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Winner of the Council of Europe Human Rights Prize

CAJ's Additional submission to the

Criminal Justice Review

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Introduction

We understand the Review is close to completion. However, we feel it is necessary to comment on the judicial review proceedings concerning barristers Seamus Treacy and Barry Macdonald, a matter that has arisen since our initial submission to the Review. We expect that the Review group has already examined the process of appointment of Queen's Counsel including the requirement that intending Queen's Counsel declare to serve the Queen. We also assume that the Review is closely following the case of its own motion given the widespread implications it may have for the independence of the legal system in general and the judiciary and lawyers in particular. In this context we recall our observations previously expressed to the Review group:

> *"Central to the effective translation of principles such as equality before the law and the delivery of impartial justice is the ethos of the criminal justice system. CAJ believe that in the context of a divided society, the ethos of the system should be such that it will not alienate any sections of that society. We therefore believe that the ethos should be gender neutral and neutral in terms of the political fault-lines in this society."*
>
> *"There are clearly elements of the current system which are inimical to nationalists who come into contact with it, including lawyers, witnesses and suspects...Given the divisions in Northern Ireland, we have determined that our workplaces will be neutral, yet the fora in which our citizens seek justice, are replete with the symbols of one community."*

Background

As a result of the case taken by Philip Magee BL in 1995 which challenged the requirement for intending Queen's Counsel to take an oath of allegiance to the Queen it appeared that the question of reference to the Queen as a condition of the appointment had been resolved. It transpired that the oath of allegiance to the Queen and the manner in which it was administered were acknowledged to be unlawful. Intending Queen's Counsel are no longer required to take such an oath however a declaration was retained, with reference to the Queen intact.

On realising that they were expected to make such a declaration, Mr Treacy and Mr Macdonald objected to the requirement to make a declaration to "well and truly serve Queen Elizabeth II" and, we understand, approached the Bar Council to voice their concerns. Attempts to solve the issue by way of informal approaches to the Lord Chief Justice by the Bar Council were unsuccessful. Thus Mr Treacy and Mr Macdonald reluctantly issued proceedings. The Bar Council subsequently became a party to the proceedings in support of them and has agreed to cover all legal costs they incur as a result of the case.

The case was introduced in court before Christmas. Leave to apply for judicial review was granted the following week. However, the matter had not been resolved by the scheduled date of the call ceremony and, on 21st December, 10 Queen's Counsel were appointed instead of 12. Mr Treacy and Mr Macdonald had been told that they could not participate in the ceremony unless they made the declaration.

On the eve of the scheduled hearing date it emerged that the Lords Justice and Puisne Judges had previously discussed the issue, having been contacted as part of the consultation process for a 1997 Bar Council examination into the appointment of Queen's Counsel ("the Elliott report"). As a result of these discussions, and by letter from Lord Justice McDermott to the Elliott Committee, the judges indicated that they believed the making of the declaration to be a condition of appointment and that the reference to the Queen should stand. The unanimous conclusion of the judges was that there could be no "rational objection" to the making of such a declaration as it was a declaration of office and not a pledge of allegiance. After its consultation and examination period the Elliott report recommended that reference to the Queen should be omitted from any declaration required on taking silk.

After the recommendations of the Elliott report had been adopted by the Bar Council a copy was sent to the Lord Chief Justice. On receipt of the report, in May 1997, he indicated that he wished to consult the other judges about its contents and that he would discuss them with the Chairman of the Bar Council when he had done so. In a subsequent informal discussion with the chairman of the Bar Council the Lord Chief Justice indicated that the declaration was not a matter for him but for the Secretary of State. However, it was subsequently disclosed that the Lord Chief Justice wrote to the Lord Chancellor in June 1997 indicating that the view of the judges was that the reference to the Queen should remain.

The applicants understood this to mean that the judges had reconsidered the issue in light of the recommendations of the Elliott report and reached the same conclusion as before. In fact, counsel for the Lord Chancellor informed the court, the Lord Chief Justice was expressing the pre-Elliott views of the judges. This is despite the fact that he had expressly indicated that he would discuss the report with the other judges. It appears that he did not do so.

While it is now clear that the letter of June 1997 from the Lord Chief Justice to the Lord Chancellor is expressing the pre-Elliott views of the judges, what is not clear is whether the Lord Chief Justice advised the Lord Chancellor of that fact.

At this stage in the proceedings lawyers for the applicants asked the judge hearing the case, Mr Justice Kerr, to stand down. Ruling on this application the Judge indicated that while he may have previously expressed a view on the matter he had not been consulted on the recommendations of the Elliot report and had neither formed nor expressed a view on the issue in light of that report. In these circumstances he ruled that there could be no objection to him hearing the case.

Independence of the Bar

As to the validity of the declaration itself, there are implications for the apparent and actual independence of barristers when they are obliged to make a declaration which singles out the Queen above all other prospective clients. There can be no justification for such a requirement being made of a lawyer in private practice. In fact when this practice is considered alongside the practice adopted in the cases of those who are Members of the Northern Ireland Assembly, the RUC and those who are public servants here it is clear that the retention of the reference to the Queen for

barristers can be seen as anachronistic. The Review will be aware that the Bar itself opposes this reference and has said

> *As a condition of obtaining advancement in one's profession as a barrister it should [not] be incumbent on the person seeking such advancement expressly to identify the crown as opposed to all potential clients in general, as a person or body to whom a promise well and truly to serve should be made.*

Discrimination

In addition, we believe the requirement to make such a declaration as a condition of taking up a position amounts to indirect discrimination against nationalists/Catholics and is contrary to Article 25 of the Fair Employment and Equal Treatment (Northern Ireland) Order 1998.

Further we believe it to be in breach of international standards, in particular paragraph 10 of the UN's Basic Principles on the Role of Lawyers which provides that:

> *Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status...*

The Judiciary

Quite apart from the wider implications the matter may have for the judiciary there are immediate concerns about the position of Mr Justice Kerr as the judge hearing the case. As noted above he ruled that he would hear the case because the sequence of events as it unfolded showed that there could be no possibility of bias on his part. CAJ questions the basis of this ruling. As we understand it the judge had expressed a view pre-Elliott and that view had been in favour of retaining the reference to the Queen. How the fact that he had not expressed a view 'post-Elliott' changes this simple fact and the appearance of bias is unclear.

In addition the unsatisfactory reality of the matter is that Mr Justice Kerr is ruling on the actions of the most senior judge in Northern Ireland who is now a party to the proceedings. It is also widely believed that Mr Justice Kerr is one of those who may be considered for the position of Lord Chief Justice when it next becomes vacant. Both the Lord Chancellor and the present Lord Chief Justice will have an input into that appointment.

As to the wider implications, we understand that the sole objection to the removal of the reference to the Queen from those who have an input into the process of appointment of Queen's Counsel comes from members of the judiciary. We are most concerned at the implications of this stance for public perceptions of the judiciary.

The extent to which the Elliott report was taken into account by the judiciary and the Lord Chancellor remains to be seen. However, it is inconceivable that the thoroughly researched recommendation of the Bar Council on this point would be ignored. The most obvious question then is: why was the recommendation not followed?

The Review group will recall CAJ's previously expressed concerns at the composition of the judiciary. The views expressed by the judges on the reference to the Queen add further weight to a number of our concerns as originally expressed. CAJ particularly notes Lord Justice MacDermott's assertion, on behalf of the judiciary, that there could be no "rational objection" to the making of the declaration given that it was a declaration of office and not a pledge of allegiance. It is our respectful submission, and we believe that of the applicants in the present case, that the description of the form of words as a declaration of office and not a pledge of allegiance makes little if any difference to the reasonably held objections to taking it. We are concerned that this comment betrays a view, apparently held by the entire Supreme Court bench at the relevant time, that does not sit easily with the provisions of Fair Employment legislation, the Good Friday Agreement and international standards as well as flying in the face of attempts to move away from previous exclusive and discriminatory attitudes.

Finally, we are concerned that the applicants were initially refused sight of the letter of June 1997 from the Lord Chief Justice to the Lord Chancellor. Indeed its existence was only disclosed to them at a very late stage, on the evening before the full hearing of the case was due to take place. At that stage the sole respondent was the Lord Chancellor but the Lord Chief Justice has since been joined to the proceedings.

Although some of the contents of the letter have now been disclosed, counsel for the Lord Chancellor, and now the Lord Chief Justice, indicated to the court that they were considering whether or not a public interest immunity certificate should issue for the remainder of its contents. We are extremely concerned at this development and note the background to the use of PIICs in Northern Ireland, of which we are sure the Review is familiar. We are concerned that there appears to have been an intention to withhold a letter written by the most senior judge in this jurisdiction and which is relevant to this case could be withheld in such a manner.

In addition, the Review will of course be aware that the letter contained the following comment from the Lord Chief Justice, Sir Robert Carswell, apparently referring to the Elliott report commissioned by the Bar Council:

> *"I have little doubt myself that this is all part of an ongoing politically-based campaign to have the office of Queen's Counsel replaced by a rank entitled Senior Counsel, or something to that effect."*

One of the inevitable consequences of the suggested use of PIICS in this case is suspicion that the purpose of their use would be to prevent embarrassment to the Lord Chief Justice. That the disclosed contents of the letter must be a source of considerable concern is self - evident. Our original observations have been further reinforced by this comment.

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