigations and a decision by the ILEX investigating committee, Mrs Kaur and five other student members of ILEX were charged with various disciplinary offences, such as conduct unbefitting to ILEX or likely to bring ILEX into disrepute in that "either alone or with others – 1. She cheated in two ILEX examinations; 2. She produced two examination scripts that were not wholly her own work; or 3. Were not wholly from her own knowledge or memory". It was inferred and alleged that she must have had access to the course manual during two examinations.
2. These and similar charges against five others were brought before the ILEX Disciplinary Tribunal ("DT") in March 2009. Only one student attended the proceedings, Mrs Kaur did not. However she had denied the allegations in her defence. The DT dismissed the charge against her in relation to one examination but found the case proved in respect of the second examination. Of the other students, one was entirely acquitted, but the charges were found proved in the case of the remaining four. Each of the five was excluded from ILEX for a minimum period of five years and ordered to pay costs in the sum of £1,700. The DT had power under its rules to impose up to £3,000 by way of fine or as costs.
3. Mrs Kaur appealed to ILEX's Appeal Tribunal ("IAT") which heard her appeal (and that of one other) on 24 June 2009. The appeals were rejected. Under ILEX's rules the possible issues for appeal are limited to issues of law (or fresh evidence) including the question of whether the decision of the DT involved a breach of natural justice. While continuing to protest her innocence, and raising numerous other issues, Mrs Kaur also raised as a preliminary matter an objection to the presence on the IAT of ILEX's vice-president. As recorded in the IAT's decision (at paras 15/21) this objection did not embrace a complaint that one of the three members of the DT had been a council member and director of ILEX. Nor had that complaint been made before the DT itself. Mrs Kaur was legally represented at the appeal hearing.
4. Having exhausted the ILEX appeal process, Mrs Kaur has brought her complaint by way of judicial review to the courts, resting on the doctrine of apparent bias, in one or other of its manifestations. On 14 April 2010 Simon J refused her renewed application for permission to bring these proceedings. She was granted permission on paper by Elias LJ, but judicial review was refused by Foskett J from whose

judgment and order dated 23 November 2010, [2010] EWHC 3321 (Admin), she now appeals to this court. She obtained permission to appeal from Lloyd LJ.

5. The short issue on this appeal is whether the presence of an ILEX council member and director of ILEX on the DT and of the council's vice-president on the IAT was in breach of the doctrines that no one may be a judge in his own cause and/or of apparent bias, requiring those decisions to be quashed. In brief, it is said on behalf of ILEX that a decision in favour of Mrs Kaur would be irreconcilable with the nature of self-regulation by ILEX; but that is disputed on behalf of Mrs Kaur, who submits that her case fits within one or other limbs of the modern doctrine of apparent bias. It has at all times been emphasised that there is no suggestion of actual bias.

ILEX and its regulatory regime

6. ILEX is the professional body representing approximately 22,000 practising legal executives and trainees. It is a company limited by guarantee, governed by elected representatives known as the council. Council members are responsible for ensuring that the affairs of the Institute are conducted "diligently, legally and honestly". They are automatically made directors of the company and as such are required to exercise the duties, fiduciary and otherwise, of any director. Among ILEX's objects as set out in its memorandum of association is the following, on which Mr Marc Beaumont, counsel on behalf of Mrs Kaur, places emphasis:

"3.4 To promote and secure professional standards of conduct amongst Fellows and those who are registered with ILEX, and regulate Fellows and Registered Persons in the public interest and to ensure compliance with those standards."

7. Fellows of ILEX are as I understand it fully trained executives and as it were full members of the Institute. Registered persons are not full members or fellows but are registered for a more limited purpose, such as being trained as law students; but they may also be registered to provide legal services or services ancillary to legal services (para 3 of the memorandum of association).
8. The council is presided over by a president and vice-president. At the time of Mrs Kaur's appeal the vice-president was Miss Gordon-Nicholls, who was a member of the IAT which heard Mrs Kaur's appeal.

9. On or about 1 October 2008, ILEX formed a subsidiary company, ILEX Professional Standards Limited (“IPSL”) to deal with its professional regulation responsibilities. The intention of forming IPSL was to put the investigatory and prosecutorial arms of regulation in a body separate from ILEX itself. However, IPSL is a company limited by shares and as such is subject to the exercise of the control, management and supervision of ILEX as its sole shareholder (held in the name of its chief executive). Its memorandum of association states that its objects are to carry out “on behalf of ILEX” the functions and responsibilities of ILEX as an approved regulator designated as such by the Legal Services Act 2007, and also to carry out “on behalf of ILEX” such functions and responsibilities of ILEX as a regulator of its membership generally, as ILEX may from time to time delegate to IPSL. This reflected the powers in ILEX’s own memorandum of association: para 4.3 stated as one of its objects “To form...any company whose objects directly or indirectly benefit ILEX (including but not limited to any company intended to provide a regulatory function)”; and para 18C of its articles of association gave its Council power to “delegate to any subsidiary company of ILEX any or all of its powers relating to the regulation of professional conduct including (but not limited to) disciplinary matters”. Thus regulatory functions were regarded as of direct or indirect benefit to ILEX and IPSL was ILEX’s agent to prosecute disciplinary matters. That said, IPSL had its own board of directors, and council members of ILEX could not be on IPSL’s board.

10. The DT which heard Mrs Kaur’s case comprised three members, two of whom were lay members and the third was a serving ILEX council member, Mr Hanning. The IAT which heard Miss Kaur’s appeal also comprised three members, two of whom were lay members (one of whom chaired the appeal) and the third was Miss Gordon-Nicholls, then the council’s vice-president (and at the time of the hearing before Foskett J its president). Both Mr Hanning and Miss Gordon-Nicholls were therefore serving directors of ILEX at the relevant times.

11. The disciplinary hearings were governed by ILEX’s Investigation, Disciplinary and Appeals Rules (“IDAR”). They were approved by the Master of the Rolls. These specified that lay members were appointed to a panel by the Master of the Rolls, and that the appeal tribunal should consist of either the president or the vice-president of the council and two lay members who had not sat on the original disciplinary tribunal. The IAT decision was to be made by a majority. It had power to affirm or vary the findings and order of the DT and to make such ancillary orders, including orders for costs, as seemed just and appropriate to it.

The leading cases on apparent bias

12. The leading cases concerned with apparent bias and its ancillary doctrine that no one must be a judge in his own cause (*nemo debet esse iudex in propria causa*) are

too well known to need extensive revisiting in this judgment. I would merely seek as briefly as possible to lay the ground by referring to the essence of them.

13. In *Regina v. Bow Street Metropolitan Stipendiary Magistrate (ex parte Pinochet)* [2000] 1 AC 119 (*Pinochet No 2*) it was held that Lord Hoffmann had been automatically disqualified to sit on the House of Lords judicial committee hearing *Pinochet No 1* because he was an unpaid director of a subsidiary of Amnesty International when the latter had intervened as a party in the proceedings. Although Lord Hoffmann had no personal interest in the case, both Amnesty International and its subsidiary were parts of a movement working towards the same goals with an interest in the proceedings' outcome. The House applied the doctrine of automatic disqualification, that no one should be a judge in his own cause, which derived typically from situations where a judge had some financial interest in a party before the court: see *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 HL 759, where Lord Campbell said (at 793):

“No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but my Lords, it is of the last importance that the maxim that no man is to be 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.”

Therefore the decision of the House of Lords in *Pinochet No 1* [2000] 1 AC 61 was set aside.

14. Lord Browne-Wilkinson said (at 135):

“Can it make a difference that, instead of being a direct member of A.I., Lord Hoffmann is a director of A.I.C.L., that is of a company which is wholly controlled by A.I. and is carrying on much of its work? Surely not. The substance of the matter is that A.I., A.I.L. and A.I.C.L. are all various parts of an entity or movement working in different fields towards the same goals. If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart C.J.'s famous dictum is to be observed: it is “of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done:” see *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259.

15. Lord Goff of Chieveley said (at 139):

“It follows that A.I., A.I.L and A.I.C.L. can together be described as being, in practical terms, one organisation, of which A.I.C.L. forms part. The effect for present purposes is that Lord Hoffmann, as chairperson of one member of that organisation, A.I.C.L., is so closely associated with another member of that organisation, A.I., that he can properly be said to have an interest in the outcome of proceedings to which A.I. has become party...

It is important to observe that this conclusion is, in my opinion, in no way dependent on Lord Hoffmann personally holding any view, or having any objective, regarding the question whether Senator Pinochet should be extradicted, nor is it dependent on any bias or apparent bias on his part...”

16. In *Porter v. Magill* [2001] UKHL 67, [2002] 2 AC 357 the modern law of apparent bias was definitively stated in the speech of Lord Hope of Craighead, building on *R v. Gough* [1993] AC 646 and *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 (CA): “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” (at [103]). There is a jurisprudential issue as to whether the *Dimes/Pinochet (No 2)* doctrine is distinct from or allied to the doctrine of apparent bias. One can perhaps see a reconciliation of the two in the illuminating observations of Lord Bingham of Cornhill in *Davidson v. Scottish Ministers* [2004] UKHL 34, [2004] HRLR 34 at [6]-[7]:

“[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...It has however been accepted 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."

Lord Bingham then went on to restate Lord Hope's definition from *Porter v. Magill* as the correct formulation of the correct test.

17. Those are the principles, but how should they be applied in the context of professional disciplinary proceedings and self-regulation?

The problem of professional self-regulation

18. The problem of professional self-regulation in the modern world is illustrated by the case of *P v. The General Council of the Bar* (24 January 2005), a decision of the Visitors to the Inns of Court, on appeal from the disciplinary tribunal of the Council of the Inns of Court, a decision of Mr Justice Colman, Ms Julia Clark and Ms Sara Nathan, reported as *Re P (A Barrister)* [2005] 1 WLR 3019. The issue was whether Ms Nathan could participate as a member of the tribunal when she was a member, albeit only as a lay representative, of the Professional Conduct and Complaints Committee (PCCC) of the Bar Council, which was the body responsible under the Bar Council code of conduct for deciding whether to prosecute a member of the Bar against whom a complaint had been made. The submission against her participation is set out in para 4 of the judgment, being that

—

"...Ms Nathan would be a judge in her own cause. This would also be a situation of apparent bias for, although it was accepted that she had taken no part in the particular decision of the PCCC to prosecute the Appellant and that there was no actual bias on her part, there was nevertheless a real apprehension or danger or possibility or suspicion of bias by reason of her membership of the PCCC."

A similar submission was made in respect of a member of the disciplinary tribunal below, a Mr Richard Groom, because he too was a lay member of the PCCC (para 8). Those submissions were upheld.

19. I should explain that lay members of the PCCC were expected to attend two meetings of the PCCC per year. They were not asked to prepare reports on complaints or recommendations, but they were expected to take part in the

decision making and vote on decisions at the meeting. They served for a period of three years renewable for one further period of three years.

20. The judgment in *P* contains a detailed *tour d'horizon* of professional self-regulation as it existed at that time, as well as a consideration of the leading cases to that date such as *Pinochet No 2* and *Porter v. Magill*. The decision was rendered under the doctrine that no one must be a judge in his own cause, rendering it unnecessary to consider whether the doctrine of apparent bias was also an impediment to Ms Nathan's participation. However, the judgment expressed the firm view that the doctrine of apparent bias did also require Ms Nathan's recusal.
21. The essence of the judgment's reasoning on these two issues can be found in the following extracts:

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

92. In considering whether a lay representative on a Visitors Panel shares the interest of the PCCC, of which that person is a member, in the appeal being dismissed, an analysis of the quality of that particular member's ability to maintain objectivity is nothing to the point. Nobody called in question Lord Hoffmann's personal ability to be objective and impartial. Nor, in our judgment, does the fact that the purpose of including lay representatives on the PCCC and as members of the Visitors panel, have the effect of insulating such persons from having the appearance of sharing the interest of the PCCC as a prosecutor. Lord Hoffmann's judicial oath could provide no such insulation. Nor do we find that a lay representative's non-participation in meetings relating to the prosecution in question, cuts off that person from the responsibility which, as a member of the PCCC, that lay representative bears together with its other members for taking forward and facilitating the prosecution. Lord Hoffmann was not a decision-taker at either Amnesty International or AICL with regard to participation in the proceedings....

107...Accordingly, the perception of impartiality is to be based on that which is open to view and not on facts which would be hidden from an outside fair-minded observer.

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

22. The issue on this appeal can be said to be whether the learning of *P*, based as it is on leading authorities on the doctrine or doctrines in question, is limited to tribunal members who have a role, albeit only as an otherwise independent layman, on the panel of a committee concerned with the investigation and prosecution of disciplinary charges, or whether the logic and rationale of the decision would embrace, for instance, other members of the Bar Council who were not themselves members of its PCCC: such as the Chairman or Vice-Chairman or members of the Bar Council themselves. On the present appeal, neither Mr Beaumont on behalf of Mrs Kaur, nor Mr Gregory Treverton-Jones QC on behalf of ILEX and its IAT, the respondents, questioned the decision or reasoning of *P*. But whereas Mr Beaumont submitted that, although on its facts it was dealing with a member of the PCCC itself, its rationale went further and potentially embraced governing officers such as the directors and vice-president of ILEX, Mr Treverton-Jones submitted that its reasoning was confined to its facts. Therefore, on Mr Treverton-Jones' analysis, its rationale could not extend outside IPSL into ILEX.

23. In the course of the judgment in *P* evidence was summarised concerning the contemporary arrangements for self-regulation of barristers, solicitors, accountants, medics, architects and those working in financial services (at paras 51-58). It appears from those passages as follows. As for barristers, the PCCC had no legal personality and prosecutions were conducted in the name of the Bar Council itself. Solicitor prosecutions were brought by the Law Society acting through its Office for the Supervision of Solicitors: solicitor members of the disciplinary tribunal could not be members of the council of the Law Society. As for accountants, no officers or serving member of the governing body of any of the accountancy professional bodies could be a member of the panel of tribunal members from which tribunal members were selected to hear prosecutions brought by the Accountancy Investigation and Discipline Board. In the financial services industry membership of the disciplinary tribunal, the Financial Services and Markets Tribunal, was in practice closed to FSA personnel. In most of those cases, a governing member of the profession's ultimate board or council could not sit on any tribunal hearing.

24. However, the arrangements discussed in *P* have not necessarily remained unaltered, and even in the case of ILEX the position has changed since the disciplinary hearings with which this case is concerned. Thus many of the professions' regulators have been moving towards complete insulation of their regulatory functions from their representative functions. Impetus towards this in the legal professions (including ILEX) has been driven by the Legal Services Act 2007 (see its section 29(2)). Thus a serving member of the Bar Council or any of its Committees cannot also be a member of the Bar Standards Board (the BSB) or any of its committees or panels. There is no question of any member of the council of the Law Society, let alone its president or vice-president, sitting on the Solicitors Disciplinary Tribunal (an independent, statutory body). ILEX itself has changed its system under new rules which took effect on 4 January 2010, barely six months after the IAT in Mrs Kaur's case gave its decision. Its new rules (the "new IDAR") have been described on ILEX's website as follows:

"Following consultation with ILEX members, IPS revised the rules governing how allegations about the conduct of members [are] investigated and disciplinary proceedings are brought.

The main driver behind the need for the revisions was that members of the ILEX Council served on the various committees and tribunals considering complaints. This no longer happens: the dual role was inconsistent with the requirement for complete separation of regulatory and representative functions. We also took the opportunity to draw on good practice among modern regulators, and to edit away a good deal of verbiage which had become redundant over the years."

The new rules coincided with the coming into force of the relevant provisions of the Legal Services Act 2007.

Some further jurisprudence

25. Some further jurisprudence has been cited, to which it is necessary to refer, especially as the cases may be said to demonstrate guidance as to the courts' flexible approach to the doctrines in issue in situations relevant to the present case.
26. Thus in *Sadler v. General Medical Council* [2003] UKPC 59, [2003] 1 WLR 2259 the Privy Council considered the role of members of the GMC sitting as panel members of its Committee on Professional Performance (the "CPP"). It needs to be explained that the GMC has two separate regulatory committees, the CPP which is concerned with proper standards of professional performance and which

replaced the former Health Committee, and the Assessment Referral Committee (the “ARC”) which is concerned with serious professional misconduct and replaced the former Professional Conduct Committee. *Sadler* concerned only the CPP, whose function under its rules is primarily to facilitate the rehabilitation of a practitioner whose professional performance has been called into question and, but only as a last resort, to suspend registration for a maximum of 12 months or to make registration subject to conditions for up to 3 years. Among many issues raised, the one that concerns this case was the bald submission that the presence of GMC members on the CPP panels was contrary to the domestic doctrine of apparent bias or to ECHR article 6. The submission appears to have been advanced primarily as an attack on professional self-regulation by reference to article 6: but Lord Hope pointed out that there is no general principle of Convention jurisprudence which prevents such self-regulation and that everything depended on all the relevant circumstances (at [77]). Lord Hope then referred to the relevant rules and the protection afforded by them and stated that their Lordships were satisfied that the CPP met the Convention requirements. For present purposes it may be noted that “No member of the CPP may be involved in other aspects of the GMC’s functions in relation to fitness to practice” (at [78]). Although Mr Treverton-Jones relied strongly on this authority, it seems to me that that is a critical difference from the present case, where the ILEX council, although it had delegated the investigation and prosecution of disciplinary matters to IPSL, retained ultimate responsibility for regulation and ensuring compliance with professional standards of conduct. Other differences are that in the present case the charge against Mrs Kaur was one that would, in the medical context, have gone to the ARC, not the CPP, and also the presence on her IAT of not merely a council member but its vice-president.

27. *Meerabux v. The Attorney General of Belize* [2005] 2 AC 513 was another decision of the Privy Council, this time concerned with a judge of the supreme court of Belize who had been removed from office by the Governor-General on the advice of the Belize Advisory Council (BAC) following complaints of misbehaviour filed by the local Bar Association. There were proceedings before the BAC. The chairman of the BAC was a member of the Bar Association, and this led to a submission that he was disqualified by the doctrines of either *Pinochet No 2* or *Porter v. Magill*. The submission failed. The judgment of the Privy Council was again delivered by Lord Hope. He pointed out that the chairman was only a member of the Bar Association because as an attorney-at-law he had to be: he was not a member of the Bar Committee on whose initiative the complaints had been brought, nor had he attended any meeting at which the complaints were discussed (at [23]). Moreover the Constitution of Belize required the BAC chairman to be a member of the Bar Association, a “powerful” and “conclusive” indication that in the context mere membership of the Association was not a sufficient ground of disqualification “in the case of the Chairman” (at [28]). As such, the decision has perhaps something for both sides of the argument in the present case, but not very much.

28. Lord Hope dealt with the submissions on the two doctrines separately. Nevertheless, in his observations one can perhaps detect a desire for the reconciliation of the two doctrines of automatic disqualification and apparent bias, or at any rate a concern that the former principle, if it could not be applied with the greater flexibility of the latter, then be confined to appropriate cases. He said –

“[21] The decision of the House of Lords in the *Pinochet (No 2)* case to apply the rule which automatically disqualifies a judge from sitting in a case in which he has an interest to the situation in which Lord Hoffmann found himself appears, in retrospect, to have been a highly technical one. There was, of course, ample precedent for the proposition that the rule that no one may be a judge in his own cause is not confined to cases where the judge is a party to the proceedings. It extends to cases where it can be demonstrated that he has a personal or pecuniary interest in the outcome, however small: *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759; *Sellar v Highland Railway Co*, 1919 SC (HL) 19. The extension of the rule was taken one step further when Lord Hoffmann was held to have been disqualified automatically by reason of his directorship of a charitable company. That company was not a party to the appeal, nor had it done anything to associate itself with those proceedings. But the company of which he was a director was controlled by Amnesty International, which was a party and which was actively seeking to promote the case for the extradition and trial of Senator Pinochet on charges of torture. Lord Browne-Wilkinson said that there was no room for fine distinctions in this area of the law if the absolute impartiality of the judiciary was to be maintained: p 135E-F.”

29. Lord Hope then turned to the subsequent development of the modern rule of apparent bias and said:

“[23]...If the House of Lords had felt able to apply this test in the *Pinochet* case, it is unlikely that it would have found it necessary to find a solution to the problem that it was presented with by applying the automatic disqualification rule.”

30. As for the automatic disqualification rule on the facts of that case, Lord Hope said as follows:

“[24] The question is whether it can be said, simply because of his membership of the Bar Association, that Mr Arnold could be identified in some way with the prosecution of the complaints that the Association was presenting to the tribunal so that it could be said that he was in effect acting as a judge in his own cause. Only if that proposition could be made good could it be said, on this highly technical ground, that he was automatically disqualified. Their Lordships are not persuaded that the facts lead to this

conclusion. Leaving the bare fact of his membership on one side, it is clear that Mr Arnold's detachment from the cause that the Bar Association was seeking to promote was complete. He had taken no part in the decisions which had led to the making of the complaints, and had no power to influence the decision either way as to whether or not they should be brought. In that situation his membership of the Bar Association was in reality of no consequence. It did not connect him in any substantial or meaningful way with the issues that the tribunal had to decide. As Professor David Feldman has observed, the normal approach to automatic disqualification is that mere membership of an association by which proceedings are brought does not disqualify, but active involvement in the institution of the particular proceedings does: *English Public aw* (2004), para 15-76, citing *Leeson v Council of Medical Education and Registration* (1889) 43 Ch D 366 where mere membership of the committee of the Medical Defence Union was held not to be sufficient to disqualify and *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 where mere ex officio membership of the committee of the Medical Defence Union too was held to be insufficient. The same contrast between active involvement in the affairs of an association and mere membership is drawn by *Shetreet, Judges on Trial* (1976), p 310. Their Lordships are of the opinion that the principle of automatic disqualification does not apply in this case."

31. In the present case, there is no suggestion that Mr Hanning or Ms Gordon-Nicholls were actively involved in the prosecution of Mrs Kaur (but see below on the separate question of the accreditation of the law college involved): but both of them, and a fortiori the vice-president Miss Gordon-Nicholls, were actively involved in the total governance of ILEX and thus were responsible for its regulatory policies.
32. In *Sadighi v. The General Dental Council* [2009] EWHC 1278 (Admin) (unreported, 5 May 2009, Plender J) the dentist had been convicted by the Council's professional conduct committee of dishonesty in forging the records of treatment of his patient. The committee tribunal had been chaired by Dr Leitch, who ending five years previously had served for two years as an elected member of the Council. It was submitted that the doctrine of apparent bias applied, but the submission failed. I do not find that surprising, seeing the merely historic nature of Dr Leitch's involvement, *Sadighi* is therefore not of much assistance in this case.
33. Finally, *R v. LL* [2011] EWCA Crim 65 is a recent authority from the context of criminal trials which raises similar questions relating to jurors, albeit there are special considerations applicable there by reason of legislation regarding jury eligibility and such like. The judgment of the CACD was given by Lord Judge CJ. It came to light that at the trial of the appellant one juror was a current employee of the Crown Prosecution Service (CPS) in general administrative duties, another

was a serving police officer in an administrative and non-operational role, and a third was a former police officer who had retired in 2003. None of them had had any involvement in the case. The issue was whether the appellant had been tried by an impartial and independent tribunal. No complaint was made about the two police officers, in accordance with established principles in this context. The leading case concerning the application of the doctrines of apparent bias in this context is *R v. Abdroikov; R v. Green; R v. Williamson* [2007] UKHL 37, [2007] 1 WLR 2679, [2008] 1 Cr App R 21. Lord Judge summarised the reasoning of the majority in that case in the following way:

“[27]...Lord Bingham of Cornhill doubted whether it was ever in contemplation that “employed Crown prosecutors would sit as jurors in prosecutions brought by their own authority”. In this sentence he was directly addressing the problem of those employed to prosecute, rather than all employees of the Crown Prosecution Service. However, he continued:

“It is my opinion clear that justice is not seen to be done if one discharging the very important neutral role of juror is a full-time salaried, long-serving employee of the prosecutor.”

This observation demonstrates that his concerns extended beyond those who act as advocates to prosecute in court, but that they did not necessarily extend to every CPS employee.

[28] Baroness Hale referred to the problem described in *R v Bow Street Metropolitan Stipendiary Magistrates, ex parte Pinochet (No 2)* [2000] 1 AC 119, which might arise from the involvement in the exercise of judicial responsibilities of those who were “promoting the same causes in the same organisation as a party to the suit”. She considered it inconceivable that the Director of Public Prosecutions could sit as a juror in a case prosecuted by the CPS. She added:

“The same must apply to a CPS lawyer, who is employed to decide upon whether or not to prosecute and to conduct the prosecutions decided upon.”

This observation coincides exactly with the first observation made by Lord Bingham. Baroness Hale then approached the position of other CPS employees who had a more peripheral role than a CPS lawyer by acknowledging that one could imagine that the prohibition on jury service

“might not apply to temporary or short-term employees in junior positions unless the prosecution were brought by the office in which they served. There would, of course, be no objection to CPS lawyers or other employees serving on juries in prosecutions brought by other persons or authorities. This view is consistent with Parliament lifting the ban upon members of the DPP’s staff serving on juries, while leaving intact the common law and Convention rules against bias.””

34. Lord Judge then derived the following conclusions from this analysis:

“[30] In our view it is clear from the observations of Lord Bingham of Cornhill and Baroness Hale of Richmond, and it would be inconsistent with the current legislative arrangements, for every employee of the CPS to be or to be regarded as excused or disqualified from service on a jury in a trial prosecuted by the CPS. In principle the position of an individual employee of the CPS is fact- and employment- specific, rather than subject to an all-embracing embargo.

[31] We therefore address the facts which we have already summarised. The employee of the CPS who served on the jury cannot be described as a temporary employee of the CPS. She had worked full-time for the CPS for no less than nine years...In our judgment her service was long enough and of sufficient importance to lead to the conclusion that she fell within the ambit of the prohibition identified by Lord Bingham and Baroness Hale in accordance with the principle which we have described. We also note that she was sitting in contravention of the guidance now issued by the CPS.”

35. These authorities to my mind illustrate the distinctions which may have to be made. Participation in a prosecutorial capacity, even if not in the case in question, will disqualify or else raise concern in the mind of the fair-minded observer about the appearance of impartial justice. Even an employee of a prosecuting agency may fall within this disqualification or concern, even though not employed in a prosecutorial capacity, provided the employment is significant enough in length or importance or location. However, that would not apply to every employee. Similarly, mere membership of a prosecuting association will not disqualify, where there is no involvement in the case in question, but a more senior role in governance may possibly do so, even though again there has been no specific involvement in the case in question, at any rate where the person in that role is not excluded from concern for regulation in general.

The judgment below

36. Foskett J accepted the submissions made on behalf of ILEX and the IAT that the creation of IPSL was a sufficient guarantee of fair regulation. It was therefore sufficient to bar those involved in IPSL from tribunal membership and unnecessary to extend that bar to council members of ILEX itself. The fact that that had now been done in the light of the Legal Services Act 2007 was irrelevant. The obligation on ILEX members to procure compliance with professional standards did not give rise to any material interest or to an appearance of bias, for it did not require the adoption of unfair procedures. Of course procedures had to

be fair, but ILEX's only interest and concern was to see that the right result was achieved, whether that was a finding of guilt or innocence. Foskett J derived assistance from the decisions in *Sadler* and *Sadighi*. The "fundamental concern" of all the jurisprudence, including *P*, was that "a member of the disciplinary panel should not have had an investigatory or screening role in the inquiry into the allegations of misconduct that he or she is called upon to consider" (at para 36). There was every sign, for instance in the fact that Mrs Kaur was acquitted of one of the two charges against her, that the system operated fairly.

37. In my view, this judgment does not adequately reflect the principled concerns discussed in the cases. It is clear from the jurisprudence that the "fundamental" concern goes much wider than involvement in the allegations in the instant case on which the panel member was called to adjudicate. Nor does an underlying fair procedure make up for a perception of the real possibility of bias. Nor can one assess the play of the issues concerned by reference to confidence in a fair outcome.

Submissions

38. On behalf of Mrs Kaur, Mr Beaumont submitted that council members and thus directors and a fortiori the vice-president of ILEX were disqualified from sitting on either the DT or the IAT which had heard Mrs Kaur's disciplinary proceedings: whether under the doctrine of automatic disqualification or under the doctrine of apparent bias. Each director of ILEX had as such an interest, indeed a duty, to promote and ensure compliance with professional standards by prosecuting breaches. That interest and duty was emphasised not only by article 3.4 of the ILEX memorandum of association but also by section 172(2)(e) of the Companies Act 2006 which imposed on directors a duty to have regard to "the desirability of the company maintaining a reputation for high standards of business conduct". The formation of IPSL was not a sufficient insulation, for all that was done by IPSL was done as ILEX's agent and in its name. That had been recognised by the January 2010 change in the rules, which now barred council members from sitting on ILEX tribunals. When therefore council members and the vice-president had sat on Mrs Kaur's disciplinary or appeal hearings they were not acting within an insulated environment but were inevitably bringing to their task their own interest as council members and directors, or as the case may be as the vice-president, in regulation and the prosecution of disciplinary charges. It was unrealistic to regard such prosecution as merely a search after truth, wherever that might lead: as the judgment in *P* had recognised at para 89 (cited at para 21 hereof above). Alternatively, the fair-minded and informed observer would consider that there was a real possibility that the tribunal was biased. Authority was either neutral or, as in the case of *P*, the most relevant of cited cases, supportive of the appeal. The rationale of *P* went beyond its own facts. The practice of other professional associations as reviewed in *P* confirmed that even at that earlier time the arrangements of ILEX were out of line.

39. These general submissions were, Mr Beaumont continued, supported by some particular factors. Thus, unlike the medical case considered in *Sadler*, the charge against Mrs Kaur was being engaged in conduct “unbefitting to ILEX or likely to bring ILEX into disrepute”, which engaged ILEX’s own interest in its reputation. Moreover, a dominant issue on appeal at the IAT had been whether ILEX’s own arrangements of requiring the president or vice-president to sit on an appeal tribunal were acceptable. A further consideration was that the tribunals had power to fine or charge in costs up to £3,000 and the DT had in fact awarded costs against each of the five students convicted of £1,700. That was to be paid to ILEX, and demonstrated that ILEX had a financial interest in the proceedings.
40. Finally, an underlying aspect of the complaint about cheating at the examinations was that it involved ILEX in having to consider the position of its accredited law school. This had been referred to by the DT at para 86 of its decision:

“In reaching its decision the Panel commented that it was inconceivable that any of the malpractice could have taken place had it not been for, at worst the active connivance of individuals at the examination centre, or at best the failure to supervise and invigilate the examinations properly. The Panel took the view that it should draw the attention of the ILEX senior management team to the matters in another forum outside of the proceedings.”

Mr Beaumont raised the question of whether any report had been brought into existence about such matters. He also observed that in June 2009, that is to say between the hearings of the DT and IAT respectively, the law college concerned had lost its ILEX accreditation. It was to be inferred that Miss Gordon-Nicholls as vice-president must have been involved or aware of such matters.

41. On behalf of ILEX and the IAT, on the other hand, Mr Treverton-Jones submitted that the judge had been right for the reasons which he gave. Prosecution was a mere search after truth: ILEX was as much interested in an acquittal, if there was no cheating, as in a conviction. It had no other interest. The creation of IPSL was a sufficient insulation. *P* was solely concerned with the presence on the disciplinary panels of those involved in the investigation or charging process. Reliance on para 3.4 of the memorandum of association was unrealistic, for it bound *every* member of ILEX, director, fellow or registered person. Any financial interest through the matter of costs was negligible: that was in any event a general feature of professional self-regulation. This appeal’s rationale was in substance an attack on such self-regulation, which jurisprudence here and in Strasbourg had approved. Nothing turned on the recent change in the rules: rules change as policy and perceptions change. No inference could be drawn as to the consequences of the DT’s drawing attention to accreditation of the law college concerned, for such matters were not in evidence.

42. Nevertheless, in his fair-minded submissions Mr Treverton-Jones also made substantial concessions. Thus he took no point, he said, that this appeal was formally concerned only with the position of Miss Gordon-Nicholls on the IAT, and not with the composition of the DT (it will be recalled that Mrs Kaur was not represented and did not appear at the DT, and there was no objection at that time, nor at the IAT, to Mr Hanning's presence on it). He accepted on behalf of ILEX at the outset of his submissions that if the challenge to Miss Gordon-Nicholls' position on the IAT was well founded, then the whole proceedings, including the DT decision, would have to be aborted and restarted from the beginning. (In fact he was mistaken to say that the position of Mr Hanning on the DT was not challenged in the grounds of this appeal.) He also accepted that the January 2010 change in the rules had brought ILEX "into line" with other regulators. Moreover, he conceded that at the IAT the challenge to Miss Gordon-Nicholls amounted to a challenge to the way ILEX did things as a matter of self-regulation, ie that it called into question ILEX's own constitution.

Discussion

43. In my judgment Mr Beaumont's submissions are in the main to be preferred. Indeed, I hope I do Mr Treverton-Jones' excellent (and as I have said fair-minded) submissions no injustice if I say that as matters progressed there came to be something less than whole-hearted about Mr Treverton-Jones' opposition. No doubt, despite the submission that ILEX's rule change came too late to be relevant, it tended to take the wind out of the respondents' sails.
44. I am somewhat sceptical that the two doctrines for which *Pinochet No 2* and *Porter v. Magill* stand authority remain to this day separate doctrines. There is force in Lord Hope's observations in *Meerabux* that if the *Porter v. Magill* development had been available to their Lordships in *Pinochet No 2* then it would have been to that doctrine to which they would more naturally have turned. It remains true, however, that even in *Meerabux* Lord Hope continued to give separate treatment to the two doctrines. Nevertheless, in a matter which has everything to do with the necessary perception of justice, it would seem odd to me if the two doctrines rendered different results. They did not in *P* (although one result was *ratio* and the other was fully reasoned *obiter dictum*), nor did they in *Meerabux* itself. Lord Hope in *Meerabux* himself suggested that the result in *Pinochet No 2* could have been derived under either doctrine. In my judgment there is also force in Lord Bingham's analysis in *Davidson* where as it seems to me he seeks to reconcile the two doctrines in terms of the disqualifying presence of some factor, interest or influence "which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment", and where this factor, interest or influence must necessarily be assessed as a matter of appearances and of perception. As Lord Bingham remarked: "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 so.” So it was that in *Pinochet No 2*, in the context of an application of the automatic disqualification doctrine, Lord Browne-Wilkinson invoked Lord Hewart’s famous dictum about the importance of appearances. It goes without saying that actual bias must disqualify. What is more difficult to define is the test to apply to disqualifying circumstances which may be argued to have the appearance of bias.

45. In these circumstances, it seems to me that by now it may be possible to see the two doctrines which remain in play in this appeal as two strands of a single overarching requirement: that judges should not sit or should face recusal or disqualification where there is a real possibility on the objective appearances of things, assessed by the fair-minded and informed observer (a role which ultimately, when these matters are challenged, is performed by the court), that the tribunal could be biased. On that basis the two doctrines might be analytically reconciled by regarding the “automatic disqualification” test as dealing with cases where the personal interest of the judge concerned, if judged sufficient on the basis of appearances to raise the real possibility of preventing the judge bringing an objective judgment to bear, is deemed to raise a case of apparent bias. I do not think that Lord Bingham regarded the automatic disqualification rule as necessarily technical (although no doubt it could be applied in a formalistic way), but be that as it may Lord Hope showed the way to avoid formalism in *Meerabux*, and I note that Lord Bingham sought to avoid technicality by qualifying the disabling personal interest by the phrase “which is not negligible”.
46. Therefore I do not see the present case as one where it is necessary to choose between the doctrines. Applying either test, I would conclude that Miss Gordon-Nicholls, the vice-president of ILEX, was disqualified by her leading role in ILEX, and thus her inevitable interest in ILEX’s policy of disciplinary regulation, from sitting on a disciplinary or appeal tribunal. Subject to the necessary hesitation that the different opinion of Foskett J engenders, I have by the end of the helpful oral argument in this case really no doubt that the fair-minded and informed observer ought to have and would have concluded that there was here a real possibility of bias. Or to be put it in Lord Bingham’s terms, he or she would be concerned that there was here the appearance and perception and indeed reality that through Miss Gordon-Nicholls the IAT was not free of an influence which could prevent the bringing of an objective judgment to bear. I note in particular that in *Meerabux* Lord Hope cited with approval Shetreet’s distinction between “active involvement in the affairs of the association and mere membership” (at [24], cited above).
47. Given Mr Treverton-Jones’ concession, it is therefore unnecessary to decide whether the same conclusion would apply to all council members and directors of ILEX. The authorities suggest that in this area of the law careful judgments may

have to be made which depend on a given tribunal member's particular status and history. However, it is my opinion that the same conclusion would embrace all such council members and directors. In this connection I am not greatly influenced by the argument that the para 3.4 object (found in ILEX's memorandum of association) applies to *all* members of ILEX, for it clearly falls upon council members and directors to a wholly different degree. Members who are not elected to council and do not seek or achieve that status are simply not concerned, as council members are, with the governance of ILEX and with the achievement of its objects.

48. In coming to this conclusion I would highlight the following factors.

49. The promotion and achievement of effective self-regulation must be among the most important objects of any professional organisation which follows the route of such self-regulation. Although it goes without saying that no one concerned with the governance of such an organisation would for that reason desire any injustice, the doctrines with which we are here concerned are to guard against the insidious effects of which those concerned are not even conscious. It follows to my mind that, whatever the means by which regulation and representation are kept separate, as modern understandings require, that necessary insulation is over-leaped (or undermined, whatever the metaphor) if those principally concerned in governance are permitted to move from representative to regulatory functions as *ex officio* members of disciplinary or appeal tribunals. This is particularly the case in ILEX where the regulatory functions were performed on behalf of ILEX by its wholly owned subsidiary. Indeed, the fact that the president or vice-president were *required* by the rules to sit on appeal tribunals (and council members generally were required to sit on the disciplinary tribunals) to my mind demonstrates the interest that ILEX continued to take in the process of self-regulation, disciplinary matters, and the promotion of professional standards. Why else was this a requirement of the rules, if such senior members of ILEX's current governance were not expected to bring their experience and views about regulation into the arena?

50. Moreover, it is clear from the examination of the practices of the various professional organisations undertaken in *P* that even in 2000, that is to say well before the Legal Services Act 2007 and its consequences, governing members of those organisations were for the most part barred either by rule or at least practice, but as it seems to me mainly by rule, from finding themselves on regulatory panels. This was a theme underlying the decision in *P* and in itself assisted that tribunal to come to its separate conclusion, on the particular facts of that case, that a panel member who had had any involvement in investigation or screening, whether or not of the particular case in question, was disqualified.

51. One only has to ask the question, as it seems to me, whether the sitting chairman or vice-chairman of the Bar could have properly sat on a disciplinary panel in a prosecution brought by the Bar Council, to conclude instinctively that that could not be right. It would not have been right, and that was confirmed in the amended version of the Bar's Disciplinary Tribunals Regulations as of 10 October 2005, which provided by regulation 2(1)(iii) that –

“no person shall be nominated to serve on a Tribunal if they are a member of the PCC or of the Bar Council or any of its other Committees or if they were a member of the PCC at any time when the matter was considered by the PCC”

Prior to October 2005 this exclusion was not dealt with expressly in the regulations. The prior regulation 2(1)(1)(ii) had merely provided that –

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

However, there was no requirement that a member of the Bar Council or its chairman or vice-chairman sit on any disciplinary tribunal, and it is believed that in practice no such thing had occurred, at any rate for some time. That would have been in at any rate practical accord with the requirements of the Law Society's regime, which were noted in *P* at para 51 as follows:

“On the Law Society website it is stated that the solicitor members of the Disciplinary Tribunal must not be members of the Council of the Law Society, although it is unclear from the material before us what is the source of this requirement. We observe that it is to be inferred that the main reason for this requirement is to ensure that these disciplinary decisions by the Tribunal are not taken by those who are connected in any way with the administrative and prosecuting machinery of the Law Society.”

52. It seems to me that these general considerations are supported and emphasised by some special features of this case. Thus the fact that the charge against Mrs Kaur was of “conduct unbecoming to ILEX or likely to bring ILEX into disrepute” underlines the interest of ILEX and its governance in upholding its professional standards. Moreover, although I accept that it would not be right to draw any inferences not dealt with on the evidence from the DT's call on “ILEX senior management” to look into the possible complicity of the law college, nevertheless that passage in its decision highlights how difficult it can be to insulate matters of regulation and representative governance once council members or the vice-president are required to sit as panel members of the disciplinary proceedings. As for the implications of costs and fines up to £3,000, it may be that this is a

negligible matter in an organisation of 22,000 members: nevertheless it again demonstrates the importance of proper separation of the disciplinary panels from those concerned with the overall governance of the organisation. It may be noted that the costs award of £8,500 (£1,700 times 5) was exactly the figure requested by the prosecution.

Conclusion

53. In sum, for the reasons stated above I would allow this appeal. The notice of appeal asks for an order to quash the orders of both the DT and the IAT, and I would do so.

Lord Justice Sullivan :

54. I agree.

Lady Justice Black :

55. I also agree.