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SCSL-2004-15-PT
(416 - 673)

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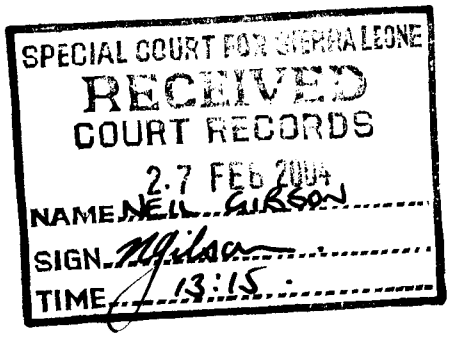
THE SPECIAL COURT FOR SIERRA LEONE

BEFORE THE APPEALS CHAMBER:

Judge Geoffrey Robertson, President
Judge King, Vice President
Judge Ayoola
Judge Winter
Judge [unknown at time of filing]

Registrar: Mr. Robin Vincent

Date filed: 27th February 2004



The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 2003 – 05 – PT

DEFENCE MOTION SEEKING THE DISQUALIFICATION OF JUDGE ROBERTSON FROM THE APPEALS CHAMBER

Office of the Prosecutor

Luc Cote
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Defence Counsel

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INTRODUCTION

1. The defence submit that the President of the Appeals Chamber, Judge Robertson, withdraw permanently and forthwith from the Appeals Chamber pursuant to Rule 15 of the Rules of Procedure and Evidence of the Special Court ("the Rules").

2. It is submitted that the President has expressed the clearest bias against both the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC) and thereby has displayed lack of impartiality to the accused indicted as members of these groups and their respective defences.

3. The matters which are central to this motion for disqualification are contained within a book entitled, "Crimes Against Humanity – The Struggle for Global Justice", published under the authorship of the President in 2002. It is submitted that the President's opinions, comments and statements, (which for ease of reference are set out below in their entirety[1]), are expressed in terms that demonstrate the clearest and most grave bias. Additionally and/or in the alternative, the same objectively give rise to an appearance of bias. Thus,[2] it is submitted that the President, pursuant to Rule 15(A) of the Rules, must withdraw from the Appeal Chamber forthwith and permanently.

4. In the event that the President does not so withdraw, then pursuant to Rule 15(B) of the Rules it is submitted that the remaining members of the Appeal Chamber must disqualify President from the Appeal Chamber.

"Crimes Against Humanity – The Struggle for Global Justice".

5. The following is the material which is the subject of this motion:

(i) Chapter – "An End to Impunity" pp 220

"Those who order atrocities believe at the time that their power will always enable them to bargain with any new government to let bygones

[1] And are also contained in Annex A

[2] See Lord Nolan in Regina v. Bow Street Metropolitan Stipendiary Magistrates and Others ex parte Pinochet Ugarte (No. 2) (House of Lords) (2000) 1 AC 119 who stated at pp15 that "in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality".

be bygones, and history since Nuremberg has tended to prove them correct – *most bizarrely in Sierra Leone, when by the Lome agreement in July 1999 the UN not only amnestied Foday Sankoh, the nation's butcher, but rewarded his pathological brutality by making him deputy leader of the government and giving him control of the diamond mines".*

(ii) Chapter – "Slouching Towards Nemesis" pp 277

"....so amnesties given to perpetrators of such deeds (genocide and torture by frightened or blackmailed governments) cannot be upheld by international law, even when agreed by international diplomats. For this reason, the UN was justified in reinterpreting the amnesty given to the despicable Foday Sankoh: it pardoned him only for crimes committed under Sierra Leone law, not international law".

(iii)Chapter – "Lessons from Sierra Leone" pp 465 - 466

"The Lome Peace Agreement, brokered by the UN, with UK and US support, purchased peace at a most extraordinary price. The democratically elected government was forced to share power with rebels who were pardoned for the most grotesque crimes against humanity, and their leader, liberated from prison, was made Deputy Prime Minister in charge of the nation's diamond resources, the very object of his ruthless campaign. As it happened, not even his capitulation could satisfy Foday Sankoh: his renewed attacks on a ragtag army of UN peacekeepers obliged the former colonial power, Great Britain to return in force, much to the relief of the populace. The case of Sierra Leone provides object lessons in (inter alia).... The impossibility of UN peacekeepers maintaining neutrality in a civil war where one side is given to committing such crimes...."

pp 466

"Styled the Revolutionary United Front (RUF) it recruited gangs of violent, dispossessed youths and armed them with AK47s for their missions of pillage, rape and diamond – heisting. The RUF had no political agenda:

its sponsor was Charles Taylor, Liberia's vicious warlord. But when, in 1995, the RUF threatened to attack Sierra Leone's capital Freetown, the military government paid a South African mercenary force, Executive Outcomes, to protect the city and re –train the government army. They did well enough for elections to be held again in 1996, which returned Ahmed Kabbah, a former UN official. By this time, the RUF had perfected its special contribution to the chambers of horrors: the practice of 'chopping' the limbs of innocent civilians. It was a means of spreading terror, especially to deter voters in the elections which the RUF opposed: their anti – election slogan, "Don't vote or don't write", came true for thousands of citizens, forced to lay their right hand on RUF chopping – blocks after they had chosen to vote. Mutilation worked, as a means of terrifying the population, and so the RUF devised more devilish tortures, such as lopping off a leg as well as an arm, sewing up vaginas with fishing lines, and padlocking mouths. Given their level of barbarism, how could Sankoh and the RUF leadership ever have been invited by Western diplomats to share power?

pp 467

"Jackson[3] chummed up with Charles Taylor and expressed admiration for the imprisoned Foday Sankoh, likening him to Nelson Mandela (who was not a psychopath given to mutilating civilians). Jackson's ignorance and moral blindness does not excuse the Western and UN diplomats who agreed to release Sankoh from prison, bestow upon him an apparently valid amnesty, and hand him the only prize in Sierra Leone worth having – control of the diamond mines.

pp 467 - 468

'The RUF, programmed to kill and pillage and mutilate, continue, continued to do so after Lome, so the UN sent in another 'peacekeeping' mission..."

[3] Reverend Jesse Jackson from the United States

pp 469

"So much for hindsight: a warring faction.. [referring to the RUF] ***...guilty of atrocities on a scale that amounts to a crime against humanity must never again be forgiven sufficiently to be accorded a slice of power: on the contrary, its leaders deserve to be captured and put on trial".***

THE LAW

The Statute and the Rules of the Special Court [4] -

6. Article 13: Qualification of Judges: Para. 1; inter alia, 'The judges shall be persons of high moral character, impartiality and integrity.....".

Article 17: Rights of the Accused: Para. 1; 'All accused shall be equal before the Special Court".

Article 17 Para. 2: The accused shall be entitled to a fair and public hearing..."

Article 17 Para. 3: The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute".

Rule 15: Disqualification of Judges: 'A Judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any personal association which might affect his impartiality....".

7. International and national laws in this area are essentially well established[5].

Prosecutor v Anto Furundzija: Appeals Chamber: 21 July 2000: Case No. IT – 95-17/1- A.

9. Para. 177. "The fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognised as being an integral component of the requirement that an accused should have a fair trial".

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[4] The defence also refer the Appeals Chamber to the corresponding provisions in the Statutes and Rules of the ICTR and ICTY (Articles 12 and 13 respectively and Article 21 and Rule 15) and also the Statute of the ICC which in Article 41(2) states inter alia: "A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground".

[5] See Art. 14 of International Covenant on Civil and Political Rights (Annex E), Art. 7 of African Charter on Human and Peoples' Rights (Annex F) and Art. 6 of European Convention on Human rights (Annex G)

Para. 179. "as a general rule, courts will find that a Judge 'might not bring an impartial and prejudiced mind' to a case if there is proof of actual bias or of an appearance of bias".

Para 182. (Referring to the jurisprudence of the European Court of Human Rights) "In considering subjective impartiality, the Court has repeatedly declared that the personal impartiality of a Judge must be presumed until there is proof to the contrary. In relation to the objective test, the Court has found that this requires that a tribunal is not only genuinely impartial, but also appears to be impartial. Even if there is no suggestion of actual bias, where appearances may give rise to doubts about impartiality, the Court has found that this alone may amount to an inadmissible jeopardy of the confidence which the court must inspire in a democratic society. The Court considers that it must determine whether or not there are ascertainable facts which may raise doubts as to impartiality'. In doing so, it has found in deciding 'whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality. The standpoint of the accused is important but not decisive.... *What is decisive is whether this fear can be held objectively justified.* Thus, one must ascertain, apart from whether a judge has shown actual bias, whether one can apprehend an appearance of bias".

Para. 189 – "On this basis the Appeal Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the statute:

A. A Judge is not impartial if it is shown that actual bias exists
B. There is an unacceptable appearance of bias if: (i) a judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a judge's disqualification from the case is automatic: or (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

Regina v Bow Street Metropolitan Stipendiary Magistrates and others, Ex parte Pinochet Ugarte (No. 2) (House of Lords) (2000) 1 AC 119.

10. pp 1/2 - " ... the fundamental principle that a man may not be a judge in his own cause was not limited to the automatic disqualification of a judge who had a pecuniary interest in the outcome of a case but was equally applicable if the judge's decision would lead to the promotion of a cause in which he was involved together with one of the parties..... that in order to maintain the absolute impartiality of the judiciary there had to be a rule which automatically disqualified a judge who was involved.... in promoting the same causes.... as was a party to the suit".

pp. 2/3 - "The court cannot rely on its knowledge of the integrity of the judge concerned to outweigh the appearance of bias to the eye of the bystander. The reference point must remain the reasonable observer. This is consistent with the test laid down under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms".

pp 21 – Lord Hutton – "... I am of the opinion that there could be cases where the interests of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation".

These principles were further explained and restated in Re Medicaments and Related Classes of Goods (No.20)(2001) 1 W.L.R 700[6], the effect of which is that the court has to decide whether a fair – minded observer would consider that there was a real danger, or real possibility of bias, notwithstanding any explanation given by the judge under review.

[6] And further see Porter v. Magill [2001] UKHL 67, [2002] 2 AC 357.

SUBMISSIONS

11. It is a universal truth that *"justice must not only be done, but should manifestly and undoubtedly be seen to be done"*[7] and no aspects of law more firmly embrace that principle than that (a) judges must be above suspicion of bias, and (b) the presumption of innocence must be respected at all times until guilt is proved according to law. By any test, the materials set out above show that the President of the Appeals Chamber must either withdraw or, should he not do so, be disqualified.

12. By reason of his position as President of the Appeals Chamber and most senior judge of this Court, with wide ranging duties and responsibilities in relation to the other judges, the President should withdraw/be disqualified and a new President should be elected. Should the President remain in post the clear suspicion would remain that the other judges are susceptible to his influence, lack impartiality, and are insufficiently independent.

ACTUAL BIAS

13. The quotations from the book "Crimes Against Humanity", 2nd Edition, set out in paragraph 5 above demonstrate beyond any doubt whatsoever that the President of the Appeals Chamber of the Special Court of Sierra Leone has prejudged many of the critical issues central to and in dispute in the cases before this Court including the criminal culpability of the RUF and its senior commanders, and holds

a) that the RUF never had any legitimate purpose or aims and was an organisation with a criminal purpose from the outset precisely as alleged by the Prosecution in its indictments against this and other accused;

b) that the amnesty granted to Foday Sankoh, (and other members of the RUF including this accused), was invalid and was rightly "reinterpreted" by the UN;

[7] Lord Hewart C.J., in Rex v. Sussex Justices, Ex parte McCarthy [1923] 1 K.B. 256, at p259

c) that the forces of the RUF had committed Crimes Against Humanity;

d) that the RUF committed "*missions of rape, pillage and diamond-heisting, ... had perfected its special contribution to the chambers of horrors: the practice of 'chopping' the limbs of innocent civilians,*" was responsible for thousands of mutilations, and "*more devilish tortures, such as lopping off a leg as well as an arm, sewing up vaginas with fishing lines, and padlocking mouths*", and that this multitude of offences was the ultimate responsibility of the RUF leadership.

14. Those ex-RUF members awaiting trial before this Court, including this Accused, are alleged to be "*persons who bear the greatest responsibility for serious violations of international humanitarian law*"[8] in the recent conflict in Sierra Leone. By his published remarks, opinions and conclusions, the President of the Appeals Chamber has demonstrated fundamental and deep-rooted bias against the RUF and its senior leaders.

REASONABLE APPEARANCE OF BIAS

15. There can be no doubt but that the quoted material has the appearance of bias. Not only do the quotations show that the President's views concerning the RUF and its leaders are held in the strongest and most adverse terms, but the fact that the President uses highly emotive language in expressing his views further exacerbates the appearance of bias.

16. No reasonable fair minded person confronted by this material would consider that the President could properly adjudicate on any matter in these cases. It is not only the interests of the accused that are at stake here but, more fundamentally still, the entire reputation and integrity of this Court.

FINANCIAL OR PROPRIETARY INTEREST IN THE OUTCOME OF THE CASE

17. The President of the Appeal Chamber is the sole author of the book "Crimes Against Humanity" now in its second edition. Accordingly, the President has a

[8] Article 1, Section 1of the Statute of the Special Court.

financial and/or proprietary interest in the issues raised relating to the cases before this Court. The President has an interest in the proof of the allegations brought by the Prosecution against accused persons, as such proof will underscore, confirm and validate his published statements: should the contrary be true the President's published work would be contradicted and his reputation damaged: thus the President has the strongest personal interest in the outcome of these cases being favourable to the Prosecution.

OPINION OF THE ACCUSED

18. The accused Sesay hotly contests this issue and holds the clear view that the position of the President is untenable and that his continuing in office would demonstrate the unfairness of the Court as a whole. By contrast, the withdrawal/disqualification of the President would demonstrate respect for the most basic tenets of law.

CONCLUSION

19. Thus, the defence requests that the President immediately withdraws permanently and forthwith from the Appeal Chamber pursuant to Rule 15(A). Alternatively, in the event that that the President does not so withdraw, the defence request that the remaining members of the chamber disqualify the President pursuant to Rule 15(B).

Dated this 26th day of February 2004.

Timothy Clayson

Wayne Jordash

Serry Kamal

Sareta Ashraph

BOOK OF AUTHORITIES

- Regina v Bow Street Metropolitan Stipendiary Magistrates and others, ex parte Pinochet Ugarte (No. 2) (House of Lords) (2000) 1 AC 119.
- Prosecutor v Anto Furundzija: Appeals Chamber: 21 July 2000: Case No. IT – 95-17/1- A.
- Re Medicaments and Related Classes of Goods (No.20)(2001) 1 W.L.R 700
- Porter v. Magill [2001] UKHL 67, [2002] 2 AC 357.
- Rex v. Sussex Justices, Ex parte McCarthy [1923] 1 K.B. 256, at p259

ANNEXES

A Relevant Excerpts of "Crimes Against Humanity – The Struggle for Global Justice", Geoffrey Robertson (2nd Edition, published 2002)

B Articles 12 and 21 of the Statute and Rule 15 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda

C Articles 13 and 21 of the Statute and Rule 15 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia

D Article 41 of the Statute of the International Criminal Court

E Article 14 of the International Covenant on Civil and Political Rights

F Article 7 of the African Charter on Human and Peoples' Rights

G Article 6 of the European Convention on Human Rights

ANNEX A

Relevant Excerpts of "Crimes Against Humanity – The Struggle for Global Justice",
Geoffrey Robertson (2nd Edition, published 2002)

73,000 people – fewer than the maniacal Marxist of Ethiopia, Colonel Mengistu, who lives happily ever after his monstrous crimes against humanity under the personal protection of Robert Mugabe in Zimbabwe. The late Pol Pot went into hospital in Thailand periodically for haemorrhoid treatment, protected by the UN's need to keep the Khmer Rouge from upsetting its peace plans in Cambodia, while its former Secretary-General, Boutros Boutros-Ghali, warmly embraced the bloodiest Khmer leaders when they emerged from hiding in 1998. In 1994, the Haitian generals provided a copybook example of how to ransom their crimes against humanity: they were prepared to stop committing them in the future in return for being allowed to keep the profits from those they had committed in the past.

This was all the doing of international diplomacy, which until the Bosnian crisis simply pretended that Nuremberg had never happened. The diplomats who represented national leaders were instructed not to countenance the prosecution of other national leaders: tyranny was a matter for negotiated climbdowns, never for justice. This approach has been reflected at a national level by the choice of amnesties and 'Truth Commissions' over trials for the crimes committed by former regimes. Thus, the middle-ranking military officers of the Argentinian junta who waged the 'dirty war' against dissidents by torturing and then causing them to disappear – often by having them pushed out of aeroplanes over the Atlantic – received a blanket amnesty in 1987. Leaders of the death squads in El Salvador received an amnesty in 1994, which embraced those responsible for killing over a hundred children in the El Mozote massacre. Go to South Africa today, and for the price of a few drinks you can listen to loquacious ex-majors tell how they tortured and killed the opponents of apartheid: the Truth and Reconciliation Commission forced them to talk, but did not reconcile them with many relatives of their victims. Those who order atrocities believe at the time that their power will always enable them to bargain with any new government to let bygones be bygones, and history since Nuremberg has tended to prove them correct – most bizarrely in Sierra Leone, when by the Lomé agreement in July 1999 the UN not only amnestied Foday Sankoh, the nation's butcher, but rewarded his pathological brutality by making him deputy leader of the government and giving him control of the diamond mines. The

main resolve to punish crimes against humanity has been to prosecute in national courts a handful of very old Nazis suspected of war crimes. Some of these trials (hinging on identification evidence, hopelessly unreliable after fifty years) have collapsed: with war crimes, as with other crimes, justice long delayed can be justice denied.

This is why it has been the great achievement of international law, by the dawn of the twenty-first century, to lift the veil of sovereign statehood far enough to make individuals responsible for the crimes against humanity committed by the states they formerly commanded, while at the same time developing a rule that those states have a continuing duty to prosecute and punish them, failing which another state or the international community may bring them to justice. This chapter places that achievement in historical perspective, focusing on the epochal judgment at Nuremberg. Chapter 7 examines the duty to prosecute and the temptations of amnesties and Truth Commissions, while chapters 8–10 will explain how the world community is working, with difficulty, towards a universal jurisdiction to try crimes against humanity, and with even greater difficulty (see chapter 11) towards a system which will stop them being perpetrated in the first place.

Nuremberg was a precedent that the United Nations ignored until the ethnic cleansing policy of the Bosnian Serbs turned its New World Order into a joke. The International Criminal Tribunal for the Former Yugoslavia was established by the Security Council on 27 May 1993 as if to stop the world laughing at its impotence, as a substitute for effective military action to stop the war. After catching one criminal in two years (and a footsoldier at that) the Tribunal finally lifted a formal finger against the Bosnian Serb leadership on 15 May 1995, by taking over the investigation into their culpability from the courts of Bosnia and Hercegovina. This step seemed insignificant at the time (the Bosnian Serb leaders were not under arrest, but on the contrary were in a position to authorize the arrest of UN peacekeepers, which they did a few weeks later). It marked, nevertheless, the first time since Nuremberg that an international court had assumed jurisdiction over the masters of war crimes, towards the close of a century in which 160 million human beings were slaughtered in war.

At this level, it was a deeply symbolic occasion. Richard Goldstone,

army to revolt unless its officers are given amnesties for crimes against humanity. Clearly, no pardon signed under threat of direct physical violence – a gun at the head of the president – can be valid: it is not the deliberate act of a head of state.[27] But pressure, even to the point of threatening calamitous loss of life, cannot invalidate through duress the presidential act of granting an amnesty if the president is physically free and makes a deliberate decision that amnesty is in the public interest as the lesser of two evils. Thus, in the Trinidad case, the Privy Council declined to invalidate the amnesty on the ground that it was extracted from the president by threats to kill the prime minister and cabinet ministers who were all being held as hostages. The court invalidated it, instead, because the Muslims did not immediately accept its condition – that they surrender their hostages unharmed – but continued to hold them for several days while negotiating an eventual surrender. With Solomonic wisdom, the court thus denied murderous fanatics any damages for wrongful arrest, but at the same time stopped the State from proceeding to hang them by ruling that it would be an abuse of process to continue prosecution because they had surrendered in the belief (induced by the government) that they were entitled to a pardon once they did eventually comply with the condition. The repugnant prospect that terrorists who killed and caused vast damage to the country might actually be awarded millions of dollars of compensation for false imprisonment (they had been detained for two years while the validity of the amnesty was considered by the courts) was a Gilbertian conclusion to be avoided at all costs, and the Privy Council avoided it by ruling that the insurgents had not surrendered quickly enough. This useful precedent was applied by the Fiji courts in 2001 to invalidate the amnesty given to George Speight by the army: it could not obliterate his continuing acts of treason. But governments which do deals with terrorists and common criminals may be legally obliged to keep them, and in such situations 'amnesty' is really no more than a formal means of promising immunity from prosecution in return for surrender.

For this reason, domestic rules upholding the validity of amnesties do not answer the question of whether in international law it is ever possible to grant a valid pre-conviction pardon in respect of a crime against humanity. There may be no objection to a state remitting the

sentence, in whole or in part, on persons convicted of such crimes, as an act of humanity or even of politics (e.g. where it is believed that insufficient weight was given to obedience to superior orders as a mitigating factor). What cannot be countenanced is either the ludicrous spectacle of the State forgiving itself its own wrongs, or the increasing phenomenon of new governments giving amnesties at the insistence of one continuing branch of the old – usually the military or the police. The State, in other words, is entitled to grant amnesty to individuals who break its laws, but not when they do so on behalf of the State itself. The State as victim may forgive, but when complicit with the perpetrator, it cannot be forgiven.

It is well established that new governments inherit the legal responsibilities of their predecessors. The principle of the continuity of the State in international law means that state responsibility exists independently of change of government and continuously from the time of the act for which the State is responsible to the time when the act is declared illegal. The State cannot therefore obliterate its own crimes, or those of its agents, committed against its subjects. This is the case whether the government granting the amnesty is the government at fault or the successor to that government. Just as genocide and torture are repugnant to international law to such an extent that no circumstances can justify them (hence these convention obligations are non-derogable), so amnesties given to perpetrators of such deeds by frightened or blackmailed governments cannot be upheld by international law, even when agreed by international diplomats. For this reason, the UN was justified in reinterpreting the amnesty given to the despicable Foday Sankoh: it pardoned him only for crimes committed under Sierra Leone law, not international law.

In other words, states which pardon torturers before trials have taken place are in breach of their international obligations to bring perpetrators of crimes against humanity to justice. The amnesty may be valid under domestic law, and the action justified in international law either under Article 4 of the Civil Covenant (a derogation taken in time of public emergency which threatens the life of the nation') or under the accepted customary law notion of necessity: obligations may be ignored to save a state from grave and imminent peril. Governments which fail in their duty to prosecute the military sometimes do

as in other parts of Indonesia. Parliament established a civilian human rights commission which soon uncovered evidence of massacres in East Timor and of how bodies of victims were transported across the border for secret disposal in West Timor. It called in and cross-examined senior generals and uncovered the conspiracy to form and arm the militias, and to fund them from the budget of East Timor's civil administration. Its report, in January 2000, accused thirty-three leaders of crimes against humanity and demanded their prosecution: command responsibility was fixed on the former military chief, General Wiranto, five other generals and a number of senior officers, together with the militia commanders and the former civilian governor of East Timor, Abilio Soares.[35] The UN Human Rights Commission inquiry reported at the same time with broadly similar conclusions, except that it recommended an extension of the Hague Tribunal, including judges from Indonesia, to try the accused.

The Indonesian government rejected this affront to its sovereignty, but renewed its promise to bring the suspects to justice – although the approval for trials of Soares and some junior officers was not given until late 2001 by President Megawati, under strong international pressure, and amid serious doubts about the capacity of local judges to manage them. The first trial, that of Soares and his chief of police, began in Jakarta in March 2002 before a special human rights tribunal: they were accused of a crime against humanity by permitting widespread and systematic militia attacks on civilians, 117 of whom lost their lives.[36] They are challenging the Tribunal's jurisdiction, but their defence on the merits is an absurd and in any event irrelevant claim that the attacks were provoked by anger at the bias of the UN mission that supervised the referendum. It is to be hoped that the new human rights court handles these cases effectively, although the worst criminals will not appear before it. General Wiranto, the overall commander, was allowed to resign from cabinet in return for an agreement not to prosecute, and the Attorney General at this point lacks the courage to indict Zacky Anwar and the other senior army officers implicated in the killings. In East Timor in the meantime, international judges at a UN Court in Dili have begun to convict remaining militia members for their part in the September 1999 atrocities.

The battle – thus far successful – by Indonesian generals to avoid

international justice has been illuminating. They have made no secret of their fears of suffering the fate of Pinochet, or of the indignity that would attend their appearance in uniform in the Hague dock.[37] What appears to have exercised them most was the humiliation of being tried in another country, under the world's gaze, rather than in their own courts. If this fear of suffering the *indignity* of international criminal justice is widely shared in military circles, and if it infects political leaders as well, then the prospect of trial at The Hague can have a real deterrent effect. The army and the militias behaved like nervous murderers, transporting the corpses, at great inconvenience, long distances to bury them across the West Timor border. The advent of international criminal law, for all the pot luck of its enforcement, had at least made them afraid of retribution for their crimes against humanity.

LESSONS FROM SIERRA LEONE

Pinochet, Kosovo, East Timor and Lockerbie occupied the world's attention in 1999, that *annus mirabilis* for international human rights law. But these steps forward were accompanied by one barely noticed backslide in the treacherous minefield of a small and turbulent African state. The Lomé Peace Agreement, brokered by the UN, with UK and US support, purchased peace at a most extraordinary price. The democratically elected government was forced to share power with rebels who were pardoned for the most grotesque crimes against humanity, and their leader, liberated from prison, was made Deputy Prime Minister in charge of the nation's diamond resources, the very object of his ruthless campaign. As it happened, not even this capitulation could satisfy Foday Sankoh: his renewed attacks on a ragtag army of UN peacekeepers obliged the former colonial power, Great Britain, to return in force, much to the relief of the populace. The case of Sierra Leone provides object lessons in:

i) the counter-productivity of amnesties for crimes against humanity;
ii) the impossibility of UN peacekeepers maintaining neutrality in a civil war where one side is given to committing such crimes;

iii) the need for a standing UN 'rapid reaction' force;
iv) the potential for legitimate use of mercenaries, and
v) the prospects for 'hybrid' war crimes courts, comprising both local and international judges and prosecutors.

When Sierra Leone, a West African coastal state, was granted independence from Great Britain in 1961, its population of 4.5 million had enjoyed comparative peace and prosperity, largely thanks to its diamond mines. Corruption soon took its toll of elected politicians and a series of army coups were interspersed with raids on the diamond mines by a breakaway Sierra Leone army faction led by Corporal Foday Sankoh, operating from neighbouring Liberia. Styled the Revolutionary United Front (RUF), it recruited gangs of violent, dispossessed youths and armed them with AK47s for their missions of pillage, rape and diamond-heisting. The RUF had no political agenda: its sponsor was Charles Taylor, Liberia's vicious warlord. But when, in 1995, the RUF threatened to attack Sierra Leone's capital Freetown, the military government paid a South African mercenary force, Executive Outcomes, to protect the city and 're-train' the government army. They did well enough for elections to be held again in 1996, which returned Ahmed Kabbah, a former UN official. By this time, the RUF had perfected its special contribution to the chamber of war horrors: the practice of 'chopping' the limbs of innocent civilians. It was a means of spreading terror, especially to deter voters in the elections which the RUF opposed: their anti-election slogan, 'Don't vote or don't write', came true for thousands of citizens, forced to lay their right hand on RUF chopping-blocks after they had chosen to vote. Mutilation worked, as a means of terrifying the population, and so the RUF devised more devilish tortures, such as lopping off a leg as well as an arm, sewing up vaginas with fishing lines, and padlocking mouths.[38] Given their level of barbarism, how could Sankoh and the RUF leadership ever have been invited by Western diplomats to share power?

The UN and the Western countries which had supervised the 1996 elections did not stay around to help President Kabbah, and in 1998 some RUF-inclined army officers staged another coup. Kabbah retained a new mercenary company, Sandline, to help his return to

power although this was in fact achieved by Nigerian forces acting through a regional OAU grouping (ECOMOG). It is ironic that Sani Abacha, the villainous Nigerian dictator who killed Ken Sara-Wiwa, looted $5 billion and denied his own country democracy should restore it in Sierra Leone, but that he did, with grudging support (there being no alternative) from the UN. He arrested Foday Sankoh, who was tried by a jury in Freetown and sentenced to death for treason. In June 1998 the UN passed resolution 1181 pursuant to which it sent in a token force of 'blue berets' to stabilize the situation, but they were wholly inadequate to stop the renewed fighting between the RUF and the governmental armies (whose members often swapped sides at night). Discredit for the Lomé Peace Agreement belongs principally to the Reverend Jesse Jackson, whose role as 'comforter and confessor' to President Clinton over the Lewinsky affair had in some bizarre way led to his appointment as Presidential envoy to stop the wars of West Africa. Jackson chummed up with Charles Taylor and expressed admiration for the imprisoned Foday Sankoh, likening him to Nelson Mandela (who was not a psychopath given to mutilating civilians). Jackson's ignorance and moral blindness does not excuse the Western and UN diplomats who agreed to release Sankoh from prison, bestow upon him an apparently valid amnesty, and hand him the only prize in Sierra Leone worth having – control of the diamond mines. Kabbah signed the Lomé Agreement in July 1999 under intense pressure, his protest symbolized by the companion he brought to the signing ceremony, a child whose arm had been chopped by the RUF. Kofi Annan, feeling queasy about the amnesty, instructed his representative to make one reservation, to the effect that it would not cover 'grave breaches' of the Geneva Conventions.

The amnesty certainly covers crimes Sankoh and the RUF have committed under Sierra Leone law, like murder and grievous bodily harm (i.e. mutilation). Whether it covers the same offences when characterized – through their widespread and systematic nature – as crimes against humanity, will be a matter for the court at Sankoh's eventual trial. At least it cannot extend to forgiveness of crimes committed after July 1999 (on the Privy Council authority of *AG Trinidad* v. *Lennox Phillip* – see p. 275). The RUF, programmed to kill and pillage and mutilate, continued to do so after Lomé, so the

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UN sent in another 'peacekeeping' mission, a ragtag army of ragbag Zambians (they arrived without kit), insubordinate Jordanians and disorganized Kenyans, and put them all under the command of an unpopular Indian Major General, whose orders they routinely disobeyed. After Sankoh's forces had taken 500 Zambian hostages and were about to overrun Freetown, it was Britain that saved the day. It did not, sensibly enough, rely on any UN mandate, but intervened at the invitation of the elected government and for the initial purpose of safely evacuating British nationals from Freetown.[39] The continuing presence of British forces proved necessary to provide some stability and to frighten the RUF (when one of its gangs kidnapped British soldiers, the ensuing SAS rescue wiped out twenty-four gang members). The British Prime Minister, in a notable speech at his party's conference, in October 2001, boasted of British action in Sierra Leone as a precedent for the defeat of terrorism in Afghanistan. The latter has proved a much more difficult prospect, but the British/UN occupation of Sierra Leone has at least ended a ten-year civil war which lost 50,000 lives and hundreds of thousands of limbs.

Although British intervention did not solve the country's intractable problems, it produced sufficient peace for plans to proceed for the trial of the re-imprisoned Foday Sankoh and some captured RUF leaders, while the more reasonable elements of that group are actually to contest an election in 2002 in a country which now has a large (and finally, effective) force of UN peacekeepers. A special court has been established pursuant to Security Council Resolution 1315, which records an agreement between the UN and Sierra Leone to try 'those who bear the greatest responsibility' for crimes against humanity and for disrupting the peace process. It will have jurisdiction to deal with crimes committed after 1996, subject to rulings on the scope of the Lomé Agreement, which in any event cannot protect Sankoh from punishment for any crimes he committed after July 1999. The court is a hybrid, staffed by local and international UN personnel. Its trial chamber has 2 judges (and 3 appeal judges) appointed by the UN Secretary General and one judge (2 appeal judges) appointed by the government. There is an international prosecutor, working mainly with local lawyers, and the rules of evidence and procedure will be those of the Rwandan Tribunal. The most difficult ethical question

was how to deal with atrocities committed by boy soldiers: many of the worst mutilations were committed by brutal and aggressive 16- and 17-year-olds, and the populace demanded that they be punished. Kofi Annan took the forgiving line of most NGOs, that these youths were in fact 'victims of psychological and physical abuse' and pursuant to the Convention on the Rights of the Child they should not be made accountable for their criminal acts. The treaty between the UN and Sierra Leone which establishes the court reaches an uneasy compromise: soldiers under the age of fifteen at the time of their crime will not be prosecuted, whilst those who were sixteen or seventeen will not go to jail if convicted. The deliberate use of child soldiers for terrorist atrocities in Africa (pioneered by CIA-backed Holden Roberto – see p. 217) and the ethical objections to punishing them makes it crucial for customary international law to recognize their recruitment as a war crime entailing individual responsibility – a development which has been helped by the inclusion of the recruitment of child soldiers as a crime in Article 8 of the ICC statute.

Sierra Leone is a small state that loomed large in the UN's latest department, which is optimistically called its 'Lessons Learned Unit'. The primary lesson was spelled out in the report produced for the millennium summit by a panel of experts chaired by Lakhdar Brahimi: it concluded that the UN's fundamental peacekeeping failure had been its 'reluctance to distinguish victim from aggressor': adherence to the traditional principles of impartiality and use of force only in self-defence had resulted in the UN's 'complicity with evil'. This referred to the Lomé Agreement, which set free the RUF leader and gave him a half share in the nation's political power and resource wealth. Henceforth, said Brahimi, Security Council mandates must permit military action by bigger and better forces, directed against 'spoilers' – parties like the RUF which break peace agreements – and include as targets their accomplice arms suppliers, drug and gem traders and parasitic crime syndicates.

So much for hindsight: a warring faction guilty of atrocities on a scale that amounts to a crime against humanity must never again be forgiven sufficiently to be accorded a slice of power: on the contrary, its leaders deserve to be captured and put on trial. Foday Sankoh embodies that proposition, and the hybrid special court devised to try

him may provide a useful precedent for states which remain in disarray after UN intervention. It gives a predominant role to experienced international judges and prosecutors, but ensures the involvement of local lawyers who will be educated and (hopefully) inspired by participating. (Since the local court system in failed and transitional states is invariably degraded, a hybrid court is one means of assisting in its renewal.) Sierra Leone provides an awkward postscript to the human rights advances at the end of the twentieth century: a warning of how easily retribution for crimes against humanity can be overlooked by diplomats and UN careerists who want 'a deal at any cost'.

The first nation to quake at the prospect of human rights law enforcement was, ironically enough, representative of the race whose history has made it necessary. Israel refused to support NATO's action against Serbia, because its right-wing government worried about Arab demands for a Kosovo-style 'autonomy' for Galilee. Shimon Peres was ashamed: 'For the first time after the Nazi Holocaust, when the world does not stand by, we do not know what to say?' But in NATO, too, Kosovo was an awkward precedent – certainly for Spain, which has used state terror against Basque separatists, and for Turkey, engaged in a war with its Kurds (which they had tactically suspended in an effort to save the life of Ocelan, their captured leader). It was precisely the fear of opening cans of ethnic worms which caused NATO's rhetoric to emphasize the humanitarian emergency and to avoid mention of Kosovo's right to self-determination, which was at the heart of the whole matter. By failing to adopt this goal as a war aim and a principle of peace, NATO and the UN face a constitutionally confusing (and very long) future in the province. In East Timor, by contrast, the future is clear and optimistic: nation-building begins apace for a people the protection of whose post-plebiscite right to self-determination was the acknowledged reason for the intervention. The KLA and Falintil were both fighting for control of a discrete patch of earth where the great majority were suffering under a brutal, militarized state, and international law was on their side. It should have been declared to be on their side – in the Dayton Accords and in the judgments of the *East Timor Case*. But the West long ago developed a kneejerk hostility to the right of self-determination,

because it was asserted first by colonial rebels and later by communist-backed liberation groups. But the lesson of Kosovo and East Timor is that in an age of human rights enforcement it should no longer be necessary for peoples to fight and die for their international law rights: the world must develop an enforcement system which will do this for them. Until international law clearly confronts the problem of secession, and lays down some ground rules for its exercise – including the existence of cast-iron guarantees for dissenters and minorities in the new seceded state – liberation struggles will be endless, and some great power claims, e.g. over Chechnya, New Caledonia and (most dangerously) Taiwan, will continue to trouble the peace of the world.

Kosovo, East Timor and Sierra Leone demonstrate the rudimentary nature of the human rights enforcement system at the turn into the twenty-first century. There is a world court, full of judges determined to save states from embarrassment by refusing to rule on the legality of NATO's war in former Yugoslavia or of Indonesia's annexation of East Timor. There is a world government, its executive unable to act without the support of the five most powerful nations of 1945, only one of which has prospered greatly since. It has no 'rapid reaction' force to parachute in when genocide is underway; Senator Jesse Helms has seen to that, threatening US withdrawal whenever the idea of the UN's own army is mentioned. So the East Timorese were butchered for two weeks because one Security Council member refused to act other than by invitation of the state whose army was committing the butchery, and Sierra Leone was sent an undisciplined rabble of 'blue berets' that proved no match for the rebels. Human rights lessons are easy to teach, but politicians and diplomats show little inclination to learn.

Kosovo and East Timor were both depicted in the media as 'ethnic conflicts' underlain by blood hatreds between races and religions: the Catholic Serbs against the Muslim Albanians; the Catholic East Timorese against the Muslim Indonesians. This analysis is simplistic, and essentially false. As historian Noel Malcolm points out in respect to Kosovo, 'It ignored the primary role of politicians (above all, the Serbian nationalist-communist Milošević) in creating conflict at a political level . . . between low-level prejudices on the one hand and a military conflict, concentration camps, and mass murder on the other,

ANNEX B

Articles 12 and 21 of the Statute and Rule 15 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda

Article 12: Qualification and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. The members of the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (hereinafter referred to as Athe International Tribunal for the former Yugoslavia@) shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

3. The judges of the Trial Chambers of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

a) The Secretary-General shall invite nominations for judges of the Trial Chambers from States Members of the United Nations and non-member States maintaining permanent observer missions at the United Nations Headquarters;

b) Within thirty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality and neither of whom shall be one of the same nationality as any judge on the Appeals Chamber;

c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less that eighteen and not more that twenty-seven candidates, taking due account of adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;

d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the nine judges of the Trial Chambers. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

4 In the event of a vacancy in the Trial Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

5. The judges of the Trial Chambers shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Tribunal for the former Yugoslavia. They shall be eligible for re-election.

Article 21
Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
(g) not to be compelled to testify against himself or to confess guilt.

Rule 15: Disqualification of Judges

(A) A Judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw from that case. Where the Judge withdraws from the Trial Chamber, the President shall assign another Trial Chamber Judge to sit in his place. Where a Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber shall assign another Judge to sit in his place.

(B) Any party may apply to the Presiding Judge of a Chamber for the disqualification of a Judge of that Chamber from a trial or appeal upon the above grounds. After the Presiding Judge has conferred with the Judge in question, the Bureau, if necessary, shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.

(C) The Judge who reviews an indictment against an accused, pursuant to Article 18 of the Statute and Rule 47 or 61, shall not be disqualified from sitting as a member of a Trial Chamber for the trial of that accused.

(E) If a Judge is, for any reason, unable to continue sitting in a part-heard case, the Presiding Judge may, if that inability seems likely to be of short duration, adjourn the proceedings; otherwise he shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point.

However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused.

(F) In case of illness or an unfilled vacancy or in any other exceptional circumstances, the President may authorize a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members.

ANNEX C

Articles 13 and 21 of the Statute and Rule 15 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia

Article 13
Qualifications and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. The judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality;
(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation of the principal legal systems of the world;
(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the eleven judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-Member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

3. In the event of a vacancy in the Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

4. The judges shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

Article 21
Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
(g) not to be compelled to testify against himself or to confess guilt.

Rule 15
Disqualification of Judges

(A) A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

(B) Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial or appeal upon the above grounds. The Presiding Judge shall confer with the Judge in question, and if necessary the Bureau shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.

(C) The Judge of the Trial Chamber who reviews an indictment against an accused, pursuant to Article 19 of the Statute and Rules 47 or 61, shall not be disqualified for sitting as a member of the Trial Chamber for the trial of that accused. Such a Judge shall also not be disqualified for sitting as a member of the Appeals Chamber, or as a member of a bench of three Judges appointed pursuant to Rules 65 (D) or 72 (E), to hear any appeal in that case.

(D) (i) No Judge shall sit on any appeal or as a member of a bench of three Judges appointed pursuant to Rules 65 (D) or 72 (E) in a case in which that Judge sat as a member of the Trial Chamber.

(ii) No Judge shall sit on any State Request for Review pursuant to Rule 108 *bis* in a matter in which that Judge sat as a member of the Trial Chamber whose decision is to be reviewed.

ANNEX D

Article 41 of the Statute of the International Criminal Court

President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred upon it in accordance with this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 39
Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 40
Independence of the judges

1. The judges shall be independent in the performance of their functions.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 41
Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 42
The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

ANNEX E

Article 14 of the International Covenant on Civil and Political Rights

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

ANNEX F

Article 7 of the African Charter on Human and Peoples' Rights

Article 7

1. Every individual shall have the right to have his cause heard. This comprises:

(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;

(c) the right to defence, including the right to be defended by counsel of his choice;

(d) the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

ANNEX G

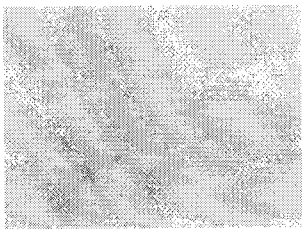
Article 6 of the European Convention on Human Rights

person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

ARTICLE 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
    - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
    - (b) to have adequate time and the facilities for the preparation of his defence;
    - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
    - (d) to examine or have examined witnesses against him and



to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[2000] 1 AC 119

REGINA v BOW STREET METROPOLITAN STIPENDIARY

MAGISTRATE and Others, Ex parte PINOCHET UGARTE (No. 2)

[HOUSE OF LORDS]

[2000] 1 AC 119

HEARING-DATES: 15, 16, 17, December 1998, 15 January 1999

15 January 1999

CATCHWORDS:
Natural Justice - Bias - Judge in own cause - Request for extradition of former head of state for human rights crimes - Applicant claiming immunity - Human rights body joined as party to proceedings - Judge unpaid director and chairman of charity closely linked to human rights body - Connection not disclosed to parties - Whether judge automatically disqualified - Whether appearance of bias

HEADNOTE:
The applicant, a former head of state of Chile who was on a visit to London, was arrested under warrants issued pursuant to section 8(1) of the Extradition Act 1989 following receipt of international warrants of arrest issued by a Spanish court alleging various crimes against humanity, including murder, hostage-taking and torture, committed during the applicant's period of office and for which he was knowingly responsible. The Divisional Court quashed the warrants on the ground, inter alia, that as a former head of state he was immune from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state. The quashing of the second warrant was stayed pending an appeal to the House of Lords by the prosecuting authorities on the issue of the immunity enjoyed by a former head of state. Before the main hearing A.I., a human rights body which had campaigned against the applicant, obtained leave to intervene in the appeal and was represented by counsel in the proceedings. The appeal was allowed by a majority of three to two and the second warrant was restored pending a decision by the Home Secretary whether to issue an authority to proceed pursuant to section 7(1) of the Act. Subsequently the applicant's advisers discovered that one of the judges who had been part of the majority was, although not a member of A.I., an unpaid director and chairman of A.I.C. Ltd., a charity which was wholly controlled by A.I. and carried on that part of its work which was charitable. One of the objects of A.I.C. Ltd. was to procure the abolition of torture, extra-judicial execution and disappearance. The Home Secretary signed the authority to proceed.

On a petition by the applicant for the House of Lords to set aside its previous decision on the ground of apparent bias on the part of the judge: -

Held, granting the petition, that as the ultimate court of appeal the House had power to correct any injustice caused by one of its earlier orders; that the fundamental principle that a man may not be a judge in his own cause was not limited to the automatic disqualification of a judge who had a pecuniary interest in the outcome of a case but was equally applicable if the judge's decision would lead to the promotion of a cause in which he was involved together with one of the parties; that, although the judge could not personally be regarded

as having been a party to the appeal, A.I., which had been a party with the interest of securing the extradition of the applicant to Spain, and A.I.C. Ltd. were both parts of a movement working towards the same goals; that in order to maintain the absolute **impartiality** of the judiciarythere had to be a rule which automatically disqualified a judge who was involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as was a party to the suit; and that, accordingly, the earlier decision of the House would be set aside (post, pp. 132D, 134B-E, 135A-F, 139B-140A,142E-143F, 146E-F).

Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, H.L.(E.) applied.

Decision of the House of Lords [2000] 1 A.C. 61 [1998] 3 W.L.R. 1456; [1998] 4 All E.R. 897 set aside.

INTRODUCTION:
Petition

This was an application by Senator Augusto Pinochet Ugarte to set aside the decision of the House of Lords (Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann; Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting) of 25 November 1998 allowing an appeal by the Commissioner of Police of the Metropolis and the Government of Spain against a decision of the Divisional Court (Lord Bingham C.J., Collins and Richards JJ.) dated 28 October 1998 granting an order of certiorari to quash a warrant issued pursuant to section 8(1) of the Extradition Act 1989 at the request of the Central Court of Criminal Proceedings No. 5, Madrid, by Ronald Bartle, Bow Street Metropolitan Stipendiary Magistrate. The ground of the application was that the links between Lord Hoffmann and Amnesty International, an intervener in the proceedings, were such as to give the appearance that he might have been biased against the applicant. Leave to intervene was given to Amnesty International.

The facts are stated in the opinion of Lord Browne-Wilkinson.

COUNSEL:
Clive Nicholls Q.C., Clare Montgomery Q.C., Helen Malcolm, James Cameron and Julian B.Knowles for the applicant.

Montgomery Q.C. The jurisdiction of the House to hear the application was not in any real dispute. The decision had international implications and required acceptance by the wider international community. The links between the judge and Amnesty International, which were not disclosed prior to the hearing and not known to the applicant's legal advisors, were such as to undermine confidence in the decision. For examples of Amnesty International's charitable objectives: see McGovern v. Attorney-General [1982] Ch. 321. For an example of how the non-charitable parts of Amnesty International have continuously campaigned against the applicant: see Ex parte Amnesty International, The Times, 11 December 1998.

A failure of disclosure is a relevant factor in deciding whether justice was seen to be done although it does not necessarily vitiate the decision. It cannot be seriously suggested that there is a duty on the applicant'ssolicitors to trawl around for information and request disclosure: see Shetreet, Judges on Trial (1976), pp. 305-306, 308, 311; In the marriage of Kennedy and Carhill (1995) F.L.C. 92-605.

It is doubtful whether the test established in Reg. v. Gough [1993] A.C. 646, of a real "danger of bias" meets the objective of the common law rule which is to preserve the appearance of non-bias rather than the fact of non-bias as determined by the court (see how the test in Gough has been interpreted in, for example, Reg. v. Inner West London Coroner, Ex parte Dallaglio [1994] 4 All E.R. 139, 151, 161). The court cannot rely on its knowledge of the integrity of the judge concerned to outweigh the appearance of bias to the eye of the

bystander. The reference point must remain the reasonable observer. This is consistent with the test laid down under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969): see Harris, O'Boyle, Warbrick, Law of the European Convention on Human Rights (1995), p. 235; Hauschildt v. Denmark (1989) 12 E.H.R.R. 266; Langborger v. Sweden (1989) 12 E.H.R.R. 416 and Holm v. Sweden (1993) 18 E.H.R.R. 79. **Impartiality** and independence are different concepts, one is sub group of the other. The position under article 6(1) should be the position under English law: see Reg. v. Sultan Khan [1997] A.C. 558 and Porter v. Magill (1997) 96 L.G.R. 157.

The New Zealand courts have preferred to follow the Australian case of Webb v. The Queen (1994) 181 C.L.R. 41 rather than Reg. v. Gough [1993] A.C. 646: see B.O.C. New Zealand Ltd. v. Trans Tasman Properties Ltd. [1997] N.Z.A.R. 49. For the Canadian approach see: Reg. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193. The court in Reg. v. Gough [1993] A.C. 646 was not referred to the Australian authorities nor even to the Scottish case of Bradford v. McLeod, 1986 S.L.T. 244.

A high standard should apply to the higher courts. At the lower levels local interests can involve everyone in the area at the higher level there is no need for any conflict of interest.

The applicant could not be said to have waived any objection he had to the judge by his subsequent actions. The connection with Amnesty International was not a matter of public record and the parties had been entitled to assume there was no such connection. Even if there was a waiver there is the issue of public interest in seeing that the judiciary is acting fairly and a duty on the House to see that confidence is maintained.

The application cannot be regarded as an abuse of process by reason of delay. Between the date of knowledge of the connection to the point of issuing proceedings there were practical problems and time was spent in investigating the facts.

The appropriate test is whether a fair minded observer with knowledge of the relevant facts would have a suspicion of bias. Non-disclosure alone is a procedural impropriety which is sufficient to raise such suspicion.

Alun Jones Q.C., David Elvin, James Lewis, Campaspe Lloyd-Jacob and James Maurici for the Commissioner of Police and the Government of Spain. The applicant raised the issue of bias with the Secretary of State before issuing the present petition. Very strong representations were made to the Secretary of State urging him to disregard the decision of the House and refuse to issue an authority to proceed. All the facts which theapplicant relies on now were known to his advisers then yet the submissions to the Secretary of State suggest that he is the only person who can uphold this point.

In effect by taking that course of action the applicant had elected to pursue his grievance before the Secretary of State rather than the House: see Auckland Casino Ltd. v. Casino Control Authority [1995] 1 N.Z.L.R. 142; Reg. v. Nailsworth Licensing Justices, Ex parte Bird [1953] 1 W.L.R. 1046; Thomas v. University of Bradford (No. 2) [1992] 1 All E.R. 964 and Reg. v. Camborne Justices, Ex parte Pearce [1955] 1 Q.B. 41. It was only after the Secretary of State had made his decision that the current petition was issued. This raises issues of waiver, abuse of process and acquiescence.

The applicant's advisers had denied having any knowledge of the link between the judge and Amnesty International yet it is clear that at least two of them had some knowledge of the connection. That is surely relevant to the discretionary aspects of relief because if one is complaining about non-disclosure one should have regard to ones own position.

Applying the "real danger of bias" test laid down in Reg. v. Gough [1993] A.C. 646 to the facts in the case it was clear that there was no such danger. The duty of disclosure is

subsumed in the Gough test. The test propounded in Reg. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193 of a "reasonable apprehension of bias" is effectively the same as the Gough test. That case also establishes that it is accepted that a judge brings his attitudes, experiences and views to the job.

The judge's involvement with the Amnesty International charity is an embodiment of his broader approach to the law which he brings to his decision making. Being against torture can hardly be regarded as bias. The applicant's real objection is to the judge's perceived liberal instincts. The fact that the subject matter of the complaint has a personal link with an organisation which has interests in the outcome of the decision is not determinative of there being a "real danger" of bias: see Reg. v. Chairman of the Town Planning Board, Ex parte Mutual Luck Investment Ltd. (1995) 5 H.K.P.L.R. 328; Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd. [1996] 3 All E.R. 304.

New Zealand, Canada and Hong Kong have all applied and followed the Gough approach. See also the discussion in Shetreet, Judges on Trial (1976), pp. 305-306.

Elvin following. The requirement of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms reflects principles already deeply embodied in the common law. Accordingly, nothing of substance is added by invocation of article 6(1). This can be seen from consideration of the two interrelated elements of article 6(1), the requirements for a tribunal which is both independent and impartial. The requirement of independence has an objective test and focuses on the structural and compositional aspects of the tribunal. **Impartiality** means lack of prejudice or bias and has a subjective test.

The European Court of Human Rights has not suggested that there is a duty of disclosure. It has said that if there is a ground for concern (after consideration of the objective and subjective tests) the judge must withdraw. As such it is the equivalent of the actual bias test under English law as described in Reg. v. Gough [1993] A.C. 646: see Campbell and Fellv. United Kingdom (1984) 7 E.H.R.R. 165; De Cubber v. Belgium (1984) 7 E.H.R.R. 236; Gregory v. United Kingdom (1997) 25 E.H.R.R. 577, 584; Reg. v. Devon County Council, Ex parte Baker [1995] 1 All E.R. 73, 88; Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd. [1996] 3 All E.R. 304. The European Court of Human Rights has ruled that the right to an impartial tribunal may be waived: see Pfeifer and Plankl v. Austria (1992) 14 E.H.R.R. 692.

Reg. v. Secretary of State for the Home Department, Ex parte Doody [1994] 1 A.C. 531 and B. v. W.(Wardship: Appeal) [1979] 1 W.L.R. 1041 were straightforward cases of failure to disclose evidence and do not have any wider application.

The Gough test concerns the appearance of bias to a reasonable observer not to one of the parties. Auckland Casino Ltd. v. Casino Control Authority [1995] 1 N.Z.L.R. 142 and Reg. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193 are both consistent with the Gough test.

Peter Duffy Q.C., Owen Davies and David Scorey for Amnesty International. There are many differences between Amnesty International and Amnesty International Charity Ltd.: see McGovern v. Attorney-General [1982] Ch. 321. For the sum total of Amnesty International's activities which are charitable see Reg. v. Radio Authority, Ex parte Bull [1998] Q.B.294.

Amnesty International supports the position of challenging trials vitiated by bias. The issue is: what constitutes bias? It is in the public benefit for judges to be involved with charities. It cannot be that if a judge is involved with a charity which is concerned with grave human rights violations he is thereby excluded from sitting in a case in which human rights issues arise. The issue of disclosure only arises if there is an issue which needs to be disclosed. Is it necessary or desirable that a ritual should be gone through whereby judges disclose their connections with every human rights body? Charitable objectives are by definition

nonpolitical and in the public interest. A judges relationship with a charity and support for its objectives should not be investigated or under suspicion.

Montgomery Q.C. in reply. The whole argument about waiver or election is based on the false premise that the Secretary of State is an alternative remedy to petitioning the House. They are in fact parallel remedies involving different standards and tests.

The provision of an impartial tribunal is a duty and cannot therefore be waived. Rights can be waived not duties: see Pfeifer and Plankl v. Austria (1992) 14 E.H.R.R. 692.

The House has indulged in no investigation of the background facts. The House cannot therefore declare on what actually occurred and has to deal only with the appearance of what occurred. A judge must not hear a case involving a matter which a charity of which he is a director is sworn to abolish in circumstances where a company closely related to that charity is an intervener in the case.

The duty of disclosure is established by practice. It is not just one of the incidents of a fair trial but lies at the heart of the matter: see Reg. v. Devon County Council, Ex parte Baker [1995] 1 All E.R. 73. The test must be that information should be disclosed which would give rise to the apprehension of bias on the part of a reasonable man in the shoes of oneof the parties. That is a free standing ground on which relief should be granted. Reg. v. Secretary of State for the Home Department, Ex parte Doody [1994] 1 A.C. 531 and B. v. W.(Wardship: Appeal) [1979] 1 W.L.R.1041 show that a failure to disclose relevant information can undermine a decision.

There is an important distinction between the appearance of bias (the actuality) and the apprehension of bias (the subjective view). Reg. v. Gough [1993] A.C. 646 has plainly been misunderstood as it is taken to mean that the relevant issue is only the actuality rather than the appearance. However, it is the appearance of bias to the public and the party concerned which is relevant. If that fear of bias is justified, even if knowledge of the facts would vitiate that fear, then the test of bias has been satisfied. In the instant case the judge was identified or apparently identified with the policy objectives of one side's case: see Reg. v. S.(R.D.) (1997) 151 D.L.R. (4th) 193, 227. That appearance of bias cannot stand.

Their Lordships took time for consideration.

17 December 1998. Their Lordships granted the application for reasons to be given later.

15 January 1999.

PANEL: Lord Browne-Wilkinson, Lord Goff of Chieveley, Lord Nolan, Lord Hope of Craighead and Lord Hutton

JUDGMENTBY-1: Lord Browne-Wilkinson

JUDGMENT-1:
Lord Browne-Wilkinson: . My Lords,

Introduction

This petition has been brought by Senator Pinochet to set aside an order made by your Lordships on 25 November 1998. It is said that the links between one of the members of the Appellate Committee who heard the appeal, Lord Hoffmann, and Amnesty International ("A.I.") were such as to give the appearance that he might have been biased against Senator Pinochet. On 17 December 1998 your Lordships set aside the order of 25 November 1998 for reasons to be given later. These are the reasons that led me to that conclusion.

Background facts

Senator Pinochet was the head of state of Chile from 11 September 1973 until 11 March 1990. It is alleged that during that period there took place in Chile various crimes against humanity (torture, hostage taking and murder) for which he was knowingly responsible.

In October 1998 Senator Pinochet was in this country receiving medical treatment. In October and November 1998 the judicial authorities in Spain issued international warrants for his arrest to enable his extradition to Spain to face trial for those alleged offences. The Spanish Supreme Court has held that the courts of Spain have jurisdiction to try him. Pursuant to those international warrants, on 16 and 23 October 1998 metropolitan stipendiary magistrates issued two provisional warrants for his arrest under section 8(1)(b) of the Extradition Act 1989. Senator Pinochet was arrested. He immediately applied to the Queen's Bench Divisional Court to quash the warrants. The warrant of 16 October was quashed and nothing further turns on that warrant. The second warrant of 23 October 1998 was quashed by an order of the Divisional Court of theQueen's Bench Division (Lord Bingham of Cornhill C.J., Collins and Richards JJ.) However, the quashing of the second warrant was stayed to enable an appeal to be taken to your Lordships' House [2000] 1 A.C. 61 on the question certified by the Divisional Court as to "the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state."

As that question indicates, the principle point at issue in the main proceedings in both the Divisional Court and this House was as to the immunity, if any, enjoyed by Senator Pinochet as a past head of state in respect of the crimes against humanity for which his extradition was sought. The Crown Prosecution Service ("C.P.S.") (which is conducting the proceedings on behalf of the Spanish Government) while accepting that a foreign head of state would, during his tenure of office, be immune from arrest or trial in respect of the matters alleged, contends that once he ceased to be head of state his immunity for crimes against humanity also ceased and he can be arrested and prosecuted for such crimes committed during the period he was head of state. On the other side, Senator Pinochet contends that his immunity in respect of acts done whilst he was head of state persists even after he has ceased to be head of state. The position therefore is that if the view of the C.P.S. (on behalf of the Spanish Government) prevails, it was lawful to arrest Senator Pinochet in October and (subject to any other valid objections and the completion of the extradition process) it will be lawful for the Secretary of State in his discretion to extradite Senator Pinochet to Spain to stand trial for the alleged crimes. If, on the other hand, the contentions of Senator Pinochet are correct, he has at all times been and still is immune from arrest in this country for the alleged crimes. He could never be extradited for those crimes to Spain or any other country. He would have to be immediately released and allowed to return to Chile as he wishes to do.

The court proceedings

The Divisional Court having unanimously quashed the provisional warrant of 23 October on the ground that Senator Pinochet was entitled to immunity, he was thereupon free to return to Chile subject only to the stay to permit the appeal to your Lordships' House. The matter proceeded to your Lordships' House with great speed. It was heard on 4, 5 and 9-12 November 1998 by a committee consisting of Lord Slynn of Hadley, Lord Lloyd of Berwick, Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann. However, before the main hearing of the appeal, there was an interlocutory decision of the greatest importance for the purposes of the present application. Amnesty International ("A.I."), two other human rights bodies and three individuals petitioned for leave to intervene in the appeal. Such leave was granted by a committee consisting of Lord Slynn, Lord Nicholls and Lord Steyn subject to any protest being made by other parties at the start of the main hearing. No such protest having been made A.I. accordingly became an intervener in the appeal. At the hearing of the appeal

A.I. not only put in written submissions but was also represented by counsel, Professor Brownlie, Michael Fordham, Owen Davies andFrances Webber. Professor Brownlie addressed the committee on behalf of A.I. supporting the appeal.

The hearing of this case, both before the Divisional Court and in your Lordships' House, produced an unprecedented degree of public interest not only in this country but worldwide. The case raises fundamental issues of public international law and their interaction with the domestic law of this country. The conduct of Senator Pinochet and his regime have been highly contentious and emotive matters. There are many Chileans and supporters of human rights who have no doubt as to his guilt and are anxious to bring him to trial somewhere in the world. There are many others who are his supporters and believe that he was the saviour of Chile. Yet a third group believe that, whatever the truth of the matter, it is a matter for Chile to sort out internally and not for third parties to interfere in the delicate balance of contemporary Chilean politics by seeking to try him outside Chile.

This wide public interest was reflected in the very large number attending the hearings before the Appellate Committee including representatives of the world press. The Palace of Westminster was picketed throughout. The announcement of the final result gave rise to worldwide reactions. In the eyes of very many people the issue was not a mere legal issue but whether or not Senator Pinochet was to stand trial and therefore, so it was thought, the cause of human rights triumph. Although the members of the Appellate Committee were in no doubt as to their function, the issue for many people was one of moral, not legal, right or wrong.

The decision and afterwards

Judgment in your Lordships' House was given on 25 November 1998. The appeal was allowed by a majority of three to two and your Lordships' House restored the second warrant of 23 October 1998. Of the majority, Lord Nicholls and Lord Steyn each delivered speeches holding that Senator Pinochet was not entitled to immunity: Lord Hoffmann agreed with their speeches but did not give separate reasons for allowing the appeal. Lord Slynn and Lord Lloyd each gave separate speeches setting out the reasons for their dissent.

As a result of this decision, Senator Pinochet was required to remain in this country to await the decision of the Home Secretary whether to authorise the continuation of the proceedings for his extradition under section 7(1) of the Extradition Act 1989. The Home Secretary had until 11 December 1998 to make that decision, but he required anyone wishing to make representations on the point to do so by the 30 November 1998.

The link between Lord Hoffmann and A.I.

It appears that neither Senator Pinochet nor (save to a very limited extent) his legal advisers were aware of any connection between Lord Hoffmann and A.I. until after the judgment was given on 25 November. Two members of the legal team recalled that they had heard rumours that Lord Hoffmann's wife was connected with A.I. in some way. During the Newsnight programme on television on 25 November, an allegation tothat effect was made by a speaker in Chile. On that limited information the representations made on Senator Pinochet's behalf to the Home Secretary on 30 November drew attention to Lady Hoffmann's position and contained a detailed consideration of the relevant law of bias. It then read:

"It is submitted therefore that the Secretary of State should not have any regard to the decision of Lord Hoffmann. The authorities make it plain that this is the appropriate approach to a decision that is affected by bias. Since the bias was in the House of Lords, the Secretary of State represents the senator's only domestic protection. Absent domestic protection the senator will have to invoke the jurisdiction of the European Court of Human Rights."

After the representations had been made to the Home Office, Senator Pinochet's legal advisers received a letter dated 1 December 1998 from the solicitors acting for A.I. written in response to a request for information as to Lord Hoffmann's links. The letter of 1 December, so far as relevant, reads as follows:

"Further to our letter of 27 November, we are informed by our clients, Amnesty International, that Lady Hoffmann has been working at their international secretariat since 1977. She has always been employed in administrative positions, primarily in their department dealing with press and publications. She moved to her present position of programme assistant to the director of the media and audio visual programme when this position was established in 1994. Lady Hoffmann provides administrative support to the programme, including some receptionist duties. She has not been consulted or otherwise involved in any substantive discussions or decisions by Amnesty International, including in relation to the Pinochet case."

On 7 December a man anonymously telephoned Senator Pinochet's solicitors alleging that Lord Hoffmann was a director of the Amnesty International Charitable Trust. That allegation was repeated in a newspaper report on 8 December. Senator Pinochet's solicitors informed the Home Secretary of these allegations. On 8 December they received a letter from the solicitors acting for A.I. dated 7 December which reads, so far as relevant, as follows:

"On further consideration, our client, Amnesty International have instructed us that after contacting Lord Hoffmann over the weekend both he and they believe that the following information about his connection with Amnesty International's charitable work should be provided to you. Lord Hoffmann is a director and chairperson of Amnesty International Charity Ltd. ('A.I.C.L.'), a registered charity incorporated on 7 April 1986 to undertake those aspects of the work of Amnesty International Ltd. ('A.I.L.') which are charitable under U.K. law. A.I.C.L. files reports with Companies House and the Charity Commissioners as required by U.K. law. A.I.C.L. funds a proportion of the charitable activities undertaken independently byA.I.L. A.I.L.'s board is composed of Amnesty International's Secretary General and two Deputy Secretaries General. Since 1990 Lord Hoffmann and Peter Duffy Q.C. have been the two directors of A.I.C.L. They are neither employed nor remunerated by either A.I.C.L. or A.I.L. They have not been consulted and have not had any other role in Amnesty International's interventions in the case of Pinochet. Lord Hoffmann is not a member of Amnesty International. In addition, in 1997 Lord Hoffmann helped in the organisation of a fund raising appeal for a new building for Amnesty International U.K. He helped organise this appeal together with other senior legal figures, including the Lord Chief Justice, Lord Bingham. In February your firm contributed oe1,000 to this appeal. You should also note that in 1982 Lord Hoffmann, when practising at the Bar, appeared in the Chancery Division for Amnesty International U.K."

Further information relating to A.I.C.L. and its relationship with Lord Hoffmann and A.I. is given below. Mr. Alun Jones for the C.P.S. does not contend that either Senator Pinochet or his legal advisers had any knowledge of Lord Hoffmann's position as a director of A.I.C.L. until receipt of that letter.

Senator Pinochet's solicitors informed the Home Secretary of the contents of the letter dated 7 December. The Home Secretary signed the authority to proceed on 9 December 1998. He also gave reasons for his decision, attaching no weight to the allegations of bias or apparent bias made by Senator Pinochet.

On 10 December 1998, Senator Pinochet lodged the present petition asking that the order of 25 November 1998 should either be set aside completely or the opinion of Lord Hoffmann should be declared to be of no effect. The sole ground relied upon was that Lord Hoffmann's links with A.I. were such as to give the appearance of possible bias. It is important to stress that Senator Pinochet makes no allegation of actual bias against Lord Hoffmann; his claim is based on the requirement that justice should be seen to be done as well as actually being

done. There is no allegation that any other member of the committee has fallen short in the performance of his judicial duties.

Amnesty International and its constituent parts

Before considering the arguments advanced before your Lordships, it is necessary to give some detail of the organisation of A.I. and its subsidiary and constituent bodies. Most of the information which follows is derived from the directors' reports and notes to the accounts of A.I.C.L. which have been put in evidence.

A.I. itself is an unincorporated, non-profit-making organisation founded in 1961 with the object of securing throughout the world the observance of the provisions of the Universal Declaration of Human Rights in regard to prisoners of conscience. It is regulated by a document known as the statute of Amnesty International. A.I. consists of sections in different countries throughout the world and its international headquarters in London. Delegates of the sections meet periodically at the international council meetings to coordinate their activities and to elect an internationalexecutive committee to implement the council's decisions. The international headquarters in London is responsible to the international executive committee. It is funded principally by the sections for the purpose of furthering the work of A.I. on a worldwide basis and to assist the work of sections in specific countries as necessary. The work of the international headquarters is undertaken through two United Kingdom registered companies, Amnesty International Ltd. ("A.I.L.") and Amnesty International Charity Ltd. ("A.I.C.L.").

A.I.L. is an English limited company incorporated to assist in furthering the objectives of A.I. and to carry out the aspects of the work of the international headquarters which are not charitable.

A.I.C.L. is a company limited by guarantee and also a registered charity. In McGovern v. Attorney-General [1982] Ch. 321, Slade J. held that a trust established by A.I. to promote certain of its objects was not charitable because it was established for political purposes; however the judge indicated that a trust for research into the observance of human rights and the dissemination of the results of such research could be charitable. It appears that A.I.C.L. was incorporated on 7 April 1986 to carry out such of the purposes of A.I. as were charitable. Clause3 of the memorandum of association of A.I.C.L. provides:

"Having regard to the statute for the time being of Amnesty International, the objects for which the company is established are: (a) To promote research into the maintenance and observance of human rights and to publish the results of such research. (b) To provide relief to needy victims of breaches of human rights by appropriate charitable (and in particular medical, rehabilitational or financial) assistance. (c) To procure the abolition of torture, extra-judicial execution and disappearance ..."

Under article 3(a) of A.I.C.L. the members of the company are all the elected members for the time being of the international executive committee of Amnesty International and nobody else. The directors are appointed by and removable by the members in general meetings. Since 8 December 1990 Lord Hoffmann and Mr. Duffy have been the sole directors, Lord Hoffmann at some stage becoming the chairperson.

There are complicated arrangements between the international headquarters of A.I., A.I.C.L. and A.I.L. as to the discharge of their respective functions. From the reports of the directors and the notes to the annual accounts, it appears that, although the system has changed slightly from time to time, the current system is as follows. The international headquarters of A.I. are in London and the premises are, at least in part, shared with A.I.C.L. and A.I.L. The conduct of A.I.'s international headquarters is (subject to the direction of the international executive committee) in the hands of A.I.L. A.I.C.L. commissions A.I.L. to undertake

charitable activities of the kind which fall within the objects of A.I. The directors of A.I.C.L. then resolve to expend the sums that they have received from A.I. sections or elsewhere in funding such charitable work as A.I.L. performs. A.I.L. then reports retrospectively to A.I.C.L. as to the moneys expended and A.I.C.L. votes sums to A.I.L. for such part of A.I.L.'s work as can properly be regarded as charitable. It was confirmedin the course of argument that certain work done by A.I.L. would therefore be treated as in part done by A.I.L. on its own behalf and in part on behalf of A.I.C.L.

I can give one example of the close interaction between the functions of A.I.C.L. and A.I. The report of the directors of A.I.C.L. for the year ended 31 December 1993 records that A.I.C.L. commissioned A.I.L. to carry out charitable activities on its behalf and records as being included in the work of A.I.C.L. certain research publications. One such publication related to Chile and referred to a report issued as an A.I. report in 1993. Such 1993 report covers not only the occurrence and nature of breaches of human rights within Chile, but also the progress of cases being brought against those alleged to have infringed human rights by torture and otherwise in the courts of Chile. It records that "no one was convicted during the year for past human rights violations. The military courts continued to claim jurisdiction over human rights cases in civilian courts and to close cases covered by the 1978 Amnesty law." It also records "Amnesty International continued to call for full investigation into human rights violations and for those responsible to be brought to justice. The organisation also continued to call for the abolition of the death penalty." Again, the report stated that "Amnesty International included references to its concerns about past human rights violations against indigenous peoples in Chile and the lack of accountability of those responsible." Therefore A.I.C.L. was involved in the reports of A.I. urging the punishment of those guilty in Chile for past breaches of human rights and also referring to such work as being part of the work that it supported.

The directors of A.I.C.L. do not receive any remuneration. Nor do they take any part in the policy-making activities of A.I. Lord Hoffmann is not a member of A.I. or of any other body connected with A.I.

In addition to the A.I. related bodies that I have mentioned, there are other organisations which are not directly relevant to the present case. However, I should mention another charitable company connected with A.I. and mentioned in the papers, namely, "Amnesty International U.K. Section Charitable Trust" registered as a company under number 3139939 and as a charity under 1051681. That was a company incorporated in 1995 and, so far as I can see, has nothing directly to do with the present case.

The parties' submissions

Miss Montgomery in her very persuasive submissions on behalf of Senator Pinochet contended (1) that, although there was no exact precedent, your Lordships' House must have jurisdiction to set aside its own orders where they have been improperly made, since there is no other court which could correct such impropriety; (2) that (applying the test in Reg. v. Gough [1993] A.C. 646) the links between Lord Hoffmann and A.I. were such that there was a real danger that Lord Hoffmann was biased in favour of A.I. or alternatively (applying the test in Webb v. The Queen (1994) 181 C.L.R. 41) that such links give rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that Lord Hoffmann might have been so biased.

On the other side, Mr. Alun Jones accepted that your Lordships had power to revoke an earlier order of this House but contended that there was no case for such revocation here. The applicable test of bias, he submitted, was that recently laid down by your Lordships in Reg. v. Gough and it was impossible to say that there was a real danger that Lord Hoffmann had been biased against Senator Pinochet. He further submitted that, by relying on the allegations of bias in making submissions to the Home Secretary, Senator Pinochet had

elected to adopt the Home Secretary as the correct tribunal to adjudicate on the issue of apparent bias. He had thereby waived his right to complain before your Lordships of such bias. Expressed in other words, he was submitting that the petition was an abuse of process by Senator Pinochet. Mr. Duffy for A.I. (but not for A.I.C.L.) supported the case put forward by Mr. Alun Jones.

Conclusions

1. Jurisdiction

As I have said, the respondents to the petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment, that concession was rightly made both in principle and on authority.

In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In Broome v. Cassell & Co. Ltd. (No. 2) [1972] A.C. 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.

However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.

2. Apparent bias

As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias.

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

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

In Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, the then Lord Chancellor, Lord Cottenham, owned a substantial shareholding in the defendant canal which was an incorporated body. In the action the Lord Chancellor sat on appeal from the Vice-Chancellor, whose judgment in favour of the company he affirmed. There was an appeal to your Lordships' House on the grounds that the Lord Chancellor was disqualified. Their Lordships consulted the judges who advised, at p. 786, that Lord Cottenham was disqualified from sitting as a judge in the cause because he had an interest in the suit. This advice was unanimously accepted by their Lordships. There was no inquiry by the court as to whether a reasonable man would consider Lord Cottenham to be biased and no inquiry as to the circumstances which led to Lord Cottenham sitting. Lord Campbell said, at p. 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 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." (Emphasis added.)

On occasion, this proposition is elided so as to omit all references to the disqualification of a judge who is a party to the suit: see, for example, Reg. v. Rand (1866) L.R. 1 Q.B. 230; Reg. v. Gough [1993] A.C. 646, 661. This does not mean that a judge who is a party to a suit is not disqualified just because the suit does not involve a financial interest. The authorities cited in the Dimes case show how the principle developed. The starting-point was the case in which a judge was indeed purporting to decide a case in which he was a party. This was held to be absolutely prohibited. That absolute prohibition was then extended to cases where, although not nominally a party, the judge had an interest in the outcome.

The importance of this point in the present case is this. Neither A.I., nor A.I.C.L., have any financial interest in the outcome of this litigation. We are here confronted, as was Lord Hoffmann, with a novel situation where the outcome of the litigation did not lead to financial benefit toanyone. The interest of A.I. in the litigation was not financial; it was its interest in achieving the trial and possible conviction of Senator Pinochet for crimes against humanity.

By seeking to intervene in this appeal and being allowed so to intervene, in practice A.I. became a party to the appeal. Therefore if, in the circumstances, it is right to treat Lord Hoffmann as being the alter ego of A.I. and therefore a judge in his own cause, then he must have been automatically disqualified on the grounds that he was a party to the appeal. Alternatively, even if it be not right to say that Lord Hoffmann was a party to the appeal as such, the question then arises whether, in non-financial litigation, anything other than a financial or proprietary interest in the outcome is sufficient automatically to disqualify a man from sitting as judge in the cause.

Are the facts such as to require Lord Hoffmann to be treated as being himself a party to this appeal? The facts are striking and unusual. One of the parties to the appeal is an unincorporated association, A.I. One of the constituent parts of that unincorporated association is A.I.C.L. A.I.C.L. was established, for tax purposes, to carry out part of the functions of A.I. those parts which were charitable which had previously been carried on either by A.I. itself or by A.I.L. Lord Hoffmann is a director and chairman of A.I.C.L., which is wholly controlled by A.I., since its members (who ultimately control it) are all the members of the international executive committee of A.I. A large part of the work of A.I. is, as a matter of strict law, carried on by A.I.C.L. which instructs A.I.L. to do the work on its behalf. In reality, A.I., A.I.C.L. and A.I.L. are a close-knit group carrying on the work of A.I.

However, close as these links are, I do not think it would be right to identify Lord Hoffmann personally as being a party to the appeal. He is closely linked to A.I. but he is not in fact A.I. Although this is an area in which legal technicality is particularly to be avoided, it cannot be ignored that Lord Hoffmann took no part in running A.I. Lord Hoffmann, A.I.C.L. and the

executive committee of A.I. are in law separate people.

Then is this a case in which it can be said that Lord Hoffmann had an "interest" which must lead to his automatic disqualification? Hitherto only pecuniary and proprietary interests have led to automatic disqualification. But, as I have indicated, this litigation is most unusual. It is not civil litigation but criminal litigation. Most unusually, by allowing A.I. to intervene, there is a party to a criminal cause or matter who is neither prosecutor nor accused. That party, A.I., shares with the government of Spain and the C.P.S., not a financial interest but an interest to establish that there is no immunity for ex-heads of state in relation to crimes against humanity. The interest of these parties is to procure Senator Pinochet's extradition and trial a non-pecuniary interest. So far as A.I.C.L. is concerned, clause 3(c) of its memorandum provides that one of its objects is "to procure the abolition of torture, extra-judicial execution and disappearance." A.I. has, amongst other objects, the same objects. Although A.I.C.L., as a charity, cannot campaign to change the law, it is concerned by other means to procure the abolition of these crimes against humanity. In my opinion, therefore, A.I.C.L. plainly had a non-pecuniary interest, to establish that Senator Pinochet was not immune.

That being the case, the question is whether in the very unusual circumstances of this case a non-pecuniary interest to achieve a particular result is sufficient to give rise to automatic disqualification and, if so, whether the fact that A.I.C.L. had such an interest necessarily leads to the conclusion that Lord Hoffmann, as a director of A.I.C.L., was automatically disqualified from sitting on the appeal? My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. Thus in my opinion if Lord Hoffmann had been a member of A.I. he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity. Indeed, so much I understood to have been conceded by Mr. Duffy.

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

Since, in my judgment, the relationship between A.I., A.I.C.L. and Lord Hoffmann leads to the automatic disqualification of Lord Hoffmann to sit on the hearing of the appeal, it is unnecessary to consider the other factors which were relied on by Miss Montgomery, viz. the position of Lady Hoffmann as an employee of A.I. and the fact that Lord Hoffmann was involved in the recent appeal for funds for Amnesty. Those factors might have been relevant if Senator Pinochet had been required to show a real danger or reasonable suspicion of bias. But since the disqualification is automatic and does not depend in any way on an implication of bias, it is unnecessary to consider these factors. I do, however, wish to make it clear (if I

have not already done so) that my decision is not that Lord Hoffmann has been guilty of bias of any kind: he was disqualified as a matter of law automatically by reason of his directorship of A.I.C.L., a company controlled by a party, A.I.

For the same reason, it is unnecessary to determine whether the test of apparent bias laid down in Reg. v. Gough [1993] A.C. 646 ("is there in the view of the court a real danger that the judge was biased?") needs to be reviewed in the light of subsequent decisions. Decisions in Canada, Australia and New Zealand have either refused to apply the test in Reg. v. Gough, or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fairminded and informed member of the public that the judge was not impartial: see, for example, the High Court of Australia in Webb v. The Queen, 181 C.L.R. 41. It has also been suggested that the test in Reg. v. Gough in some way impinges on the requirement of Lord Hewart C.J.'s dictum that justice should appear to be done: see Reg. v. Inner West London Coroner, Ex parte Dallaglio [1994] 4 All E.R. 139, 152a-b. Since such a review is unnecessary for the determination of the present case, I prefer to express no view on it.

It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25 November 1998 would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that A.I. was a party to the appeal; (2) that A.I. was joined in order to argue for a particular result; (3) the judge was a director of a charity closely allied to A.I. and sharing, in this respect, A.I.'s objects. Only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest.

Finally on this aspect of the case, we were asked to state in giving judgment what had been said and done within the Appellate Committee in relation to Amnesty International during the hearing leading to the order of 25 November. As is apparent from what I have said, such matters are irrelevant to what we have to decide: in the absence of any disclosure to the parties of Lord Hoffmann's involvement with A.I., such involvement either did or did not in law disqualify him regardless of what happened within the Appellate Committee. We therefore did not investigate those matters and make no findings as to them.

Election, waiver, abuse of process

Mr. Alun Jones submitted that by raising with the Home Secretary the possible bias of Lord Hoffmann as a ground for not authorising the extradition to proceed, Senator Pinochet had elected to choose the Home Secretary rather than your Lordships' House as the arbiter as to whether such bias did or did not exist. Consequently, he submitted, Senator Pinochet had waived his right to petition your Lordships and, by doing so immediately after the Home Secretary had rejected the submission, was committing an abuse of the process of the House.

This submission is bound to fail on a number of different grounds, of which I need mention only two. First, Senator Pinochet would only be put to his election as between two alternative courses to adopt. I cannot see that there are two such courses in the present case, since the Home Secretary had no power in the matter. He could not set aside the order of 25 November and as long as such order stood, the Home Secretary was bound to accept it as stating the law. Secondly, all three concepts - election, waiver and abuse of process - require that the person said to have elected etc. has acted freely and in full knowledge of the facts. Not until 8 December 1998 did Senator Pinochet's solicitors know anything of Lord

Hoffmann's position as a director and chairman of A.I.C.L. Even then they did not know anything about A.I.C.L. and its constitution. To say that by hurriedly notifying the Home Secretary of the contents of the letter from A.I.'s solicitors, Senator Pinochet had elected to pursue the point solely before the Home Secretary is unrealistic. Senator Pinochet had not yet had time to find out anything about the circumstances beyond the bare facts disclosed in the letter.

Result

It was for these reasons and the reasons given by my noble and learned friend, Lord Goff of Chieveley, that I reluctantly felt bound to set aside the order of 25 November 1998. It was appropriate to direct a rehearing of the appeal before a differently constituted committee, so that on the rehearing the parties were not faced with a committee four of whom had already expressed their conclusion on the points at issue.

JUDGMENTBY-2: Lord Goff of Chieveley

JUDGMENT-2:
Lord Goff of Chieveley: . My Lords, I have had the opportunity of reading in draft the opinion prepared by my noble and learned friend, Lord Browne-Wilkinson. It was for the like reasons to those given by him that I agreed that the order of your Lordships' House in this matter dated 25 November 1998 should be set aside and that a rehearing of the appeal should take place before a differently constituted Committee. Even so, having regard to the unusual nature of this case, I propose to set out briefly in my own words the reasons why I reached that conclusion.

Like my noble and learned friend, I am of the opinion that the principle which governs this matter is that a man shall not be a judge in his own cause - nemo judex in sua causa: see Dimes v. Proprietors of Grand Junction Canal, 3 H.L.Cas. 759, 793, per Lord Campbell. As stated by Lord Campbell the principle is not confined to a cause to which the judge is a party, but applies also to a cause in which he has an interest. Thus, for example, a judge who holds shares in a company which is a party to the litigation is caught by the principle, not because he himself is a party to the litigation (which he is not), but because he has by virtue of his shareholding an interest in the cause. That was indeed the ratio decidendi of the famous Dimescase itself. In that case the then Lord Chancellor, Lord Cottenham, affirmed an order granted by the Vice-Chancellor granting relief to a company in which, unknown to the defendant and forgotten by himself, he held a substantial shareholding. It was decided, following the opinion of the judges, that Lord Cottenham was disqualified,by reason of his interest in the cause, from adjudicating in the matter, and that his order was for that reason voidable and must be set aside. Such a conclusion must follow, subject only to waiver by the party or parties to the proceedings thereby affected.

In the present case your Lordships are not concerned with a judge who is a party to the cause, nor with one who has a financial interest in a party to the cause or in the outcome of the cause. Your Lordships are concerned with a case in which a judge is closely connected with a party to the proceedings. This situation has arisen because, as my noble and learned friend has described, Amnesty International ("A.I.") was given leave to intervene in the proceedings; and, whether or not A.I. thereby became technically a party to the proceedings, it so participated in the proceedings, actively supporting the cause of one party (the Government of Spain, represented by the Crown Prosecution Service) against another (Senator Pinochet), that it must be treated as a party. Furthermore, Lord Hoffmann is a director and chairperson of Amnesty International Charity Ltd. ("A.I.C.L."). A.I.C.L. and Amnesty International Ltd. ("A.I.L.") are United Kingdom companies through which the work of the International Headquarters of A.I. in London is undertaken, A.I.C.L. having been incorporated to carry out those purposes of A.I. which are charitable under U.K. law. Neither Senator Pinochet nor the lawyers acting for him were aware of the connection between Lord

Hoffmann and A.I. until after judgment was given on 25 November 1998.

My noble and learned friend has described in lucid detail the working relationship between A.I.C.L., A.I.L. and A.I., both generally and in relation to Chile. It is unnecessary for me to do more than state that not only was A.I.C.L. deeply involved in the work of A.I., commissioning activities falling within the objects of A.I. which were charitable, but that it did so specifically in relation to research publications including one relating to Chile reporting on breaches of human rights (by torture and otherwise) in Chile and calling for those responsible to be brought to justice. It is in these circumstances that we have to consider the position of Lord Hoffmann, not as a person who is himself a party to the proceedings or who has a financial interest in such a party or in the outcome of the proceedings, but as a person who is, as a director and chairperson of A.I.C.L., closely connected with A.I. which is, or must be treated as, a party to the proceedings. The question which arises is whether his connection with that party will (subject to waiver) itself disqualify him from sitting as a judge in the proceedings, in the same way as a significant shareholding in a party will do, and so require that the order made upon the outcome of the proceedings must be set aside.

Such a question could in theory arise, for example, in relation to a senior executive of a body which is a party to the proceedings, who holds no shares in that body; but it is, I believe, only conceivable that it will do so where the body in question is a charitable organisation. He will by reason of his position be committed to the well-being of the charity, and to the fulfilment by the charity of its charitable objects. He may for that reason properly be said to have an interest in the outcome of the litigation, though he has no financial interest, and so to be disqualified from sitting as a judge in the proceedings. The cause is "a cause in which he has aninterest," in the words of Lord Campbell in the Dimes case, at p. 793. It follows that in this context the relevant interest need not be a financial interest. This is the view expressed in Shetreet, Judges on Trial (1976), p. 310, where he states that "[a] judge may have to disqualify himself by reason of his association with a body that institutes or defends the suit," giving as an example the chairman or member of the board of a charitable organisation.

Let me next take the position of Lord Hoffmann in the present case. He was not a member of the governing body of A.I., which is or is to be treated as a party to the present proceedings: he was chairperson of an associated body, A.I.C.L., which is not a party. However, on the evidence, it is plain that there is a close relationship between A.I., A.I.L. and A.I.C.L. A.I.C.L. was formed following the decision in McGovern v. Attorney-General [1982] Ch. 321, to carry out the purposes of A.I. which were charitable, no doubt with the sensible object of achieving a tax saving. So the division of function between A.I.L. and A.I.C.L. was that the latter was to carry out those aspects of the work of the international headquarters of A.I. which were charitable, leaving it to A.I.L. to carry out the remainder, that division being made for fiscal reasons. 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. This conclusion is reinforced, so far as the present case is concerned, by the evidence of A.I.C.L. commissioning a report by A.I. relating to breaches of human rights in Chile, and calling for those responsible to be brought to justice. It follows that Lord Hoffmann had an interest in the outcome of the present proceedings and so was disqualified from sitting as a judge in those proceedings.

It is important to observe that this conclusion is, in my opinion, in no way dependent on Lord Hoffmann personally holding any view, or having any objective, regarding the question whether Senator Pinochet should be extradited, nor is it dependent on any bias or apparent bias on his part. Any suggestion of bias on his part was, of course, disclaimed by those representing Senator Pinochet. It arises simply from Lord Hoffmann's involvement in A.I.C.L.;

the close relationship between A.I., A.I.L. and A.I.C.L., which here means that for present purposes they can be regarded as being, in practical terms, one organisation; and the participation of A.I. in the present proceedings in which as a result it either is, or must be treated as, a party.

JUDGMENTBY-3: Lord Nolan

JUDGMENT-3:
Lord Nolan: . My Lords, I agree with the views expressed by noble and learned friends, Lord Browne-Wilkinson and Lord Goff of Chieveley. In my judgment the decision of 25 November had to be set aside for the reasons which they give. I would only add that in any case where the **impartiality** of a judge is in question the appearance of the matter is just as important as the reality.

JUDGMENTBY-4: Lord Hope of Craighead

JUDGMENT-4:
Lord Hope of Craighead: . My Lords, I have had the advantage of reading in draft the speeches which have been prepared by my noble and learned friends, Lord Browne-Wilkinson and Lord Goff of Chieveley. For the reasons which they have given I also was satisfied that the earlier decision of this House cannot stand and must be set aside. But in view of the importance of the case and its wider implications, I should like to add these observations.

One of the cornerstones of our legal system is the **impartiality** of the tribunals by which justice is administered. In civil litigation the guiding principle is that no one may be a judge in his own cause: nemo debet esse judex in propria causa. It is a principle which is applied much more widely than a literal interpretation of the words might suggest. It is not confined to cases where the judge is a party to the proceedings. It is applied also to cases where he has a personal or pecuniary interest in the outcome, however small. In London and North-Western Railway Co. v. Lindsay (1858) 3 Macq. 99 the same question as that which arose in Dimes v. Proprietors of Grand Junction Canal, 3 H.L.Cas. 759 was considered in an appeal from the Court of Session to this House. Lord Wensleydale stated that, as he was a shareholder in the appellant company, he proposed to retire and take no part in the judgment. The Lord Chancellor said that he regretted that this step seemed to be necessary. Although counsel stated that he had no objection, it was thought better that any difficulty that might arise should be avoided and Lord Wensleydale retired.

In Sellar v. Highland Railway Co., 1919 S.C.(H.L.) 19 the same rule was applied where a person who had been appointed to act as one of the arbiters in a dispute between the proprietors of certain fishings and the railway company was the holder of a small number of ordinary shares in the railway company. Lord Buckmaster, after referring to the Dimes and Lindsay cases, gave this explanation of the rule, at pp. 20-21:

"The law remains unaltered and unvarying today, and, although it is obvious that the extended growth of personal property and the wide distribution of interests in vast commercial concerns may render the application of the rule increasingly irksome, it is none the less a rule which I for my part should greatly regret to see even in the slightest degree relaxed. The importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured. In practice also the difficulty is one easily overcome, because, directly the fact is stated, it is common practice that counsel on each side agree that the existence of the disqualification shall afford no objection to the prosecution of the suit, and the matter proceeds in the ordinary way, but, if the disclosure is not made, either through neglect or inadvertence, the judgment becomes voidable and may be set aside."

As my noble and learned friend, Lord Goff of Chieveley, said in Reg. v. Gough [1993] A.C. 646, 661, the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits injudgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of partiality. The disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable. In practice the application of this rule is so well understood and so consistently observed that no case has arisen in the course of this century where a decision of any of the courts exercising a civil jurisdiction in any part of the United Kingdom has had to be set aside on the ground that there was a breach of it.

In the present case we are concerned not with civil litigation but with a decision taken in proceedings for extradition on criminal charges. It is only in the most unusual circumstances that a judge who was sitting in criminal proceedings would find himself open to the objection that he was acting as a judge in his own cause. In principle, if it could be shown that he had a personal or pecuniary interest in the outcome, the maxim would apply. But no case was cited to us, and I am not aware of any, in which it has been applied hitherto in a criminal case. In practice judges are well aware that they should not sit in a case where they have even the slightest personal interest in it either as defendant or as prosecutor.

The ground of objection which has invariably been taken until now in criminal cases is based on that other principle which has its origin in the requirement of **impartiality.** This is that justice must not only be done; it must also be seen to be done. It covers a wider range of situations than that which is covered by the maxim that no one may be a judge in his own cause. But it would be surprising if the application of that principle were to result in a test which was less exacting than that resulting from the application of the nemo judex in sua causa principle. Public confidence in the integrity of the administration of justice is just as important, perhaps even more so, in criminal cases. Article 6(1) of the European Convention on Fundamental Rights and Freedoms makes no distinction between civil and criminal cases in its expression of the right of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Your Lordships were referred by Miss Montgomery in the course of her argument to Bradford v. McLeod, 1986 S.L.T. 244. This is one of only two reported cases, both of them from Scotland, in which a decision in a criminal case has been set aside because a full-time salaried judge was in breach of this principle. The other is Doherty v. McGlennan, 1997 S.L.T. 444. In neither of these cases could it have been said that the sheriff had an interest in the case which disqualified him. They were cases where the sheriff either said or did something which gave rise to a reasonable suspicion about his **impartiality.**

The test which must be applied by the appellate courts of criminal jurisdiction in England and Wales to cases in which it is alleged that there has been a breach of this principle by a member of an inferior tribunal is different from that which is used in Scotland. The test which was approved by your Lordships' House in Reg. v. Gough [1993] A.C. 646 is whetherthere was a real danger of bias on the part of the relevant member of the tribunal. I think that the explanation for this choice of language lies in the fact that it was necessary in that case to formulate a test for the guidance of the lower appellate courts. The aim, as Lord Woolf explained, at p. 673, was to avoid the quashing of convictions upon quite insubstantial grounds and the flimsiest pretexts of bias. In Scotland the High Court of Justiciary applies the test which was described in Gough as the reasonable suspicion test. In Bradford v. McLeod, 1986 S.L.T. 244, 247 it adopted as representing the law of Scotland the rule which was expressed by Eve J. in Law v. Chartered Institute of Patent Agents [1919] 2 Ch. 276, 289:

"Each member of the council in adjudicating on a complaint thereunder is performing a judicial duty, and he must bring to the discharge of that duty an unbiased and impartial mind. If he has a bias which renders him otherwise than an impartial judge he is disqualified from performing his duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice), if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's **impartiality,** those circumstances are themselves sufficient to disqualify although in fact no bias exists."

The Scottish system for dealing with criminal appeals is for all appeals from the courts of summary jurisdiction to go direct to the High Court of Justiciary in its appellate capacity. It is a simple, one-stop system, which absolves the High Court of Justiciary from the responsibility of giving guidance to inferior appellate courts as to how to deal with cases where questions have been raised about a tribunal's **impartiality.** Just as Eve J. may be thought to have been seeking to explain to members of the council of the chartered institute in simple language the test which they should apply to themselves in performing their judicial duty, so also the concern of the High Court of Justiciary has been to give guidance to sheriffs and lay justices as to the standards which they should apply to themselves in the conduct of criminal cases. The familiar expression that justice must not only be done but must also be seen to be done serves a valuable function in that context.

Although the tests are described differently, their application by the appellate courts in each country is likely in practice to lead to results which are so similar as to be indistinguishable. Indeed it may be said of all the various tests which I have mentioned, including the maxim that no one may be a judge in his own cause, that they are all founded upon the same broad principle. Where a judge is performing a judicial duty, he must not only bring to the discharge of that duty an unbiased and impartial mind. He must be seen to be impartial.

As for the facts of the present case, it seems to me that the conclusion is inescapable that Amnesty International has associated itself in these proceedings with the position of the prosecutor. The prosecution is not being brought in its name, but its interest in the case is to achieve the same result because it also seeks to bring Senator Pinochet to justice. This distinguishes its position fundamentally from that of other bodies which seek to uphold human rights without extending their objects to issuesconcerning personal responsibility. It has for many years conducted an international campaign against those individuals whom it has identified as having been responsible for torture, extra-judicial executions and disappearances. Its aim is that they should be made to suffer criminal penalties for such gross violations of human rights. It has chosen, by its intervention in these proceedings, to bring itself face to face with one of those individuals against whom it has for so long campaigned.

But everyone whom the prosecutor seeks to bring to justice is entitled to the protection of the law, however grave the offence or offences with which he is being prosecuted. Senator Pinochet is entitled to the judgment of an impartial and independent tribunal on the question which has been raised here as to his immunity. I think that the connections which existed between Lord Hoffmann and Amnesty International were of such a character, in view of their duration and proximity, as to disqualify him on this ground. In view of his links with Amnesty International as the chairman and a director of Amnesty International Charity Ltd. he could not be seen to be impartial. There has been no suggestion that he was actually biased. He had no financial or pecuniary interest in the outcome. But his relationship with Amnesty International was such that he was, in effect, acting as a judge in his own cause. I consider that his failure to disclose these connections leads inevitably to the conclusion that the decision to which he was a party must be set aside.

JUDGMENTBY-5: Lord Hutton

JUDGMENT-5:
Lord Hutton: . My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Browne-Wilkinson. I gratefully adopt his account of the matters (including the links between Amnesty International and Lord Hoffmann) leading to the bringing of this petition by Senator Pinochet to set aside the order made by this House on 25 November 1996. I am in agreement with his reasoning and conclusions on the issue of the jurisdiction of this House to set aside that order and on the issues of election, waiver and abuse of process. In relation to the allegation made by Senator Pinochet, not that Lord Hoffmann was biased in fact, but that there was a real danger of bias or a reasonable apprehension or suspicion of bias because of Lord Hoffmann's links with Amnesty International, I am also in agreement with the reasoning and conclusion of Lord Browne-Wilkinson, and I wish to add some observations on this issue.

In the middle of the last century the Lord Chancellor, Lord Cottenham, had an interest as a shareholder in a canal company to the amount of several thousand pounds. The company filed a bill in equity seeking an injunction against the defendant who was unaware of Lord Cottenham's shareholding in the company. The injunction and the ancillary order sought were granted by the Vice-Chancellor and were subsequently affirmed by Lord Cottenham. The defendant subsequently discovered the interest of Lord Cottenham in the company and brought a motion to discharge the order made by him, and the matter ultimately came on for hearing before this House in Dimes v. Proprietors of Grand Junction Canal, 3 H.L.Cas. 759. The House ruled that the decree of the Lord Chancellor should be set aside, not because in coming to his decision Lord Cottenham was influenced by his interest in the company, butbecause of the importance of avoiding the appearance of the judge labouring under the influence of an interest. Lord Campbell said, at pp. 793-794:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, 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. Since I have had the honour to be Chief Justice of the Court of Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this High Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."

In his judgment in Reg. v. Gough [1993] A.C. 646, 659 my noble and learned friend, Lord Goff of Chieveley, made reference to the great importance of confidence in the integrity of the administration of justice, and he said:

"In any event, there is an overriding public interest that there should be confidence in the integrity of the administration of justice, which is always associated with the statement of Lord Hewart C.J. in Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, 259, that it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'"

Then referring to the Dimes case, he said, at p. 661:

" ... I wish to draw attention to the fact that there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand. Such cases attract the full force of Lord Hewart C.J.'s requirement that justice must not only be done but must manifestly be seen to be done. These cases arise where a person sitting in a

judicial capacity has a pecuniary interest in the outcome of the proceedings. In such a case, as Blackburn J. said in Reg. v. Rand (1866) L.R. 1 Q.B. 230, 232: "any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter.' The principle is expressed in the maxim that nobody may be judge in his own cause (nemo judex in sua causa). Perhaps the most famous case in which the principle was applied is Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, in which decrees affirmed by Lord Cottenham L.C. in favour of a canal company in which he was a substantial shareholder were set aside by this House, which thenproceeded to consider the matter on its merits, and in fact itself affirmed the decrees. Lord Campbell said, at p. 793: 'No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, 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.' In such a case, therefore, not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand."

Later in his judgment Lord Goff said, at p. 664f, agreeing with the view of Lord Woolf, at p. 673f, that the only special category of case where there should be disqualification of a judge without the necessity to inquire whether there was any real likelihood of bias was where the judge has a direct pecuniary interest in the outcome of the proceedings. However I am of opinion that there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation. I find persuasive the observations of Lord Widgery C.J. in Reg. v. Altrincham Justices, Ex parte N. Pennington [1975] Q.B. 549, 552:

"There is no better known rule of natural justice than the one that a man shall not be a judge in his own cause. In its simplest form this means that a man shall not judge an issue in which he has a direct pecuniary interest, but the rule has been extended far beyond such crude examples and now covers cases in which the judge has such an interest in the parties or the matters in dispute as to make it difficult for him to approach the trial with the **impartiality** and detachment which the judicial function requires. Accordingly, application may be made to set aside a judgment on the so-called ground of bias without showing any direct pecuniary or proprietary interest in the judicial officer concerned."

A similar view was expressed by Deane J. in Webb v. The Queen, 181 C.L.R. 41, 74:

"The area covered by the doctrine of disqualification by reason of the appearance of bias encompasses at least four distinct, though sometimes overlapping, main categories of case. The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment ... The third category is disqualification by association. It will often overlap the first and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or personsinterested in, or otherwise involved in, the proceedings." (My emphasis.)

An illustration of the approach stated by Lord Widgery and Deane J. in respect of a non-pecuniary interest is found in the earlier judgment of Lord Carson in Frome United Breweries Co. Ltd. v. Bath Justices [1926] A.C. 586, 618 when he cited with approval the judgments of the Divisional Court in Reg. v. Fraser (1893) 9 T.L.R. 613. Lord Carson described Fraser's case as one:

"where a magistrate who was a member of a particular council of a religious body one of the objects of which was to oppose the renewal of licences, was present at a meeting at which it was decided that the council should oppose the transfer or renewal of the licences, and that a solicitor should be instructed to act for the council at the meeting of the magistrates when the case came on. A solicitor was so instructed, and opposed the particular licence, and the magistrate sat on the bench and took part in the decision. The court in that case came to the conclusion that the magistrate was disqualified on account of bias, and that the decision to refuse the licence was bad. No one imputed mala fides to the magistrate, but Cave J., in giving judgment, said: 'the question was, What would be likely to endanger the respect or diminish the confidence which it was desirable should exist in the administration of justice?' Wright J. stated that although the magistrate had acted from excellent motives and feelings, he still had done so contrary to a well settled principle of law, which affected the character of the administration of justice."

I have already stated that there was no allegation made against Lord Hoffmann that he was actually guilty of bias in coming to his decision, and I wish to make it clear that I am making no finding of actual bias against him. But I consider that the links, described in the judgment of Lord Browne-Wilkinson, between Lord Hoffmann and Amnesty International, which had campaigned strongly against General Pinochet and which intervened in the earlier hearing to support the case that he should be extradited to face trial for his alleged crimes, were so strong that public confidence in the integrity of the administration of justice would be shaken if his decision were allowed to stand. It was this reason and the other reasons given by Lord Browne-Wilkinson which led me to agree reluctantly in the decision of the Appeal Committee on 17 December 1998 that the order of 25 November 1998 should be set aside.

DISPOSITION:
Petition granted.

SOLICITORS:
Solicitors: Kingsley Napley; Crown Prosecution Service, Headquarters; Bindman & Partners.

B. L. S.

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IN THE APPEALS CHAMBER

Before:
Judge Mohamed Shahabuddeen, Presiding
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Patrick Lipton Robinson
Judge Fausto Pocar

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 21 July 2000

PROSECUTOR

v.

ANTO FURUNDZIJA

JUDGEMENT

Counsel for the Prosecutor:

Mr. UpawansaYapa
Mr. Christopher Staker
Mr. Norman Farrell

Counsel for the Accused:

Mr. Luka S. Misetic
Mr. Sheldon Davidson

I. INTRODUCTION

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal" or "the ICTY") is seized of an appeal filed by Anto Furundzija ("the Appellant") against the Judgement rendered by Trial Chamber II of the International Tribunal on 10 December 1998.

The Trial Chamber held the Appellant individually responsible for his participation in the crimes charged in the Amended Indictment pursuant to Article 7(1) of the Statute of the International Tribunal ("the Statute"). The Trial Chamber also found that under Article 3 of the Statute, the Appellant was guilty as a co-perpetrator of torture as a violation of the laws or customs of war and for aiding and abetting outrages upon personal dignity, including rape, as a violation of the laws or customs of war.[1]

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Having considered the written and oral submissions of the Appellant and the Prosecutor ("the Prosecutor" or "the Respondent"), the Appeals Chamber

HEREBY RENDERS ITS JUDGEMENT.

A. Procedural background

1. In the original indictment, confirmed by Judge Gabrielle Kirk McDonald on 10 November 1995 ("the Indictment"), the Appellant was charged with three counts comprising Count 12, alleging a grave breach of the Geneva Conventions of 1949 under Article 2(b) of the Statute relating to torture and inhumane treatment, Count 13, alleging a violation of the laws or customs of war under Article 3 of the Statute relating to torture, and Count 14, alleging a violation of the laws or customs of war under Article 3 of the Statute relating to outrages upon personal dignity including rape.

2. The Appellant was arrested on 18 December 1997. At his initial appearance on 19 December 1997, he pleaded not guilty to all counts of the Indictment and was remanded in detention pending trial.

3. On 13 March 1998, the Trial Chamber issued an Order granting the Prosecutor leave to withdraw Count 12 of the Indictment and denying the Defence's motion to dismiss all counts against the Accused based on defects in the form of the Indictment.

4. Following submissions by the Prosecutor on 1 May 1998 of statements and transcripts of witnesses, and on 4 May 1998 of legal material relating to the alleged criminal conduct of the Appellant, the Trial Chamber found on 13 May 1998 that sufficient material had been provided to the Defence to enable it to prepare its case.[2]

5. On 22 May 1998, the Prosecutor filed a pre-trial brief. On 29 May 1998, the Trial Chamber directed the Prosecutor to redact and amend portions of the Indictment. An amended version of the Indictment was filed on 2 June 1998 ("the Amended Indictment"). It contained two charges: Count 13 alleging torture and Count 14 alleging outrages upon personal dignity including rape. Both counts were charged as violations of the laws or customs of war under Article 3 of the Statute.

6. The trial of the Appellant commenced on 8 June 1998. The Appellant filed a motion on 12 June 1998, seeking to exclude the portion of Witness A's testimony that related to the Appellant's presence during the sexual assaults alleged to have been perpetrated by a co-accused, hereafter Accused B, upon Witness A, on the ground that it did not fall within the scope of the Amended Indictment. In a Decision issued later on the same day, the Trial Chamber held that it would "only consider as relevant Witness A's evidence in so far as it relates to Paragraphs 25 and 26 as pleaded in the Indictment against the Accused."[3]

7. By confidential decision dated 15 June 1998, the Trial Chamber responded to the Prosecutor's request for clarification of its decision of 12 June 1998 regarding Witness A's testimony and ruled as inadmissible "all evidence relating to rape and sexual assault perpetrated on [Witness A] by [Accused B] in the presence of [the Appellant] in the `large room' apart from the evidence of sexual assault alleged in paragraph 25 of the Indictment."[4]

8. The parties presented their closing arguments on 22 June 1998, whereupon the hearing was closed with judgement reserved to a later date. On 29 June 1998, after the close of the hearings, the Prosecutor disclosed to the Appellant a redacted certificate of psychological treatment dated 11 July 1995 and a witness statement dated 16 September 1995 from a psychologist from Medica Women's Therapy Centre ("Medica") in Zenica, Bosnia and Herzegovina, concerning Witness A and the treatment she had received at Medica.

9. On 10 July 1998, the Appellant filed a motion to strike the testimony of Witness A or, in the event of a conviction, requested a new trial. The Trial Chamber issued its written Decision on the matter on 16 July 1998, finding that there had been serious misconduct on the part of the Prosecutor in breach of Rule 68 of the Rules of Procedure and Evidence of the International Tribunal ("the Rules") causing prejudice to the Appellant. As a consequence, the Trial Chamber ordered that the proceedings be re-opened but limited strictly to the cross-examination of Prosecution witnesses and the recalling of any defence witnesses or new evidence only in connection with the medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993 ("the re-opened proceedings"). The Trial Chamber further ordered the Prosecutor to disclose any other connected documents.

10. On 23 July 1998, the Appellant filed a request for leave to appeal the Trial Chamber's Decision of 16 July 1998. By its Decision of 24 August 1998, a bench of the Appeals Chamber unanimously denied the application, finding that the requirements under sub-Rule 73(B) for interlocutory appeals had not been met.[5]

11. Subsequently, the Defence sought leave to introduce the evidence of two witnesses into the re-opened proceedings by way of deposition. By its confidential ex parte Order dated 27 August 1998, the Trial Chamber denied the Defence request to take the deposition of a certain individual, referred to as Witness F for the purposes of this appeal, reasoning that his evidence did not fall within the scope of the re-opened proceedings, as circumscribed by the Trial Chamber's Decision of 16 July 1998. In this regard the Trial Chamber noted that, according to its Decision of 16 July 1998, the Appellant may call new evidence only to address any medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993. Thereafter, on 13 October 1998, the Trial Chamber issued a confidential Decision denying the Defence leave to call Mr. Enes Surkovic as a witness in the re-opened proceedings on the same grounds.[6]

12. On 9 November 1998, the proceedings were re-opened. The Appellant called four witnesses, including two expert witnesses, while the Prosecutor called two expert witnesses. On 9 and 11 November 1998, the Trial Chamber received two applications to file *amicus curiae* briefs, both of which were granted. The re-opened proceedings were closed on 12 November 1998 after the presentation of both parties' closing arguments.

13. On 10 December 1998, Trial Chamber II rendered its Judgement ("the Judgement"), finding the Appellant guilty on Count 13, as a co-perpetrator of torture as a violation of the laws or customs of war, and guilty on Count 14, as an aider and abettor of outrages upon personal dignity, including rape, as a violation of the laws or customs of war. The Trial Chamber sentenced the Appellant to ten years' imprisonment for the conviction under Count 13 and eight years' imprisonment for the conviction under Count 14. Consistent with the Trial Chamber's disposition, the Appellant is serving the sentences concurrently, *inter se*.

1. The Appeal

(a) Notice of Appeal

14. The Appellant filed the "Defendant's Notice of Appeal Pursuant to Rule 108" on 22 December 1998.

(b) Post-Trial Application

15. The Appellant filed on 3 February 1999 the "Defendant's Post-Trial Application to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to Vacate Conviction and Sentence, and Motion for a New Trial". By this motion, the Appellant sought an order from the Bureau disqualifying Judge Mumba, vacating the Judgement and ordering a new trial before a

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differently constituted Trial Chamber. On 5 March 1999, the Appeals Chamber issued an order suspending the briefing schedule in the appeal on the merits pending the decision by the Bureau. On 11 March 1999, the Bureau issued its Decision on the Post-Trial Application, dismissing the application on the ground that the determination as to the fairness of the trial was not within the competence of the Bureau.[7]

(c) Filing of Briefs

16. On 24 March 1999, following the Bureau's decision, the Appeals Chamber issued a decision resuming the briefing schedule and ordered the parties to file their briefs as follows: the Appellant's Brief by 21 May 1999, the Respondent's Brief by 21 June 1999 and the Appellant's Reply by 6 July 1999. Following a request by the Appellant, the filing deadline for the Appellant's Brief was extended until 25 June 1999, with subsequent changes in the filing dates for the Response and Reply. On 25 June 1999, the Appellant filed the "Defendant's Appellate Brief".

17. The Appellant filed on 25 June 1999 the "Defendant's Motion to Supplement the Record on Appeal" requesting that the Registrar certify the Post-Trial Application and the exhibits attached thereto as part of the Record on Appeal. The Prosecutor filed a response on 20 July 1999, opposing the motion on the ground that the Post-Trial Application contained new evidence not submitted by the Appellant at trial. In this regard, the Prosecutor contended that the Appellant must satisfy the requirements under the relevant Rules pertaining to additional evidence before the Post-Trial Application could be submitted on appeal.

18. The Appellant filed on 23 July 1999, as a confidential document, its "Reply Memorandum in Support of Defendant's Motion to Supplement Record on Appeal" requesting that the Motion to Disqualify Presiding Judge Mumba and the Affidavit of Witness F be added to the record on appeal. On 2 August 1999, the Appellant filed a non-confidential version of the "Defendant's Appellate Brief".

19. On 2 September 1999, the Appeals Chamber issued its "Order on Defendant's Motion to Supplement Record on Appeal". By this Order, the Appeals Chamber granted the Appellant's motion to amend the Appellate Brief, but considered that Rule 109(A) of the Rules did not allow for the record on appeal to be supplemented as requested, and that Rules 115 and 119 of the Rules were not applicable to the material sought to be admitted, as the Appellant's ground of appeal related to the partiality of a Judge at trial and not to the guilt or innocence of the Appellant.

20. On 14 September 1999, the Appellant filed the "Defendant's Amended Appellate Brief" and on 30 September 1999 the Prosecutor filed the "Respondent's Brief of the Prosecution". On 14 October 1999, the Appeals Chamber issued, at the request of the Appellant, an order granting an extension of time for the filing of the Appellant's Reply. On 8 November 1999, the Appellant filed the "Defendant's Reply Brief". All three briefs were filed as confidential documents.

21. On 28 February 2000, the President of the International Tribunal assigned Judge Fausto Pocar to the Appeals Chamber to replace Judge Wang Tieya, who had withdrawn from the bench under Rule 16 of the Rules.[8]

22. The hearing of the appeal was held on 2 March 2000 and judgement was reserved to a later date.[9]

23. Subsequently, on 8 March 2000, the Appellant filed a motion entitled "Conviction of Anto Furundzija based upon alleged Torture of Witness D is void as being (1) Outside the Scope of the Jurisdiction of the ICTY and (2) Based upon an Alleged Crime not charged in the Indictment." The motion was rejected by the Appeals Chamber on 5 May 2000 as it was filed out of time.

24. Upon the request of the Appeals Chamber, the Appellant filed public versions of his amended appellate brief and reply brief on 23 June 2000 ("the Appellant's Amended Brief" and "the Appellant's Reply" respectively). [10] The Prosecutor filed a public version of her response brief on 28 June 2000 ("the Prosecutor's Response").[11]

B. Grounds of Appeal

25. The Appellant submits the following grounds of appeal against the Judgement of 10 December 1998:

Ground (1): That the Appellant was denied the right to a fair trial in violation of the Statute;

Ground (2): That the evidence was insufficient to convict him on either count;

Ground (3): That the Defence was prejudiced by the Trial Chamber's improper reliance on evidence of acts that were not charged in the indictment and which the Prosecutor never identified prior to the trial as part of the charges against the Appellant;

Ground (4): That presiding Judge Mumba should have been disqualified; and

Ground (5): That the sentence imposed upon him was excessive.[12]

C. Relief Requested

26. By his appeal, the Appellant seeks the following relief:

(i) That the Appellant be acquitted or, in the alternative, that his convictions be reversed[13] or that he be granted a new trial.[14]

(ii) That, in the alternative, if the Appeals Chamber affirms the conviction imposed by the Trial Chamber, the Appeals Chamber reduce the sentence to a term that does not exceed six years, including time served since the date of his original incarceration (18 December 1997).[15]

II. STANDARD OF REVIEW ON APPEAL

A. Submissions of the Parties

1. The Appellant

27. The Appellant submits that the standard of review in the Appeals Chamber "necessarily takes into account the standard of proof in the Trial Chamber."[16] The Appellant further submits that "[i]f a reasonable person could have reasonable doubt about his guilt, the conviction must be reversed."[17]

28. The Appellant argues that to satisfy the test of proof beyond reasonable doubt, "[t]he evidence must be so overwhelming that it excludes every fair or rational hypothesis except that of guilt."[18] He contends that he "appeals on the basis that the Trial Chamber was unreasonable in concluding that the only fair or rational hypothesis that could be derived from the evidence is that Mr. Furundzija is guilty."[19] He concludes that the Appeals Chamber must acquit him because the evidence may be read to support a fair or rational inference of innocence.[20]

2. The Respondent

29. The Respondent submits that the appealing party bears the burden of establishing an error within the terms of Article 25(1) of the Statute.[21] The Respondent further contends that the appropriate standard of review on appeal depends on the classification of the alleged error as one of fact or law.[22]

30. The Respondent submits that two categories of error fall within Article 25(1)(a) of the Statute, which provides for an appeal from "an error on a question of law invalidating the decision". The first relates to an error in the substantive law applied by the Trial Chamber and the second to an error in the exercise of the Trial Chamber's discretion.[23] Where the error alleged is one of substantive law, the Respondent says that the nature of the burden on the appealing party is that of persuasion rather than proof.[24] Where the appeal is based on an error in the exercise of the Trial Chamber's discretion, the Respondent contends that the Appeals Chamber should review the impugned decision under an abuse of discretion standard.[25] The Respondent submits that "absent a showing that the Trial Chamber abused its discretion, the Appeals Chamber should not substitute its own view for that of the Trial Chamber."[26]

31. As regards the standard of review under Article 25(1)(b) of the Statute, which provides for an appeal on the basis of "an error of fact which has occasioned a miscarriage of justice," the Respondent identifies two types of error which may be the subject of an appeal under this provision. The first is an error based on the submission of additional evidence that was not available at trial, and the second is an error in the factual conclusions the Trial Chamber reached based upon the evidence submitted at trial.[27]

32. The Respondent contends that the standard of review on appeal proposed by the Appellant is erroneous, and that the Appeals Chamber should not disturb the Trial Chamber's findings of fact, unless no reasonable person could have so concluded on the evidence presented.[28] The Respondent finds equally mistaken the Appellant's proposed standards as regards the burden placed on the Appellant.[29]

33. The Respondent further submits that in order to appeal a decision under Article 25(1), a party has to object at trial in a timely and proper manner to an error of the Trial Chamber or to a Trial Chamber's abuse of discretion, or the issue of waiver must be considered.[30]

B. Discussion

34. Article 25 of the Statute sets forth the circumstances in which a party may appeal from a final decision of the Trial Chamber. A party invoking a specific ground of appeal must establish an error within the scope of this provision, which provides:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
>
> (a) an error on a question of law invalidating the decision; or
>
> (b) an error of fact which has occasioned a miscarriage of justice.
>
> 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

35. Errors of law do not raise a question as to the standard of review as directly as errors of fact.

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Where a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake. A party alleging that there was an error of law must be prepared to advance arguments in support of the contention; but, if the arguments do not support the contention, that party has not failed to discharge a burden in the sense that a person who fails to discharge a burden automatically loses his point. The Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.

36. Furthermore, this Chamber is only empowered to reverse or revise a decision of the Trial Chamber on the basis of Article 25(1)(a) when there is an error of law that invalidates that decision. It is not any error of law that leads to a reversal or revision of the Trial Chamber's decision; rather, the appealing party alleging an error of law must also demonstrate that the error renders the decision invalid.

37. As to an allegation that there was an error of fact, this Chamber agrees with the following principle set forth by the Appeals Chamber for the International Criminal Tribunal for Rwanda ("the ICTR")[31] in *Serushago*:

> Under the Statute and the Rules of the Tribunal, a Trial Chamber is required as a matter of law to take account of mitigating circumstances. But the question of whether a Trial Chamber gave due weight to any mitigating circumstance is a question of fact. In putting forward this question as a ground of appeal, the Appellant must discharge two burdens. He must show that the Trial Chamber did indeed commit the error, and, if it did, he must go on to show that the error resulted in a miscarriage of justice.[32]

Similarly, under Article 25(1)(b) of the ICTY Statute, it is not any and every error of fact which will cause the Appeals Chamber to overturn a decision of the Trial Chamber, but one which has led to a miscarriage of justice. A miscarriage of justice is defined in *Black's Law Dictionary* as "a grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[33] This Chamber adopts the following approach taken by the Appeals Chamber in the *Tadic* case[34] in dealing with challenges to factual findings by Trial Chambers:

> [t]he task of hearing, assessing and weighing the evidence presented at trial is left to the judges sitting in a Trial Chamber. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.[35]

The position taken by this Chamber in the *Tadic* Appeals Judgement has been reaffirmed in the *Aleksovski* Appeals Judgement.[36] The reason the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known; the Trial Chamber has the advantage of observing witness testimony first-hand, and is, therefore, better positioned than this Chamber to assess the reliability and credibility of the evidence.

38. The Appeals Chamber now turns to consider the Appellant's submissions in relation to the appropriate standard of review where the sufficiency of the evidence in support of a conviction is challenged on appeal. The Appellant submits that the *Tadic* Appeals Judgement demonstrates that, in evaluating the sufficiency of the evidence in support of a conviction, the Appeals Chamber must determine whether the standard of proof beyond reasonable doubt was correctly applied by the Trial Chamber.[37] The Appellant further invites the Appeals Chamber to: 1) conduct an independent

assessment of the evidence, both as to its sufficiency and its quality; and 2) inquire whether a reasonable trier of fact could have found that an inference or hypothesis consistent with innocence of the offence charged was open on the evidence.[38] The Appellant further contends that, as to the application of the standard of proof beyond reasonable doubt, the Appeals Chamber must find that guilt was not merely a reasonable conclusion based on the evidence, but rather the only "fair and rational hypothesis which may be derived from the evidence".[39]

39. The Appellant's reliance on the *Tadic* Appeals Judgement is misplaced. In *Tadic,* the Appeals Chamber held that the Trial Chamber had erred in law in its application of the legal standard of proof beyond reasonable doubt to its factual findings in respect of certain charges in the indictment. The application of the correct legal standard did not support the inferences which the Trial Chamber had drawn from the facts. On a true interpretation, the *Tadic* Appeals Chamber did not disturb the finding of facts by the Trial Chamber.

40. The Appeals Chamber finds no merit in the Appellant's submission which it understands to mean that the scope of the appellate function should be expanded to include *de novo* review. This Chamber does not operate as a second Trial Chamber. The role of the Appeals Chamber is limited, pursuant to Article 25 of the Statute, to correcting errors of law invalidating a decision, and errors of fact which have occasioned a miscarriage of justice.

III. FIRST GROUND OF APPEAL

A. Submissions of the Parties

1. The Appellant

41. As a first ground of appeal against the Judgement, the Appellant argues that he was denied the right to a fair trial under Article 21 of the Statute. As a consequence, the Appeals Chamber should acquit him on Counts 13 and 14 of the Amended Indictment. In support of this ground, the Appellant submits the following arguments: (a) he did not receive fair notice of the charges to be proven against him; (b) the Trial Chamber failed to provide a reasoned opinion in respect of the conflicting testimony of Witness A and Witness D; and (c) he was denied the right under Article 21(4) of the Statute to call witnesses during the re-opened proceedings.[40]

(a) Lack of fair notice of the charges to be proven against the Appellant

42. As a first aspect of this ground of appeal, the Appellant submits that the Trial Chamber erred by failing to ensure that he received fair notice of the charges to be proven against him, as required by Articles 20 and 21 of the Statute.

43. The Appellant argues that his convictions rested upon a sequence of events which were not described in any document filed by the Prosecutor prior to trial and that the case of the Prosecutor leading to the findings of the Trial Chamber, which in turn resulted in his convictions, was not presented to him until trial.[41] He submits that the Prosecutor's case at trial proved to be inconsistent with that reflected in the Indictment and Amended Indictment and the pre-trial pleadings.[42]

44. More specifically, the Appellant contends that the documents submitted by the Prosecutor prior to trial, on which the Appellant relied for trial preparation, including the Indictment and the 1995 Statement by Witness A, do not contain any allegations of complicity in rapes or sexual assaults committed in the large room ("the Large Room") either in his presence or after his departure.[43] According to the Appellant, the Amended Indictment does not contain allegations of a conspiracy

between him and Accused B, nor does it contain allegations of concert of action and forced nudity, since any rapes and sexual assaults committed in the Large Room are alleged to have taken place before the Appellant's arrival in that room.[44] The Appellant contends that, in reliance on the Prosecutor's pre-trial submissions and the Indictment, he prepared for trial in the reasonable belief that the Prosecutor would attempt to prove that he arrived in the Large Room after the sexual assaults on Witness A by Accused B had taken place.[45] The Appellant submits that the testimony of Witness A at trial was inconsistent with the events alleged in the Amended Indictment and all pre-trial pleadings, in that Witness A testified at trial that the Appellant 1) began questioning Witness A prior to Accused B's arrival in the Large Room, 2) was present at the time of Accused B's rape of Witness A in the Large Room, 3) questioned Witness A in the "Large Room" while Accused B was raping her and otherwise sexually assaulting her, and 4) left Witness A with Accused B in the Large Room where Accused B continued to rape and sexually assault her.[46]

45. The Appellant contends that he alerted the Trial Chamber to the serious prejudice he suffered as a result of the misleading pleadings and that the Trial Chamber responded by issuing a decision, dated 12 June 1998, stating that it would consider the evidence of Witness A only "insofar as it relates to Paragraphs 25 and 26 as pleaded in the Indictment."[47] A subsequent motion for clarification submitted by the Prosecutor led to an additional confidential decision, dated 15 June 1998, specifying that "[T]he Trial Chamber rules inadmissible all evidence relating to rape and sexual assault perpetrated on [Witness A] by the individual identified as [Accused B] in the presence of the accused in the `Large Room' apart from the evidence of sexual assault alleged in paragraph 25 of the [Amended Indictment]."[48] The Appellant submits that, in reliance on the decisions of the Trial Chamber, he did not undertake the necessary measures to obtain additional witnesses who could testify to his absence from the Large Room while Witness A was being sexually assaulted. [49] He further contends that the Amended Indictment did not allege that he left Witness A to be sexually assaulted by Accused B.[50]

46. In sum, the Appellant submits that the trial proved to be unfair when the Trial Chamber made findings concerning rapes and sexual assaults perpetrated by Accused B on Witness A in the Large Room on the basis of evidence which it had previously declared inadmissible, and convicted the Appellant based on those findings.

(b) The Trial Chamber failed to provide a reasoned opinion in relation to the conflict between the testimony of Witness A and that of Witness D

47. In respect of the second aspect of this ground of appeal, the Appellant submits that he did not receive a fair trial as a result of the Trial Chamber's failure to provide a reasoned opinion to explain its evaluation of the conflicting evidence of Witness A and Witness D on a determinative issue. The Appellant contends that the Trial Chamber failed to reconcile the conflicting testimony as to whether the Appellant conducted an interrogation in the pantry ("the Pantry") and whether he was even present in that room. He argues that the absence of reasoning in the Judgement on this decisive point constitutes an error of law and violates his right to a fair trial under Articles 21 and 23(2) of the Statute as well as under Article 6(1) of the European Convention on Human Rights.[51]

48. While recognising that the Trial Chamber need not address every discrepancy in the evidence, the Appellant contends that discrepancies on issues that may be determinative of guilt or innocence must be addressed in a reasoned manner.[52] The Appellant cites the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights to support the contention that "the Trial Chamber was under an obligation to address well-founded submissions on determinative issues."[53]

(c) Denial of the right to call Witnesses F and Enes Surkovic upon the reopening of the proceedings

49. As a third aspect of this ground of appeal, the Appellant contends that the Trial Chamber denied his right under Article 21(4) of the Statute to obtain the attendance and examination of Witness F and Enes Surkovic during the re-opened proceedings, as part of his general right to a fair trial.[54]

50. The Appellant submits that the Trial Chamber failed to remedy the prejudice suffered by him as a consequence of the Prosecutor's inexcusable misconduct with regard to the belated disclosure of the Medica documents, since the relief chosen by the Trial Chamber failed to place him in the position he would have been in had the Prosecutor disclosed the Medica documents prior to trial.[55] According to the Appellant, the scope of the re-opened proceedings was so restrictive that he could not pursue relevant defences and, consequently, did not receive a fair trial. The Appellant argues that, by limiting the issues at the re-opened proceedings to the psychiatric and psychological treatment received by Witness A, he was prevented from introducing relevant evidence contained in the Medica documents, such as Witness A's mental and emotional condition during the material period in 1993, the relevance of which was unknown to the Defence prior to the disclosure of the Medica documents.[56] Furthermore, according to the Appellant, the limited scope of the re-opened proceedings prevented him from introducing evidence regarding the credibility of Witness A's trial testimony in respect of her emotional condition during the relevant period of 1993.[57]

51. The Appellant further contends that the Trial Chamber erred in denying him the right to call Witness F on the ground that his testimony would fall outside the scope of the re-opened proceedings. The Appellant submits that the testimony of Witness F was within the ambit of the re-opened proceedings, since, among other things, Witness F was purportedly the first person to take Witness A for medical treatment after the events in question.[58] Furthermore, the Appellant submits that it was only in the course of the investigation arising out of the disclosure of the Medica documents that he learnt that Witness F had relevant information.[59]

52. In respect of Enes Surkovic, the Appellant argues that his proposed testimony would bear directly on the issue of Witness A's credibility and, in particular, Witness A's repudiation of a 1993 statement which Enes Surkovic prepared based on a conversation he had with Witness A in December 1993.[60]

2. The Respondent

53. The Prosecutor rejects the Appellant's complaints regarding the alleged errors committed by the Trial Chamber, as set out in the first ground of appeal, and requests that this ground be dismissed.

(a) Appellant received fair notice in respect of the charges to be proven against him

54. In addressing the first aspect of this ground of appeal, the Prosecutor submits that there was ample notice of the conduct alleged in paragraphs 25 and 26 of the Amended Indictment which the Appellant faced at trial,[61] and that, in any event, the issue of lack of fair notice as to conduct in the Large Room which was not reflected in the Amended Indictment was resolved by the Trial Chamber's Decision of 12 June 1998, granting the Appellant's request to exclude certain evidence.[62] The Prosecutor further submits that there are no findings in the Judgement which support the Appellant's argument that the Trial Chamber based its conviction on evidence which it had previously held to be inadmissible.[63]

(b) Alleged failure of the Trial Chamber to provide a reasoned opinion in relation to the conflict between the testimony of Witness A and that of Witness D

55. The Prosecutor submits that there is no inconsistency between the testimony of Witnesses A and D as to whether Witness D was interrogated in the Pantry and that there is no failure on the part of

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the Trial Chamber to give a reasoned opinion on this particular issue. The Prosecutor further submits that the Trial Chamber was under no obligation to provide reasons for its findings with respect to an issue that was never squarely raised by either party.[64] The Prosecutor contends that the Trial Chamber's findings (or lack thereof) with respect to the alleged inconsistencies in the evidence of Witness A and Witness D concerning the Appellant's presence in the Pantry do not amount to a violation of the Appellant's right to a reasoned opinion pursuant to Article 23 of the Statute.[65] The Prosecutor says that, upon a review of the Judgement in its totality, the Trial Chamber provided a "reasoned opinion in writing", as required by Article 23 of the Statute.[66] The Prosecutor distinguishes the circumstances of the instant case from those in the case law on which the Appellant relies.[67]

(c) Alleged denial of the right to call Witnesses F and Enes Surkovic upon the reopening of the proceedings

56. The Prosecutor rejects the Appellant's contention that the scope of the re-opened proceedings was too limited and submits that the new matter which arose as a result of the belated disclosure of the Medica documents was correctly circumscribed by the Trial Chamber in its decision to reopen the proceedings.[68] The Prosecutor contends that the issue of medical, psychiatric or psychological treatment or counselling received by Witness A was the focus of the re-opened proceedings, and not the mental health or psychological state of Witness A generally.[69] According to the Prosecutor, the Appellant was aware that any evidence relating to the mental health or psychological state of Witness A generally would have been material to his case since his defence had been conducted on the basis that Witness A's memory was flawed. Consequently, the Prosecutor submits, the Appellant was under an obligation to exercise due diligence in respect of the production of such evidence during the trial.[70]

57. With regard to the proposed testimony of Witness F, the Prosecutor submits that this testimony would not have been relevant to the issue of any medical, psychological or psychiatric treatment or counselling received by Witness A after 1993. The Prosecutor, therefore, argues that the Trial Chamber's decision to deny the Appellant leave to introduce the testimony of Witness F was in accordance with the limits set by the Trial Chamber's decision defining the scope of the re-opened proceedings. The Prosecutor further contends that the alleged relevance of Witness F's proposed testimony could have been ascertained through the exercise of due diligence before the Medica documents were disclosed.[71]

58. The Prosecutor contends that the same conclusions apply in respect of the proposed testimony of Enes Surkovic. [72]

B. Discussion

(a) First aspect of the first ground of appeal

59. With regard to the first aspect of the first ground of appeal, the Appellant submits that his trial was unfair since he did not receive fair notice of the charges to be proven against him. In particular, he complains that the Trial Chamber erred by including certain findings in the Judgement relating to acts which fall outside the scope of the Amended Indictment.

60. The Appeals Chamber notes that the Indictment was filed and remains under seal. On 2 June 1998, however, the Prosecutor filed an Amended Indictment, which set forth, by way of a redacted version of the Indictment, only those allegations underlying three counts against the Appellant.[73] The only difference between the Indictment and the Amended Indictment is that in the former the introductory words "shortly after the events described in paragraphs 21 and 22" appear in paragraph

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25. The Appellant did not raise any objections in respect of the Amended Indictment as filed on 2 June 1998, and his trial proceeded on the basis of the charges as set forth therein. Any complaint raised by the Appellant as to whether he received fair notice of the charges to be proven against him must be assessed in light of the allegations contained in the Amended Indictment. Accordingly, the charges set forth in the Indictment against the Appellant and the other co-accused, including Accused B, are not relevant to the determination of this ground of appeal.

61. Article 18(4) of the Statute and Rule 47(C) of the Rules require that an indictment contain a concise statement of the facts of the case and of the crime with which the suspect is charged. That requirement does not include an obligation to state in the indictment the evidence on which the Prosecution has relied. Where evidence is presented at trial which, in the view of the accused, falls outside the scope of the indictment, an objection as to lack of fair notice may be raised and an appropriate remedy may be provided by the Trial Chamber, either by way of an adjournment of the proceedings, allowing the Defence adequate time to respond to the additional allegations, or by excluding the challenged evidence.

62. The Amended Indictment alleges in relevant part:

> On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow") [the Appellant] the local commander of the Jokers, [Accused B] and another soldier interrogated Witness A. While being questioned by [the Appellant], [Accused B] rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.[74]

63. The Appellant submits that the Trial Chamber erred in finding that his questioning of Witness A in the Large Room commenced prior to Accused B's entry, as this sequence of events is not consistent with that set forth in the Amended Indictment. While it is stated in the Judgement that "Witness A, under cross-examination was adamant that [the Appellant] was in the [Large Room] before Accused B entered",[75] this is merely a narrative account of the evidence given by Witness A and does not form part of the Trial Chamber's factual findings. The Appeals Chamber, therefore, is unable to find any merit in the Appellant's submission.

64. The Appellant further submits that the Trial Chamber erred in finding that rapes and sexual assaults were committed in his presence in the Large Room, on the basis of evidence which it had previously declared inadmissible, and in convicting him on that basis. The objection was founded on the fact that the Amended Indictment did not include an allegation that the Appellant was present in the Large Room, while rapes and sexual assaults were perpetrated there. The Appeals Chamber observes that the Trial Chamber upheld this objection insofar as it ruled "inadmissible all evidence relating to rape and sexual assault perpetrated on [Witness A] by [Accused B[in the presence of the [Appellant] in the `Large Room' apart from the evidence of sexual assault alleged in paragraph 25 of the [Amended Indictment]".[76]

65. The Appellant however raises the additional question whether the Trial Chamber failed to adhere to the terms of its own decision by including factual findings in the Judgement concerning rapes and sexual assaults committed in the Appellant's presence in the Large Room and convicting the Appellant on that basis. These factual findings are set out in the following paragraphs of the Judgement relating to events in the Large Room:

> 124. Witness A was interrogated by the [Appellant]. She was forced by Accused B to undress and remain naked before a substantial number of soldiers. She was subjected to cruel, inhuman and degrading treatment and to threats of serious physical assault by Accused B in the course of her interrogation by the [Appellant]. The purpose of this abuse was to extract information from Witness A about her family, her connection with the ABiH and her relationship with certain Croatian soldiers, and also to degrade and

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> humiliate her. The interrogation by the [Appellant] and the abuse by Accused B were parallel to each other.
>
> 125. Witness A was left by the accused in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her.
>
> 126. Witness A was subjected to severe physical and mental suffering and public humiliation.

66. The Appeals Chamber would observe that paragraph 125 refers to rapes and sexual assaults perpetrated by Accused B after the Appellant's departure from the Large Room. The Trial Chamber did not make any factual findings that rapes and sexual assaults were committed in the Appellant's presence in the Large Room, nor was the Appellant convicted on that basis.[77]

67. The Appellant further submits that the Trial Chamber's finding that the Appellant left Witness A in the Large Room to be raped and sexually assaulted by Accused B was impermissible as falling outside the scope of the Amended Indictment.[78] In this context, the Appeals Chamber notes the following. Although the Amended Indictment against the Appellant does not contain any allegations to that effect, at trial Witness A gave evidence that the Appellant left her in the Large Room where she was raped and sexually assaulted by Accused B. In its Judgement, the Trial Chamber states that the Defence "has not disputed that the [Appellant] left Witness A in the room and that there followed another phase of serious sexual assaults by Accused B."[79] The Trial Chamber found that "Witness A was left by the [Appellant] in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her".[80] But while finding so as part of the narrative, the Trial Chamber did not say that the Appellant, in leaving Witness A in the custody of Accused B, did so with the intent that Accused B should perform those acts on Witness A. The performance of such acts by Accused B did not influence the Trial Chamber in coming to a decision to convict the Appellant. This is borne out by a review of the Trial Chamber's legal findings in support of the Appellant's conviction for torture under Count 13 which contain no reference to rapes and sexual assaults in the Large Room:

> The Trial Chamber is satisfied that the Appellant was present in the large room and interrogated Witness A, whilst she was in a state of nudity. As she was being interrogated, Accused B rubbed his knife on the inner thighs of Witness A and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation by the accused. The accused did not stop his interrogation, which eventually culminated in his threatening to confront Witness A with another person, meaning Witness D and that she would then confess to the allegations against her. To this extent, the interrogation by the accused and the activities of Accused B became one process. The physical attacks, as well as the threats to inflict severe injury, caused severe physical and mental suffering to Witness A.[81]

There is no reference in this paragraph or in any of the other paragraphs relating to these legal findings to the evidence of Witness A being "left by the [Appellant] in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her."[82]

(b) Second aspect of the first ground of appeal

68. The Appellant submits that he was denied a fair trial under Article 21(2) and Article 23(2) of the Statute, since the Trial Chamber failed to provide a reasoned opinion as to the manner in which it resolved the conflict between the testimony of Witness A and that of Witness D on the question whether the Appellant conducted an interrogation in the Pantry. The Appellant specifically objects to the Trial Chamber's conclusion that "the evidence of Witness D does confirm the evidence of

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Witness A in this regard."[83]

69. The right of an accused under Article 23 of the Statute to a reasoned opinion is an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute. The case-law that has developed under the European Convention on Human Rights establishes that a reasoned opinion is a component of the fair hearing requirement, but that "the extent to which this duty . . . applies may vary according to the nature of the decision" and "can only be determined in the light of the circumstances of the case."[84] The European Court of Human Rights has held that a "tribunal' is not obliged to give a detailed answer to every argument.[85]

70. From a reading of the Judgement, the Appeals Chamber considers that the Trial Chamber dealt satisfactorily with the evidence of Witnesses A and D. Paragraphs 84 - 89 of the Judgement are devoted to events in the Pantry. In these paragraphs, the Trial Chamber considered the evidence of both Witnesses A and D in respect of the events in the Pantry and, on this basis, arrived at its factual findings which are set out in paragraphs 127 - 130.

71. Moreover, the Appeals Chamber is not convinced that there was any necessary conflict in the evidence of the two witnesses. Indeed, Witness D's evidence could be read to support Witness A's testimony that the Appellant was present in the Pantry, as Witness D testified that he entered the Pantry with the Appellant and that later, while he was being beaten by Accused B, the Appellant was standing by the doorway to the Pantry.[86]

72. As to the Appellant's objection to the Trial Chamber's statement that "the evidence of Witness D does confirm the evidence of Witness A in this regard,"[87] the Appeals Chamber notes that this conclusion does not relate to the issue whether the Appellant interrogated anyone in the Pantry or whether he was present in that room. The statement was made in the context of the Trial Chamber's review of certain inconsistencies in Witness A's testimony and did not refer to the question whether the Appellant conducted any interrogation in the Pantry. The Appellant's objection is therefore unfounded.

73. Based on the foregoing analysis, the Appeals Chamber finds that the evidence is not conflicting on the question whether the Appellant conducted an interrogation in the Pantry or whether he was present in that room during the physical assaults perpetrated by Accused B upon Witnesses A and D. In view of this, the Appeals Chamber is unable to conclude that the Trial Chamber erred in the manner alleged by the Appellant.

(c) Third aspect of the first ground of appeal

74. In respect of the third aspect of the first ground, the Appellant contends that, by preventing him from introducing the testimony of Witness F and Enes Surkovic when the proceedings were re-opened, the Trial Chamber violated his right, under Article 21(4) of the Statute, to examine, and obtain the attendance of, relevant witnesses on his behalf.

75. Article 21(4)(e) of the Statute grants an accused the right "to obtain the attendance and examination of witnesses on his behalf". This right is, for obvious reasons, subject to certain conditions, including a requirement that the evidence should be called at the proper time.[88] In this regard, the Appeals Chamber observes that the Appellant was obliged, under the applicable rules, to present all available evidence at trial. However, it should be noted that the proceedings were re-opened due to the exceptional circumstance of the Prosecutor's late disclosure of material which, in the view of the Trial Chamber, "clearly had the potential to affect the `*credibility of prosecution evidence*"'.[89] The question arises whether the Trial Chamber was correct to limit the Appellant's right to call new evidence in the re-opened proceedings to "any medical, psychological or psychiatric

treatment or counselling received by Witness A after May 1993,"[90] and to deny him the right to call Witness F and Enes Surkovic on the ground that their proposed testimony fell outside the scope of the re-opened proceedings.

76. As to the first issue, namely, whether the scope of the re-opened proceedings was too restrictive, the Appeals Chamber notes that the material belatedly disclosed by the Prosecutor was a witness statement dated 16 September 1995 from a psychologist at the Medica Women's Therapy Centre, concerning the treatment Witness A had received at the Centre. The Trial Chamber determined that the sole issue arising out of the disclosure of the material was the medical, psychological or psychiatric treatment or counselling received by Witness A, and not the more general question of the mental health and psychological state of Witness A. The Appeals Chamber sees no basis for interfering with this assessment. Furthermore, the Appeals Chamber considers that the relevance of Witness A's mental health could not have been unknown to the Appellant prior to the Prosecutor's disclosure of the material, especially in the light of the mistreatment that Witness A had endured and the circumstance that the Appellant's defence was premised on the fact that Witness A's memory was flawed and that she was therefore not a reliable witness. This conclusion is supported by the fact that, at trial the Appellant called an expert witness, Dr. Elisabeth Loftus, to testify on the effects of shock and trauma on memory. In accordance with the general rule that evidence should be called at the proper time, the Appellant was obliged to call all evidence which, in his estimation, had a bearing on the more general subject of Witness A's mental condition and her lack of reliability during the trial.

77. The second issue concerns the Trial Chamber's denial of the Appellant's alleged right to call Witness F and Enes Surkovic on the ground that their proposed evidence fell outside the scope of the re-opened proceedings. The Appeals Chamber finds no merit in the Appellant's submission that the evidence was incorrectly excluded. The proposed evidence was clearly not relevant to the question of medical, psychological or psychiatric treatment or counselling received by Witness A, which was the subject of the re-opened proceedings. Outside of these matters, the introduction of the evidence at that stage could not be justified.

78. The Appeals Chamber accordingly finds that the Trial Chamber did not err when it decided to deny the Appellant the right to call Witness F and Enes Surkovic on the ground that the proposed testimony fell outside the scope of the re-opened proceedings.

79. For the foregoing reasons, this ground must fail.

IV. SECOND GROUND OF APPEAL

A. Submissions of the Parties

1. The Appellant

80. As the second ground of appeal, the Appellant submits that the Prosecutor failed to prove beyond reasonable doubt: (a) that he committed torture; and (b) that he committed outrages upon personal dignity including rape.

(a) The evidence was insufficient to convict Anto Furundzija of the crime of torture (Count 13 of the Amended Indictment)

81. The Appellant alleges that the Trial Chamber established his liability for the crime of torture on the basis of its finding that he interrogated Witness A in the Pantry, but that the evidence does not

prove this beyond reasonable doubt.[91] He claims that Witness D testified that the only interrogator in the Pantry was Accused B, and that the "very, very credible" testimony of the "truthful" Witness D, as described by the Prosecutor during the trial, precludes a finding that the Appellant conducted any interrogation in the Pantry.[92]

82. The Appellant further contends that Witness A's identification of him in court is unreliable.[93] He refers to the case of *Prosecutor v. Dusko Tadic* where the Trial Chamber addressed the need to identify the accused independently of in-court identification.[94] He submits that in the Judgement, the Trial Chamber never addressed the possibility that Witness A's memory of him could have been displaced or altered, when she saw his image on a BBC television report, or that her in-court identification of him was merely an identification of the man she had seen on television rather than a description of the person she had seen in the Large Room or the Pantry.[95]

83. The Appellant further submits that the acts charged in the Amended Indictment would not constitute torture, even if proven. The Appellant alleges that the Prosecutor failed to prove that, by the acts and omissions charged in the Amended Indictment, he intentionally inflicted "severe pain or suffering, whether physical or mental", aimed at "obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person."[96]

84. The Appellant contends that, to establish his liability as co-perpetrator of the crime of torture under the Trial Chamber's definition of the necessary elements of that crime, proof by the Prosecutor that he questioned Witness A is insufficient. He submits that a direct connection must be proven between his questioning and the infliction by Accused B of severe pain and suffering upon Witness A, whether physical or mental,[97] but that there has been no such proof.[98]

85. The Appellant further submits that Witness A's testimony of the events was unreliable, as she suffered from post-traumatic stress disorder ("PTSD"), and that the inconsistencies in her testimony do not justify the Trial Chamber's finding that "inconsistencies may, in certain circumstances, indicate truthfulness and the absence of interference with witnesses".[99]

(b) The evidence was insufficient to convict Anto Furundzija of the crime of outrages upon personal dignity, including rape

86. The Appellant submits that the Trial Chamber cited no authority for the proposition that his presence alone could support a conviction for aiding and abetting.[100] He contends that the acts charged against him in paragraph 26 of the Amended Indictment do not constitute aiding and abetting, and that the cases upon which the Trial Chamber relied to support the conviction for aiding and abetting are distinguishable from the instant case. The Appellant distinguishes the circumstances in the *Dachau Concentration Camp* case and submits that the conduct of the accused in that case, which the court found to constitute "acting in pursuance of a common design to violate the laws and usages of war", did not occur in the present case.[101] Referring to the case of *Rohde*, he argues that there is no evidence that he was a link in the chain of events that led to the rape of Witness A.[102] He also refers to the decision in the *Stalag Luft III* case, and submits that there is no proof that his acts contributed directly to the rape or that the rape would not have happened in this manner had he not aided it willingly.[103] Relying on the *Schonfeld* case, the Appellant submits that he cannot be convicted of aiding and abetting merely because he did not endeavour to prevent the rape of Witness A.[104] He argues that, unlike in the *Schonfeld* case, there was no allegation in this case that his mere presence in or outside the Pantry "was calculated to give additional confidence" to Accused B.[105] He also submits that his case is to be contrasted with the *Almelo Trial* and the *Trial of Otto Sandrock and Three Others*, since there was no allegation or evidence that he knew that there was a common

purpose behind the rape of Witness A or that he had gone to the Pantry for the very purpose of having Witness A raped.[106]

2. The Respondent

(a) The evidence was sufficient to convict the Appellant of torture

87. As regards the Appellant's argument that Witness D testified that the only interrogator in the Pantry was Accused B, the Respondent submits that there is no inconsistency between the testimony of Witnesses A and D as to whether Witness D was interrogated in the Pantry and that there is no failure on the part of the Trial Chamber to give a reasoned opinion on this particular issue.[107]

88. With respect to the Appellant's argument concerning his in-court identification by Witness A, the Prosecutor submits that a proper identification of the Appellant did not depend only on Witness A's evidence, but that Witness D's evidence, among others, was highly relevant, and that the totality of the evidence more than sufficiently identified the Appellant.[108]

89. As regards the Appellant's contention that the acts charged against him in the Amended Indictment, even if proven, do not constitute torture, the Prosecutor interprets that contention to include such issues as the insufficiency of the Amended Indictment, an error of law by the Trial Chamber in determining the elements of torture, the insufficiency of the evidence, and the lack of showing of a previous conspiracy or of evidence in support of a finding of action in concert.[109] The Prosecutor submits that the elements of torture committed in an armed conflict, as stated by the Trial Chamber in the Judgement, reflect a correct interpretation of the law.[110] It is submitted that there was sufficient and relevant evidence for the Trial Chamber to draw the factual conclusions to establish beyond reasonable doubt the elements of the offence of torture in this case.[111] The Prosecutor submits that neither the Statute and the Rules nor the jurisprudence of the International Tribunal require that each and every element of an offence be alleged in an indictment, and that, by failing to raise the insufficiency of the Amended Indictment at the pre-trial stage, the Appellant effectively waived this argument.[112] Any challenge by the Appellant to the Trial Chamber's formulation of the elements of torture would constitute an error of law that requires *de novo* review. However, the Prosecutor considers that the determination by the Trial Chamber that the evidence proved the Appellant's guilt of torture beyond reasonable doubt should not be disturbed, as there is a reasonable basis for it.[113]

90. As to the question whether the Amended Indictment contained sufficient allegations of concerted action between Accused B and the Appellant, the Prosecutor submits that the Amended Indictment alleged that the Appellant was liable under Article 7(1) of the Statute, and that the *Tadic* Appeals Judgement establishes that liability for action in concert is contained within Article 7(1) of the Statute.[114] With respect to the need to demonstrate a conspiracy or a pre-existing plan, the Prosecutor argues that this is unnecessary, as the *Tadic* Appeals Judgement finds that individual criminal responsibility does not require a pre-existing plan between the parties.[115] The Prosecutor contends that the evidence provided a reasonable basis for the finding of co-perpetration, consistent with the *Tadic* Appeals Judgement,[116] and, in her view, established that the Appellant acted "in unison" with Accused B, performing different parts of the torture process.[117] The Prosecutor submits that the events in this case should not be artificially divided between the Large Room and the Pantry, as the process was a continuum and must be assessed in its entirety.[118] It is her view that the Appellant has failed to demonstrate that the Trial Chamber's finding that the Appellant and Accused B acted in concert was unreasonable,[119] and that there is no requirement that there be proof of a pre-existing plan or design in order to find the accused criminally liable as a co-perpetrator; common design may be inferred from the circumstances of the case.[120]

91. The Prosecutor notes that Witness A testified that there was a relationship between the questions and the assaults,[121] and that the evidence demonstrated that the Appellant was seeking information from Witness A. Even assuming that the main purpose of the Appellant was to obtain information, in contrast with the purpose of Accused B, which was to humiliate and degrade Witness A, that main purpose would not alter the individual criminal responsibility of the Appellant as co-perpetrator of torture.[122]

92. Contrary to the Appellant's argument that the Trial Chamber erred in finding Witness A to be reliable, the Prosecutor is of the view that the Trial Chamber had ample opportunity to assess all the submissions made on this issue and its determination should be given due weight.[123]

(b) The evidence was sufficient to convict the Appellant of the crime of outrages upon personal dignity including rape

93. It is the Prosecutor's view that the substance of the Appellant's arguments relates to the mode of participation, i.e., aiding and abetting, upon which the Appellant was found guilty of outrages upon personal dignity.

94. The Prosecutor addresses the three bases supporting the Appellant's arguments. First, as regards the Appellant's submission that the Prosecutor failed to prove beyond reasonable doubt that the Appellant conducted any interrogation in the Pantry, based on Witness D's testimony, the Prosecutor argues that the Trial Chamber's findings were reasonable and that Witness D's testimony corroborated Witness A's testimony as to the presence of the Appellant in the Pantry.[124] Secondly, concerning the Appellant's submission that Witness A's identification of the Appellant in court was unreliable, the Prosecutor contends that the totality of the evidence confirms the identity of the Appellant as the perpetrator of the crimes of which he now stands accused.[125] Thirdly, the Prosecutor submits that the Appellant's argument that the acts described in paragraph 26 of the Amended Indictment do not constitute aiding and abetting is based on the Appellant's misunderstanding of the case law cited in the Judgement. In support, the Prosecutor refers to the case law of the International Tribunal which establishes that a "knowing presence" that has a direct and substantial effect on the commission of the illegal act is sufficient "to base a finding of participation and assign the criminal culpability that accompanies it."[126]

95. Regarding the Appellant's argument that the allegations in paragraph 26 of the Amended Indictment did not meet the requirements for aiding and abetting reflected in the cases cited by the Trial Chamber, the Prosecutor submits that what is relevant to the appeal is not the allegations contained in the charging instrument, but the legal and factual findings contained in the Judgement.[127] Overall, the Prosecutor submits that the Appellant must demonstrate that the findings of the Trial Chamber are inconsistent with existing international customary law and with other decisions of this Tribunal and consequently cannot constitute the basis for determining individual criminal responsibility.[128]

3. Appellant in Reply

96. The Appellant submits that the evidence is insufficient to support the Trial Chamber's finding of his guilt beyond reasonable doubt.[129] He argues that there is no direct evidence of concerted action and that the inference could be drawn that there was no concert of action between him and Accused B.[130] He also argues that, given the unreliability of Witness A's testimony, there is no evidence that he did anything to Witness A or that he shared any criminal purpose with Accused B.[131] He contends that the testimony of Witness D raises a reasonable doubt as to the reliability of Witness A's testimony.[132]

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97. The Appellant also claims that there is reasonable doubt as to whether he was present at the time the offences were committed, whether his presence was "approving" and further, whether his authority could have assisted in the commission of the offence. He argues that the Prosecutor failed to prove beyond reasonable doubt that he gave Accused B assistance, encouragement, or moral support that had a substantial effect on the perpetration of the rape or that the Appellant knew that his acts assisted Accused B in the commission of the rape.[133]

B. Discussion

98. At the outset, this Chamber identifies the constituent bases of this ground of appeal as follows. First, there is the alleged failure of the Trial Chamber to address fully Witness D's testimony in relation to its findings of events in the Pantry. That testimony, according to the Appellant, shows that he did not conduct an interrogation while Accused B beat Witnesses A and D and sexually assaulted Witness A. Secondly, the courtroom identification of the Appellant by Witness A was not reliable, in view of her previously stated impression of him. Thirdly, the Prosecutor failed to prove that the acts charged in the Amended Indictment constituted the crime of

torture. Fourthly, the Prosecutor did not prove beyond reasonable doubt that the Appellant was a co-perpetrator of the crime of torture. Fifthly, Witness A's testimony is not reliable as it was given in a state of post-traumatic stress disorder. Lastly, the mere presence of the Appellant at the scene of the acts charged in paragraph 26 of the Amended Indictment did not constitute aiding or abetting.

99. These elements will be dealt with separately. Before embarking on an analysis of the issues raised by this ground, the Chamber reiterates its conclusions set out above: an appellant who argues an error of fact must establish that the Trial Chamber's findings "could not reasonably have been accepted by any reasonable person",[134] and that the error was a decisive factor in the outcome. An appellant who argues an error of law must also show that the error invalidated the decision.

1. Witness D's Testimony

100. The Trial Chamber found that both Witnesses A and D were interrogated in the Pantry.[135] The Appellant submits that, contrary to the testimony of Witness A, Witness D's testimony showed that the Appellant did not interrogate anyone in the Pantry, and that the Appellant was not present when Witness D was in the Pantry with Witness A and Accused B. The Prosecutor argues that the Trial Chamber relied on the evidence given by Witness D as to the presence of the Appellant in the Pantry,[136] and that Witness D's evidence showed that the events in the Large Room and in the Pantry were part of a single process, whereby the Appellant sought information from both Witness A and Witness D. The Appellant brought in the latter to confront Witness A in the Pantry, having failed to obtain satisfactory answers from her in the Large Room.[137] According to Witness A's testimony, Witness D was questioned by the Appellant in the Pantry.

101. The evidence relied upon by the Trial Chamber in the Judgement reveals the following. Witness A gave evidence that the Appellant was standing in the doorway to the Pantry or in that room during the attacks on Witness D and the subsequent sexual assaults on Witness A,[138] and further testified that she and Witness D were interrogated by the Appellant in the Pantry.[139] Witness D testified that, when he entered the Pantry, the Appellant was there, and that the Appellant remained in the vicinity of the doorway to the Pantry.[140] Witness D's evidence thus supports the testimony of Witness A that the Appellant was present in the Pantry or at least in the doorway to that room. It is Witness D's testimony that he did not recall if anything was said while he was being beaten in the Pantry that the Appellant argues gives rise to reasonable doubt as to whether the Appellant conducted an interrogation in the Pantry. However, given that this testimony of Witness D relates solely to the question whether he was interrogated by the Appellant while he was being beaten by Accused B,

Witness D's testimony is not dispositive on the question whether the Appellant interrogated Witness A in the Pantry at any time during her confinement in that room. Moreover, Witness D was only in the Pantry for part of the period of Witness A's confinement in that room, and consequently his testimony does not cover events in the Pantry before his entry, or after his departure. Witness D did testify that upon leaving the Pantry he heard the screams of Witness A and a soldier's voice calling out the name of Furundzija.[141] The Appeals Chamber takes the view that it was not unreasonable for the Trial Chamber to conclude, based upon a consideration of the testimony of both Witnesses A and D, that the Appellant interrogated Witness A in the Pantry.

102. For these reasons, this element of the ground must fail.

2. Courtroom Identification

103. The Appellant argues that Witness A's description of the Appellant contained in her 1995 statement differed in significant respects from her in-court description and identification of the Appellant. He further submits that Witness A's in-court identification of the Appellant is the only evidence that the Appellant was present in the Large Room and that the Trial Chamber should have found an independent basis for identifying the Appellant. Further, he recalls that the Prosecutor never asked Witness A to identify him in court, but only asked whether the voice of the person who questioned her in the Pantry was the same as the voice of the person who questioned her in the Large Room.[142] The Prosecutor submits that Witness A's identification of the Appellant as the individual who interrogated her in the Large Room is supported by the uncontested evidence of Witness D.[143]

104. The Trial Chamber made the following finding in relation to the identification of the Appellant by Witness A:

> The Trial Chamber notes that the evidence of Witness A consistently places the accused at the scenes of the crimes committed against her in the Holiday Cottage in May 1993. It is also significant to note that she has been consistent throughout her statements in her recollection that the accused was never the one assaulting her during her period of captivity in the Holiday Cottage; Accused B is always described as the actual perpetrator of the rapes and other assaults. The Trial Chamber finds that Witness A has identified the accused as Anto Furundzija, the Boss. The inconsistencies in her identification testimony are minor and reasonable. In light of her recollection at the time of seeing the accused on television and even noticing that he had put on weight, the Trial Chamber is satisfied that the accused has been sufficiently identified by Witness A.[144]

105. The Judgement shows that, in reaching this conclusion, the Trial Chamber carefully considered the significance of the differences in Witness A's 1995 description of the Appellant's appearance and his actual appearance.[145] The Trial Chamber appears to have accepted Witness A's explanation on this point. The Trial Chamber was further persuaded by Witness A's recognition of the Appellant when she saw him briefly on a BBC television news broadcast. In this regard, the Trial Chamber cited Witness A's testimony that, when she saw the Appellant on television, she recalled thinking that he had put on weight.[146]

106. Moreover, Witness A's in-court identification is not the sole evidence identifying the Appellant as present in the Large Room; there is other evidence to confirm this. This includes the testimony of Witness A of the arrival of the commander of the Joker unit, addressed by his subordinates as "the Boss" or "Furundzija", in the Large Room where she was interrogated by him immediately after his arrival.[147] Witness A further testified that the Appellant had been irritated by her not giving satisfactory answers to his questions there, and that he had gone to set up the confrontation in the

Pantry with another person who later turned out to be Witness D.[148] Both Witness A and Witness D identified the Appellant as being present in the doorway to the Pantry during the events that subsequently unfolded in that room as charged in the Amended Indictment.[149] The Appeals Chamber notes that the Appellant has not addressed any of these arguments in his reply to the Prosecutor's Response.

107. In sum, the Appeals Chamber can find no fault with the Trial Chamber's treatment of the courtroom identification of the Appellant, and notes that, in any event, there was other evidence of the Appellant's identity on the basis of which it would be reasonable for the Trial Chamber to be satisfied with the identification of the Appellant.

108. For these reasons, this element of the ground must fail.

3. Whether the Acts Charged in the Amended Indictment Constitute Torture

109. The Appellant argues that the Prosecutor failed to prove that the acts charged in the Amended Indictment constituted the crime of torture. He submits that the Trial Chamber failed to consider whether the acts of Accused B in the Large Room, for which the Appellant was subsequently convicted as a co-perpetrator, were serious enough to amount to torture.[150] The Prosecutor submits that the findings of the Trial Chamber that torture was committed should not be disturbed on appeal, considering that there was a reasonable factual basis for them.[151]

110. Those arguments raised by the Appellant under this heading which relate to the Appellant's conviction as a co-perpetrator of torture will be dealt with in relation to the next element of this ground.

111. The Appeals Chamber supports the conclusion of the Trial Chamber that "there is now general acceptance of the main elements contained in the definition set out in Article 1 of the Torture Convention",[152] and takes the view that the definition given in Article 1 reflects customary international law.[153] The Appellant does not dispute this finding by the Trial Chamber. The Trial Chamber correctly identified the following elements of the crime of torture in a situation of armed conflict:

> (i) . . . the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
>
> (ii) this act or omission must be intentional;
>
> (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;
>
> (iv) it must be linked to an armed conflict;
>
> (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.*, as a de facto organ of a State or any other authority-wielding entity.[154]

Under this definition, in order to constitute torture, the accused's act or omission must give rise to "severe pain or suffering, whether physical or mental."

112. In respect of the events in the Large Room, the Trial Chamber said:

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> The physical attacks, as well as the threats to inflict severe injury, caused severe physical and mental suffering to Witness A.[155]

113. The Trial Chamber based this conclusion upon its findings that Witness A was interrogated in the Large Room in a state of nudity, and that, "[a]s she was being interrogated, Accused B rubbed his knife on the inner thighs of Witness A and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation by the accused."[156] It is difficult to ignore the intimidating and humiliating aspects of that scene and their devastating impact on the physical and mental state of Witness A. The act of Accused B rubbing his knife against Witness A's inner thighs and threatening to put his knife inside her vagina was carried out parallel to the interrogation of Witness A by the Appellant. The entire scene was marked by the Appellant's showing of his annoyance with Witness A and the laughter and stares of the on-looking soldiers.

114. The Appeals Chamber finds this element of the ground to be unmeritorious. It also finds it inconceivable that it could ever be argued that the acts charged in paragraph 25 of the Amended Indictment, namely, the rubbing of a knife against a woman's thighs and stomach, coupled with a threat to insert the knife into her vagina, once proven, are not serious enough to amount to torture. This element of the second ground of appeal must fail.

4. Co-perpetration

115. The Appellant submits that in order to sustain his conviction as a co-perpetrator of torture, it must be proved that there was a "direct connection" between the Appellant's questioning and the infliction on Witness A of severe pain or suffering, whether physical or mental.[157] He also submits that "SwChat is missing in this case is any allegation *or* proof that Mr. Furundzija participated in any crime, *i.e.,* intentionally acted *in concert with* Accused B in questioning Witness A", and that there was no such allegation contained in the Amended Indictment, nor was proof offered at the trial in this regard.[158] He comments on the evidence of Witness A thus:

> Witness A's testimony shows only that Accused B's actions took place during Mr. Furundzija's alleged interrogation of Witness A; it does not show that Mr. Furundzija planned, agreed, or intended that Witness A would be touched or threatened in any way in the course of his questioning. There is no evidence that Mr. Furundzija invited or encouraged Accused B's actions or threats, or that he endorsed them in any way.[159]

116. The Appellant was charged under Article 7(1) of the Statute which, in the Prosecutor's submission, clearly covers liability for action in concert and does not require that a pre-existing "conspiracy", "agreement" or "plan" between the offenders be proved beyond reasonable doubt,[160] in order for the Trial Chamber to find the Appellant to be a co-perpetrator of torture.

117. The Appeals Chamber notes that the Appellant did not challenge the Trial Chamber's use of the definition of co-perpetrator found in Article 25 of the Rome Statute.[161] Article 25 of the Rome Statute states in relevant part:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> . . .
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

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> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime; . . .

118. The Trial Chamber found that two types of liability for criminal participation "appear to have crystallised in international law - co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other".[162] It further stated that, to distinguish a co-perpetrator from an aider or abettor, "it is crucial to ascertain whether the individual who takes part in the torture process also *partakes of the purpose behind torture* (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person)".[163] It then concluded that, to be convicted as a co-perpetrator, the accused "must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person".[164]

119. This Chamber, in a previous judgement, identified the legal elements of co-perpetration. It is sufficient to recall the Chamber's conclusion in that Judgement in relation to the need to demonstrate a pre-existing design:

> There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise. [165]

120. There is no dispute that the Appellant sought certain information from Witness A in the events relevant to this case. There is also no dispute that the various physical attacks in the Large Room and in the Pantry were not committed by the Appellant, but by Accused B. According to the Trial Chamber's factual findings,[166] the Appellant was present both in the Large Room and the Pantry interrogating Witness A while the offences charged in the Amended Indictment took place. The Appeals Chamber agrees with the Prosecutor's submission that the events in this case should not be artificially divided between the Large Room and the Pantry, as the process was a continuum and should be assessed in its entirety. Once the abuses started and continued successively in two rooms, the interrogation did not cease. There was no need for evidence proving the existence of a prior agreement between the Appellant and Accused B to divide the interrogation into the questioning by the Appellant and physical abuse by Accused B. The way the events in this case developed precludes any reasonable doubt that the Appellant and Accused B knew what they were doing to Witness A and for what purpose they were treating her in that manner; that they had a common purpose may be readily inferred from all the circumstances, including (1) the interrogation of Witness A by the Appellant in both the Large Room while she was in a state of nudity, and the Pantry where she was sexually assaulted in the Appellant's presence; and (2) the acts of sexual assault committed by Accused B on Witness A in both rooms, as charged in the Amended Indictment. Where the act of one accused contributes to the purpose of the other, and both acted simultaneously, in the same place and within full view of each other, over a prolonged period of time, the argument that there was no common purpose is plainly unsustainable.

121. For these reasons, this element of the ground must fail.

5. Post-Traumatic Stress Disorder (PTSD)

122. This issue was the subject of the re-opened proceedings at which several experts testified. The

weight of the expert testimony, PTSD's impact upon memory, and the effect of treatment of PTSD on memory, were fully argued before the Trial Chamber which, having examined the inconsistencies in Witness A's evidence, held that:

> 108. ...Witness A's memory regarding material aspects of the events was not affected by any disorder which she may have had. The Trial Chamber accepts her evidence that she has sufficiently recollected these material aspects of the events. There is no evidence of any form of brain damage or that her memory is in any way contaminated by any treatment which she may have had....
>
> 109. The Trial Chamber bears in mind that even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given. There is no reason why a person with PTSD cannot be a perfectly reliable witness.[167]

123. Under the standard established in the *Tadic* Appeals Judgement, the Appeals Chamber will only disturb a finding of fact by the Trial Chamber where "the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person. . .".[168] In the re-opened proceedings, numerous experts gave evidence on the potential effects of PTSD on memory. The Trial Chamber was best placed to assess this evidence and to draw its own conclusions.[169] The Appeals Chamber can find no reason to disturb these findings and accordingly this element must fail.

6. Presence of the Appellant and Aiding and Abetting

124. The Appellant raises three points in connection with his conviction for aiding and abetting outrages upon personal dignity including rape. First, the Prosecutor failed to prove that the Appellant interrogated anyone in the Pantry. The Trial Chamber failed to cite any authority to support the proposition that presence alone would implicate the Appellant as an aider and abettor.[170] Secondly, the allegations in paragraph 26 of the Amended Indictment do not meet the requirements for aiding and abetting set forth in the cases cited by the Trial Chamber.[171] Thirdly, the Prosecutor did not prove beyond reasonable doubt that the Appellant gave Accused B assistance, encouragement, or moral support that had a substantial effect on the perpetration of the rape or that he knew that his acts assisted Accused B in the commission of the rape.[172] The reasons are that the Appellant never interrogated anyone in the Pantry, that Witness D's evidence conflicts with that of Witness A, and that mere presence would not constitute aiding and abetting.

125. The Prosecutor replies that the case law of the International Tribunal establishes that "knowing presence" that has a substantial effect on the commission of an offence is sufficient for a finding of participation and attendant liability.[173] Further, as to the second point of the Appellant, the Prosecutor considers that the Appellant failed to identify and discuss any legal finding of the Trial Chamber in the Judgement.[174] The cases were cited by the Trial Chamber in its inquiry into whether there were relevant rules of customary law on this point.[175] As to the third point, the Prosecutor refers to its various replies in relation to the reasons given by the Appellant.

126. The Trial Chamber found that the Appellant's "presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him".[176] As the Trial Chamber found that the Appellant was not only present in the Pantry, but that he acted and continued to interrogate Witness A therein, it is not necessary to consider the issue of whether mere or knowing presence constitutes aiding and abetting.[177] Although the Appellant disputed Witness A's testimony in this regard, the Trial Chamber was in the best position to assess the demeanour of the witness and the weight to be attached to that testimony. This Chamber can find no reason to disturb this finding.

127. For the reasons given, this element of the second ground of appeal must fail and thus the second ground of appeal fails as a whole.

V. THIRD GROUND OF APPEAL

A. Submissions of the Parties

1. The Appellant

128. The Appellant argues that the Defence was prejudiced by the Trial Chamber's admission of, and reliance on, evidence of acts not charged in the Indictment and which the Prosecutor never identified prior to trial as part of the charges against the Appellant.

(a) Evidence concerning other acts in the Large Room and the Pantry

129. The Appellant submits that, despite having ruled in its Decision of 12 June 1998 and the Confidential Decision of 15 June 1998 that it would only consider Witness A's testimony as relating to paragraphs 25 and 26 of the Amended Indictment, the Trial Chamber made factual and legal findings relating to facts not alleged in the Amended Indictment, which led to his conviction for torture. These include findings that the Appellant (i) interrogated Witness A while she was in a state of forced nudity, (ii) threatened in the course of his interrogation to kill Witness A's sons, and (iii) abandoned Witness A in the Large Room to further assaults by Accused B.[178]

(b) Evidence of alleged acts committed by the Appellant which are unrelated to Witness A

130. The Appellant refers to specific paragraphs in the Judgement to support the proposition that the Trial Chamber allowed the Prosecutor to introduce evidence concerning events which are unrelated to the acts with which the Appellant is charged. In this regard, the Appellant points in particular to the events which occurred in the village of Ahmici on 16 April 1993. He also contests the alleged finding by the Trial Chamber of his guilt of persecution, a crime with which he was not charged.[179]

(c) Violation of Rule 50 by the Prosecutor and the Trial Chamber: Evidence of acts not charged in the Amended Indictment

131. Rule 50 of the Rules sets forth the procedure for amending indictments. The Appellant contends that by attempting to amend the Amended Indictment through proof at trial, the Prosecutor violated Rule 50, and that, by admitting the evidence and finding him guilty of a crime without giving him notice of charges relating to the village of Ahmici, the Trial Chamber violated Rule 50.[180]

2. The Respondent

132. The Respondent submits that under this ground of appeal, the Appellant must demonstrate that the Trial Chamber erred in concluding that the evidence was within the scope of the Amended Indictment and that such evidence was relied upon by the Trial Chamber to convict the Appellant.[181]

(a) Evidence concerning other acts in the Large Room and the Pantry

133. The Respondent submits that, neither before nor during trial did the Appellant seek to exclude the evidence which he claims to be at variance with the Amended Indictment. The Respondent contends that the issue is being raised for the first time on appeal.[182]

134. The Respondent submits that, although the Trial Chamber includes sexual assaults by Accused B in the Large Room in the factual findings, these assaults are not mentioned in the legal findings.[183] Overall, the Respondent submits that (i) the factual findings were not at variance with the Amended Indictment, (ii) even if they were at variance, this would be permissible in light of their minor nature, and (iii) even if the Trial Chamber erred in finding facts allegedly outside the scope of the Amended Indictment, there has been no showing that this would invalidate the decision.[184]

135. As regards acts not charged in the Amended Indictment, the Respondent submits that Article 18 (4) of the Statute and Rule 47 of the Rules prescribe that an indictment should identify the suspect's name and particulars and provide a concise statement of the facts and of the crime with which the suspect is charged.[185] The Respondent indicates that the case law of the International Tribunal demonstrates that an indictment must contain information that permits an accused adequately to prepare his defence. The Respondent notes that, in two recent decisions, a distinction has been drawn between the material facts underpinning the charges and the evidence that goes to prove those facts.[186]

136. As regards the evidence challenged by the Appellant as being at variance with the Amended Indictment, which concerns the manner in which the interrogation alleged in the Amended Indictment was carried out, the Respondent submits that it constitutes evidence which "relates to Paragraphs 25 and 26 as pleaded in the Indictment against the Accused" and is therefore admissible pursuant to the Trial Chamber's own order.[187]

137. With respect to the evidence that the Appellant threatened to kill Witness A's sons during the course of the interrogation, the Respondent submits that there is no indication that the Trial Chamber relied upon this evidence in convicting the Appellant.[188] The Respondent further submits that the evidence relating to the assaults against Witness A by Accused B after the Appellant's departure from the Large Room relates to the ongoing acts which occurred during the course of the interrogation and was not relied upon in convicting the accused.[189]

138. The Respondent alleges that, even if the evidence were at variance with the Amended Indictment, such variance would be permissible, as it did not alter the scope of the charges against the Appellant, nor did it affect his right to be notified of the charges against him (the Appellant received sufficient notification of the precise nature of the charges in the pre-trial documents disclosed).[190] The Respondent concludes that the Appellant's failure to seek to have the evidence excluded constitutes a waiver of the issue on appeal.[191]

(b) Evidence of alleged acts by Appellant unrelated to Witness A

139. As regards the Appellant's argument that he was found guilty of the crime of persecution, the Respondent submits that the Appellant was not found guilty of persecution, but that the evidence was properly admitted to prove the existence of an armed conflict and the nexus of the Appellant to that armed conflict.[192]

(c) Allowing evidence not charged in the Indictment violates Rule 50

140. With respect to the Appellant's argument that the Respondent violated Rule 50 of the Rules by attempting to further amend the Amended Indictment through evidence submitted at trial, the Respondent reiterates that the evidence was not at variance with the Amended Indictment, that even if the evidence were at variance, that variance would be permissible, and that the evidence submitted was directly relevant to the charges.[193]

3. Appellant in Reply

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141. The Appellant rejects the Respondent's interpretation of this ground of appeal. The Appellant indicates that his argument is that he was misled and that the Amended Indictment failed to provide sufficient notice of the proof that would be offered at trial. Instead, the Appellant submits, he was tried and convicted on the basis of acts which either fell outside the scope of the Amended Indictment or were ordered by the Trial Chamber to be excluded pursuant to its Decisions dated 12 June 1998 and 15 June 1998.[194] The Appellant argues that the Trial Chamber's findings of facts as contained in paragraphs 120-130 of the Judgement "relate to acts that are outside the scope of [Amended Indictment]" and should have been excluded.[195]

142. The Appellant submits that "[a]n Indictment defines and circumscribes the elements of the crimes for which a defendant can be convicted. The Trial Chamber cannot convict a defendant of crimes not charged in the Indictment or crimes committed by means of acts not set forth in the Indictment."[196]

143. As regards the crime of torture specifically, the Appellant submits that he was found guilty of torture on the basis of a particular course of conduct not charged in the Amended Indictment or committed by means of acts not set forth in the Amended Indictment.[197]

B. Discussion

144. The Appellant submits that, notwithstanding the assurance given by the Trial Chamber, the latter made factual findings inconsistent with the Amended Indictment and its decisions of 12 and 15 June 1998. In this regard, the Appellant refers specifically to the factual findings listed in paragraphs 124 -130 of the Judgement, which are as follows:

> In the Large Room:
>
> 124. Witness A was interrogated by the accused. She was forced by Accused B to undress and remain naked before a substantial number of soldiers. She was subjected to cruel, inhuman and degrading treatment and to threats of serious physical assault by Accused B in the course of her interrogation by the accused. The purpose of this abuse was to extract information from Witness A about her family, her connection with the ABiH and her relationship with certain Croatian soldiers, and also to degrade and humiliate her. The interrogation by the accused and the abuse by Accused B were parallel to each other.
>
> 125. Witness A was left by the accused in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her.
>
> 126. Witness A was subjected to severe physical and mental suffering and public humiliation.
>
> In the Pantry:
>
> 127. The interrogation of Witness A continued in the pantry, once more before an audience of soldiers. Whilst naked but covered by a small blanket, she was interrogated by the accused. She was subjected to rape, sexual assaults, and cruel, inhuman and degrading treatment by Accused B. Witness D was also interrogated by the accused and subjected to serious physical assaults by Accused B. He was made to watch rape and sexual assault perpetrated upon a woman whom he knew, in order to force him to admit allegations made against her. In this regard, both witnesses were humiliated.
>
> 128. Accused B beat Witness D and repeatedly raped Witness A. The accused was

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present in the room as he carried on his interrogations. When not in the room, he was present in the near vicinity, just outside an open door and he knew that crimes including rape were being committed. In fact, the acts by Accused B were performed in pursuance of the accused's interrogation.

129. It is clear that in the pantry, both Witness A and Witness D were subjected to severe physical and mental suffering and they were also publicly humiliated.

130. There is no doubt that the accused and Accused B, as commanders, divided the process of interrogation by performing different functions. The role of the accused was to question, while Accused B's role was to assault and threaten in order to elicit the required information from Witness A and Witness D.

145. The Appellant argues that in convicting him of torture, the Trial Chamber relied on evidence to make findings as to material facts not alleged in the Amended Indictment. Article 18 of the Statute provides in relevant part:

> 4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

146. Moreover, Rule 47 of the Rules provides *inter alia* that:

> (C) The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.

147. Under both the Statute and the Rules, as discussed in paragraph 61 above, there is no requirement that the actual evidence on which the Prosecutor relies has to be included in the indictment. Where, in the course of the trial, evidence is introduced which, in the view of the accused, does not fall within the scope of the indictment, or is within the scope but in relation to which there is no corresponding material fact in the indictment, the defence may challenge the admission of the evidence or request an adjournment.

1. Evidence Concerning Other Acts in the Large Room and the Pantry

148. Trial Chambers have been consistently mindful of the primary function of the International Tribunal, which is to ensure that justice is done and that the accused receives a fair trial. It is, no doubt, in light of this preoccupation that in evaluating the testimony of Witness A, the Trial Chamber limited its consideration to that part of the testimony relating to the Amended Indictment. This exercise by the Trial Chamber is indicative of its sensitivity to any prejudice to the fairness of the trial that could result from Witness A's testimony. Consistent with this concern, the Trial Chamber acknowledged that "[t]he witness has testified that rapes and sexual abuse took place in the large room in the presence of the accused", and that the relevant "evidence falls outside the facts alleged in paragraphs 25 and 26 of the Amended Indictment, and is contrary to earlier submissions by the Prosecutor."[198] The Trial Chamber also remarked that during the proceedings the Prosecutor did not seek to modify the Amended Indictment to charge the Accused with participation in the rapes and sexual abuse.

149. It is on the basis of the aforementioned grounds that the Trial Chamber decided that "the Trial Chamber will not consider evidence relating to rapes and sexual assault of Witness A in the presence of the accused, other than those alleged in paragraph 25 and 26 of the Amended Indictment."[199]

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150. The factual allegations contained in paragraphs 25 and 26 of the Amended Indictment and pertaining to Counts 13 and 14 are as follows:

> 25. On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow"), Anto FURUNDZIJA the local commander of the Jokers, [REDACTED] and another soldier interrogated Witness A. While being questioned by FURUNDZIJA, [REDACTED] rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.
>
> 26. Then Witness A and Victim B, a Bosnian Croat who had previously assisted Witness A's family, were taken to another room in the "Bungalow". Victim B had been badly beaten prior to this time. While FURUNDZIJA continued to interrogate Witness A and Victim B, [REDACTED] beat Witness A and Victim B on the feet with a baton. Then [REDACTED] forced Witness A to have oral and vaginal sexual intercourse with him. FURUNDZIJA was present during this entire incident and did nothing to stop or curtail [REDACTED] actions.

151. In its written decision of 12 June 1998, the Trial Chamber allowed the oral motion by the Defence and held that "in the circumstances, the Trial Chamber will only consider as relevant Witness A's evidence in so far as it relates to Paragraphs 25 and 26 as pleaded in the Indictment against the accused." In the written Confidential Decision issued on 15 June 1998, addressing the "Prosecutor's Request for Clarification of Trial Chamber's Decision Regarding Witness A's Testimony", the Trial Chamber "rules as inadmissible all evidence relating to rape and sexual assault perpetrated on [Witness A] by the individual identified as [Accused B] in the presence of the accused in the large room apart from the evidence of sexual assault alleged in paragraph 25 of the [Amended Indictment]."

(a) The interrogation of Witness A by the Appellant while she was in a state of forced nudity

152. In relation to the interrogation of Witness A while she was in a state of forced nudity, the Trial Chamber found that "SWitness AC was forced by Accused B to undress and remain naked before a substantial number of soldiers", and that "Witness A was left by the accused in the custody of Accused B."[200] Although the fact of Witness A's nudity appears in the Judgement under the section entitled "Legal Findings"[201] and was obviously a factor in arriving at the decision to convict, it was nonetheless permissible for the Trial Chamber to take account of it, since it fell within the scope of the acts alleged in the Amended Indictment.

153. In this context, the Appeals Chamber considers as correct the distinction made in *Krnojelac*[202] between the material facts underpinning the charges and the evidence that goes to prove those material facts. In terms of Article 18 of the Statute and Rule 47, the indictment need only contain those material facts and need not set out the evidence that is to be adduced in support of them. In the instant case, the Appeals Chamber can find nothing wrong in the Trial Chamber's admission of this evidence which supports the charge of torture, even though it was not specified in the Amended Indictment. It would obviously be unworkable for an indictment to contain all the evidence that the Prosecutor proposes to introduce at the trial.

(b) Alleged threats in the course of the Appellant's interrogation to kill Witness A's sons

154. In relation to this aspect of the third ground of appeal, the Trial Chamber accepted the evidence of Witness A about the nature of her interrogation by the Appellant.[203] This finding was made in the context of the Trial Chamber's discussion of the link between the armed conflict and the Appellant, and did not form part of the legal findings underlying the Appellant's convictions.

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(c) Witness A abandoned in the Large Room to further assaults by Accused B

155. The Trial Chamber found that "Witness A was left by the [Appellant] in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her".[204] In this respect, the Appeals Chamber recalls paragraph 67 of this Judgement and reiterates that the finding was not one that influenced the Trial Chamber in coming to a decision to convict the Appellant. This is borne out by a review of the legal findings in Chapter 7 of the Judgement, and in particular paragraphs 264 - 269 relating to Count 13 (torture), which show that the Trial Chamber did not rely upon this evidence in convicting the Appellant. In paragraph 264, the Trial Chamber found that the Appellant

> was present in the large room and interrogated Witness A, whilst she was in a state of nudity. As she was being interrogated, Accused B rubbed his knife on the inner thighs of Witness A and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation by the accused. The accused did not stop his interrogation, which eventually culminated in his threatening to confront Witness A with another person, meaning Witness D and that she would then confess to the allegations against her. To this extent, the interrogation by the accused and the activities of Accused B became one process. The physical attacks, as well as the threats to inflict severe injury, caused severe physical and mental suffering to Witness A.[205]

156. There is no reference in paragraph 264, or in any of the other paragraphs relating to these legal findings, to the evidence of Witness A being "left by [the Appellant] in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her."[206]

2. Evidence of alleged acts by the Appellant unrelated to Witness A

157. The Appellant submits the following findings by the Trial Chamber as evidence of acts unrelated to Witness A and upon which the Trial Chamber relied in convicting him:[207]

> The accused was a member of the Jokers, a special unit of the HVO military police, which participated in the armed conflict in the Vitez municipality and especially in the attack on the village of Ahmici. These attacks led to the expulsion, detention, wounding and deaths of numerous civilians.[208]
>
> Finally, on 16 April 1993, the HVO carried out a concerted attack on both Vitez and Ahmici.[209]
>
> Witness B testified about the HVO attack on Ahmici. On 16 April 1993, she woke up to the sound of shooting and explosions. A group of HVO soldiers, including the accused, entered her house and searched it while verbally abusing the witness and her mother. Witness B appealed to the accused for help as he was an acquaintance of hers, but he remained silent. She was then forced to flee as the soldiers fired at her feet. Her house was set on fire.[210]
>
> Witness B also testified that during the attack on Ahmici, the accused was wearing a Jokers patch on his sleeve.[211]

158. The above paragraphs are not findings made by the Trial Chamber; rather they are the Trial Chamber's recitation of the factual allegations submitted by the Prosecutor. It is not of little consequence that these paragraphs of the Judgement are preceded by the heading: "The Prosecution Case".

159. The Appellant further submits that the Trial Chamber held that he "was an active combatant and participated in expelling Moslems from their homes."[212] This section in the Judgement comprises the factual findings of the Trial Chamber for purposes of the requirement under Article 3 of the Statute that the violations of the laws or customs of war occur during an armed conflict; thus the heading "The Link Between the Armed Conflict and the Alleged Facts".

160. Finally, the Appellant refers to the following legal findings of the Trial Chamber in support of his proposition that "the Trial Chamber found that Mr. Furundzija was guilty of the crime of persecution":[213]

> The accused was a commander of the Jokers, a special unit of the HVO. He was an active combatant and had engaged in hostilities against the Moslem community in the Lasva Valley area, including the attack on the village of Ahmici, where he personally participated in expelling Moslems from their homes in furtherance of the armed conflict already described.[214]

161. The Appeals Chamber finds no support in the Judgement for the Appellant's contention that the Trial Chamber found him guilty of the crime of persecution.

3. Alleged violation of Rule 50 of the Rules

162. The Appeals Chamber finds wholly unmeritorious the argument that the Prosecutor violated Rule 50 by further amending the Amended Indictment through proof at trial. As discussed above, under Article 18 of the Statute and Rule 47 of the Rules, an indictment need only plead the material acts underlying the charges and need not set out the evidence that is to be adduced in support of them.[215] The evidence admitted at trial did not alter the charges in the Amended Indictment.

163. Thus, this ground of appeal fails.

VI. FOURTH GROUND OF APPEAL

164. The issue which has been raised as the fourth ground of appeal is that of recusal, namely, whether or not Judge Mumba, the Presiding Judge in the Appellant's trial was impartial or gave the appearance of bias. The allegations turn on her former involvement with the United Nations Commission on the Status of Women ("the UNCSW"). It is the nature of her involvement with this organisation and its implications on the Appellant's trial which have led the Appellant to assert that she should have been disqualified pursuant to Rule 15 of the Rules.

165. The Appeals Chamber finds it useful to set out initially the factual basis for the allegations made by the Appellant.

166. Judge Mumba has served as a Judge of the International Tribunal since her election on 20 May 1997. For a period of time prior to her election, she was a representative of the Zambian Government on the UNCSW.[216] At no stage was she a member of the UNCSW whilst at the same time serving as a Judge with the International Tribunal. The UNCSW is an organisation whose primary function is to act for social change which promotes and protects the human rights of women.[217] One of its concerns during Judge Mumba's membership of it was the war in the former Yugoslavia and specifically the allegations of mass and systematic rape. This concern was exhibited by its resolutions which condemned these practices and urged the International Tribunal to give them priority by prosecuting those allegedly responsible.[218]

167. The UNCSW was involved in the preparations for the UN Fourth World Conference on Women held in Beijing, China, 4-15 September 1995, and specifically participated in the drafting of the "Platform for Action," a document identifying twelve "critical areas of concern" in the area of women's rights and which contained a five-year action plan for the future, the aim being to achieve gender equality by the year 2000. Three of the critical areas of concern were particularly relevant to issues in the former Yugoslavia.[219] There was an Expert Group Meeting following the Beijing conference, whose purpose was to work towards achieving certain of the goals drawn from the Beijing Conference and set out in the Platform for Action, including the reaffirmation of rape as a war crime, by the end of 1998. Three authors of one of the *amicus curiae* briefs later filed in the instant case[220] and one of the Prosecutors in the instant case, Patricia Viseur-Sellers ("the Prosecution lawyer"), attended this meeting.[221] This Expert Group proposed a definition of rape under international law.[222]

168. The Appeals Chamber notes that it is not so much that the parties dispute the factual basis of the Appellant's allegations, but rather that they differ in their interpretation of it and the relevance of it to the ground of appeal. For example, the parties do not dispute that Judge Mumba was involved in the UNCSW in the past, but they do dispute the nature of her involvement and the exact role which she played. The parties do not dispute that the Prosecution lawyer and the three authors of one of the *amicus curiae* briefs may also have been involved in either the activities of the UNCSW on some level or the Expert Group Meeting, but they do dispute the extent of the contact they may have had with Judge Mumba and its impact on, or relevance to, the Appellant's trial.

A. Submissions of the Parties

1. The Appellant

169. The Appellant submits that because of Judge Mumba's personal interest in, and association with the UNCSW, the ongoing agenda or campaign of the Platform for Action, the three authors of one of the *amicus curiae* briefs, and the Prosecution lawyer, she should have been disqualified under Rule 15 of the Rules.[223] He argues that the test which should be applied by the Appeals Chamber in ascertaining if disqualification is appropriate is whether "a reasonable member of the public, knowing all of the facts SwouldC come to the conclusion that Judge Mumba has *or had* any associations, which *might* affect her impartiality."[224] Based on this test, he submits that Judge Mumba should have been disqualified as an appearance was created that she had sat in judgement in a case that could advance and in fact did advance a legal and political agenda which she helped to create whilst a member of the UNCSW.[225]

170. The Appellant alleges that Judge Mumba continued to promote the goals and interests of the UNCSW and Platform for Action after her membership concluded, and contends that this was reflected directly in his trial. He does not allege that Judge Mumba was actually biased.[226] Rather, the issue was whether a reasonable person could have an apprehension as to her impartiality.[227] In this regard, he argues that a tribunal should not only be unbiased but should avoid the appearance of bias.[228] Hence the submission that there could be no other conclusion based on the above test than that Judge Mumba has or had associations which might affect her impartiality.[229]

2. The Respondent

171. The Respondent submits that the Appellant has failed to establish the existence of either a personal interest by Judge Mumba in the instant case, or the existence of an association or working relationship between Judge Mumba, the three authors of one of the *amicus curiae* briefs and the Prosecution lawyer, such that she should have been disqualified. In addition, the Appellant has submitted no evidence to support an allegation that Judge Mumba exhibited actual bias or

partiality.[230] The Prosecutor contends that the standard for a finding of bias should be high and that Judges should not be disqualified purely on the basis of their personal beliefs or legal expertise.[231] In the view of the Prosecutor, the Appellant has failed to meet the "reasonable apprehension" of bias standard.[232] The prior involvement of a Judge in a United Nations body such as the UNCSW cannot give rise to any reasonable apprehension that the Judge has an agenda which would cause him or her to be biased against an accused appearing before him or her. [233]

B. Discussion

172. Before proceeding to consider this matter further, the Appeals Chamber makes two observations.

173. First, the Appellant states that he first discovered Judge Mumba's associations and personal interest in the case after judgement was rendered, and for this reason, only then raised the matter before the Bureau.[234] Although the Appeals Chamber has decided to consider this matter further, given its general importance,[235] it would point out that information was available to the Appellant at trial level, which should have enabled him to discover Judge Mumba's past activities and involvement with the UNCSW. The Appeals Chamber notes, in this context, public documentation issued by the International Tribunal, including, for example, its published yearbooks which contain sections devoted to biographies of the Judges elected to serve at the International Tribunal.[236] In addition, Public Information Service of the Tribunal, which is responsible for ensuring public awareness of the International Tribunal's activities, regularly publishes Bulletins and releases information on the International Tribunal's web-site. Both the Yearbook and the Public Information Service of the Tribunal provide official information to the public regarding such issues as the election of new Judges to the International Tribunal and details of a Judge's legal background. The information was freely available for the Appellant to discover.

174. The Appeals Chamber considers that it would not be unduly burdensome for the Appellant to find out the qualifications of the Presiding Judge of his trial. He could have raised the matter, if he considered it relevant, before the Trial Chamber, either pre-trial or during trial. On this basis, the Appeals Chamber could find that the Appellant has waived his right to raise the matter now and could dismiss this ground of appeal.

175. These observations however, should not be construed as relieving an individual Judge of his or her duty to withdraw from a particular case if he or she believes that his or her impartiality is in question. This is in fact what Rule 15(A) of the Rules calls for when it says that the Judge shall in any such circumstance withdraw. The Appeals Chamber finds that Judge Mumba had no such duty for the reason that she had no potentially disqualifying personal interest or associations.

176. The second observation is concerned with the additional material annexed to the Appellant's Amended Brief. It is to be recalled that, in an order dated 2 September 1999, the Appeals Chamber granted leave to the Appellant to amend his Appellate Brief, although not specifically admitting the material referred to in the "Defendant's Motion to Supplement Record on Appeal".[237] The Appeals Chamber confirms that, by granting leave to file an amended Appellate Brief, it granted leave to file the annexed documents, which the Appeals Chamber will take into account in considering the Appellant's submissions.

1. Statutory Requirement of Impartiality

177. The fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognised as being an integral component of the requirement that an accused should have a fair trial. Article 13(1) of the Statute reflects this, by expressly providing that Judges

of the International Tribunal "shall be persons of high moral character, *impartiality* and integrity".[238] This fundamental human right is similarly reflected in Article 21 of the Statute, dealing generally with the rights of the accused and the right to a fair trial.[239] As a result, the Appeals Chamber need look no further than Article 13(1) of the Statute for the source of that requirement.

178. However, it is still the task of the Appeals Chamber to determine how this requirement of impartiality should be interpreted and applied to the circumstances of this case. In doing so, the Appeals Chamber notes that, although the issue of impartiality of a Judge has arisen in several cases to date, before both the Bureau and a Presiding Judge of a Trial Chamber,[240] this is the first time that the Appeals Chamber has been seized of the matter.

2. Interpretation of the Statutory Requirement for Impartiality

179. Interpretation of the fundamental human right of an accused person to be tried by an impartial tribunal is carried out by considering situations in which it is alleged that a Judge is not or cannot be impartial and therefore should be disqualified from sitting on a particular case. A two-pronged approach appears to have developed. Although interpretation on a national or regional level is not uniform, as a general rule, courts will find that a Judge "might not bring an impartial and unprejudiced mind"[241] to a case if there is proof of actual bias or of an appearance of bias.

180. The Appellant acknowledges that he "makes no claim that Judge Mumba was actually biased".[242] The Appeals Chamber will proceed on this basis.

181. The European Convention on Human Rights has generated a large amount of jurisprudence on the interpretation of Article 6 of that Convention which provides, *inter alia,* that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." In the view of the European Court of Human Rights:

> Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6§1 (art.6-1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given Judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.[243]

182. In considering subjective impartiality, the Court has repeatedly declared that the personal impartiality of a Judge must be presumed until there is proof to the contrary.[244] In relation to the objective test, the Court has found that this requires that a tribunal is not only genuinely impartial, but also appears to be impartial. Even if there is no suggestion of actual bias, where appearances may give rise to doubts about impartiality, the Court has found that this alone may amount to an inadmissible jeopardy of the confidence which the Court must inspire in a democratic society.[245] The Court considers that it must determine whether or not there are "ascertainable facts which may raise doubts as to...impartiality."[246] In doing so, it has found that in deciding "whether in a given case there is a legitimate reason to fear that a particular Judge lacks impartiality the standpoint of the accused is important but not decisive....*What is decisive is whether this fear can be held objectively justified.*"[247] Thus, one must ascertain, apart from whether a judge has shown actual bias, whether one can apprehend an appearance of bias.

183. The interpretation by national legal systems of the requirement of impartiality and in particular the application of an appearance of bias test, generally corresponds to the interpretation under the European Convention.

184. Nevertheless, the rule in common law systems varies. In the United Kingdom, the court looks to see if there is a "real danger of bias rather than a real likelihood",[248] finding that it is "unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time."[249] However, other common law jurisdictions have rejected this test as being too strict, and cases such as *Webb, R.D.S.,* and the *South African Rugby Football Union* case use the reasonable person as the arbiter of bias, investing him with the requisite knowledge of the circumstances before an assessment as to impartiality can be made.

185. In the case of *Webb*, the High Court of Australia found that, in determining whether or not there are grounds to find that a particular Judge is partial, the court must consider whether the circumstances would give a fair-minded and informed observer a "reasonable apprehension of bias".[250] Similarly, the Supreme Court of Canada identified the applicable test for determining bias to be whether words or actions of the Judge give rise to a reasonable apprehension of bias to the informed and reasonable observer: "This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must be reasonable in the circumstances of the case. Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances".[251]

186. A recent case to confirm the above formula is the *South African Rugby Football Union Case,*[252] where the Supreme Court of South Africa stated that "[t]he question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel." [253]

187. In the United States a federal Judge is disqualified for lack of impartiality where "a reasonable man, cognisant of the relevant circumstances surrounding a Judge's failure to recuse himself, would harbour legitimate doubts about the Judge's impartiality."[254]

188. This is also the trend in civil law jurisdictions, where it is required that a Judge should not only be actually impartial, but that the Judge should also appear to be impartial.[255] For example, under the German Code of Criminal Procedure, although Articles 22 and 23 are the provisions setting down mandatory grounds for disqualification, Article 24 provides that a Judge may be challenged for "fear of bias" and that such "[c]hallenge for fear of bias is proper if there is reason to distrust the impartiality of a Judge". Thus, one can challenge a Judge's partiality based on an objective fear of bias as opposed to having to assert actual bias. Similarly in Sweden, a Judge may be disqualified if any circumstances arise which create a legitimate doubt as to the Judge's impartiality.[256]

3. A standard to be applied by the Appeals Chamber

189. Having consulted this jurisprudence, the Appeals Chamber finds that there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome

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> of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
>
> ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[257]

190. In terms of the second branch of the second principle, the Appeals Chamber adopts the approach that the "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."[258]

191. The Appeals Chamber notes that Rule 15(A) of the Rules provides:

> A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case. [259]

The Appeals Chamber is of the view that Rule 15(A) of the Rules falls to be interpreted in accordance with the preceding principles.

4. Application of the statutory requirement of impartiality to the instant case

(a) Actual Bias

192. As mentioned above,[260] the Appellant does not allege actual bias on the part of Judge Mumba. Accordingly, the Appeals Chamber sees no need to consider this aspect further in the instant case.

(b) Whether Judge Mumba was a party to the cause or had a disqualifying interest therein

193. With regard to the first branch of the second principle, the Appellant highlights the similarities in the circumstances of this case and that of *Pinochet*.[261] However, the *Pinochet* case is distinguishable from the instant case on at least two grounds.

194. First, whereas Lord Hoffmann was at the time of the hearing of that case a Director of Amnesty International Charity Limited, Judge Mumba's membership of the UNCSW was not contemporaneous with the period of her tenure as a Judge in the instant case.[262] Secondly, the close link between Lord Hoffmann and Amnesty International in the *Pinochet* case is absent here. As Lord Browne-Wilkinson said, "[o]nly in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties."[263] While Judge Mumba may have been involved in the same organisation, there is no evidence that she was closely allied to and acting with the Prosecution lawyer and the three authors of one of the *amicus curiae* briefs in the present case. The link here is tenuous, and does not compare to that existing between Amnesty International and Lord Hoffmann in the *Pinochet* case. Nor may this link be established simply by asserting that Judge Mumba and the Prosecution lawyer and the three *amici* authors shared the goals of the UNCSW in general. There is, therefore, no basis for a finding in this case of partiality based on the appearance of bias test established in the *Pinochet* case.

(c) Whether the circumstances of Judge Mumba's membership of the UNCSW would lead a

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reasonable and informed observer to apprehend bias

195. The Appeals Chamber, in applying the second branch of the second principle, considers it useful to recall the well known maxim of Lord Hewart CJ that it is of "fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[264] The Appellant, relying on the findings in the *Pinochet* case, alleges that there was an appearance of bias, because of Judge Mumba's prior membership of the UNCSW and her alleged associations with the Prosecution lawyer and the three authors of one of the *amicus curiae* briefs.[265]

196. In the view of the Appeals Chamber, there is a presumption of impartiality which attaches to a Judge. This presumption has been recognised in the jurisprudence of the International Tribunal,[266] and has also been recognised in municipal law. For example, the Supreme Court of South Africa in the *South African Rugby Football Union* case found:

> The reasonableness of the apprehension [of bias] must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. [267]

197. The Appeals Chamber endorses this view, and considers that, in the absence of evidence to the contrary, it must be assumed that the Judges of the International Tribunal "can disabuse their minds of any irrelevant personal beliefs or predispositions." It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that Judge Mumba was not impartial in his case. There is a high threshold to reach in order to rebut the presumption of impartiality . As has been stated, "disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be `firmly established.'"[268]

198. The Appellant suggests that, during her time with the UNCSW, Judge Mumba acted in a personal capacity and was "personally involved" in promoting the cause of the UNCSW and the Platform for Action. Consequently, she had a personal interest in the Appellant's case and, as this created an appearance of bias, she should have been disqualified.[269] The Prosecutor argues that Judge Mumba acted solely as a representative of her country and, as such, was not putting forward her personal views, but those of her country.[270]

199. The Appeals Chamber finds that the argument of the Appellant has no basis. First, it is the Appeals Chamber's view that Judge Mumba acted as a representative of her country and therefore served in an official capacity. This is borne out by the fact that Resolution 11(II) of the UN Economic and Social Council that established the UNCSW provides that this body shall consist of "one representative from each of the fifteen Members of the United Nations selected by the Council."[271] Representatives of the UNCSW are selected and nominated by governments.[272] Although the Appeals Chamber recognises that individuals acting as experts in many UN human rights bodies do serve in a personal capacity, [273] the founding Resolution of the UNCSW does not provide for its members to act in such capacity. Therefore, a member of the UNCSW is subject to the instructions and control of the government of his or her country. When such a person speaks, he or she speaks on behalf of his or her country. There may be circumstances which show that, in a given case, a representative personally identified with the views of his or her government, but there is no evidence to suggest that this was the case here. In any event, Judge Mumba's view presented before the UNCSW would be treated as the view of her government.

200. Secondly, even if it were established that Judge Mumba expressly shared the goals and

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objectives of the UNCSW and the Platform for Action, in promoting and protecting the human rights of women, that inclination, being of a general nature, is distinguishable from an inclination to implement those goals and objectives as a Judge in a particular case. It follows that she could still sit on a case and impartially decide upon issues affecting women.

201. Indeed, even if Judge Mumba sought to implement the relevant objectives of the UNCSW, those goals merely reflected the objectives of the United Nations,[274] and were contemplated by the Security Council resolutions leading to the establishment of the Tribunal. These resolutions condemned the systematic rape and detention of women in the former Yugoslavia and expressed a determination "to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them."[275] In establishing the Tribunal, the Security Council took account "with grave concern" of the "report of the European Community investigative mission into the treatment of Muslim women in the former Yugoslavia" and relied on the reports provided by, *inter alia*, the Commission of Experts and the Special Rapporteur for the former Yugoslavia, in deciding that the perpetrators of these crimes should be brought to justice.[276] The general question of bringing to justice the perpetrators of these crimes was, therefore, one of the reasons that the Security Council established the Tribunal.

202. Consequently, the Appeals Chamber can see no reason why the fact that Judge Mumba may have shared these objectives should constitute a circumstance which would lead a reasonable and informed observer to reasonably apprehend bias. The Appeals Chamber agrees with the Prosecutor's submission that "ScConcern for the achievement of equality for women, which is one of the principles reflected in the United Nations Charter, cannot be taken to suggest any form of pre-judgement in any future trial for rape."[277] To endorse the view that rape as a crime is abhorrent and that those responsible for it should be prosecuted within the constraints of the law cannot in itself constitute grounds for disqualification.

203. The Appeals Chamber recognises that Judges have personal convictions. "Absolute neutrality on the part of a judicial officer can hardly if ever be achieved."[278] In this context, the Appeals Chamber notes that the European Commission considered that "political sympathies, at least insofar as they are of different shades, do not in themselves imply a lack of impartiality towards the parties before the court".[279]

204. The Appeals Chamber considers that the allegations of bias against Judge Mumba based upon her prior membership of the UNCSW should be viewed in light of the provisions of Article 13(1) of the Statute, which provide that "[i]n the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."

205. The Appeals Chamber does not consider that a Judge should be disqualified because of qualifications he or she possesses which, by their very nature, play an integral role in satisfying the eligibility requirements. Judge Mumba's membership of the UNCSW and, in general, her previous experience in this area would be relevant to the requirement under Article 13(1) of the Statute for experience in international law, including human rights law. The possession of this experience is a statutory requirement for Judges to be elected to this Tribunal. It would be an odd result if the operation of an eligibility requirement were to lead to an inference of bias. Therefore, Article 13(1) should be read to exclude from the category of matters or activities which could indicate bias, experience in the specific areas identified. In other words, the possession of experience in any of those areas by a Judge cannot, in the absence of the clearest contrary evidence, constitute evidence of bias or partiality.[280]

206. The Appellant has alleged that "Judge Mumba's decision Sthe JudgementC in fact promoted specific interests and goals of the Commission."[281] He states that she advocated the position that

rape was a war crime and encouraged the vigorous prosecution of persons charged with rape as a war crime.[282] He erroneously states that this was the first case in which either the International Tribunal or the ICTR was offered the opportunity to reaffirm that rape is a war crime,[283] and that through this case the Trial Chamber expanded the definition of rape.[284] The Appellant alleges that this expanded definition of rape which emerged in the Judgement reflected that which had been adopted by the Expert Group Meeting, at which the three authors of one of the *amicus curiae* briefs and the Prosecution lawyer were present.[285] In his submissions, these circumstances could cause a reasonable person to reasonably apprehend bias.

207. On the other hand, the Prosecutor argues that, in terms of the definition of rape, there is no evidence that Judge Mumba acted under the influence of the Expert Group Meeting or that she was even aware of it or its report. The Prosecutor states that the three authors of one of the *amicus curiae* briefs did not advance a definition of rape in their submissions (the Appellant does not dispute this statement[286]), and that in any event, the Appellant took no issue with the submissions made by the Prosecutor on the elements of rape during trial.[287]

208. The Appeals Chamber notes that there was no dispute at trial as to whether rape can, or should, be categorised as a war crime. The Prosecutor addressed the definition of rape in both her pre-trial brief and during the trial,[288] and, as found by the Trial Chamber, these submissions went unchallenged by the Appellant.[289] In addition, the Appellant confirmed during the oral hearing on the appeal that there was no issue raised at trial as to whether rape could be categorised as a war crime;[290] in fact, at the same hearing, he made no oral submission on the question of recusal.[291] For these reasons, the Appeals Chamber finds that the circumstances could not lead a reasonable observer, properly informed, to reasonably apprehend bias.

209. Moreover, the Appeals Chamber notes that both the International Tribunal and the ICTR have had the opportunity, prior to the Judgement, to define the crime of rape.[292]

210. With regard to the issue of the reaffirmation by the International Tribunal of rape as a war crime, the Appeals Chamber finds that the international community has long recognised rape as a war crime.[293] In the *Celebici* Judgement, one of the accused was convicted of torture by means of rape, as a violation of the laws or customs of war.[294] This recognition by the international community of rape as a war crime is also reflected in the Rome Statute where it is designated as a war crime.[295]

211. The Appeals Chamber also finds without merit the allegation that Judge Mumba is shown to have been biased by the fact that the Judgement expanded the definition of rape in a manner which reflected the definition put forward by the Expert Group Meeting. There is no evidence that Judge Mumba was influenced by the latter definition. On the other hand, there was jurisprudence which led the Trial Chamber to take the direction which it took. In the case of *The Prosecutor v. Jean-Paul Akayesu* before the ICTR, the Trial Chamber, while acknowledging that there was no generally accepted definition of rape in international law and that there were also variations at the national level,[296] defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[297] This definition was subsequently adopted in the *Celebici case*.[298]

212. In the instant case, there was no issue on this point at trial.[299] The Trial Chamber stated that it sought to arrive at an "accurate definition of rape based on the criminal law principle of specificity".[300] The Appeals Chamber recognises that the Trial Chamber was entitled to interpret the law as it stood.

213. Finally, the Appellant alleges that the association Judge Mumba had with the three authors of an *amicus curiae* brief created an apprehension of bias. He contends that, in filing the briefs before the Trial Chamber, the "amici actively assisted the prosecution in its effort to convict Mr. Furundziija by seeking to prevent the reopening of the trial after the Defence discovered that relevant documents had been withheld by the prosecution....the amici advanced legal arguments that assisted the prosecution in order to advance an agenda they shared with Judge Mumba."[301] The Appellant quotes sections of the briefs to illustrate the attitude which Judge Mumba shared; those sections, he says, reminded "the Tribunal that its ruling `profoundly affects (a) women's equal rights to access to justice and (b) the goal of bringing perpetrators of sexual violence in armed conflict before the two International Criminal Tribunals."[302]

214. The Judgement notes that the *amicus curiae* briefs "dealt at great length with issues pertaining to the re-opening of the...proceedings" and the suggested scope of the reopening.[303] They did not address the question of rape or the Appellant's personal responsibility for the rapes in question.[304] In any event, by the time the briefs were filed on 9 and 11 November 1998, the Trial Chamber had already decided to reopen the proceedings which commenced on 9 November 1998.[305]

215. The Appeals Chamber finds that there is no substance in the Appellant's allegations as contained in this ground of appeal. This ground therefore fails.

VII. FIFTH GROUND OF APPEAL

A. Submissions of the Parties

1. The Appellant

216. The Appellant contends that the sentences of ten years' imprisonment for the commission of acts of torture and eight years' imprisonment for aiding and abetting an outrage upon personal dignity, in violation of the laws or customs of war, constitute "cruel and unusual punishment".[306] He submits that, in the event that the Appeals Chamber affirms either conviction, it should reduce the sentence to a length of time consistent with the emerging penal regime of the Tribunal.[307]

217. The Appellant submits that the sentence is too harsh in light of evidence which suggests the possibility that he could be innocent,[308] and that the judgements issued by the Tribunal to date demonstrate an emergent jurisprudence embodying several general sentencing principles. According to the Appellant, the first such principle is that crimes against humanity should attract a harsher sentence than war crimes. In support, he cites the Trial Chamber's opinion in *Prosecutor v. Dusko Tadic* and the Appeals Chamber's agreement with the principle in *Prosecutor v. Drazen Erdemovic*.[309] The second principle is that crimes resulting in the loss of human life are to be punished more severely than other crimes. The Appellant argues that in the Sentencing Judgement at trial in the *Tadic* case[310] ("the *Tadic* Sentencing Judgement"), in respect of a crime in which Dusko Tadic participated, i.e., cruel and inhumane treatment leading to the death or disappearance of the victims, he received a sentence of three years additional to that received for the same crime when no death resulted.[311] Relying on the *Tadic* Sentencing Judgement, the Appellant submits that six years is an appropriate benchmark for a violation of the laws or customs of war when the accused is convicted of particularly cruel and terrorising treatment that did not result in the victim's death.[312]

218. Referring to the *Celibici* Judgement, the Appellant submits that the Trial Chamber in that case also reaffirmed the principle that crimes warrant a harsher penalty where they result in loss of human

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life.[313]

219. The Appellant further offers the judgement of the Trial Chamber in the *Aleksovski* case as an important precedent for the purposes of this appeal. In that case, Zlatko Aleksovski was sentenced to two and a half years' imprisonment for outrages upon personal dignity. By contrast, in respect of a crime of the same category, the Appellant has received eight years' imprisonment.[314]

220. Overall, the Appellant submits that, in order to ensure consistency between the sentence imposed on him and those imposed by the Trial Chamber in the *Tadic, Erdemovic* and *Aleksovski* cases,[315] his sentence should be reduced to six years' imprisonment or less.[316]

2. The Respondent

221. The Respondent submits that a sentence is imposed in the exercise of a Trial Chamber's discretion. Therefore, the Appeals Chamber may not substitute its opinion for that of a Trial Chamber, unless it is demonstrated that the Trial Chamber's discretion has not been validly exercised due to error. The Respondent contends that the Appellant in this case failed to demonstrate an error in the exercise of the Trial Chamber's discretion in sentencing.[317]

222. The Respondent submits that every sentence imposed by a Trial Chamber must be individualised as there are a great many factors to which the Trial Chamber may have regard in exercising its discretion in each case.[318]

223. The Respondent disputes the contention that there is a cognisable sentencing regime at the Tribunal, noting that the Appeals Chamber has only addressed the question of sentencing on one occasion.[319] Further, each of the sentences imposed by a Trial Chamber to date, which the Appellant contends reflect an emerging penal regime, is the subject of an appeal. The Respondent submits that the *Erdemovic* case[320] cannot serve as an appropriate guideline, as the circumstances surrounding that case were unique. The accused in that case pleaded guilty to the charges against him, and duress was treated as a significant mitigating factor. Therefore, the Respondent argues, *Erdemovic* is clearly distinguishable from the instant case.[321]

224. Contrary to the Appellant's submission that the Appeals Chamber be guided by the sentences passed by the Trial Chambers to date, the Respondent submits that it would be desirable for the Appeals Chamber to establish appropriate sentencing principles in order to achieve consistency and even-handedness.[322]

225. The Respondent further argues that deterrence and retribution should be the primary goals of sentencing. In the Respondent's view, deterrence has two aspects, one "suppressive" and the other "educative". The Respondent submits that both of these aspects of deterrence and the aim of retribution would be defeated were the sentences imposed by the Tribunal generally lower than those typically imposed in national systems.[323]

226. As to the suppressive aspect, the Respondent contends that a prospective violator of international humanitarian law would not be dissuaded by the sanctions imposed by an international tribunal if they were lower than those imposed under national law. As to the educative aspect, the Respondent argues that lower sentences imposed by the International Tribunal would signal that genocide, crimes against humanity and war crimes are less serious than ordinary crimes under national law. Finally, the imposition by the International Tribunal of sentences lower than those prevailing in national jurisdictions would undermine the Tribunal's aim of contributing to the restoration of peace and security in the former Yugoslavia.[324]

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227. The Respondent submits that the gravity of the crime must form the starting point for any determination of sentence. Rather than subscribing to some form of hierarchy between the offences generally, a Trial Chamber should impose a sentence which reflects the inherent gravity of the accused's criminal conduct.[325] The gravity of the crimes must ultimately be determined with regard to the particular circumstances of the case; the degree of the accused's participation should be considered and, generally, the closer a person is to actual participation in the crime, the more serious the nature of his crime.[326] However, an individual who orders or plans a course of criminal conduct will be responsible for his role in having ordered all of the crimes committed by the perpetrators and his responsibility may, therefore, be greater.[327]

228. As a general proposition, the Respondent agrees with the Appellant that a crime that results in the death of the victim is more serious than a crime not involving the loss of human life. However, this principle may not apply in the circumstances of every case. The Respondent rejects the Appellant's argument that six years' imprisonment has been established as the "appropriate benchmark" for violations of the laws or customs of war when the accused is convicted of particularly cruel and terrorising treatment that did not result in the death of a victim.[328] The Respondent also highlights other factors which are to be considered, such as the personal circumstances of the accused, aggravating and mitigating factors, and the general practice regarding prison sentences in the courts of the former Yugoslavia.[329]

229. The Respondent submits that the Appellant has not demonstrated that his sentence of ten years for torture was manifestly disproportionate to the gravity of the criminal conduct in question. The Trial Chamber found the Appellant guilty as a co-perpetrator of the act of torture, suggesting that the criminal conduct of the Appellant and that of Accused B were equally serious. Therefore, the sentence imposed cannot be regarded as disproportionate.[330] The Respondent adds that the sentence for outrages upon personal dignity reflects the Appellant's diminished role in this crime, although the conduct underlying this count was the same as that underlying the torture count.[331] The Prosecutor concludes that the Defence has failed to establish that the Trial Chamber abused its discretion in imposing the sentences.[332]

230. The Respondent further submits that, even if any weight is given to sentences imposed by Trial Chambers in other cases, the sentences do not appear to be inconsistent. The Respondent highlights as an example the accused Hazim Delic, in the *Celebici* case, who received a sentence of fifteen years for rape. The Respondent contends that this sentence is probably the one most analogous on its facts to the circumstances of this case.[333] Furthermore, the Respondent submits that, although sentences imposed by Trial Chambers should not serve as a point of reference before this Appeals Chamber, life imprisonment has been imposed in several cases before the ICTR and in the *Jelisic* case before this Tribunal a sentence of 40 years was imposed.[334] In the view of the Respondent, the overall ten-year sentence in this case is within the appropriate range, and on that basis the Appellant has shown no abuse of discretion by the Trial Chamber.[335]

231. Finally, the Respondent submits that the Appellant seems to suggest that an accused might be convicted where doubts about his innocence still exist, and that in such cases, doubts should function as a mitigating factor in sentencing.[336]

3. Appellant in Reply

232. The Appellant rejects the Respondent's arguments that his sentence is not inconsistent with the Tribunal's practice. He reiterates his objections to the emphasis placed by the Respondent on his interrogation of Witness A while she was being sexually assaulted, a scenario which he says is not supported by the evidence.[337]

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233. The Appellant reiterates his position as submitted in the Appellant's Amended Brief, that the sentence imposed by the Trial Chamber is entirely inconsistent with those imposed at trial in the *Tadic,*[338] *Erdemovic*[339] and *Aleksovski*[340] cases. He asserts that the Respondent made no attempt to reconcile the *Tadic* and *Aleksovski* sentencing decisions with that of *Furundzija,* and that such a reconciliation would, in any event, not have been possible.[341]

234. As regards the *Erdemovic* case, the Appellant submits that in the First *Erdemovic* Sentencing Judgement, the accused was sentenced to ten years' imprisonment for the commission of more than seventy murders, absent mitigating circumstances, but that, in the Second *Erdemovic* Sentencing Judgement, the accused received only a five-year sentence on account of duress and a plea-bargaining agreement reached with the Prosecutor.[342]

B. Discussion

235. The relevant provisions concerning sentencing procedure before the Tribunal are Articles 23 and 24 of the Statute and Rule 101 of the Rules.

Article 23 - Judgement

> 1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
>
> 2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24 - Penalties

> 1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
>
> 2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
>
> 3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Rule 101 - Penalties

> (A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.
>
> (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:
>
> (i) any aggravating circumstances;

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(ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

(iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;

(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

(D) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

236. Before addressing individual arguments concerning sentencing, it is worth examining the Appellant's overall contention on this ground. He submits that, in the event that the Appeals Chamber affirms either of the convictions at trial, the sentence relating to the upheld conviction should be reduced to a length of time consistent with the emerging penal regime of the Tribunal.[343] This submission implies that an "emerging penal regime" exists and is identifiable. Although the fundamental function of the Appeals Chamber is to determine whether the sentence imposed by the Trial Chamber is appropriate in terms of the Statute and the Rules, it may, nonetheless, be helpful to consider first whether there is, as contended by the Appellant, an emerging penal regime in the Tribunal.

237. The Appeals Chamber notes that the practice of the Tribunal with regard to sentencing is still in its early stages. Several sentences have been handed down by different Trial Chambers but these are now subject to appeal. Only three final sentencing judgements have been delivered: one by a Trial Chamber established for sentencing purposes following a successful appeal by the accused in *Erdemovic*,[344] and the others by the Appeals Chamber in *Tadic*[345] and *Aleksovski*,[346] each of which has resulted in a revision of the sentence imposed by the original Trial Chamber. It is thus premature to speak of an emerging "penal regime",[347] and the coherence in sentencing practice that this denotes. It is true that certain issues relating to sentencing have now been dealt with in some depth; however, still others have not yet been addressed. The Chamber finds that, at this stage, it is not possible to identify an established "penal regime". Instead, due regard must be given to the relevant provisions in the Statute and the Rules which govern sentencing, as well as the relevant jurisprudence of this Tribunal and the ICTR, and of course to the circumstances of each case.

238. The Prosecutor submits that, while there is no existing penal regime, it would be appropriate for the Appeals Chamber to set out sentencing guidelines which should be applied, based on the functions and purposes of sentencing in the legal system of the Tribunal.[348] Without questioning the possible utility of such guidelines, the Chamber considers it inappropriate to establish a definitive list of sentencing guidelines for future reference, when only certain matters relating to sentencing are at issue before it now. Thus, the Appeals Chamber will limit itself to the issues directly raised by this appeal.

239. One other preliminary matter merits consideration - the standard of review to be applied in an appeal against sentence. The Prosecutor submits that the Appeals Chamber should not substitute its opinion for that of a Trial Chamber unless it is demonstrated that the latter's discretion was not validly exercised.[349] The Appeals Chamber's finding in the *Tadic* Sentencing Appeals Judgement

supports this view: 519

> Insofar as the Appellant argues that the sentence of 20 years was unfair because it was longer than the facts underlying the charges required, the Appeals Chamber can find *no error in the exercise of the Trial Chamber's discretion* in this regard. The sentence of 20 years is within the discretionary framework provided to the Trial Chambers by the Statute and the Appeals Chamber will not, therefore, quash the sentence and substitute its own sentence instead.[350]

The test of a discernible error in respect of the exercise of the Trial Chamber's discretion set out in paragraph 22 of the same judgement has been followed in the *Aleksovski* Appeals Judgement.[351]

1. Crimes against humanity attract harsher penalties than war crimes

240. In the Appellant's Amended Brief, the argument was advanced that a principle has emerged in the practice of the Tribunal that an act classified as a crime against humanity should be punished more severely than an act classified as a war crime.[352]

241. In support of this submission, the Appellant relies on, *inter alia,* certain decisions of this Tribunal.[353] In particular, he draws attention to the judgement of the Appeals Chamber in the *Erdemovic* case in which the majority of the Appeals Chamber found that crimes against humanity should attract a harsher penalty than war crimes.[354]

242. This Chamber notes that, when the Appellant's Amended Brief was filed on 14 September 1999, the Judgement of the Appeals Chamber in the *Tadic* Sentencing Appeals Judgement was yet to be delivered.[355] In this latter case, the Chamber considered the case law now relied upon by the Appellant, but reached a conclusion, by majority, contrary to that which the Appellant now advocates:

> [T]*here is in law no distinction between the seriousness of a crime against humanity and that of a war crime*. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case.[356]

243. This Chamber notes that the same arguments now advanced by the Appellant were considered and rejected by the Appeals Chamber in the *Tadic* Sentencing Appeals Judgement. The question arises whether this Chamber should follow the *ratio decidendi* on this issue set out in that Judgement. In the recent *Aleksovski* Appeals Judgement the Appeals Chamber held that:

> [w]here, in a case before it, the Appeals Chamber is faced with previous decisions that are conflicting, it is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice.[357]

The Appeals Chamber will follow its decision in the *Tadic* Sentencing Appeals Judgement on the question of relative gravity as between crimes against humanity and war crimes.

2. Crimes resulting in loss of life are to be punished more severely than other crimes

244. The Appellant submits, and the Prosecutor agrees in principle, that crimes which result in the loss of human life should be punished more severely.[358]

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245. The Appellant submits that certain judgements of the Tribunal may serve as benchmarks for sentences to be handed down in relation to specific crimes. In particular, it is submitted that the judgements of the Trial Chambers in the *Tadic*[359] and *Erdemovic*[360] cases establish the maximum sentence for war crimes as nine years' imprisonment in cases in which the violation led to the death of the victim.[361] In the *Tadic* case, a person convicted of crimes against humanity was consistently sentenced to an additional three years in cases that resulted in the death or disappearance of victims. From this the Appellant deduces that violations which do not result in death should receive a sentence three years less than for those from which death results. In view of the above, the Appellant submits that an appropriate benchmark sentence for a violation of the laws or customs of war that does not result in the death of the victim is six years.

246. The reasoning behind this proposed benchmark of six years depends in part on the view that crimes resulting in loss of life are to be punished more severely than those not leading to the loss of life. The Appeals Chamber considers this approach to be too rigid and mechanistic.

247. Since the *Tadic* Sentencing Appeals Judgement, the position of the Appeals Chamber has been that there is no distinction in law between crimes against humanity and war crimes that would require, in respect of the same acts, that the former be sentenced more harshly than the latter. It follows that the length of sentences imposed for crimes against humanity does not necessarily limit the length of sentences imposed for war crimes.

248. The argument implicitly advanced by the Appellant in support of a six-year benchmark sentence is that all war crimes should attract similar sentences. The reasoning may be summarised as follows: because war crimes not resulting in death received sentences of six years in *Tadic*, it stands to reason that war crimes not resulting in death in this case should receive the same or a similar sentence. The Appeals Chamber does not agree with this logic, or with the imposition of a restriction on sentencing which does not have any basis in the Statute or the Rules.

249. In deciding to impose different sentences for the same type of crime, a Trial Chamber may consider such factors as the circumstances in which the offence was committed and its seriousness. While acts of cruelty that fall within the meaning of Article 3 of the Statute will, by definition, be serious, some will be more serious than others. The Prosecutor submits that sentences must be individualised according to the circumstances and gravity of the particular offence. The Appeals Chamber agrees with the statement of the Prosecutor that "the sentence imposed must reflect the inherent gravity of the accused's criminal conduct",[362] which conforms to the statement of the Trial Chamber in the *Kupreskic* Judgement:

> The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.[363]

This statement has been endorsed by the Appeals Chamber in the *Aleksovski* Appeals Judgement,[364] and there is no reason for this Chamber to depart from it.

250. The sentencing provisions in the Statute and the Rules provide Trial Chambers with the discretion to take into account the circumstances of each crime in assessing the sentence to be given. A previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances; otherwise, a Trial Chamber is limited only by the provisions of the Statute and the Rules. It may impose a sentence of imprisonment for a term up to and including the remainder of the convicted person's life.[365] As a result, an individual convicted of a war crime could be sentenced to imprisonment for a term up to and including the remainder of his life, depending on the circumstances.

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251. The Appellant's submission regarding the appropriate length of benchmark sentences is contradicted by recent Appeals Chamber practice. In the *Tadic* Sentencing Appeals Judgement, the Appeals Chamber pronounced sentences of twenty years for wilful killings under Article 2 of the Statute and for murders under Article 3 of the Statute,[366] both of which surpass the nine-year benchmark which the Appellant argues is appropriate for war crimes resulting in death.

252. The Appellant further relies upon the judgement of the Trial Chamber in the *Aleksovski* case in order to establish a benchmark for sentencing. In that case, the convicted person was sentenced to two and a half years in prison for outrages upon personal dignity. However, in the recent *Aleksovski* Appeals Judgement, the Appeals Chamber found that there was a discernible error on the part of the Trial Chamber in the exercise of its discretion, namely:

> giving insufficient weight to the gravity of the conduct of the Appellant and failing to treat his position as commander as an aggravating feature in relation to his responsibility under Article 7(1) of the Statute.[367]

The Appeals Chamber went on to sentence Zlatko Aleksovski to seven years, stating that, had it not been for an element of double jeopardy involved in the process, "the sentence would have been considerably longer."[368]

3. Additional arguments

253. The Appellant submits that "there are substantive issues that hang over the case" that suggest innocence is a possibility and that this should be considered in sentencing.[369] The Appeals Chamber rejects this argument. Guilt or innocence is a question to be determined prior to sentencing. In the event that an accused is convicted, or an Appellant's conviction is affirmed, his guilt has been proved beyond reasonable doubt. Thus a possibility of innocence can never be a factor in sentencing.

254. Accordingly, this ground of appeal must fail.

VIII. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER, UNANIMOUSLY**, rejects each ground of appeal, dismisses the appeal, and affirms the convictions and sentences.

Done in both English and French, the English text being authoritative.

_____
Mohamed Shahabuddeen
Presiding

_____
Rafael Nieto-Navia

_____
Fausto Pocar

_____
Patrick Lipton Robinson

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Lal Chand Vohrah

Dated this twenty-first day of July 2000
At The Hague,
The Netherlands.

Judge Shahabuddeen, Judge Vohrah and Judge Robinson append declarations to this Judgement.

[SEAL OF THE TRIBUNAL]

Annex A - Glossary of Terms

Aleksovski Appeals Judgement *Prosecutor v. Zlatko Aleksovski,* Case No. IT-95-14/1-A, Judgement, 24 Mar. 2000.

Amended Indictment *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-PT, Amended Indictment, 2 June 1998.

Appellant Anto Furundzija.

Appellant's Amended Brief *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-A, Defendant's Amended Appellate Brief sPublic Versions, 23 June 2000.

Appellant's Reply *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-A, Appellant's Reply Brief sPublic Versions, 23 June 2000.

Bungalow A well-known hostelry in the village of Nadioci, Central Bosnia.

Celebici Judgement *Prosecutor v. Zejnil Delalic et al.,* Case No. IT-96-21-T, Judgement, 16 Nov. 1998.

Confidential Decision *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Confidential Decision, 15 June 1998.

Defence Defence for Anto Furundzija.

Eur. Ct. H. R. Prior to 1996, the official publication of the Registry of the European Court of Human Rights was entitled "Publications of the European Court of Human Rights." Thereafter, the title was changed to "Reports of Judgments and Decisions."

European Convention on Human Rights European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.

First *Erdemovic* Sentencing Judgement *Prosecutor v. Drazen Erdemovic,* Case No. IT-96-22-T, Sentencing Judgement, 29 Nov. 1996.

HVO Croatian Defence Council.

Holiday Cottage Building adjacent to the Bungalow - living quarters of the Jokers.

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ICCPR International Covenant on Civil and Political Rights, 1966.

ICTR International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

Indictment *Prosecutor v. Anto Furundzija,* Case No. IT-95-17/1-T,

Indictment, 2 Nov. 1995.

International Tribunal or ICTY International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

Jokers A special unit of the military police of the HVO.

Judgement *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgement, 10 Dec. 1998.

Kupreskic Judgement *Prosecutor v. Zoran Kupreskic et al*, Case No. IT-95-16-T, Judgement, 14 Jan. 2000.

Large Room A room in the Holiday Cottage where the events alleged in paragraph 25 of the Amended Indictment occurred.

Pantry A room in the Holiday Cottage where the events alleged in paragraph 26 of the Amended Indictment occurred.

Prosecutor or Respondent Office of the Prosecutor.

Prosecutor's Response *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-A, Prosecution Submission of Public Version of Confidential Respondent's Brief of the Prosecution dated 30 September 1999, 28 June 2000.

PTSD Post-Traumatic Stress Disorder.

Re-opened proceedings Post-trial proceedings commencing on 9 November 1998, pursuant to the Trial Chamber's Decision of 16 July 1998. These proceedings ended on 12 November 1998.

Rome Statute Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998, U.N. Doc. A/CONF. 183/9.

Rules Rules of Procedure and Evidence of the International Tribunal.

Report of the Secretary-General Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993.

Second *Erdemovic* Sentencing Judgement *Prosecutor v. Drazen Erdemovic,* Case No. IT-96-22-T*bis,* Sentencing Judgement, 5 Mar. 1998.

SFRY Socialist Federal Republic of Yugoslavia.

Statute Statute of the International Tribunal.

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T. (2 March 2000) Transcript of hearing on appeal in *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-A. All transcript page numbers referred to in the course of this Judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public.

Tadic Appeals Judgement *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgement, 15 July 1999.

Tadic Sentencing Judgment *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Sentencing Judgment, 14 July 1997.

Tadic Sentencing Appeals Judgement *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 Jan. 2000.

[2001] ICR 306, (Transcript)

Re **Medicaments** and Related Classes of Goods

RESTRICTIVE PRACTICES COURT

[**2001**] ICR 306, (Transcript)

HEARING-DATES: 11 MARCH 1999

11 MARCH 1999

This is a signed transcript handed down the judge, with a direction that no further record or transcript need be made pursuant to Practice Direction 6.1 to Part 39 of the Civil Procedure Rules (formerly RSC Order, r(**1**) (f), order 68, r1). See Practice Note dated 9 July 1990, [1990] 2 All ER 1024.

COUNSEL:
D Oliver QC, J Turner, for the Appellant; M Cran QC for the Respondent; Treasury Solicitor, Cameron McKenna

PANEL: BUCKLEY J, MR JA SCOTT OBE, MR BD COLGATE

JUDGMENTBY-1: BUCKLEY J:

JUDGMENT-1:
BUCKLEY J:

This is the judgment of the Court. In 1970 the Court held that certain goods, described in a Schedule to the Court's Order and known as **Medicaments** and related classes of goods, should be exempted goods for the purpose of the Resale Prices Act, 1964. (The relevant act is now the Resale Prices Act, 1976 - "the Act"). In short, the Court permitted agreements leading to the maintenance of resale prices to continue. It found that to be in the public interest.

Two classes of **medicaments** were canvassed before the Court; ethicals, which are pharmaceutical products sold under brand names to wholesalers and retailers and principally obtained by the public on prescription, and proprietary medicines which are pharmaceutical products sold over the counter under brand names without the need for a prescription. Reference may be made to the report - In re **Medicaments** Reference (**No. 2)** 7 RP 267 for a full account of the proceedings and judgment.

The Director General of Fair Trading now applies to the Court under s 17 of the 1976 Act for leave to make an application under that Section inviting the Court to discharge the 1970 Order.

Mr Oliver QC, on his behalf, submits that since 1970 there has been a material change in the relevant circumstances in respect of **medicaments** and that since he has placed prima facie evidence of that before us, leave should be granted. See s 17(**1**) a. and (2).

It was not disputed before the court that there had been a material change in respect of ethicals in that manufacturers ceased to enforce resale price maintenance some time in the 1970s. Mr Cran QC, for the Proprietary Association of Great Britain and the Proprietary Articles Trade Association, however disputes any material change in circumstances relating to proprietary medicines. The Association of the British Pharmaceutical Industry, whose members manufacture ethicals, has taken no part in this application. On the evidence and in the absence of any contrary submission we find prima facie evidence of a material change in respect of ethicals. We proceed to consider proprietary medicines.

Section 17 of the Act provides for applications to the Court to discharge a previous exemption Order (17(**1**)(a).) or to make an exemption Order where the Court has previously refused to make **one** or discharge **one** (17 (**1**)(b).).

Section 17(2) provides:

"No application shall be made under this section except with the Court's leave, and that leave shall not be granted except upon prima facie evidence of a material change in the relevant circumstances since the Court's last decision in respect of the goods in question."

Mr Cran submitted that s 17(2) sets a high hurdle for the applicant and rightly so since a further hearing would involve all interested parties in a great deal of work and expense. In particular, he submitted that: "material change" means a change that would have led the Court to reach a different conclusion on the previous occasion; "prima facie" means evidence which if not contradicted drive the Court to find the fact in question, in the sense that not to do so would be perverse as opposed to evidence upon which the Court could reasonably so find; and finally, that "relevant circumstances" refers to an essential part of the Court's reasoning.

Mr Oliver contested each of those submissions, save the last, which was drawn from the judgment of Mocatta J. In re Cement Makers Federation Agreement (**No. 2)** [1974] 2 All ER 219, 1974 ICR 445 at 452F and followed by Ferris J. In re Net Book Agreement 1957 (No. 4) 1998 ICR 753 at 773F.

Provided it is understood that the reference to the Court's reasoning is a reference to the circumstances which the Court found to exist in its previous judgment, we accept the last submission, albeit we find it clearer to stick to the statutory words which seem plain enough. That both Mocatta J. and Ferris J. so understood the words is clear from their respective judgments. See, in particular page 448B et seq in the Cement case, where Mocatta J. in seeking to summarise the Court's earlier reasoning recites the relevant findings and proceeds to compare them with the "grounds" put forward in support of the application which comprised the "new factual situation". 449H; 450G and 453F et seq.

As to "material change" Mr Oliver submitted, and we accept, that it means a change which, sensibly regarded, might have led the Court to a different result. We believe that to be the natural meaning of the words, in context. To adopt Mr Cran's submission would involve the Court in, virtually, a full assessment of the case including the criteria set out in s 14 in order to judge whether the change or changes in question would have led to a different result, and all that at the leave stage.

As to "prima facie", academic opinion was cited to us which identified at least two shades of meaning, Mr Cran's and a lesser standard, namely, evidence from which a reasonable tribunal could draw a particular inference or find a particular fact. In the end Mr Oliver put forward a definition from Halsbury 4th Edition para 28:

" "Prima facie evidence" means evidence which, if not balanced or outweighed by other evidence, will suffice to establish a particular contention."

which seemed to us practically to bring the parties together. Evidence that will be accepted as sufficient to establish a particular contention may vary somewhat with the context and the precise standard must be left to the good sense of the tribunal, particularly where, as here, the Court has a residual discretion both under s 17 and s 14. We shall adopt this definition.

Finally, on these preliminary questions, but not unrelated to the last question, is Mr Cran's submission that the hurdle set up by s 17 is a high **one.** In so far as that was intended to import a standard different from an application of the words of the Section as we have interpreted them, we reject it. Restrictive Practices litigation is not analogous to ordinary inter partes litigation. There is the overriding interest of the public as consumers or users. It is not strictly inter partes in the private law sense. Nor is it surprising that the Court is empowered to alter previous decisions in appropriate circumstances. Aspects of the economy and consumers' interest change with the passage of time. It would defeat the public interest if, when circumstances change, the Court could not review its earlier decisions. We readily accept that the Court's duty is to scrutinise carefully the evidence adduced before committing the parties to a lengthy and expensive hearing, and to satisfy itself that it is sufficient. We find nothing in the wording of s 17 or rr 19, 20 or 21 of Resale Prices Rules, 1976 which encourages the Court, in construing the Section, to adopt a bias towards imposing a high hurdle for the applicant to surmount.

THE 1970 JUDGMENT

Section 14 of the Act provides:

"(**1**) Upon an application under Section 16 or Section 17 below the Restrictive Practices Court ("the Court") may make an Order in accordance with this Section directing that goods of any class shall be exempted goods for the purposes of this Part of this Act.

(2) The order referred to in sub-section (**1**) above may be made if it appears to the Court that in default of a system of maintained minimum resale prices applicable to those goods -

(a) .....;

(b) The number of establishments in which the goods are sold by retail would be substantially reduced to the detriment of the public as such consumers or users;

(c) .....;

(d) .....;

(e) .....;

and in any such case that the resulting detriment to the public as consumers or users of the goods in question would outweigh any detriment to them as such consumers or users (whether by the restriction of competition or otherwise) resulting from the maintenance of minimum resale prices in respect of the goods."

The Court held (see page 323G) that the Associations were entitled to succeed under s 5(2)(b) of the 1964 Act, now s 14(2)(b) of the 1976 Act. The Court so held because it had concluded on the evidence that the removal of resale price maintenance from proprietary medicines would result in more chemists going out of business more quickly and thus a loss of outlets for proprietary and prescribed medicines; further, that although there might be no loss of outlets for the small range of most popular proprietary medicines there would be a substantial loss of outlets for other less frequently demanded proprietary medicines, all to the detriment of the public. Although the more popular proprietary medicines would be found

in supermarkets at somewhat reduced prices, that would be outweighed by the detriment to the public arising from the first two findings (see page 323D - G).

The facts found by the Court which led to those conclusions are set out in the judgment beginning at page 310E and include the following:

(a) Most proprietary medicines were sold through chemists' shops but a small range of the most popular items (which nevertheless accounted for a substantial proportion by value) were sold elsewhere;

(b) Those items were price maintained and but for RPM supermarkets and other outlets would cut prices on them;

(c) The prime importance to the retail chemist of sales of proprietary medicines was the large number of customers they brought to the shop, which was a significant factor in promoting sales of other lines; (at page 302H the Court had described the retail chemists' business as comprising: dispensing prescriptions, selling proprietary medicines and over-the-counter sales of a large number of miscellaneous goods including cosmetics, photographic materials and toiletries);

(d) Many chemists (40%) were only marginally profitable and vulnerable to any change in their economic position;

(e) Supermarket trading was on the increase;

(f) Very many smaller chemists' shops were in rural areas or urban areas but away from shopping centres and would suffer severely from any success by supermarkets in changing the shopping habits of the public;

(g) The number of chemists' shops had been declining for a considerable number of years, for example from 15,300 in 1954 to 12,800 by the end of 1969; that trend reflected a general trend away from small local businesses and was attributable to the economic climate of the age and a decline in local shopping;

(h) In the absence of RPM, supermarkets in particular would increase their share of the market for the most popular brands of proprietary medicines;

(i) A corresponding loss of trade for retail chemists not only in proprietary medicines but in their other miscellaneous goods would be likely to increase substantially the rate at which small retail chemists were going out of business;

(j) That would not lead to an overall loss of outlets but to a loss of those outlets supplying the large range of items not in frequent demand, and also prescriptions;

(k) The main casualties would be in urban areas away from shopping centres.

Mr Cran drew our attention to certain other findings, including that it was important to the proper functioning of the National Health Service that there should be an adequate and efficient supply of household medicines available to the public, that professional advice was available in a chemist's shop and that ease of access to a chemist was a matter of public importance, particularly, for the old, infirm and mothers of young children who make most use of chemists.

THE CHANGES

Mr Whitehorn's affirmation in support of the Director General's application for leave asserts

that there have been changes in the circumstances found by the Court in 1970, including a change in the balance of detriment (perhaps a convenient paraphrase of the last quoted paragraph of s 14). The evidence in support is largely contained in the substantial Office of Fair Trading Report (the OFT Report) finalised in December 1997. The OFT Report is the product of its review of developments in the pharmaceutical retailing market commenced in October 1995. It collected and analysed information from manufacturers, a major wholesaler, most of the major retail chains and some independent chemists, relating to sales in the United Kingdom of proprietary and related products. It also obtained information on both price maintained and other medicines from a number of the most important non-pharmacy outlets including some of the main supermarkets.

The Office also obtained information from the Department of Health and commissioned a consumer survey from Taylor Nelson AGB on shopping patterns with particular reference to chemists.

A consultation paper was issue in 1996 which prompted 55 replies.

All this led the Director General to the view that material changes had occurred since 1970 and he announced his intention to ask the Court for leave to apply to discharge the 1970 Order on 18 October 1996. Further enquiries and work led to the final report.

We mention those facts in view of Mr Cran's criticisms of certain passages of Mr Whitehorn's affirmation and his submission that evidence, not assertion or non-expert opinion is required. We accept that some inappropriate, but forgivable, passages crept into the affirmation. However, we are satisfied that the OFT Report and other exhibits to the affirmation provide more than enough evidence for us to reach a clear conclusion.

Mr Whitehorn identifies eight principal changes in respect of proprietaries. We proceed on the basis that we are entitled, indeed bound, to consider those changes individually and together. That seems to us to follow from the wording of ss 14 and 17. In particular, two or more changes may become material if, taken together, they could affect the balance of detriment, albeit **one** alone may not. We also remind ourselves that our charge is to identify prima facie evidence. By definition, that means evidence filed by the Respondent, however interesting, is likely to be unhelpful at this leave stage. In practice and because all are agreed that the Court has a discretion under s 17, we acknowledge that if incontrovertible evidence was available which clearly undermined the factual assertions put forward by an Applicant or demonstrated that they were thoroughly misleading it would be helpful for it to be adduced by a Respondent. However, since the section does not envisage an evidential battle any such evidence should be strictly controlled. It would, for example, have been better in this case had the matter been brought before a Judge of the Court for directions as to the filing of evidence. We note in passing that r 20 makes no express provision for evidence on behalf of a Respondent. We do not find that surprising and believe the position should be as we have stated. In the event a considerable amount of evidence was filed on behalf of the Respondents to which we have given careful consideration.

We turn to the eight changes put forward by the Director General.

(i) Contrary to the decline in the numbers of small chemists identified by the Court in 1970 there is now evidence that the position has stabilised. The decline continued during the 1970s to a low point of 10,600 in 1980. Numbers then rose to 12,000 in 1987 and have remained roughly stable since them with a peak of 12,300 in 1996. Indeed, in about 1987 controls administered by the Health Authorities were introduced with a view to curbing the increase in the number of small pharmacies. The controls remain in force. In 1970 the Court found that small chemists were a disappearing species. We regard this as evidence of a material change and certainly so when considered in context with the other changes;

(ii) The Taylor Nelson AGB survey revealed that 62% of those sampled said their main reason for visiting a chemist was to have a prescription dispensed, compared with 16% who gave other reasons for visiting a chemist. This is evidence of a change in shopping habits since 1970. It is an important **one** because of the Court's finding as to the "promotional" value of proprietaries for the chemists' other miscellaneous sales. The sale of cosmetics and other miscellaneous items has clearly declined and whereas the Court found that some manufacturers of medium priced cosmetics marketed their products solely through chemists' shops in 1970, the OFT Enquiry revealed no evidence of any manufacturers following that practice today. Mr Cran accepted that a change had occurred in the mix of business of today's chemists. It was also common ground that about 73% of a chemist's turnover in 1995 was from National Health Service prescriptions as compared with 45% in 1970. Thus there is evidence that the role of proprietaries as a "promoter" of other over-the-counter sales is much diminished and over-the-counter sales themselves pay a lesser role in maintaining the viability of independent chemists. These are clearly changes compared with the circumstances found by the Court in 1970. We consider them to be material and it would be important for a Court to consider them in conjunction with (i) above and (iii) below;

(iii) There is clearly evidence of a change in the mix and financial structure of an independent chemist's business. As stated above National Health Service prescriptions now account for about 73% of turnover. This is a substantial increase and sales of both proprietaries and miscellaneous items have decreased markedly. Mr Cran accepted there had been a change in this respect but submitted it was not material. In particular he submitted the evidence was insufficient to show any real change in the mix or pattern of trading or vulnerability of the 40% of chemists identified in the 1970 judgment. However, the Court in 1970 looked at the business of retail chemists as a group. We see no reason to regard the most vulnerable independent chemists as inherently different in this respect and adopt the same approach. Again we regard this change in the pattern of business to be material, the more so when considered with (i) and (ii) above;

(iv) There was evidence before us of so called "clustering" of small chemists shops. The OFT Report and the 1992 National Audit Office Report (also exhibited to Mr Whitehorn's affirmation) contain evidence of this phenomenon. The National Audit Office Report goes so far as to conclude on the basis of its analysis of distribution of chemists in Lancashire and Gateshead, that most low volume chemists made little contribution to the accessibility of the service. That is based simply on the fact that a significant number of small chemists are situated in close proximity to others. Mr Oliver acknowledged that the Court in 1970 did not mention this phenomenon but submitted that at least taken in conjunction with (i), (ii) and (iii) above it was a material change. Mr Cran, whilst accepting that a new fact or circumstance could constitute a material change, pointed out that "clustering" was not a new fact since the OFT Report clearly recognised its existence in 1970. We would not regard "clustering" as a material change taken by itself. However, given other material changes which we do not find, it is at least an added factor to be considered in the exercise of our overall discretion;

(v) In 1970 there appears to have been no evidence of supermarket trends, save that the Court envisaged that in the absence of price maintenance supermarkets would stock and compete for sales of the most popular brands of proprietaries. The evidence today is very different. Despite price maintenance not only is there evidence that some supermarkets stock a wide range of proprietaries but some are locating pharmacies within their stores. For example, Safeway stocks some 1,800 items, which compares favourably with the stocks held by large chains of chemists' shops. Many supermarket pharmacies dispense prescriptions. This concept was not envisaged by the Court in 1970. The OFT Report which contains figures showing the numbers of pharmacies in supermarkets, drew on the 1996 Report of the Monopolies and Mergers Commission into the proposed mergers of Unichem plc/Lloyds Chemists plc and GEHE AG/Lloyds Chemists plc. We were given some further updated figures during the course of the hearing. It seems the total number of supermarket pharmacies is in

excess of 400 and according to our latest figures has risen to 474. These changes were accepted by Mr Cran but he submitted they were not sufficient to be material. He accepted that Safeway stocked about 1,800 different lines of proprietaries but suggested Tesco stocked 900 and Asda and Sainsbury's no more than 200. The number of non-dispensing supermarket pharmacies, he submitted, was around 3% of the total number of retail chemists. We regard these developments in supermarket trading and retailing generally to be significant. They were not envisaged by the Court in 1970 and we regard them as material changes. Again, they have added weight when considered in conjunction with the other changes identified. We add here that there has also been a growth in the number of dispensing doctors from 2,500 to 4,400 and they now account for some 7% of all dispensed prescriptions. This, particularly taken with the increase in pharmacies in supermarkets, clearly has an effect on the availability of outlets for prescriptions. This factor alone may not constitute a material change but it adds weight to the overall picture;

(vi) The 1970 Court judgment placed no significance at all on own-brand goods. Research into the transcript and proofs of evidence from 1970 has yielded scant reference to the topic. Only Mr Harold Moss (chemist) mentions them but foresaw no great scope for own-branding, nor were his own brands generally cheaper than proprietaries. The evidence suggests the position today is very different. Own-brand sales by supermarkets account for about 20% by value. Since they are dramatically cheaper than equivalent branded proprietaries the percentage by volume would be higher. Mr Cran submitted that the evidence concerning own-brands was insufficient and reminded us that chemists have always sold own-brands. Notwithstanding those submissions we regard these changes as significant. They constitute yet further evidence of the significant overall changes in the pattern of retail trade in or connected with proprietaries;

(vii) The Court in 1970 recognised the existence of chains of retail chemists. However, the evidence demonstrates that such chains now account for a significantly higher proportion of outlets compared with single retail shops. The parties differ as to whether that constitutes any evidence that individual chemists or the more vulnerable **ones** amongst them are likely to go out of business. Although protecting vulnerable chemists may be convenient shorthand, it is as well to remind ourselves that the business of the Court is not to protect individual chemists per se. It is to preserve a sufficient number of outlets for pharmaceutical products for the public as consumers and users. Thus the demise of an individual chemist shop may be sad for the proprietor but it is not against the public interest provided the shop is taken over by a chain or if there exists another suitable outlet in the vicinity. Again, if the growth in chains was considered alone, however unrealistically, it might not constitute a material change. But it is, nevertheless, a significant piece of the jigsaw of retail trading in pharmaceuticals;

(viii) Finally, the Director General points to an alleged dramatic increase in the price of popular brands of proprietary medicines. This would, of course, increase the detriment to the public interest that the Court identified in 1970. Whilst we are satisfied that there has been a significant increase in price in real terms, we have not found it easy on the present evidence to identify how far this has gone. Because of its potential impact on the detriment mentioned it seems to us that this also is a significant part of the overall picture.

We have identified those changes we regard as material in themselves. We have done this since Mr Cran specifically invited us to do so and we have considered the evidence in respect of each separately. We do, however, feel that the real change since 1970 may be described more generally as a change in the pattern of retail trading in pharmaceuticals, which includes the number of retail outlets. Whether we are right or wrong in individual instances we have no doubt that overall there is prima facie evidence that the matters raised on behalf of the Director General constitute a material change in the retailing of pharmaceuticals and that the circumstances found by the Court in 1970 have materially changed. Clearly such a change could alter the Court's conclusion under s 14(2)(b) and/or the balance of detriment.

It might be thought surprising if little of significance had changed in the last 29 years, but however that may be, in view of the evidence to which we have referred and the importance of the matters to the public as consumers and users, we are convinced it is in the public interest for the Court to revisit this matter and the Director General is given leave.

DISPOSITION:
Judgment accordingly.??

[2001] UKHL 67, [2002] 2 AC 357

Porter v **Magill; Weeks** v **Magill**

Court of Appeal (Civil Division); House of Lords

[2001] UKHL 67, [2002] 2 AC 357

HEARING-DATES: 22, 23, 24, 25, 26, March, 30 April 1999, 5, 6, 7, 8, 12 November, 13 December 2001

30 April 1999; 13 December 2001

CATCHWORDS:
Local government - Audit - Loss due to "wilful misconduct" - Majority party's policy to sell council properties in marginal wards - Legal advice that policy unlawful - Revised policy adopted by housing committee and endorsed by council - Allegations of breach of statutory obligations and gerrymandering - Auditor certifying substantial loss due to wilful misconduct of responsible persons - Whether policy unlawful - Whether evidence establishing wilful misconduct - Auditor's refusal to discharge himself following objections to conduct of investigation - Whether investigation conducted fairly - Whether real possibility of bias - Local Government Finance Act 1982 (c 32), s. 20 - Human Rights Act 1998 (c 42), Sch. 1, Pt I, art 6(1)

HEADNOTE:
In the local government elections in May 1986 the Conservative Party retained control of a city council with a much reduced majority. In the belief that home owners were more likely than council tenants to vote Conservative, P and W, the leader and deputy leader of the council, formulated a policy to sell, pursuant to powers under section 32 of the Housing Act 1985, 250 council properties a year in eight marginal wards. Following legal advice that such targeted sales would be unlawful, the policy was revised to extend designated sales to 500 across the city while maintaining the target of 250 sales in the marginal wards. A report was prepared on three housing options with the revised policy, option 3, enjoying majority party support. The housing committee, of which neither P nor W was a member, adopted option 3 in July 1987. The council approved the committee's decision later in July. Measures to implement the policy were introduced and the progress of the policy was monitored. Opposition councillors objected that the policy prevented the council from meeting its statutory obligations as a housing authority, and in July 1989 gave notice of objection to the auditor under section 17 of the Local Government Finance Act 1982. The objectors requested that the council's auditor certify a sum due to the council as a result of wilful misconduct under section 20 n1 of the 1982 Act on the ground that all expenditure arising from the policy was unlawful. Having completed his investigation into the statutory objections in January 1994, the auditor announced his provisional findings in a press statement which attracted considerable publicity. He also made such findings available to those he had interviewed, including P and W, and invited submissions. After an audit hearing and further evidence on quantum of damages, in May 1996 the auditor gave a final decision. In reaching his conclusion the auditor found, with regard to P and W, that the council had adopted a policy with the predominant purpose of achieving electoral advantage for the majority party, that P and W were party to its adoption and implementation in the knowledge that it was unlawful and that the policy so promoted and implemented by them had caused financial loss to the council. In

n1 Local Government Finance Act 1982, s. 20: see post, paras 69, 70.

respect of the accounts for 1987-88 to 1994-95 the auditor certified that those responsible for the policy, including P and W, had jointly and severally by their wilful misconduct caused the council to lose approximately oe31m. The Divisional Court allowed appeals by the chairman of the housing committee, the director of housing and the managing director of the council but, accepting the auditor's findings in relation to P and W, dismissed their appeals, although the amount of the loss was reduced to £26,462,621. On their further appeal the Court of Appeal, by a majority, held that since they had acted on what they believed to be legal advice they were not guilty of wilful misconduct, that the Divisional Court had acted inconsistently in dismissing their appeals while allowing those of the other appellants and that, since other members of the housing committee had not voted for option 3 for improper reasons, any improper motive or purpose attributable to P and W did not render the committee's decision unlawful and was not causative of the council's loss. The Court of Appeal accordingly allowed their appeals and quashed the auditor's certificates.

On appeal by the auditor and on the questions whether the conduct of his investigation had been fair and P's and W's rights under article 6(1), as scheduled to the Human Rights Act 1998 n2 , had been infringed-

Held, (1) that a public power given to a local authority might only be exercised for the public purpose for which it had been conferred and those who exercised such a power otherwise misconducted themselves; that where they so acted knowingly or recklessly they were guilty of wilful misconduct and were liable under section 20 of the 1982 Act to make good to the local authority any consequent loss; that, although councillors did not act improperly or unlawfully if, exercising a power on behalf of a council for its proper purpose, they hoped to obtain the electorate's support and strengthen their electoral position and although they might lawfully support party policy so long as they did not abdicate responsibility to exercise personal judgment, powers conferred on a local authority might not lawfully be exercised to promote the electoral advantage of a political party; and that, accordingly, while the council might lawfully dispose of its property in exercise of its powers under section 32 of the 1985 Act it could not do so lawfully to promote the electoral advantage of any party represented on the council (post, paras 19, 21-22, 59-60, 144, 164).

(2) Allowing the appeal, that there were no grounds to doubt the correctness of the findings on which, as primary fact-finders, the auditor and the Divisional Court had based their decisions; that those findings precluded P's and W's claim to reliance on legal advice, in particular, since such advice had not been sought as to the lawfulness of a revised policy in the form of option 3 and since they plainly knew that such a policy was unlawful; that given the strength of the findings against them they suffered no injustice from the Divisional Court's dismissal of their appeals while those of the other appellants had been allowed; that, given P's and W's acceptance that once option 3 had been adopted by the majority party it would be approved by the housing committee, that committee's decision to adopt the policy gave effect to its unlawful purpose, whatever the voting reasons of individual members; further that, if account were taken of those reasons, the resolution was invalid for want of a majority, since the votes of chairman and vice-chairman were tainted by knowledge of the policy's unlawful purpose and other members were not in a position to exercise an independent and informed judgment; and that, accordingly, the chain of causation was unbroken between P's and W's wilful misconduct and the loss caused to the council (post, paras 25-26, 28-29, 31-32, 40, 45-48, 50-60, 131, 144, 148, 155, 163-164).

(3) That, assuming P and W might rely on Convention rights irrespective of the acts in question predating implementation of the 1998 Act, proceedings under section 20 of the

1982 Act were not punitive in character but compensatory and

n2 Human Rights Act 1998, Sch. 1, Pt I, art 6(1): "In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

regulatory, the measure of compensation being the amount of loss suffered, and there was no provision for a fine or penalty by way of imprisonment; and that, therefore, the proceedings before the auditor were civil, and not in the nature of a criminal charge; that on its proper construction article 6(1) created separate, though closely related rights, which required separate consideration; that, although the auditor's role within the context of the 1982 Act required him to act as investigator, prosecutor and judge, the requirement of the tribunal's independence and impartiality was met by the right of appeal from his decision provided by section 20(3) by way of a full rehearing by the appellate court; that, since the Divisional Court's conduct of the appeals satisfied the requirement of independence and impartiality, that element of P's and W's rights under article 6(1) were fully protected; that the appropriate test in determining an issue of apparent bias was whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased; that since the auditor had emphasised in his public statement that his findings were provisional, since a progress statement would have been appropriate in view of the public interest in the matter and having regard to his subsequent conduct, no real possibility of bias was shown; that the right to a determination of a person's civil rights within a reasonable time was, on a proper interpretation of article 6 (1), an independent right which was not to be regarded simply as part of an overriding right to a fair trial and did not require the complainant to show himself prejudiced by the delay; that, having regard to the complexity of the case and the volume of evidence before the Divisional Court, to the immense scope of the auditor's investigations and to his constant activity in the pursuit of information, the proceedings did not exceed the reasonable time requirement in article 6(1); and that, accordingly, P's and W's Convention rights were not infringed and they suffered no unfairness at common law (post, paras 57, 59-60, 82, 85-87, 92-94, 102-103, 105, 106, 108, 109-114, 118, 131, 161).

K"nig v Federal Republic of Germany (1978) 2 EHRR 170, Findlay v United Kingdom (1997) 24 EHRR 221 and Darmalingum v The State [2000] 1 WLR 2303, PC applied.

R v Gough [1993] AC 646, HL(E) and In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700, CA considered.

(4) That the underlying principle in providing for certification under section 20 of the 1982 Act was to compensate the body which had suffered the loss by such amount as would put it in the position it would have been in but for the relevant wilful misconduct; that since the council's loss was the difference between the full market value of the properties sold and the discounted prices received no element of double counting in the auditor's calculation had been demonstrated; and that, accordingly, the sum certified by him, as reduced by the Divisional Court, would be restored (post, paras 54-56, 59, 126, 129-130, 131, 160, 163-164).

Decision of the Court of Appeal [2000] 2 WLR 1420 reversed.

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INTRODUCTION:
APPEAL from the Divisional Court of the Queen's Bench Division

By a notice of appeal amended in November 1998 the appellant, Dame Shirley Porter, appealed from the decision of the Divisional Court on 19 December 1997 dismissing her appeal against the certificate of the respondent auditor, John **Magill,** made under section 20 of the Local Government Finance Act 1982 on 9 May 1996 and giving a certificate that the appellant by wilful misconduct caused a loss to Westminster City Council in the sum of oe27,023,376 amended to oe26,462,621 on 12 January 1998.

The grounds of appeal were, inter alia, first in relation to unfairness, that the Divisional Court erred in law and fact or exercised its discretion on an erroneous basis in failing to find that the bias or appearance of a real danger of bias or manifest unfairness of the auditor rendered the procedure grossly defective and so prejudiced the appellant that it would have been appropriate to quash the auditor's decision, alternatively if the Divisional Court was justified in embarking on a rehearing it erred in law or exercised its discretion on an erroneous basis in failing to provide a full rehearing, that the Divisional Court erred in law in applying the test of whether there was a real danger of bias, the correct test being whether there was an appearance of a real danger of bias, that the Divisional Court erred in its application of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969), in particular in finding that the proceedings were not criminal within article 6, in concluding that there had been no breach of the reasonable time guarantee in article 6 and in rejecting the contention that it was incompatible with article 6 for the auditor to exercise the

functions of investigator, expert witness, judge and prosecutor.

In relation to liability, the grounds of appeal were, inter alia, that the Divisional Court erred in law in finding that the decision of the housing committee of 8 July 1987 was unlawful, that in view of the burden and high standard of proof the Divisional Court erred in finding the appellant guilty of wilful misconduct, that the Divisional Court misunderstood the meaning, effect and purpose of the legal advice given to the appellant and misunderstood the role of political considerations in local government decisions and the appellant's understanding of it, that the Divisional Court erred in law and fact in finding that the housing committee's resolution of 8 July 1987 was caused by the appellants, and in finding that the policy of building stable communities targeted marginal wards.

In relation to the loss and deficiency, the Divisional Court erred in law and in fact in finding that any loss was caused to the council.

By a notice of appeal the appellant, David **Weeks,** appealed in substantially the same terms.

By respondent's notices dated 2 April 1998 in relation to Mr **Weeks** and 29 July 1998 in relation to Dame Shirley Porter, the auditor contended that the order of the Divisional Court should be affirmed or the certificates varied to oe28,142,103 on the grounds, inter alia, (1) that the court erred in holding that it was for the appellants to show merely that the auditor had appearedto go wrong in any respect and that, if they did, it was then for the auditor to prove misconduct causing loss. The court should have held (i) that it was for the appellants to establish that the auditor had in fact erred in some respect, whether in fact or in law, on grounds specified in the grounds of appeal, (ii) that if the appellants discharged that burden then it was for the auditor to show none the less that his decision to issue the certificate in respect of a particular amount should be upheld or that the certificate should be varied and (iii) that, in doing so, the auditor was entitled to rely on any findings in respect of which the appellants had not shown that the auditor had erred in some respect as specified in the appellants' grounds of appeal; (2) that the court erred in holding that prima facie the auditor went wrong in giving no consideration to the impact on the state of mind of the appellants of Mr England's report of 5 May 1987 of the advice given by Jeremy Sullivan QC; (3) that the court erred in treating the auditor as having prima facie gone wrong in relation to the impact on the appellants of Mr England's report of 5 May 1987 of Mr Sullivan's advice as the court's own specific findings on that impact in relation to the electoral advantage of the Conservative Party were consistent with and supported those of the auditor; (4) that the court erred in treating the impact of that advice on the appellants as sufficient to place on the auditor the onus of proving wilful misconduct causing loss in respect of all matters whether or not the auditor's findings in relation thereto were the subject of any, or any successful, grounds of appeal; (5) that the court erred in law in holding that a person reaching or promoting a decision would only be guilty of wilful misconduct if he knew, or was recklessly indifferent to whether, the decision was unlawful, whereas it was sufficient for him to be guilty of wilful misconduct if he deliberately did, or omitted to do, something knowing such conduct to be wrong or with reckless indifference to whether or not it was wrong; (6) that the court should have found that the decision of the housing committee was unlawful for the reasons given by the auditor; and (7) that the court erred in disallowing an apportioned part of central management and other costs on the ground that they would have been incurred in any event and that only increased marginal costs involved an authority in a loss.

The facts are stated in the judgments of Kennedy and Robert Walker LJJ.

The auditor appealed.

John Howell QC and Karen McHugh for the auditor. Councillors must exercise their statutory powers for the public purposes for which those powers are conferred: see R v Waltham Forest London Borough Council, Ex p Baxter [1988] QB 419 and R v Local Comr for

Administration in North and North-East England, Ex p Liverpool City Council [2001] 1 All ER 462. Statutory powers are held on trust and cannot validly be used for the purpose of promoting the electoral advantage of any particular party or the re-election of an individual councillor. The power to dispose of land under section 32 of the Housing Act 1985 cannot be used for such an unlawful purpose: see Credit Suisse v Allerdale Borough Council [1997] QB 306; R v Tower Hamlets London Borough Council, Ex p Chetnik Developments Ltd [1988] AC 858; Padfield v Minister of Agriculture,Fisheries and Food [1968] AC 997; R v Board of Education [1910] 2 KB 165 and R v Port Talbot Borough Council, Ex p Jones [1988] 2 All ER 207.

"Wilful misconduct" within section 20 of the Finance Act 1982 is the wrongful and deliberate act or omission with knowledge of its wrongfulness or with reckless indifference as to whether or not it is wrong: see Graham v Teesdale (1981) LGR 117 and Lloyd v McMahon [1987] AC 625. Councillors are, in any event, required to discharge their duties to the best of their ability and judgment and may be liable to make good resources whose unlawful alienation they have procured: see Asher v Lacey [1973] 1 WLR 1412; Asher v Secretary if State for the Environment [1974] Ch 208; Smith v Skinner (1986) 26 RVR 45; Parr v Attorney General (1842) 8 Cl & Fin 409; Attorney General v De Winton [1906] 2 Ch 106; Barrs v Bethell [1982] Ch 294; Charitable Corpn v Sutton (1742) 2 Atk 400; Attorney General v Wilson (1840) Cr & Ph 1 and Attorney General v Belfast Corpn (1855) 4 Ir Ch R 119.

The Divisional Court's findings were well founded and the Court of Appeal was not entitled to interfere with or displace them: see SS Hontestroom (Owners) v SS Sagaporack (Owners) [1927] AC 37; Watt or Thomas v Thomas [1947] AC 484; R v Birmingham City District Council, Ex p O [1982] 1 WLR 679; [1983] 1 AC 578; In re District Auditor for London, Ex p Riley (unreported) 20 November 1944; Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378; Pooley v District Auditor No 8 Audit Office (1964) 63 LGR 60 and Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd [1999] 2 AC 22.

The Divisional Court was correct to hold that the council suffered a loss when it disposed of the dwellings at less than their open market value: see Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997] AC 191. The Divisional Court was also correct in holding that the additional homelessness costs incurred as a result of the unlawful disposal of any property involved no element of double-counting. Those costs would have been incurred whether the properties were disposed of at market value or at less than their market value, and no interest was assessed on the delayed recovery of the value lost on the disposal of the dwellings.

Jeremy McMullen QC, Stuart Cakebread and Clare Roberts for Dame Shirley Porter. Although a local authority must exercise its statutory powers consistently with the purposes for which they were conferred (see Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997 and Credit Suisse v Allerdale Borough Council [1997] QB 306), councillors are in general elected on a party political manifesto. Reality demands that Party political or electoral considerations may be relevant to the development of policy or the deliberations of councillors in committee and will not necessarily render their decision unlawful. The motivation of the individual members cannot be ascribed to the council. If, therefore, the voting members were ignorant of the unlawful purposes of non-voting members or knew of them but did not take them into account; those purposes would have no bearing on the lawfulness of the voting members' decision: compare Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378. The decision would only be unlawful if the voting members relied upon the political motivation of the non-voting members of the exclusion of local government reasons. Since the housing committee's decision was lawful the motivation of P was irrelevant: see R vSheffield City Council, Ex p Chadwick (1985) 84 LGR 563; R v Waltham Forest London Borough Council, Ex p Baxter [1988] QB 419; Jones v Swansea City Council [1990] 1 WLR 54; [1990] 1 WLR 1453; R v Bradford City Metropolitan Council, Ex p Wilson (Note)[1990] 2

QB 375; R v Local Comr for Administration in North and North-East England, Ex p Liverpool City Council [2001] 1 All ER 462; R v Port Talbot Borough Council, Ex p Jones [1988] 2 All ER 207; R v Derbyshire County Council, Ex p The Times Supplements Ltd (1991) 151 LG Rev 123; Smith v Skinner 26 RVR 45; R v Bradford Metropolitan City Council, Ex p Wilson (Note) [1990] 2 QB 375; In re Magrath [1934] 2 KB 415; R v Secretary of State for Foreign and Commonwealth Affairs, Ex p World Development Movement Ltd [1995] 1 WLR 386 and In re District Auditor for London, Ex p Riley (unreported) 20 November 1944.

The test of wilful misconduct within the meaning of section 20 of the Local Government and Finance Act 1982 is defined in Graham v Teesdale 81 LGR 117. For a member to be liable for a decision of the council it is a necessary, but not sufficient, condition that the decision is unlawful: see Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2000] 2 WLR 1220. Section 20 must be strictly construed; the law must be adequately accessible, clear and predictable and so defined that members and officers can regulate their conduct and reasonably know the circumstances in which they would risk certification. "Misconduct" means "improper conduct" and connotes malfeasance or culpable neglect: see Horabin v British Overseas Airways Corpn [1952] 2 All ER 1016. It must consist of conduct which takes place in relation to the member's office. Moving a political programme to achieve electoral advantage is not enough.

The standard of proof for wilful misconduct is high and will only be satisfied if the member knew that his conduct was unlawful. The test of whether a councillor has acted with reckless indifference is no less stringent than that applicable to misfeasance in public office: see Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2000] 2 WLR 1220. Reliance on legal advice is a defence: see Asher v Lacey [1973] 1 WLR 1412; Asher v Secretary of State for the Environment [1974] Ch 208; Lloyd v McMahon[1987] AC 625 and Ex p Riley (unreported) 20 November 1944. In assessing whether P had the necessary belief that her conduct was unlawful regard must be had to her knowledge and expertise. An unpaid lay councillor is not in the same position as a paid professionally qualified senior council officer: see In re Waterman's Will Trusts; Lloyds Bank Ltd v Sutton [1952] 2 All ER 1054 and Bartlett v Barclays Bank Trust Co Ltd (Nos 1 and 2) [1980] Ch 515. Liability should only be imposed on councillors where they are sufficiently aware of what they are doing.

The Court of Appeal was entitled to review the Divisional Court's findings: see Watt or Thomas v Thomas [1947] AC 484, equality of treatment is a fundamental principle. Like cases should be treated alike unless there is sound justification for not doing so. See also, Arthur J S Hall & Co v Simons [2002] 1 AC 615; R v Westminster City Council, Ex p Union of Managerial and Professional Officers [2000] LGR 611; R v Hertfordshire County Council, Ex p Cheung The Times, 4 April 1986; Court of Appeal (Civil Division) Transcript No 287 of 1986; Police v Rose [1976] MR 79; Matadeen v Pointu [1999] 1 AC 98 and Belgian Linguistic Case (No 2) (1968) 1 EHRR 252.

The object of the section 20 certificate is to restore a local authority to the position it would have been in if the unlawful act had not occurred. The Court of Appeal was correct to conclude that there was no loss if the discounted prices actually received by the Council exceeded the value of the dwellings as tenanted social housing. Since the Council did not intend to acquire replacement properties at full market price it was not reasonable that it be entitled to receive the difference between that price and the discounted price: see Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344; Attorney General v Blake [2001] 1 AC 268; Livingstone v Rawyards Coal Co (1880) 5 App Cas 25; The Argentino (1888) 13 PD 191; East Ham Corpn v Bernard Sunley & Sons Ltd[1966] AC 406; CR Taylor (Wholesale) Ltd v Hepworths Ltd [1977] 1 WLR 659; Ministry of Defence v Ashman (1993) 25 HLR 513 and R v Roberts[1908] 1 KB 407.

The decisions of the auditor and of the Divisional Court should in any event be set aside on the ground that they were unfair and in breach of P's rights at common law and under article

6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: see R v Lambert [2001] 3 WLR 206; R v Kansal (No 2) [2002] 2 AC 69; R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326; R v Benjafield [2001] 3 WLR 75; Klass v Federal Republic of Germany(1978) 2 EHRR 214 and King v Walden [2001] STC 822. Although the Convention was not then part of the domestic law P may rely on it: see R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532.

In exercising his wide discretions under the 1982 Act, the Auditor had to act consistently with the Convention: see R v Secretary of State for the Home Department v Brind [1991] 1 AC 696 and Derbyshire County Council v Times Newspapers Ltd[1992] QB 770. By virtue of article 6 he is obliged to determine issues impartially within a reasonable time and in accordance with principles of natural justice and fairness. It is relevant to consider the structural unfairness of the statutory scheme under which he operates: see Preiss v General Dental Council[2001] 1 WLR 1926. The multiplicity of roles he is required to perform-investigator, prosecutor and decision-maker-violates his article 6 obligation to act with independence and impartiality: see Piersack v Belgium (1982) 5 EHRR 169; Findlay v United Kingdom (1997) 24 EHRR 221; De Cubber v Belgium (1984) 7 EHRR 236; Hauschildt v Denmark (1989) 12 EHRR 266 and Ringeisen v Austria (No 1) (1971) 1 EHRR 455.

Article 6 requires not only that its safeguards are met where the initial determination of civil rights or obligations is made by a court (see De Cubber v Belgium (1984) 7 EHRR 236) but also that, where that determination is made by an administrative or quasi-judicial body, an appeal lies to a judicial body which itself complies with article 6: see Albert and Le Compte v Belgium (1983) 5 EHRR 533. Where serious criminal charges are brought the accused is entitled to appear before a first instance tribunal which fully meets the requirements of article 6: see Findlay v United Kingdom 24 EHRR 221. Any appeal tribunal whether criminal or civil, must comply with Article 6: Delcourt v Belgium (1970) 1 EHRR 355. However, the auditor is not a tribunal within the meaning of article 6: see Belilos v Switzerland (1988) 10 EHRR 466. His office is not established by statute as a court and he is not obliged to administer justice in public. Nor is he an "inferior court" under English law whose functions can be protectedby contempt proceedings: see Attorney General v British Broadcasting Corpn [1981] AC 303. He is not a judicial forum applying the rules of due process which would be applied in a court or judicial tribunal.

"Wilful misconduct" under section 20 of the 1982 Act has a criminal or quasi-criminal character. Classification of offences under domestic law is not determinative for the purposes of the Convention: see Deweer v Belgium (1980) 2 EHRR 439. Thus the substance rather than the form of the "offence" has to be examined in the light of the severity and nature of the penalty and the stigma involved in any finding of "guilt": see AP, MP and TP v Switzerland (1997) 26 EHRR 541; B v Chief Constable of Avon and Somerset Constabulary [2001] 1 WLR 340; R (McCann) v Crown Court at Manchester [2001] 1 WLR 1084; Lutz v Germany (1987) 10 EHRR 182; Bendenoun v France (1994) 18 EHRR 54; Georgiou (trading as Marios Chippery) v United Kingdom [2001] STC 80; King v Walden[2001] STC 822; Lloyd v McMahon [1987] AC 625; R (Greenfield) v Secretary of State for the Home Department [2001] 1 WLR 1731; Lauko v Slovakia (1998) 33 EHRR 994; Demicoli v Malta (1991) 14 EHRR 47; Engel v Netherlands (No 1) (1976) 1 EHRR 647; Weber v Switzerland(1990) 12 EHRR 508; Pierre-Bloch v France (1997) 26 EHRR 202; Campbell and Fell v United Kingdom (1984) 7 EHRR 165; Customs and Excise Comrs v City of London Magistrates' Court [2000] 1 WLR 2020 and Garyfallou AEBE v Greece (1997) 28 EHRR 344. G v France (1988) 57 DR 100 is distinguishable on its facts.

Since, on the basis that for the purposes of the Convention, wilful misconduct is to be treated as criminal, the procedural safeguards of article 6, in particular the presumption of innocence (as well as under the common law: see Woolmington v Director of Public Prosecutions [1935] AC 462), must be observed whatever procedure is adopted. Although rules of evidence are for the domestic law to determine, a reverse onus rule must be within reasonable limits and

the overall effect of the proceedings must safeguard P's rights. Here they failed to do so (see Barber..., Messegue and Jabardo v Spain (1988) 11 EHRR 360; Allenet de Ribemont v France (1995) 20 EHRR 557; Salabiaku v France (1988) 13 EHRR 379 and Krause v Switzerland (1978) 13 DR 73) and required P to prove her innocence: see R v Roberts [1908] 1 KB 407; Jones v Attorney General [1974] Ch 148; Lloyd v McMahon [1987] AC 625 and X v Austria (1972) 42 CD 145; contrast Tyrer v District Auditor for Monmouthshire (1973) 230 EG 973. Publicity given to the interim findings of the auditor both violated the presumption of innocence and gave an appearance of bias: see Hoekstra v HM Advocate [2001] 1 AC 216; Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451. The auditor was not an independent and impartial tribunal in breach of article 6 (see Bryan v United Kingdom(1995) 21 EHRR 342), and this failure led to the appearance of bias such that his findings should be set aside: see Dimes v Proprietors of Grand Junction Canal (1852) 3 HL Cas 759; R v Sussex Justices, Ex p McCarthy [1924] 1 KB 256; R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2) [2000] 1 AC 119; Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; Montgomery v HM Advocate [2001] 2 WLR 779; Hoekstra v HM Advocate [2001] 1 AC 216; Darmalingum v The State [2000] 1 WLR 2303 and R v Camborne Justices, Ex p Pearce [1955] 1 QB 41.

The test for apparent bias is whether, on an objective evaluation, the circumstances would lead a fair-minded and informed observer reasonably to apprehend that there was a real possibility that the tribunal would unfairly consider the case of one party with favour or disfavour: see R v Gough [1993] AC 646; Webb v The Queen (1994) 181 CLR 41; Johnson v Johnson [2000] 201 CLR 488; Valente v The Queen [1985] 2 SCR 673; Bradford v McLeod1986 SLT 244; Doherty v McGlennan 1997 SLT 444; BOC New Zealand Ltd v Trans Tasman Properties Ltd[1997] NZAR 49; Moch v Nedtravel (Pty) Ltd (1993) 3 SA 1; President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA 147; Delcourt v Belgium 1 EHRR 355; Findlay v United Kingdom 24 EHRR 221; Bryan v United Kingdom 21 EHRR 342; Pullar v United Kingdom (1996) 22 EHRR 391; Hauschildt v Denmark 12 EHRR 266; Piersack v Belgium 5 EHRR 169; De Cubber v Belgium 7 EHRR 236; Sander v United Kingdom (2001) 31 EHRR 1003; Gregory v United Kingdom (1997) 25 EHRR 577; Roylance v General Medical Council (No 2) [2000] 1 AC 311; In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700; Preiss v General Dental Council [2001] 1 WLR 1926; Kremzow v Austria (1993) 17 EHRR 322; Grant v United Kingdom (1988) 55 DR 218 and R v WilliamsThe Times, 8 October 2001.

Although unfairness can be cured on appeal the Divisional Court failed to do so; in any event the defect was systemic, as well as so gross and flagrant as to be incapable of cure: the only proper course was to quash the decision: see Lloyd v McMahon [1987] AC 625; Calvin v Carr [1980] AC 574; Smith v Skinner 26 RVR 45; Jones v Attorney General [1974] 1 Ch 148, the Preiss case [2001] 1 WLR 1926 and Darmalingum v The State [2000] 1 WLR 2303.

The auditor's inordinate delay also breached the reasonable time requirement in article 6(1). At common law, a complainant may need to show prejudice resulting from the delay: see Bell v Director of Public Prosecutions [1985] AC 937; Minister of Home Affairs v Fisher [1980] AC 319; Barker v Wingo (1972) 407 US 514; R v Secretary of State for the Home Department, Ex p Phansopkar [1976] 1 QB 606; Martin v Tauranga District Court [1995] 2 LRC 788; R v Morin [1992] 1 SCR 771; Fisher v Minister of Public Safety and Immigration [1998] AC 673; Mungroo v The Queen [1991] 1 WLR 1351; Director of Public Prosecutions v Tokai [1996] AC 856; McCalla v Disciplinary Committee of the General Legal Council (unreported) 30 July 1998; Darmalingum v The State [2000]1 WLR 2303; Flowers v The Queen [2000] 1 WLR 2396 and Attorney General's Reference(No 2 of 2001) [2001] 1 WLR 1869; contrast Attorney General's Reference (No 1 of 1990) [1992] QB 630; Jago v District Court of New South Wales (1989) 168 CLR 23 and Tan v Cameron [1992] 2 AC 205. The Convention test is different: prejudice does not have to be shown; but specific factors are to be taken into account, including the complexity of the case, the complainant's conduct and the manner in which the judicial and administrative authorities have dealt with the case: see Eckle v Federal Republic

of Germany (1982) 5 EHRR 1 and K"nig v Federal Republic of Germany (1978) 2 EHRR 170. Time runs from the institution of civil proceedings or from the time of a charge in criminal proceedings and includes appellate proceedings: see Ausiello v Italy (1996) 24 EHRR 568; H v United Kingdom (1987) 10 EHRR 95 and Attorney General's Reference(No 2 of 2001) [2001] 1 WLR 1869. Robins v United Kingdom (1997) 26 EHRR 527 is not relevant where criminal matters are in issue. Whether the length of time is "reasonable" will depend on the test in the K"nig case: see Ciricosta and Viola v Italy (unreported) 4 December 1995, Publications of the European Court of Human Rights, Series A no 337-A. The remedy for undue delay is to quash the decision in question: see the Darmalingum case. There may be alternative remedies, however: see Attorney General's Reference (No 2 of 2001) [2001] 1 WLR 1869; Locabail (UK) Ltd v Waldorf Investment Corpn (No 4) The Times, 13 June 2000 and Sparks v Harland [1997] 1 WLR 143.

Stuart Cakebread and Clare Roberts, for Mr **Weeks,** adopted the submissions of Dame Shirley Porter.

Howell QC in reply. The Divisional Court was correct to conclude that the alleged delay did not prejudice P and W so as to make a fair trial impossible: see Attorney General's Reference (No 1 of 1990) [1992] QB 630; Tan v Cameron [1992] 2 AC 205; Jago v District Court of New South Wales168 CLR 23; Director of Public Prosecutions v Tokai[1996] AC 856 and Rochefoucauld v Boustead [1897] 1 Ch 196. In any event, the Court of Appeal could only interfere with the Divisional Court's finding if it was satisfied that it was plainly wrong: see SS Hontestroom (Owners) v SS Sagaporak (Owners) [1927] AC 37.

The Human Rights Act 1998 does not apply to the present case: see R v Lambert [2001] 3 WLR 206. In any event, article 6 does not prescribe the consequences of proceedings where the reasonable time requirement is not met. The expedition required by article 6 must be consonant with the proper administration of justice: see Bell v Director of Public Prosecutions [1985] AC 937; R v Morin [1992] 1 SCR 771; Ciricosta and Viola v Italy 4 December 1995, Publications of the European Court of Human rights, Series A no 337-A and Pretto v Italy (1983) 6 EHRR 182.

The test of bias or apparent bias is whether the circumstances would lead a fair-minded and informed person to conclude that there was a real possibility that the tribunal would unfairly consider the case of a party. On that test, or the real danger test (see R v Gough [1993] AC 646) there was no apparent bias such as to vitiate the auditor's decision: see Sander v United Kingdom 31 EHRR 1003; Pullar v United Kingdom 22 EHRR 391; Hauschildt v Denmark12 EHRR 266; Montgomery v Lord Advocate [2001] 2 WLR 779; In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700; Gregory v United Kingdom 25 EHRR 577; Locobail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; Johnson v Johnson 201 CLR 488; In re Minister for Immigration and Multicultural Affairs, Ex p Epeabaka [2001] 179 ALR 296; President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA 147 and Roylance v General Medical Council (No 2) [2000] 1 AC 311.

The provisional view of a decision-maker does not disqualify him on the ground of actual or apparent bias (see Kremzow v Austria 17 EHRR 322 and Grant v United Kingdom 55 DR 218) although a premature but concluded view will (see Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70).

Section 20(1) of the 1982 Act neither creates a criminal offence nor imposes a penalty for such an offence. The section merely enables a localauthority to recover compensation in the civil courts for the loss or deficiency suffered. Prospective disqualification is not a punitive sanction but a disciplinary or professional measure imposed for the regulation of persons in positions of trust: see Lauko v Slovakia 33 EHRR 994; Pierre-Bloch v France 26 EHRR 202; Bendenoun v France 18 EHRR 54; Weber v Switzerland 12 EHRR 508; Demicoli v Malta 14 EHRR 47; Garryfallou AEBE v Greece 28 EHRR 344 and R v Secretary of State for Trade and

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Industry, Ex p McCormick [1998] BCC 379.

Any lack of fairness in the proceedings conducted by the auditor may be cured by a rehearing on the merits: see Lloyd v McMahon [1987] AC 625; Kingsley v United Kingdom The Times, 9 January 2001 and R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] 2 WLR 1389.

Their Lordships took time for consideration. 13 December, House of Lords.

COUNSEL:
Lord Lester of Herne Hill QC, Jeremy McMullen QC, Stuart Cakebread and Clare Roberts for Dame Shirley Porter; Stuart Cakebread and Clare Roberts for David **Weeks;** John Howell QC and Karen McHugh for the auditor.

JUDGMENT-READ:
Cur adv vult. 30 April, Court of Appeal. The following judgments were handed down.

PANEL: Kennedy, Schiemann and Robert Walker LJJ

Lord Bingham of Cornhill, Lord Steyn,

Lord Hope of Craighead, Lord Hobhouse of Woodborough and Lord Scott of Foscote

JUDGMENTBY-1: KENNEDY LJ

JUDGMENT-1:
KENNEDY LJ: This judgment is in three sections. The first section is an introduction which comes conveniently at the beginning of this judgment, but which is in fact an introduction provided by the court. A more detailed summary of events covering the years 1986 to 1989 can be found at the start of the judgment of Robert Walker LJ. The second section of this judgment looks at the decision of the Divisional Court (1997) 96 LGR 157 in relation to the issue of liability, and the third section deals with my approach to that issue. My conclusions in relation to that issue make it unnecessary for me todeal with the other two issues, namely fairness and quantum, but fairness is dealt with in the judgment of Schiemann LJ, with which I agree, and I also agree with that part of the judgment of Robert Walker LJ which deals with quantum.

I. Introduction

This is an appeal by Dame Shirley Porter and Mr David **Weeks** from an order of the Divisional Court (Rose LJ, Latham and Keene JJ) made on 19 December 1997. The Divisional Court had heard appeals under section 20(3) of the Local Government Finance Act 1982 by five individuals (three former members and two former officers of the Westminster City Council) against whom the appointed auditor, Mr John **Magill,** had issued certificates of loss under section 20(1) of the 1982 Act.

The Divisional Court allowed the appeals of three of the appellants (Mr Peter Hartley, Mr Graham England and Mr Bill Phillips). It reduced the amount of the loss certified against Dame Shirley and Mr **Weeks** but dismissed their appeals on liability. They appeal to this court on issues of procedural unfairness, liability and quantum. The auditor by a respondent's notice seeks to reverse the reduction in quantum.

Elected members and senior officers of local authorities are in the position of trustees for their ratepayers and since the 19th century there have been statutory procedures of audit and surcharge as a sanction against losses to ratepayers caused by unlawful expenditure or wilful misconduct on the part of members or senior officers of local authorities. The

provisions in force at the material time (since re-enacted in the Audit Commission Act 1998) were in Part III of the 1982 Act.

Section 11 of the 1982 Act provided for the establishment of the Audit Commission for Local Authorities in England and Wales. Sections 12 to 16 provided for the Audit Commission to appoint auditors and for the appointed auditors to audit local authorities' accounts in accordance with a code of audit practice prescribed by the Audit Commission, with statutory powers of obtaining documents and information. Section 15(3) was in the following terms:

"The auditor shall consider whether, in the public interest, he should make a report on any matter coming to his notice in the course of the audit in order that it may be considered by the body concerned or brought to the attention of the public, and shall consider whether the public interest requires any such matter to be made the subject of an immediate report rather than of a report to be made at the conclusion of the audit."

Section 17 provided for accounts to be open for public inspection, and by section 17(3) any local government elector might (on notice under section 17(4)) make an objection as to any matter in respect of which the auditor could take action under section 19 or section 20, or could make a report under section 15(3).

Section 19(1) (2) and (3) were in the following terms:

"(1) Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act that any item of account is contrary to law he may apply to the court for a declaration that the item is contrary to law except where it is sanctioned by the Secretary of State.

"(2) On an application under this section the court may make or refuse to make the declaration asked for, and where the court makes that declaration, then, subject to subsection (3) below, it may also-(a) order that any person responsible for incurring or authorising any expenditure declared unlawful shall repay it in whole or in part to the body in question and, where two or more persons are found to be responsible, that they shall be jointly and severally liable to repay it as aforesaid; (b) if any such expenditure exceeds oe2,000 and the person responsible for incurring or authorising it is, or was at the time of his conduct in question, a member of a local authority, order him to be disqualified for being a member of a local authority for a specified period; and (c) order rectification of the accounts.

"(3) The court shall not make an order under subsection (2)(a) or (b) above if the court is satisfied that the person responsible for incurring or authorising any such expenditure acted reasonably or in the belief that the expenditure was authorised by law, and in any other case shall have regard to all the circumstances, including that person's means and ability to repay that expenditure or any part of it."

The following subsections contained ancillary provisions, including rights of appeal for objectors under section 17(3). Section 20(1) (2) (3) and (4) were in the following terms:

"(1) Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act-(a) that any person has failed to bring into account any sum which should have been so included and that the failure has not been sanctioned by the Secretary of State; or (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person, he shall certify that the sum or, as the case may be, the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the body in question (or, in the case of a parish meeting, the chairman of the meeting) may recover that sum or amount for the benefit of that body; and if the auditor certifies under this section that any sum or amount is due from two or more persons, they shall be jointly and severally liable for that sum or amount.

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"(2) Any person who-(a) has made an objection under section 17(3)(a) above and is aggrieved by a decision of an auditor not to certify under this section that a sum or amount is due from another person; or (b) is aggrieved by a decision of an auditor to certify under this section that a sum or amount is due from him, may not later than six **weeks** after he has been notified of the decision require the auditor to state in writing the reasons for his decision.

"(3) Any such person who is aggrieved by such a decision may appeal against the decision to the court and-(a) in the case of a decision to certify that any sum or amount is due from any person, the court may confirm, vary or quash the decision and give any certificate which the auditor could have given; (b) in the case of a decision not to certify that any sum or amount is due from any person, the court may confirm the decision or quash it and give any certificate which the auditor could have given; and any certificate given under this subsection shall be treated for the purposes of subsection (1) above and the following provisions of this section as if it had been given by the auditor under subsection (1) above.

"(4) If a certificate under this section relates to a loss or deficiency caused by the wilful misconduct of a person who is, or was at the time ofsuch misconduct, a member of a local authority and the amount certified to be due from him exceeds oe2,000, that person shall be disqualified for being a member of a local authority for the period of five years beginning on the ordinary date on which the period allowed for bringing an appeal against a decision to give the certificate expires or, if such an appeal is brought, the date on which the appeal is finally disposed of or abandoned or fails for non-prosecution."

The following subsections contained ancillary provisions. It will be apparent that section 20 is concerned with the most serious breaches of duty (failure to account or wilful misconduct causing loss) and that neither the auditor nor the court has any discretion as to the amount to be certified.

The principal events relevant to this appeal were concerned with housing policies in the City of Westminster between 1986 and 1989. Those events were examined in great detail in a history of events which formed part of the auditor's report and decisions. There is little or no challenge to the accuracy of that history, so far as primary facts are concerned, although the conclusions drawn are matters of acute controversy.

By way of introduction it is useful to isolate a few landmark dates and events. On 8 May 1986 there were local elections at which the Conservative group on the Westminster City Council was returned to power, but with a greatly reduced majority. Dame Shirley Porter was leader of the council and Mr **Weeks** was deputy leader. Mr Hartley became chairman of the housing committee in June 1987 (succeeding Mrs Patricia Kirwan). Mr England was director of housing. Mr Phillips was head of the policy unit until February 1987 and then became managing director (the second most senior officer serving the council).

In the latter part of 1986 and the early part of 1987 a policy of "building stable communities" ("BSC") was discussed and adopted among the majority party. An important element of that policy was a proposed increase in designated sales, that is sales of council dwellings, when vacant, otherwise than under existing "right to buy" ("RTB") arrangements. On 5 May 1987 Mr Jeremy Sullivan QC gave advice in consultation as to the lawfulness of the proposed extension of designated sales. Legal advice had already been obtained from the city solicitor and further advice was obtained from counsel later.

On 8 July 1987 the housing committee voted by seven votes to five to adopt a policy (called "option 3" in a written joint report prepared by officers) which is of central importance to this case. The lawfulness of that decision and the legal advice obtained in relation to it have been the subject of close examination and discussion before the auditor, in the Divisional Court

and in this court. The policy greatly expanded the council's programme of designated sales, with an associated programme of capital grants for the purchase of dwellings.

The policy came under fierce and sustained attack from the Labour opposition party on the council. On 18 and 19 July 1989 the attack culminated with a notice of objection given to the auditor (under section 17 of the 1982 Act) by Councillor Neale Coleman, an opposition member of the housing committee, and 12 other electors, and with the transmission on the BBC Panorama programme of an edition entitled "Lady Porter-the pursuit of power". The auditor undertook a long investigation (the character andfairness of which have been issues before this court). He conducted a large number of interviews, including interviews with Dame Shirley Porter and Mr **Weeks.** On 13 January 1994 the auditor issued notices to 10 individuals, together with a note of his provisional findings and views and a large number of supporting documents. The 10 individuals included Dame Shirley Porter, Mr **Weeks,** Mr Hartley, Mr England and Mr Phillips. The auditor held a press conference on 13 January 1994 which attracted a great deal of publicity at the time, and which has attracted a great deal of criticism subsequently. Indeed the auditor was asked to disqualify himself but in a written decision dated 18 October 1994 he declined to do so (the Audit Commission having already decided not to exercise its power to remove him as auditor).

The auditor was asked to hold an audit hearing (in relation to the council's accounts for 1987-88 to 1994-95) and he did so over 32 days between 19 October 1994 and 7 February 1995. Dame Shirley was legally represented (as were many other interested parties) but she did not give evidence. Expert evidence was given on her behalf on the issue of quantum. Mr **Weeks** appeared in person and made submissions but did not give evidence. On 9 May 1996 the auditor gave his final written decision in the form of a report under section 15(3) of the 1982 Act (designated as volume 1); decisions and reasons on the section 19 objection, excluding questions of personal liability (volume 2); decisions and reasons on the section 19 and section 20 objections in relation to individual members of the council (volume 3A) and individual officers (volume 3B); and appendices containing the auditor's history of events (volume 4, appendix 1), associated documents (volume 4, appendices 2 to 12), and the auditor's findings on quantum (volume 5, appendix 13 with its 23 annexes).

The auditor issued certificates in the sum of oe31.677m each against Dame Shirley Porter, Mr **Weeks,** Mr Hartley, Mr England, Mr Phillips and Mr Paul Hayler (a housing officer). Their appeals to the Divisional Court (except that of Mr Hayler, which was stayed for health reasons) were heard between 2 October and 4 November 1997, with further oral evidence from numerous witnesses, including Dame Shirley and Mr **Weeks.** The Divisional Court allowed the appeals of Mr Hartley, Mr England and Mr Phillips but dismissed those of Dame Shirley and Mr **Weeks,** apart from a reduction in the certificated amount to oe26.463m (rounded to the nearest oe1,000).

II. Divisional Court re Liability

(A) The case for and against

The Divisional Court summarised the way in which that court saw the central issue in the case in relation to all five appellants before it-namely Dame Shirley Porter, Mr **Weeks,** Mr Hartley, Mr England and Mr Phillips, 96 LGR 157, 166:

"The essence of the case against all the appellants is that each, in differing ways, played a role in 1986-1987 in devising and/or implementing a policy targeting designated sales of council properties in marginal wards with a view to increasing the Conservative vote there in the 1990 elections. It is the case for each appellant that whatever role, if any, he or she played in the targeting, which admittedly existed as a political aspiration, no such targeting became council policy, as distinctfrom political aspiration and, or alternatively, there was no wilful misconduct: members relied on legal and other advice from officials; officials did no

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more than proffer advice."

The Divisional Court set out the case against Dame Shirley whose role and that of Mr **Weeks** the court regarded as "inextricably intertwined", at p 181:

"The essence of the case against [Dame Shirley] ... was that as leader of the majority party she was instrumental in pursuing the political policy of targeting designated sales in the marginal wards, despite the absence of support from council officials or independent consultants and, in the absence of any legitimate local government reasons, for the improper purpose of electoral advantage by seeking to introduce more electors who might vote Conservative. The essence of her case is that political considerations inevitably play a part in local government, but there is a divide well understood by councillors between party proposals and council policy and there was nothing improper in the council or housing committee implementing a policy founded on party political considerations provided these were not dominant and there were other legitimate reasons for the policy; further, she was entitled to rely on the advice of leading counsel, based on information provided to him by officials which she believed would include all relevant matters, as a complete answer to an allegation of wilful misconduct."

(B) The auditors' error

The Divisional Court noted, at p 174g, that the auditors' decision lacked "a sufficient analysis of the possible impact on the state of mind of the appellants, which is crucial in relation to wilful misconduct, of the legal advice received, or reported to have been received, on 5 May 1987". That was a shortcoming which, the Divisional Court found to be "in itself sufficient reason for concluding that prima facie the auditor went wrong".

(C) Matters common to all appellants

The Divisional Court identified three matters which were common to all five appellants before that court.

(1) All were observed to distance themselves from responsibility for the designated sales policy targeted in marginal wards which was prima facie improper (see p 175), but the court recognised, at p 177, that such a distancing did not necessarily indicate any lack of frankness. The crucial events occurred a decade ago, and certainly since the auditor held his press conference in 1994 they had attracted much criticism. In addition, they were of course the very reason why the appellants found themselves surcharged and having to appeal to the Divisional Court. The Divisional Court said, at p 177:

"In such circumstances it would be unsurprising if any of the appellants, however innocent of wrongdoing, had claimed any close relationship with the genesis and propagation of a policy which it is now common ground was both unlawful unless rescued by proper non-political reasons and might give rise to wilful misconduct unless sanitised by legal advice."

I have reservations about the way in which the Divisional Court expressed itself in relation to the common ground, but the recognition of the huge pressures on all appellants was clearly apposite.

(2) Secondly the Divisional Court noted the legal advice which was available to one or more of the appellants during the period from March to July 1987. It came from Mr Lewis (the deputy city solicitor), Mr Ives (the city solicitor) and counsel instructed by Westminster City Council (Mr Jeremy Sullivan QC and Mr Alan Wilkie). The first relevant piece of advice was that of Mr Lewis on 20 March 1987, when he advised Mrs Kirwan (then chairman of the housing committee) of the possible adverse effect on the homeless of a change in disposal policy, and of the need legally to justify a major change in policy: p 177. In fact the purpose

of Mr Lewis's note was to explain the circumstances in which a policy change might be quashed by the court on judicial review, and it emphasised the need for the officer's report leading to a controversial decision to be "comprehensive, giving the pros and cons of possible actions." The effect on the homeless was given as an example of a relevant consideration. As Mr Lewis put it in his note, "there must be sufficient justification for the policy decision in the report, even if some of the factors point to a different decision".

On 24 March 1987 Mr England and Mr Ives responded separately to a series of questions posed by Mr Greenman (Dame Shirley's assistant). In answer to question 4(A) Mr Ives said:

"The way to avoid successful challenge [by judicial review] is to devise legitimate arguments and to ensure that all possible ramifications have been considered by those taking the decision. If this is done judicial review may be successfully resisted unless it can be demonstrated that the decision-takers have acted irrationally or relied on an irrelevant consideration."

In answer to question 7 he said:

"It is crucial that any report should critically examine a proposal to designate for sale. The advantages of sale have to be considered not from any ulterior motive but from the standpoint of what is right in view of the council's role as a housing authority. A general policy of disposal is much more likely to be susceptible of challenge than decisions taken in respect of each block or each property."

On 5 May 1987, at short notice, Mr Sullivan was consulted about the policy which at that time was to designate properties in such a way as to yield at least 250 sales in marginal wards in the belief that such changes of tenure would increase the Conservative vote. There is, as the Divisional Court noted, no contemporaneous record or minute of Mr Sullivan's advice, but after the consultation, Mr England prepared a note for Dame Shirley to use in connection with a discussion paper prepared by Mr Hayler (divisional director of housing, private sector) at the chairmen's group meeting to be held that evening. Mr England's note makes some important references to Mr Sullivan's advice as to designated estates, capital grants, and what should go into a joint report to go to the housing committee. For the moment I leave aside capital grants, but as to other matters Mr England's note reads:

"Counsel advises that designated estates should be identified in both marginal and non-marginal wards in order to protect the council ... The target set by housing committee is 'at least 250.' Counsel advises that this cannot be targeted solely in key wards, therefore, the group will need to decide whether the final target is 250 or some greater figure which would yield 250 in the marginal wards. Counsel also advises that reference to affordable housing contained in the PA Cambridge study should be included in the report. This report has now been released to the opposition ..."

It also contains this passage:

"If the group wish to go for a larger global target in order to achieve 250 in the marginal wards, this will require a decision by the committee. Counsel confirms that the report should be considered at the same meeting."

As the Divisional Court observed, at p 178f, Mr England's note "does not suggest that Mr Sullivan had advised that sales could be targeted in marginal wards for electoral advantage". No doubt, but the clear thrust of his advice, as recorded, was that if the housing committee was provided with a balanced report, and then decided to adopt a designated sales policy which was city-wide, that decision could not be impugned provided that it was a decision which a reasonable committee could take in the light of the report-even if, when operated even-handedly across the city, it yielded 250 or more designated properties in marginal

wards, a yield which for electoral reasons the majority party wanted to achieve.

On 12 June 1987 Mr Sullivan approved the fourth draft of the joint report which was to go before the housing committee, and on 26 June 1987 Mr England sent Mr Hartley, the new chairman of the housing committee, an analysis of the estates by ward, and "a suggested list of estates which would give approximately the target sales and where sales can be justified in terms of the four indicators included in the committee report". There were 269 properties in key or marginal wards, and 220 in other areas, a total of 489. Mr Lewis, in his note to Mr Hartley of the same date, said:

"The report on designated sales to the next housing committee invites the committee to select estates for designation. In drawing up its list it is vital that the committee chooses estates on the basis of housing and planning issues. We must be able to defend any challenge to the list by showing that there is a rationale behind it and that it was neither arbitrary nor drawn up with regard to improper factors. To help the chairman, four criteria are set out in the report. Other factors can be taken on board, including members' own knowledge of the area. You are not limited by the criteria set out. But the list must be capable of surviving challenge in the courts and to do so it must be defensible in housing and planning terms."

On 3 July 1987 instructions were sent to Mr Sullivan and Mr Wilkie to advise on the homeless persons legislation in the context of the final version of the joint report, and the forthcoming meeting of the housing committee on 8 July. Advice was given at a lunchtime consultation on 6 July.

After the housing committee had met, but just before the meeting of the full council on 29 July, Dame Shirley circulated to all members of the majority party a note prepared by Mr Lewis on 23 July which recorded his recollection of the advice given by Mr Sullivan on 5 May. She commented, "As you can see from the attached note our legal advice is that our policy is 'completely judge proof'."

(3) The third matter effecting all appellants considered by the Divisional Court was the housing committee decision of 8 July. The Divisional Court held, at p 181, that it was "substantially influenced by a wish to alter the composition of the electorate by increasing the Conservative vote in marginal wards by the sale of council properties, and was therefore unlawful". The policy was proposed by Mr Hartley, and it gave effect to what the Divisional Court described as "this purpose" (i e the wish identified above) "whatever may have been the reasons for the votes of individual members". If the votes of individual members are not critical it must follow that it is necessary to look for the influential wish elsewhere. As the Divisional Court pointed out, a corrupt principal can act through an innocent agent, and the Divisional Court explained its conclusion, at p 181, by saying that option 3, the option for which the housing committee voted, was placed before the committee "in part at least, in order to achieve the improper purpose" of altering the composition of the electorate in marginal wards. In the circumstances that is a conclusion which is directly relevant to the state of mind of each of the appellants with whom we are concerned, and to whom I now turn.

(D) Dame Shirley and Mr **Weeks**

The Divisional Court said of these two appellants, at p 181, that "Although the evidence given by and about them differed in some respects, their roles in these events were ... closely and inextricably intertwined." Dame Shirley as the majority party leader was clearly a driving force, and Mr **Weeks** was her details man, ensuring that the majority party objectives "particularly in targeting designated sales in marginal wards" were fulfilled. As the Divisional Court pointed out, at p 182, there was ample documentary evidence to show that from July 1986 onwards targeting marginal wards "ensuring that the right people live in the right

areas" was central to Dame Shirley's political objectives. In January 1987, in the paper produced by Mr Segal at Dame Shirley's request, he spoke of the short-term objective being to target the marginal wards and "redress the imbalance by encouraging a pattern of tenure which is more likely to translate into Conservative votes". The Divisional Court concluded that the paper was generally endorsed. Between that date and 5 May 1987 document after document shows that Dame Shirley and Mr **Weeks** were pushing that policy forward, hoping initially that the PA Cambridge Economic Consultants ("PACEC") report would provide a non-partisan explanation for the policy which could then be put to the housing committee. However, that hope was not fulfilled, and it was against that background that Mr Sullivan was consulted on 5 May and gave the advice to which I have already referred.

As to the effect of that advice on Dame Shirley and Mr **Weeks** the Divisional Court said, at p 179e, that it was "impossible for [her] to contend that she believed at any stage that targeting marginal wards for electoral advantage was legally permissible". The Divisional Court also found that onthe evening of 5 May the chairmen's group meeting, attended by Dame Shirley and Councillor **Weeks,** agreed to target designated sales city-wide in order to produce the agreed number of designated sales in marginal wards. The drive towards implementation then continued. As I have already mentioned, Mr Sullivan was asked to approve the joint report for the housing committee which was to meet on 8 July and, using the criteria set out in that report, a selection of 489 properties was made city-wide, 269 of them being in marginal wards.

The Divisional Court, at p 184b, rejected as "plainly untrue" the claim of Dame Shirley and Mr **Weeks** that following counsel's advice on 5 May designation of sales in marginal wards for electoral purposes was abandoned. Throughout June and July steps identified by the Divisional Court were being taking to monitor the effect of the city-wide policy now proposed in relation to marginal wards, and, even after the full council meeting on 29 July, this went on. Later in 1988, as the Divisional Court found, there was "a cover-up" which, the court held, was inconsistent with the belief that what had been done in 1987 was proper.

The Divisional Court found that from March 1987, when she saw the answers given by Mr Ives, Dame Shirley knew that the advantages of selling council properties had to be considered "not from any ulterior motive but from the standpoint of what is right in view of the council's role as a housing authority". She did not understand counsel's advice on 5 May to be any different, and so, the Divisional Court concluded, at p 185a, she cannot have thought that the suggestion of increasing the numbers city-wide came from Mr Sullivan because it "would have left untouched the continuing ulterior motive in relation to marginal wards which Mr Ives had advised against".

By way of summary, the Divisional Court concluded, at p 185, that because Dame Shirley and Mr **Weeks** knew the targeting policy was unlawful they were content to adopt the suggestion in Mr England's note that it be "dressed up in city-wide clothes". Their purpose throughout was to achieve unlawful electoral advantage. Because they knew that the purpose, which they sought to conceal, was unlawful they were guilty of wilful misconduct.

(E) Mr Hartley

Although the Divisional Court allowed the appeals of Mr Hartley and the two officers, Mr England and Mr Phillips, it is necessary to look at the court's reasons for doing so because it is said on behalf of both appellants before us that at least to a large extent the same reasons applied in their cases and should have led to the same conclusion.

Mr Hartley knew of the designated sales policy long before he took over the chairmanship of the housing committee in June 1987. He knew of Dame Shirley and Mr **Weeks's** objective to sell properties in marginal wards to boost Conservative votes, but, he claimed, his intention was to sell as many houses as possible. He regarded the policy which he guided through the

housing committee on 8 July 1987 as a lawful policy to sell at least 500 homes per annum city-wide, which was not in any way skewed to obtain electoral advantage for the Conservatives. It met his political objective of selling as many council properties as possible, and Dame Shirley's aspirations in the marginal wards. Neither Mr England nor Mr Lewis (as legal adviser to the housing committee) suggested it was unlawful.Subsequent monitoring he regarded as a legitimate tool to gauge the effect of the policy in wards in which his party had a particular interest.

The Divisional Court was satisfied that Mr Hartley knew that the policy which he had to carry forward would produce 250 sales per annum in marginal wards, which was intended to improve the Conservative vote. But the list of properties presented to Mr Hartley was one which apparently met the legal requirement identified by Mr Lewis. Mr England had not apparently approved or disapproved of the figure of 500 so, the Divisional Court concluded, at p 198:

"... [Councillor Hartley] had no reason to believe that he would be acting contrary to either professional housing or legal advice were he to present, as he did, option 3 as the majority party's preferred option at the housing committee meeting. He was entitled, in our view, to take further comfort from the fact that the joint report had, so far as he was concerned, been approved by counsel."

Both Mr McMullen, for Dame Shirley, and Mr Cakebread, for Mr **Weeks,** contend that their respective clients were in the same position. The Divisional Court was critical of Mr Hartley, saying, at p 198:

"He knew that the genesis and development of the policy to extend designated sales lay in the lead members' desire to add to the number of Conservative voters in marginal wards. We have no doubt that he knew that this was an improper purpose. He knew that in supporting the policy he would enable that improper purpose to be achieved. In doing so he was guilty of misconduct in that he was promoting a policy which was infected by that improper purpose."

The court then went on to say, at p 199, that the crucial question in his case was whether he knew or was reckless as to whether the policy was unlawful, given that his own purpose was lawful. The Divisional Court's conclusion was that because he had a proper motive (i e to sell as many houses as possible) he did not appreciate the unlawfulness of his conduct, and genuinely believed that his own proper purpose rendered his actions lawful, so his misconduct was not wilful.

(F) Mr England

The Divisional Court found that from January 1987 onwards, and probably before, the designated sales policy was clearly targeted at marginal wards, and yet Mr England as director of housing assisted the council members to pursue their policy. The PACEC report provided no justification for such a policy, and yet Mr England did not give to council members unequivocal and clear advice that the choice of marginal wards for electoral advantage was improper. He was anxious about the council's ability to discharge its statutory obligations to the homeless, but, the Divisional Court accepted, at p 191h, after seeing Mr Sullivan's advice on 5 May 1987 Mr England "believed that designating city-wide would not be unlawful merely because it met [Dame Shirley's] objective of 250 in marginal wards". Before us Mr McMullen and Mr Cakebread asked why their clients could not be credited with the same belief.

After Mr Hartley was appointed chairman of the housing committee, Mr England was told that the chairman's group had decided to go for 500sales per annum. The case against Mr England was that thereafter he went along with that proposal, and drew up a list of

designated properties distorted in such a way as to provide 250 sales in marginal wards. There was also an allegation as to the way in which the PACEC report was reflected in the joint report to the housing committee which he helped to prepare, but for present purposes that is not so significant. What is significant is that the Divisional Court, at p 193, accepted Mr England's evidence that in his view the figure of 500 was "just the right side of the line", and the Divisional Court also accepted that in the joint report he "fairly, properly and in clear language set out the consequences of each of the options". The report as a whole was described by the Divisional Court as "a fair and adequately comprehensive representation of the relevant issues" which, in a version "not materially different from that seen by the committee" had been approved by leading and junior counsel.

Mr England helped to prepare the list which was ultimately chosen by the committee. In essence it was the list which he passed to Mr Hartley on 26 June, and despite its apparent bias the Divisional Court was not satisfied that the lists were manipulated by council officers. There was no evidence before the Divisional Court casting doubt on the propriety of the criteria used to compile the list.

Having accepted that, after seeing Mr Sullivan on 5 May 1987, Mr England believed that designating city-wide would not be unlawful merely because it met Dame Shirley's objective of 250 in marginal wards, the Divisional Court found it impossible to conclude that anything Mr England did up to and including the date of the housing committee meeting on 8 July amounted to wilful misconduct. He was, the court found, entitled to take comfort from the fact that Mr Sullivan had, according to Mr Lewis, approved the joint report.

Thereafter there was monitoring, assisting the majority party to ascertain whether the council's policy was yielding the results which the majority party, and the present appellants in particular, hoped that it would yield in the marginal wards. The Divisional Court found, at p 195b, that Mr England knew that it was inappropriate for him to be involved in that partisan activity, but it also found "no substantial evidence that the monitoring was coupled with a deliberate attempt to increase the level of designated sales actually achieved in the marginal wards", and that, like the findings in relation to the compilation of the list, seems to me to be a significant finding so far as the present appellants are concerned. As the Divisional Court concluded, at p 195d, in relation to Mr England, "if he may have believed that the majority party's aspirations could be lawfully achieved, the fact that he was involved in monitoring to see whether they had in fact been achieved adds nothing to the case against him".

In the light of those findings in relation to Mr England the argument presented to us by Mr McMullen and Mr Cakebread on behalf of their respective clients is clear and obvious. It can be encapsulated thus: if Mr England, with his extensive knowledge of local government and his full knowledge of all the relevant facts, was entitled to conclude on 5 May 1987, after seeing Mr Sullivan, that designating city-wide would not be unlawful merely because it met Dame Shirley's objective of 250 in marginal wards, why were two amateur politicians to whom he reported not entitled to reach the same conclusion? And if that was their conclusion, where is the evidenceof wilful misconduct which justified the court in distinguishing between Dame Shirley and Mr **Weeks** on the one hand and Mr England on the other?

(G) Mr Phillips

The argument to which I have just referred is clearest when it is advanced by reference to the decision of the Divisional Court in relation to Mr England, but it is also advanced by reference to the decision in relation to Mr Hartley and the decision in relation to Mr Phillips, who joined Westminster City Council in July 1986 as head of the policy unit, and who in February 1997 was appointed managing director. He too was an experienced civil servant. He knew of the targeting of the eight key wards both before and after 8 July 1987, but he did not claim to have been influenced by the legal advice obtained on 5 May. The Divisional

Court, at p 201e, regarded it as an important piece of evidence in his favour that after meeting Mr England and Mr Hayler he prepared the "critical path" which required that the draft report to the housing committee be sent to counsel. The Divisional Court regarded that as strongly indicating that at that date Mr Phillips believed that there was a lawful policy which could be taken forward to committee with the approval of counsel. Here again, we are asked to consider wherein lies the difference? If Mr Phillips was able to reach that state of mind on the basis of the information he received from Mr England, why should it be said that the state of mind of Dame Shirley and Mr **Weeks,** who had the same informant, could not have been identical? Indeed in the case of Mr Phillips, although he did not rely upon Mr Sullivan's advice, the Divisional Court regarded the advice given on 5 May as having affected his mind "and his appreciation of whether what was thereafter proposed was unlawful": p 202. The Divisional Court's conclusion was that his state of mind might have been affected by the fact that Mr England and Mr Lewis, the deputy solicitor, were both prepared to carry forward the policy determined by the chairman's group on 5 May. Somewhat surprisingly, the Divisional Court went on to say of Mr Phillips, at p 202:

"he knew that what was proposed would give effect to an improper purpose, and he was therefore guilty of misconduct. But he was not advised that it was unlawful and accordingly we are not prepared to conclude that he must have known that what was proposed was unlawful as well as improper."

The critical path which he set out was regarded as a sufficient answer to an allegation of recklessness, and his position after 8 July was regarded as broadly similar to that of Mr England.

(H) Causation

The Divisional Court accepted that most members of the housing committee were not guilty of misconduct and did not themselves vote for option 3 for improper reasons, but the court found that option 3 was placed before the committee because Dame Shirley and Mr **Weeks** hoped to increase the Conservative vote in marginal wards by selling each year 250 council properties in those wards. Furthermore, as adoption of option 3 was Conservative policy promulgated by Mr Hartley as chairman of the committee, Dame Shirley and Mr **Weeks** knew that it would become councilpolicy because in reality the housing committee always did adopt the majority party's policy. So the Divisional Court concluded that the housing committee's decision on 8 July was caused by Dame Shirley and Mr **Weeks** and thus there was no break in the chain of causation. At the end of July the full council refused to overturn the housing committee's decision, and on that occasion Councillor **Weeks** voted with the majority, motivated, so the Divisional Court held, at p 204a, by "a continuing desire to target marginal wards".

Before us Mr McMullen and Mr Cakebread have submitted that once it was clear that Mr Hartley and the members of the housing committee had before them a full and properly balanced report which pointed out the advantages and disadvantages of each option (including option 1, which was the maintenance of the status quo), and once it was held that "most" members of the housing committee were not guilty of misconduct and did not vote for option 3 for improper reasons, it followed that even if Dame Shirley and Mr **Weeks** were guilty of misconduct their misconduct was not causative of the committee's decision and any resultant loss. Indeed it can only be linked to the decision by reason of the fact that the two appellants were responsible for the matter going before the committee with majority party support for option 3, and that, it is contended, is an insufficient link, given the duty of individual councillors on the housing committee to decide matters for themselves on proper grounds, a duty which, according to the Divisional Court, they fulfilled.

III. Liability

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1 Auditor's approach to liability contrasted with that of Divisional Court

Unlike the Divisional Court, the auditor treated the legal advice given by counsel as almost an irrelevance. His conclusion in substance was that the key members of the majority party and the key local government officers at all material times knew that they could not sell council property in marginal wards to secure, or to attempt to secure, an electoral advantage. Any canvassing of that idea amounted to wilful misconduct, and, although legal advice was obtained on 5 May 1987 and on various occasions thereafter, the reality was that the members and officers continued as before, pursuing an objective which they knew to be illegal, but masking their activities by purporting to act city-wide and restricting the flow of information wherever possible. The monitoring of sales in marginal wards and the lack of frankness when challenged were regarded by the auditor as indications of wilful misconduct, so he concluded that all who were involved should be held liable-not only the present appellants, but also Mr Hartley, Mr England and Mr Phillips. In my judgment, that was a tenable position to adopt, but it was not the position adopted by the Divisional Court.

The Divisional Court found that the legal advice, especially that given by counsel, was critical for some of the appellants before that court, and the court made other findings of fact which seem to me to be of considerable importance. I list some of them.

1. After receiving the advice of counsel on 5 May 1987, Mr England "believed that designating city-wide would not be unlawful merely because it met [Dame Shirley's] objective of 250 in marginal wards": p 191h (emphasis supplied). He was an experienced director of housing, and it wasthrough him that on that evening Dame Shirley and the chairmen's group learnt what counsel had advised.

2. The decision was then made to designate 500 properties city-wide. That number of properties was regarded by Mr England as "just the right side of the line", having regard to the council's other obligations: p 193b

3. A joint report was then prepared by council officers, including Mr England, which "fairly, properly and in clear language set out the consequences of each of the options" which members of the housing committee were to be invited to consider: p 193b One of the options was option 3, which the court clearly regarded as a genuine option, thus rejecting Mr Howell's submission that it was an option which no rational authority could accept.

4. The Divisional Court found that, considered as a whole, the joint report was "a fair and adequately comprehensive representation of the relevant issues", which was approved by leading and junior counsel in a version "not materially different from that seen by the committee": p 193d

5. Dame Shirley and Mr **Weeks** were aware that counsel had approved the report, and Mr Phillips had, in his "critical path", specified that counsel approval be sought-something which the Divisional Court regarded as clearly indicative of his belief that there was a lawful policy which could be taken forward to committee with the approval of counsel: p 201. So two important council officers, who knew of the majority party's aspirations in relation to the marginal wards, nevertheless at the material time believed that the policy being pursued was lawful, and neither counsel nor any officer appears thereafter to have suggested otherwise.

6. As the Divisional Court noted when dealing with Mr Hartley, neither Mr England nor Mr Lewis (as legal adviser to the housing committee) suggested that the policy was unlawful, and Mr Hartley had "no reason to believe that he would be acting contrary to either professional housing or legal advice were he to present, as he did, option 3 as the majority party's preferred option at the housing committee meeting": p 198a. He too was regarded by the Divisional Court as entitled to take comfort from the fact that the joint report had been approved by counsel.

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7. The joint report set out criteria for the selection of properties. The criteria were appropriate, and although the application of those criteria resulted in a surprisingly large number of properties being designated in the eight marginal wards, the Divisional Court, having heard evidence from Mr England, held that the auditor was unable to establish to the requisite standard of proof that the criteria or the lists were manipulated by officers for the purpose of securing party political advantage for the majority party.

8. After 8 July 1987 there was monitoring of sales in marginal wards, but, as the Divisional Court recognised in relation to Mr England, monitoring was equivocal: "if he may have believed that the majority party's aspirations could be lawfully achieved, the fact that he was involved in monitoring to see whether they had in fact been achieved adds nothing to the case against him": p 195d.

9. There was, as the Divisional Court found, "no substantial evidence that the monitoring was coupled with a deliberate attempt to increase the level of designated sales actually achieved in the marginal wards": p 195b.

2 Approach of Court of Appeal

Mr Howell, for the auditor, whilst for his own purposes reminding us of the weight which this court always gives to findings of fact reached by a court which has seen and heard the relevant witnesses, has nevertheless invited us to reconsider virtually all of the factual conclusions listed above. For obvious reasons he would like to restore the auditor's conclusions, but there is no appeal against the conclusions of the Divisional Court in relation to Mr Hartley, Mr England and Mr Phillips, and it would be strange indeed if we were to reopen the evaluation of the case against each of them without them even having an opportunity to be heard. In my judgment this case must now proceed upon the basis that the Divisional Court was entitled to make each of the findings which are set out above.

As part of his attempt to put back the clock, Mr Howell also invited us to reverse the Divisional Court's decision that the auditor failed to make any sufficient analysis of and the possible impact on the state of mind of the appellants of the legal advice received and reported on 5 May 1987 which, as the Divisional Court said, "is crucial in relation to wilful misconduct": p 174g. However, that is no longer a matter of any real significance, because the fact is that the Divisional Court decided to conduct a full hearing. The hearing involved fresh evidence, as well as looking again at evidence which already existed, and it is against the decisions of the Divisional Court as to the liability of the appellants that this appeal lies. As I understand the position, the auditor does not go so far as to contend that the Divisional Court was not entitled to reach its own conclusions as to liability, so I need say no more about his analysis of the impact of legal advice on the appellants' separate states of mind.

3 What is "wilful misconduct?"

Wilful misconduct was defined by Webster J in Graham v Teesdale (1981) 81 LGR 117, 123 as "deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not". In this case that definition has enjoyed universal support, but there is an issue as to the extent to which the conduct in question must impact upon the activities of a local authority before it becomes misconduct for the purposes of section 20 of the 1982 Act. Mr Howell submits that a state of mind alone will suffice, so he says:

"It is misconduct for a member of a local authority to seek to promote a proposal for an authority to do something for a reason which the authority may not take into account, such as the electoral advantage of his own political party. Such misconduct is wilful if that member knows that the reason is one which the authority may not take into account or is recklessly

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indifferent to whether or not it may do so."

Mr McMullen adopts a narrower formulation, saying:

"For a member to be guilty of wilful misconduct because she has caused or taken part in a decision of the council, it is necessary for that decision to be unlawful, because, for example, it is an abuse of the council's relevant public powers, and has caused a loss or deficiency. The fact that the decision is ultra vires and unlawful is a necessary but not sufficient condition for the section 20 offence to be committed."

I agree with Mr Howell that the wording of section 20 is wide, and has to be related to the facts of an individual case. It may, as he points out, be used where there has been a theft of council property, but the section only bites where a loss has been incurred or a deficiency has been caused (the past tense is, in my judgment, important). So, for example, discussions at a meeting of party members which do not result in any action impacting upon the local authority cannot be misconduct for the purposes of section 20. That is important because politicians must be free to discuss and explore ideas freely prior to implementation. So, in the present case, the impact upon the local authority occurred when the housing committee made its decision on 8 July 1987 to increase designated sales to 500 per annum and to institute a scheme of capital grants. If there was misconduct by the appellants or by either of them, it must be found in effective action which they took to obtain and/or implement that decision. In the context of this case, that seems to resolve itself into two issues: (1) did the appellants know when they caused or permitted option 3 to go before the housing committee with majority party support that they were acting illegally? (2) If so, was their conduct causative of the housing committee's decision?

Unlike Mr McMullen I do not begin by analysing the legality of the housing committee's decision, but unlike Mr Howell I do not regard the legality of that decision as a matter of no significance.

4 Real politics

Some of the submissions advanced on behalf of the auditor have been framed in such a way as to suggest that any councillor who allows the possibility of electoral advantage even to cross his mind before he decides upon a course of action is guilty of misconduct. That seems to me to be unreal. In local, as in national, politics many if not most decisions carry an electoral price tag, and all politicians are aware of it. In most cases they cannot seriously be expected to disregard it, but they know that if the action which they take is to withstand scrutiny (to be "judge-proof") there must be sound local government reasons, not just excuses, on which they can rely. As Neill LJ said in Credit Suisse v Allerdale Borough Council [1997] QB 306, 333:

"The statutory powers conferred on local authorities to be exercised for public purposes can only be validly used if they are used in the way which Parliament, when conferring the powers, is presumed to have intended. This is a general principle of public law ..."

Although the sale of local authority housing is a matter in relation to which many people have strong views it is common ground that local authorities are entitled to sell housing, so the adoption of option 3 did not, on the face of it, contravene the law. Furthermore, in a case which has achieved so much notoriety, it is important to recognise that no one has ever contended that either appellant became involved in the sale of council properties for private gain.

5 Burden and standard of proof

Allegations of wilful misconduct contrary to section 20(1)(b) of the 1982 Act are very serious

and, as this case shows, if they are established theoutcome for the individual may well be catastrophic. As Lord Nicholls of Birkenhead said in In re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563, 586:

"the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

Mr Howell contends that the Divisional Court adopted the wrong approach in relation to the issues raised by all five appellants in that court. He submits that the Divisional Court cast the burden of proof upon the auditor and then made the standard too high. In my judgment there is no substance in that submission. The Divisional Court was right to require the auditor to prove his case, and, although the Divisional Court used different formulations at different times when expressing its conclusions, I see no reason to conclude that it was ever unaware of the standard which had to be attained.

6 Effect of legal advice

I remind myself that the Divisional Court had the advantage of seeing the two appellants, as well as others, when they gave evidence, and clearly that court was not particularly impressed by these two appellants, but what I cannot follow is how the court was able to find these appellants guilty of wilful misconduct having regard to its conclusions in relation to those important factual issues which I set out at the beginning of this section of this judgment, conclusions which led the court to conclude that three out of five appeals must be allowed. I recognise that long before 5 May 1987 Dame Shirley, but not Mr **Weeks,** had received legal advice from Mr Ives, but on 5 May 1987 the possibility of targeting sales in marginal wards for political gain was put to leading counsel of considerable standing. Mr England, who received and reported upon counsel's advice, was led to believe that designating city-wide would not be unlawful merely because it met Dame Shirley's objective of 250 in marginal wards. The judgment of the Divisional Court simply does not explain why the advice of leading counsel did not affect Dame Shirley and Mr **Weeks** as it affected Mr England, and for that matter Mr Hartley and Mr Phillips, and I cannot make good the omission because there seems to have been no reason to make any distinction. The Divisional Court said that the purpose of the appellants throughout was "to achieve unlawful electoral advantage". The use of the word "unlawful" begs the question. Their submission is that having taken legal advice they, like the others, believed that electoral advantage could lawfully be pursued by the route envisaged in Mr England's report of his consultation with Mr Sullivan, and thereafter the route chosen was, they believed, entirely legitimate. The number of properties designated was not excessive. A joint report was prepared and approved by counsel. Proper criteria were used to select properties in marginal and other wards. No improper pressure was brought to bear on the members of the housing committee or thereafter on the officers responsible for sales, and, although sales in marginal wards were monitored, that was, as the Divisional Court recognised, no clear indication of guilt.

Mr Howell is right to say that the inconsistencies on which the appellants rely are not internal. They are only observed when I look to see how theDivisional Court dealt with others, but that is no answer when they relate as they do so closely to the case of each appellant. I recognise, of course, that in the Divisional Court the appellants contended that the great increase in the number of designated properties was not promoted in order to achieve 250 sales per annum in marginal wards, and that the Divisional Court held otherwise, but in all essential matters the records speak for themselves. On 5 May 1987 counsel and the officers who attended on him knew all there was to know about Dame Shirley's ambition as to sales in marginal wards. The Divisional Court was critical of both appellants for saying that, in the light of Mr Sullivan's advice, the policy was abandoned. The court said, 96 LGR 157, 185, that they "lied", but on any view option 3 was not the proposal which Mr Sullivan was asked to consider. It was only formulated as a result of his advice.

As Mr McMullen pointed out, those who wish to offend against the law do not usually consult lawyers of good reputation, give them access to all relevant information, and then act in accordance with their understanding of the lawyer's advice, arranging for further advice to be obtained as events progress. In most cases where a breach of section 20 has been found proved, the evidence shows an unwillingness to obtain or a defiance of legal advice. That is not this case.

Mr Howell, being fully alive to the difficulty of his position, sought to contend that, if the Divisional Court erred, it was when it allowed appeals, not when it dismissed them. In my judgment in this case, such severance is simply not a possibility, and the findings of fact made by the Divisional Court, primarily in relation to others, should have resulted in the appeals of these appellants also being allowed. In the light of those findings, it is simply not possible to find, as against these two appellants, even on a balance of probabilities, in relation to a serious matter such as this, that wilful misconduct has been proved. That is a conclusion I reach without resort to the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969), which we were invited to consider, together with a whole host of authorities to which it is unnecessary to refer.

7 Legality of the housing committee decision

If there was no wilful misconduct by either appellant prior to the decision of the housing committee on 8 July 1987, then there would seem to be no ground for saying that the housing committee's decision was unlawful.

8 Causation

In any event, the link between the wilful misconduct alleged and the housing committee decision can only be found in the decision of the appellants to put before the housing committee a joint report which contained option 3, and to advise the members of the committee that option 3 had majority party support. As Mr McMullen points out, the reasons for laying a proposal before a committee may not be the same as the reasons for adopting it, if it is adopted, and here that point is clearly illustrated by the decision of the Divisional Court. Mr Hartley, as chairman of the housing committee, was a firm believer in selling as many properties as possible, and no doubt voted for option 3 for that reason. As to the rest, the Divisional Court found, at p 203f, that "most members of the committee were notguilty of misconduct and did not themselves vote for option 3 for improper reasons". They knew, of course, of Dame Shirley's desire to sell properties in marginal wards, and could reasonably infer that it was that desire which generated party support for option 3, so it would seem to follow from the Divisional Court's finding, that in the end party support for that option was not critical. The support of Mr Hartley may have been.

9 Grants

If, as I would hold, the findings of wilful misconduct cannot be sustained in relation to the primary decision to designate properties city-wide, the same must follow in relation to capital grants. They were an ancillary part of the designation package, incorporated into the joint report as approved by counsel. As it turns out there was, it seems, no power to make such grants, but it is not contended that either appellant knew that.

10 Preparation of papers

Similarly, as it seems to me, the cost of preparing papers and other costs related to the widespread designation cannot be laid at the door of the appellants if they did not transgress. I would therefore discharge the certificates in their entirety and allow the appeal of both appellants.

JUDGMENTBY-2: SCHIEMANN LJ

JUDGMENT-2:
SCHIEMANN LJ: Having nothing to add as to the facts which are compendiously set out in Kennedy and Robert Walker LJJ's judgments I can go straight to the first issue in this appeal, namely whether or no the evidence before the Divisional Court showed that a loss had been incurred by the wilful misconduct of the two appellants.

I agree with Kennedy LJ's conclusion and reasoning to the effect that the auditor has not shown that any loss has been incurred or deficiency caused by wilful misconduct on the part of either appellant and that therefore this appeal must be allowed and the certificate quashed. Since that is the view of the majority of this court it is not necessary for me express a view on the submissions as to unfairness or as to quantum. As to the latter I prefer to express no opinion. The submissions as to unfairness, however, raise some issues of general importance, upon which I take this opportunity to comment later in this judgment. Before doing so I would like to express in my own words the reasoning process which has led me to the conclusion that the appeals ought to be allowed.

As Robert Walker LJ points out in his judgment, post, p 432a-b, there was throughout the hearing a certain lack of focus as to precisely what misconduct is alleged against the appellants and the relationship between that alleged misconduct and the decision of the housing committee on 8 July 1987. I agree with him that the Divisional Court approached the issue as being "whether the appellants had promoted, pursued or implemented a policy which was unlawful because of its improper purpose": post, p 433a-b. However, unlike him, I do not consider that the Divisional Court was right so to do. That very formulation has led to the lack of focus to which he draws attention. The phrase "its improper purpose" leads one to forget to be clear as to whose purpose is under examination. I differ from him in the formulation of the issue. He formulates it in this way, post, p 428a-b:

"The crucial issue is whether the appellants devoted a great deal of their considerable energy and enthusiasm, and a great deal of the council's financial resources, to the genuine pursuit of a lawful (though highly controversial) policy ... or whether they merely pretended to do so and their real purpose remained the improper purpose of targeting marginal wards in order to win the 1990 elections, but with an extension of the policy to other wards tacked on as camouflage."

As it seems to me the following questions lie at the root of this case. Was the decision of the committee on 8 July unlawful? Did either appellant wish the committee to take an unlawful decision?

What caused any loss to the council was the decision of the housing committee on 8 July. Unless it can be shown that this decision was unlawful the appeals should, in my judgment, succeed. Even if it can be shown that the decision taken by the committee was unlawful, nevertheless the appeals should in my judgment succeed unless it can be shown that the relevant appellant wished the committee to take an unlawful decision.

Whether or not the decision of the housing committee was unlawful depends, in the circumstances of this case, on the motivation of the committee at the time of the vote. If its motive was purely to secure electoral advantage for the Conservative Party then the decision was unlawful. If purely Housing Act considerations were its motivation then its decision would be lawful. I shall term these two motives electoral and housing respectively. There is a complication. Frequently individual persons act from mixed motives. Further, group decisions may have multiple motivations-in part because there are many votes cast and in part because each voter may himself have several motivations. For the purposes of the present case I can ignore this complication and proceed on the assumption that the committee

decision was either motivated by electoral considerations or by Housing Act considerations.

The following in my judgment are not sufficiently analysed in the judgment of the Divisional Court: (1) the motivation of the committee and those who composed it; (2) two possible desires in the breast of Dame Shirley: (i) a desire, having a party political aim, that designated sales should take place in marginal wards, and (ii) a desire that those who voted in favour of designated sales in marginal wards should do so being themselves motivated by party political considerations.

The Divisional Court found on ample material that: (1) Dame Shirley was motivated by a desire, having an electoral aim, that 250 designated sales should take place in marginal wards; (2) Dame Shirley expected the Conservative majority on the committee to share her desire; (3) Dame Shirley knew and every other councillor knew that for the committee to take the decision motivated at that time purely by electoral considerations would be unlawful; (4) had it not been for Dame Shirley the proposal for designated sales in the marginal wards would not have been placed before the committee.

The appellants knew that if a decision to designate city-wide was taken the chances were that it would be challenged in the law courts by their political opponents. They were expressly warned by their officers of this risk. It is clear that they were concerned, at the least, to obtain something "judge-proof"-that is to say something whose illegality could not bedemonstrated in court. In those circumstances a court can legitimately demonstrate such worldly wisdom as it has and expose any reality which is hidden behind a form of words. However, a court embarking on such an exercise must do so with immense care, identifying precisely what are the questions which need to be asked and what is the evidence in relation to each question. It is a particularly difficult task when the court is faced with a group decision. The Divisional Court might perhaps have concluded on the evidence before it that the resolution passed by the housing committee was voted for by the Conservative councillors solely because they wished for electoral advantage. However, the Divisional Court refrained from so concluding. Instead the reasoning was that because the passing of the resolution would achieve Dame Shirley's political purpose she was guilty of wilful misconduct in urging the committee to pass it. That I regard, with respect, as too simplistic a solution to the difficulties of this case.

It is important initially to keep separately in mind the position and motivation of each of three sets of persons-the committee, individual councillors who vote, and the councillor, such as each of the appellants, who does not vote but who seeks to persuade others to vote. The judgment under appeal does not do so.

It is legitimate for councillors to desire that their party should win the next election. Our political system works on the basis that they desire that because they think that the policies to which their party is wedded are in the public interest and will require years to be achieved. There is nothing disgraceful or unlawful in councillors having that desire. For this court to hold otherwise would depart from our theory of democracy and current reality. The leading case on this branch of the law is R v Waltham Forest London Borough Council, Ex p Baxter [1988] QB 419. That was a decision of this court (Sir John Donaldson MR, Stocker and Russell LJJ) upholding a decision of the Divisional Court consisting of Glidewell LJ and myself. The essence of the case, as was pointed out by Watkins LJ in R v Derbyshire County Council, Ex p Times Supplements Ltd (1991) 155 LGRev 123, 126, is contained in the following quotation from the judgment of Russell LJ [1988] QB 419, 428:

"Party loyalty, party unanimity, party policy, were all relevant considerations for the individual councillor. The vote becomes unlawful only when the councillor allows these considerations or any other outside influences so to dominate as to exclude other considerations which are required for a balanced judgment. If, by blindly toeing the party line, the councillor deprives himself of any real choice or the exercise of any real discretion,

then his vote can be impugned and any resolution supported by his vote [is] potentially flawed."

The Court of Appeal's decision in the Waltham Forestcase was expressly referred to in the judgment of Slade LJ in Jones v Swansea City Council [1990] 1 WLR 54, 83 where he said:

"Even if the evidence had established that all the Labour members who voted for the resolution both knew of the resolution and on 28 June would have regarded it as subjecting themselves to an informal party whip, they would still have been entitled and bound to have regard to their personal responsibility and to vote in accordance with their beliefsand consciences. The decision of this court in R v Waltham Forest London Borough Council, Ex p Baxter [1988] QB 419 shows that this would have been their duty as councillors, even if there had been a party whip. It also illustrates that the mere fact that all the members of one party vote the same way does not establish that they were not exercising an independent judgment."

This passage in the judgment of Slade LJ was approved by Lord Lowry and at least three of the other members of the appellate committee of the House of Lords when the decision in that case was reversed [1990] 1 WLR 1453, 1469e.

Although a councillor can be motivated by a desire that his party should win the next election, a desire that one party should win the next elections is not one which is permitted to motivate the council's actions: it is an impermissible motivation for the committee. If the committee's resolution had set out the motivation of the committee and that motivation had been expressed to be to change the composition of the electorate in order to advantage the Conservative Party this would have been an impermissible motivation for the council.

One of the problems highlighted by the present case is that it is difficult to separate the motivation of individual councillors from the motivation of the committee. But this is a commonplace of decision-making by a body having a legally separate existence but constituted of individuals. Examining the motivation of individuals is fraught with problems. One problem is that the motivation of councillors may change during the course of debate-to suppose otherwise would render all debate futile. Further, a resolution for which a councillor's vote is sought may have a number of concurrent different attractions for him. Another problem is that different councillors may vote for the same resolution but for different reasons.

The law of the European Community, following French traditions, requires that regulations, directions and decisions of the Council and the Commission shall state the reasons on which they are based: EC Treaty, article 190. Absent deceit, this has the great advantage that the court knows the motivation and can test its legality. That however is not our tradition. The decision under attack does not set out the reasoning of the councillors who passed it. It is common ground that the decision is not illegal on its face. I accept that it is open to a court, after hearing evidence, to come to the conclusion that the council's motivation was an impermissible one.

The Divisional Court held in relation to the decision of 8 July, 96 LGR 157, 181:

"In our view this decision was substantially influenced by a wish to alter the composition of the electorate by increasing the Conservative vote in marginal wards by the sale of council properties, and was therefore unlawful. The policy proposed at the meeting by [Mr Hartley] and adopted by the committee was one which gave effect to this purpose, whatever may have been the reasons for the votes of individual members. It is perfectly possible, in law and common sense, for a corrupt principal to cause a result through an innocent agent or (in the context discussed by Lord Nicholls of Birkenhead in Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378, 385c) a dishonest third party to be liable for a breach of trust perpetrated

by a trustee acting innocently. In the present case,whatever the reasons of individual members for voting as they did, the option for which they voted was placed before the committee, in part at least, in order to achieve the improper purpose to which we have referred." (My emphasis.)

The meaning of the first sentence is obscure. It has not been proved that the committee was itself motivated by legally impermissible motives. The repeated reference in the passage which I have just cited to "whatever the reasons of individual members" indicates that the Divisional Court did not regard the motives of the voting members as crucial to its decision. It would have been open to the Divisional Court to conclude that the committee was motivated at the time of the vote by an impermissible motive but the Divisional Court refrains from making such a finding. In those circumstances, I do not think that we ought to make a finding that the committee's motivation was impermissible. Thus the decision must be regarded as a lawful decision by the committee unless it is prevented from being lawful by the motivation of the councillors who voted for it or by the motivation of those who procured the presence of the motion on the committee agenda.

The motivation of individual voting councillors

Questions

In theory there are two separate question which arise: (1) what is permissible motivation for voting councillors; (2) did the voting councillors in the present case overstep the limits of what is permissible?

The Divisional Court did not decide that the voting councillors themselves overstepped the limits of what was permissible. In those circumstances the logically first question does not need to be answered.

As I indicated above it is legitimate for councillors to desire that their party should win the next election. For a council to decide to lower council house rents with a view to pleasing council house tenants or to decide to lower rates with a view to pleasing ratepayers is not illegal provided that these decisions involve no other element of illegality, such as not providing for a balanced budget. These voter-pleasing decisions are lawful in my judgment even if one of the motivating factors in the minds of the councillors who vote for them is the desire to be re-elected and a consciousness that their wards contain a significant number of electors of the category which the relevant decision is designed to benefit.

Undoubtedly, however, there are some means of securing the re-election of one's party that are unlawful. The declaration of what is lawful and which are unlawful in this context is, in part at any rate, made expressly by Parliament. Thus imposing a rate at a higher figure than is permitted under statute is illegal. Deliberately setting a rate so low that the council's total income and reserves will not enable the council to fulfil its statutory obligations is again unlawful. Giving money bribes to electors is unlawful. In part the courts have felt free to supplement these parliamentary constraints by imposing behavioural rules on a council acting as a council-broadly equating the council's position with that of a trustee.

Designating properties city-wide does not become unlawful merely because it achieved Dame Shirley's objective of 250 in marginal wards. It is similar in some ways to a decision to lower council house rents not beingillegal merely because it may well have been motivated by a desire not to lose council house tenants' votes at the next election.

Parliament has, by sections 94 to 98 of the Local Government Act 1972, placed certain limits on what councillors may vote for when they have a personal interest. They do not impinge on the present case save that the very fact that Parliament saw fit to regulate some matters and not others may be a pointer and save that it could be said that this legislation was in part not

necessary if the theory that a councillor is a trustee be correct.

The law recognises that the fact that an individual may have voted for a decision without having given careful thought to all relevant factors, or for personal grounds which are strictly irrelevant to the merits of that decision, does not make the decision illegal. A vast number of decisions come before local authorities at each meeting and it is simply not practicable for each councillor to have examined the merits of each decision. In practice the immediate motivation of the councillors voting for it will often be that the proposal has the support of members of their party some of whom will have carefully considered the merits of the proposal in the light of general values which a particular councillor member of that party will broadly share. Thus councillor A will frequently vote for the sewage scheme proposed by his party or by councillor B because councillor A wishes to persuade his party and councillor B to vote for councillor A's education proposal.

As it seems to me there is nothing illegal in a councillor saying to a council officer, "This is the aim we are trying to achieve. Is that an aim which is permitted to us by law and are the means we are minded to employ open to us?" Nor is there anything illegal in council officers spending money in an attempt to find the answer to them. I agree with the Divisional Court when it says, 96 LGR 157, 174:

"We can see nothing improper today in council officers attending political meetings of a group of council members if invited to do so. Their presence does not convey assent to party political views but gives the opportunity to hear the germination and development of ideas which, particularly if they are the ideas of the majority party, may develop into council policy. That knowledge will both alert them to issues which they may ultimately have to address professionally and, in some cases, afford an opportunity ... 'to give a steer' as to the practicality and propriety of ideas before they become policy."

I do not think it would be right to draw a distinction between asking questions designed to avoid one possible illegality and questions designed to avoid another type of illegality.

The motivation of those who procured the presence of the relevant motion on the committee agenda but who did not vote

The Divisional Court suggest that, if a proposal comes before a committee by reason of what would be illegal motivation if that were the committee's motivation at the time of resolution, then, whatever the motivations of the voting councillors at the time of their vote, the passing of the motion is an illegal act. I disagree. Where a councillor proposes something for an unlawful reason and this illegality is pointed out to the committee and the committee then expressly rejects the unlawful ground and instead substitutes a lawful ground justifying the same action then the committee's resolution islawful notwithstanding the unlawfulness attendant upon the policy's conception.

The judgment under appeal concentrates on two matters: (1) a historical examination as to how it came about that the motion was before the committee at all; (2) the fact that the policy was presented to the committee as being Conservative Party policy.

So far as the first is concerned, it seems to me of no great significance that Dame Shirley was motivated throughout by a desire that her party's interest should triumph at the next election. There is nothing in local government law which prevents a councillor putting a proposal before a council in a matter in which he has a personal interest. There are inhibitions on voting but that is a separate matter. If Dame Shirley had applied for a discretionary grant for herself under some legislation she would not have been acting improperly if she had put that matter before the council. Nor I think would she have been acting improperly if she had tried to lobby other councillors before the vote to vote in favour of giving her the grant. That is her right in a democracy. If that be correct, then I can not see

anything wrong in her lobbying other councillors to cast their votes in favour of a proposal which favours, not her pocket, but her party.

While I accept that a corrupt principal can cause a result through an innocent agent and a dishonest third party can be liable for breach of trust committed by a trustee acting innocently, I differ from the Divisional Court in that I do not regard these principles as dispositive in the present case. I do not see how Dame Shirley can be regarded as the council's principal or the council as her agent. Once one accepts that the committee has passed a lawful resolution the question of the liability of a dishonest third party does not arise. Not that I accept that she was dishonest or indeed improperly motivated.

As the division of opinion in this court shows, there is no doubt that the borderline between what is permissible and what is not permissible in the context of what Dame Shirley was trying to achieve is not easily perceived by lawyers and even less easily perceived by laymen. It is clear to me that Dame Shirley was seeking to avoid doing anything illegal and that this was the reason why she laid bare her hopes to her legal advisers and asked for legal advice.

If she, motivated by a desire to benefit her party, had sought to persuade the committee to vote with the same motivation as she herself had, then I accept she would have acted improperly, though given the complexities of analysis required I am not entirely persuaded that she would have acted improperly wilfully. However, that is not the present case.

Rider

The judgment of the Divisional Court and the questioning by members of the court of Dame Shirley and their conclusion that she lied fail, as it seems to me, sufficiently to distinguish between: (1) the end result she desired in the marginal wards, and (2) what her desires were in relation to the motivation of the committee voting for the resolution which would produce that end result.

As it seems to me, the position is that she, motivated by a desire to benefit her party, sought to persuade the council to vote with the same result butmotivated by a different desire. That does not seem to me illegal or improper, still less wilfully so.

Of course I concede that a different view from mine as to the legality of the committee's decision may be taken. However, as it seems to me, if a judge takes the view that something is lawful, albeit that other judges differ, it is hard to describe the attitude of a layman who takes the same view as the first judge as wilful misconduct even if her conduct took place at a time when she did not know of the first judge's view.

I turn now to my comments on the submissions on unfairness.

Unfairness

Lord Lester, in submissions which were broadly adopted by Mr Cakebread, submitted that this court should quash the certificate on the basis that the procedures adopted by the auditor and the Divisional Court were in their total effect so unfair that such a quashing was appropriate. For the purpose of exposition he isolated for the attention of the court four matters-apparent bias on the part of the auditor, unreasonable delay on the part of the auditor and the Divisional Court in confirming the auditor's decision in part, a failure on the part of the Divisional Court to hold a fair balance between the auditor and Dame Shirley Porter, and a breach by the Divisional Court of the presumption of innocence.

Lord Lester drew our attention to a number of features which he submitted cumulatively did result, or may have resulted, in the conclusions reached by the auditor and the court being unsafe. Mixed with these submissions were submissions of a different nature which one can

call rights-based submissions. These had as their conceptual origin the rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms. In particular, Lord Lester submitted that there had been an infringement of a right to a trial within a reasonable time. He submitted that "the English courts should fashion an appropriate and effective remedy for a breach of Dame Shirley's right to a trial within a reasonable time and that the only effective remedy in the circumstances of this case was and is to quash the certificate". He submitted that this should be the result even if there was no danger that the infringement of the alleged right had produced wrong conclusions on the part of the tribunals below.

He inevitably accepted that at the relevant times the Convention had not been incorporated into our law. He accepted that no private rights could be derived from the provisions of unincorporated treaties. He submitted, however, that there were uncertainties and gaps in the statute and common law which this court should resolve and fill by seeking inspiration from the Convention and the jurisprudence decided under it.

Apparent bias

Lord Lester put at the forefront of his submissions complaints as to the way the auditor had conducted himself at and after the press conference in January 1994.

The Divisional Court, 96 LGR 157, deals with this aspect in the following passages in its judgment:

"Having completed his investigation into the statutory objections, the auditor on 13 January 1994 wrote to all the appellants and others with anote of his provisional findings and views, together with 13 appendices, a bundle of material documents including notes and transcripts of interviews, a copy of the statement which he had that day made to the press and a notice that he had to consider whether to certify a sum slightly in excess of oe21m or some other sum as due, on the ground that the loss of such a sum had been incurred by the wilful misconduct of the appellants and others. The notice also indicated that written representations could be made by 29 July 1994 ... The letter emphasised that the history of events set out in appendix 1 to the note and the auditor's findings and views were provisional and were being made available so that the appellants, the objectors and the council might make oral and/or written representations. On the same day, 13 January 1994, the auditor made a statement to the press which received substantial publicity on television and in the newspapers. This court has seen video recordings of the relevant item on the 1 p m and 9 p m BBC news. In the light of this event and other matters to which we shall later come, [Dame Shirley Porter] ... invited the Audit Commission to discharge the auditor, which they declined to do. That decision was not sought to be challenged by judicial review. All the appellants then invited the auditor to discharge himself and made representations to him. This he refused to do, in his written decision dated 18 October 1994": pp 165-166.

"We are prepared to accept that, in the light of the great public interest in this matter and the lengthy period taken by the initial investigation culminating in the provisional findings, it was appropriate for the public to be given some explanation for the time spent and some indication of the auditor's provisional views. But, in our judgment, the press conference which took place was ill-conceived and unfortunately executed. It would have been sufficient for a press statement to have been issued, preferably by the auditor's solicitor, saying that the complexity of the investigation accounted for its length and that, at that stage, the auditor was provisionally minded to make findings of wilful misconduct causing loss against the individuals named but that, before he reached any final decision, the individuals would have the opportunity to give evidence and make submissions to him. Instead, a televised announcement was arranged at which the auditor himself appeared and, although he said that his views were provisional, he expressed them in florid language and supported them by reference to the thoroughness of the investigation which he claimed to have carried out.

There was a further feature of the event which should have had no place in the middle of a quasi-judicial inquiry. A stack of ring binders on the desk at which the auditor sat bearing the name of his firm for the benefit of the cameras was, ostensibly, under the protection of a security guard: unless it was being implied that the persons under investigation might wish to steal the documents, it is not clear what was the purpose of this posturing": p 173.

"We express the hope that, in any future statutory investigation of this kind, no auditor will stage any similar event, which may undermine the perception, whatever may be the reality, of the auditor's open-mindedness. In the light of the material before us, including, in particular, the auditor's reasons for declining to recuse himself, we accept that, despite such inferences to the contrary as might have been drawn from the press conference, the auditor did have an open mind and wasjustified in continuing with the subsequent hearings. We note that he did not confirm his preliminary findings in respect of those who gave evidence at those hearings. The error of judgment which we find he made, in holding the press conference as he did, did not, in our view, demonstrate bias on his part. He was at pains to stress the provisional nature of his findings and it is pertinent that in his final decision he made no finding of wilful misconduct against three people in relation to whom he had, provisionally, been minded so to find. In any event, as with the investigation, any possible unfairness to the appellants has been cured by the hearing before us": p 174.

I note that the Divisional Court referred to the auditor's reasons for declining to recuse himself. These reasons fall into two categories. The first category consists of contentions in the nature of submissions as to what was a sensible procedure for him to follow in the light of the audit procedure laid down by statute. The second category consists of protestations of lack of bias in fact. It was perfectly sensible of the auditor to include those protestations: had he not done so, some might have said that he had not even bothered to deny actual bias. However I would not regard such protestations as being of any great assistance to a court dealing with allegations of apparent bias. I doubt whether the Divisional Court in its reference to the auditor's reasons for declining to recuse himself had these protestations in mind. For my part I have given no weight to them.

So far as conduct at the press conference is concerned we too have seen the videos and agree with the criticisms of the Divisional Court. The citation from the judgment above accurately sets out the gist of some of Lord Lester's present submissions. To them, however, he adds complaints that the auditor did not do all he could to stem the publicity or correct inaccuracies in reporting.

Lord Lester accepts that he has not shown that the auditor was actually biased against the appellants but he submits that the auditor's conduct had as its predictable result that those against whom a prima facie case was found were "effectively found guilty by the media and the public at large." I agree that this seems probable. He submits that the release of all this material to the appellants' political opponents was almost bound to result in incomplete snippets adverse to his client appearing in the news media. I agree. He submits that the auditor could have done more than he did to discourage the media from such reporting. Perhaps, although there is no reason to suppose that this would have had any effect.

Lord Lester submits that there was "prejudicial publicity". In one sense of that word he is clearly right: the publicity would incline at least the superficial listener or reader to suppose that it was the auditor's view that Dame Shirley's conduct had been improper and that she had caused a huge loss. His difficulty, as he recognised, is that he has to establish a risk that the auditor and the Divisional Court, not the public, might be prejudiced. He sought to overcome this hurdle by submitting that, after such a public statement and after spending over oe3m on the investigation the auditor would be under some psychological, perhaps unconscious, pressure to make his final conclusion tally in its essentials with his preliminary conclusion.

In this context it is important to separate out two types of damage which can be caused by this sort of publicity-first, damage to the integrity of thejudicial process in so far as it affects the appellants and, second, damage to the appellants' general reputation by giving publicity to provisional findings. While the latter is clearly regrettable it is not something with which this court is concerned in the present context.

Mr Howell before us disputed the accuracy of the description of what happened as a press conference and provided a number of reasons which, he submitted, justified the auditor in proceeding as he did. I see force in some of what Mr Howell submitted under this head but there is no need to lengthen this judgment by setting out findings in detail. This is because the resolution of the disputes as to the propriety of each of the auditor's actions or inactions under this head is not crucial to my conclusion.

The parties are at one in relation to the test which the court has to apply in cases where there is an allegation of apparent bias. That is the test pronounced by Lord Goff of Chieveley in R v Gough [1993] AC 646, 670. Although that test has not escaped criticism (see the comment by Lord Browne-Wilkinson in R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2) [2000] 1 AC 119, 36a-b), each of the other members of the appellate committee approved it. All counsel agree that we are bound by it:

"... I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ..."

The mere fact that the case of one party is regarded with disfavour is manifestly not enough to raise a danger of bias. It is necessary to concentrate on the assertion that there is a danger that this regarding with disfavour was the result of some unfairness. Lord Lester submits that the Divisional Court confused actual bias with danger of bias. The basis of that submission was the reference by the Divisional Court to the auditor's own exposition of his views when he refused to recuse himself. I do not accept that there was such a confusion in the Divisional Court which expressly referred to R v Gough [1993] AC 646. In any event, we are not thus confused.

I think there was room for a casual observer in January 1994 after the press conference to form the view that the auditor might be biased. However, that is not the relevant test. We must look at the matter now and consider whether there is a danger that the auditor in coming to his provisional and final conclusions unfairly regarded with disfavour the case of either of these appellants. Having looked at the material it seems to me that the auditor's conclusions at either stage in relation to that material arenot so odd that they lead one to suspect that the explanation for the oddness might be bias. To express that differently, the conclusions are ones which, while they can be the subject of rational attack, are ones to which there is an understandable path. Again, the fact that the auditor expressed a provisional view is one wholly understandable given the procedure sanctioned by Parliament. Having looked at the audit procedure laid down by Parliament and the code of practice, while one can take the view that the auditor was too enthusiastic and may have got lost by reason of having seen the mass of material which his researches dug up, there is nothing to lead one to suppose that he was unfairly biased against either of the appellants. Again, while one can

take the view that he might have done more to discourage leaking of material after the press conference or to correct unfair press reports there is no reason to suppose that his failure to do so was attributable to bias.

I note that no one has been able to suggest any possible motive for bias on the part of the auditor against either of these appellants. Like the Divisional Court, and giving no weight to the auditor's inevitably self-serving protestations when he refused to recuse himself, I consider that there is here no real danger that the auditor might have unfairly regarded with disfavour the case of either of these appellants.

One can examine the issues in relation to bias in the light of the jurisprudence under the Convention and Lord Lester did so at length in his interesting submissions. However, as we think he accepts, the Convention case law does not suggest that the test in R v Gough is either wrong or inadequate. In those circumstances it is unnecessary to lengthen this judgment by consideration of that case law.

Delay causing an unsafe verdict

I turn now to examine the submission in relation to delay. For the purposes of exposition it is useful to consider separately two possible effects of delay-an unsafe verdict and other damage for the appellant.

I first consider the submission that the effect of the undoubted delay in disposing of this matter rendered the conclusions of the Divisional Court unsafe. The submission was primarily based on the fact that the appellants and others found themselves giving evidence some 10 years after the relevant events. A secondary basis was that, by reason of the delay, the appellants found themselves prejudiced when it came to adducing evidence in relation to the amount of the loss allegedly suffered by the city.

Lord Lester submitted that the delay was such that disadvantage to Dame Shirley in the presentation of her case is to be inferred. He pointed out that she had stated in her affidavits and at the trial before the Divisional Court that her memory of some of the meetings was imperfect.

The Divisional Court said in its judgment that the crucial question was whether the delay had given rise to such prejudice that no fair trial could be held. It considered that no such prejudice had on the balance of probabilities been shown and pointed out, 96 LGR 157, 169:

"All the appellants were aware of the allegations from the time they were made in 1989 ... [Dame Shirley] was advised by counsel from September 1989. [Mr **Weeks**] instructed solicitors in August 1991. In the public hearing which followed the provisional findings there was, as itseems to us, ample and fair opportunity given for the appellants to make their case to the auditor. Although each chose not to give evidence, each made representations, [Dame Shirley] ... by counsel. Numerous contemporaneous documents chart the course of events. Accordingly, we are not persuaded that the auditor's final conclusions can be impeached on the grounds of unfairness. In any event, we are satisfied that the hearing which has taken place before this court has cured any possible unfairness to the appellants which could have arisen from the conduct of the auditor. Each has had the opportunity, after mature consideration of the objectors' complaints, the relevant documents and the auditor's findings, to put his or her case fully in evidence and submission by experienced counsel."

Mr Howell asked the court to note that: (1) the objection related to a major controversial policy for the appellants' party in the evolution and implementation of which both were closely involved; (2) the appellants were aware of the objection at the outset and they had every opportunity to prepare their case and refresh their memory by reference to documents produced at the time, the appellants were aware that the auditor would investigate the

matter and that it was inevitable that they would be interviewed and that indeed they were interviewed on a number of occasions by the auditor when they were shown relevant documents; (3) the Divisional Court reminded itself that it was necessary to bear in mind the lapse of time since the crucial events. That court was able to consider the extent to which the lapse of time materially interfered with the ability to hold a fair hearing, given the amount of contemporary documentation available, and having seen the appellants and others give oral evidence. The court was able to conclude that a fair hearing could be held notwithstanding the lapse of time.

I have no doubt that the appellants' memory of events 10 years before, even given the contemporary documentation, would not be as full or accurate as their memory in 1989. However, in the context of what are the crucial issues in the present case, I consider that the Divisional Court was justified in its conclusion that the lapse of time did not impede the fairness of the trial.

Submissions were made to the effect that the passage of time had adversely affected the appellants' ability to adduce evidence in relation to quantum. I desire to do no more than to say that I was not impressed by this part of the appellants' case.

Delay not causing an unsafe verdict

I now turn to the first of the rights-based submissions. They are founded on article 6 of the Convention and on citations from a number of authorities from various common law jurisdictions, many of which are helpfully and extensively considered in a decision of the New Zealand Court of Appeal: Martin v Tauranga District Court [1995] 2 LRC 788.

Article 6 provides:

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

The concept of reasonableness in this context is not limited by the effect of the delay on the reliability of any verdict produced after trial. Pursuant to the Convention there can be a remedy for the distress or other loss caused by delay even if there is an acquittal. We were addressed at length about the causes of the undoubted delay. For the purposes of this part of this judgment I am prepared to assume in the appellants' favour, without so finding, that the appellants did not have a hearing within a reasonable time.

Mr Howell did not accept that there was in English law any right to a trial within a reasonable time; still less did he accept that there was a right not to be tried after the lapse of a reasonable time. It is not in my judgment necessary for us to express any concluded view on either proposition in the abstract and I refrain from doing so. This is because I reject the submission that, on the assumption that such rights exist in certain circumstances, the natural consequence of the lapse of a reasonable time is that there must be a quashing of any order made after the lapse of this period-in the context of the present case a setting aside of the order of the Divisional Court and a quashing of the certificate. Lord Lester repeatedly referred to the "prejudice" resulting to Dame Shirley from the delay. However, his use of the word had a chameleonic quality-sometimes it referred to the distress and damage caused to the appellants by having these grave charges hanging over them and sometimes it referred to the possibility that their chances of success in relation to the surcharge and disqualification had been adversely affected by the delay.

The passage of time may have one or both of two results. First, it may cast doubt on the reliability of the conclusions reached by the tribunal. Second, it may cause or aggravate financial, physical or psychological harm to one or more of the parties to litigation. In so far

as the court considers that the reliability of the conclusions reached by the tribunal has been impaired by the tribunal's failure to give appropriate weight to the effects of the passage of time, the court may treat this as a ground for quashing the judgment arrived at by the tribunal. This I have already considered.

However, in so far as the passage of time has resulted in other harm to the litigants, the requirement in article 13 of the Convention that everyone be given an effective remedy for a violation of his rights does not have as a logical or inevitable consequence that the decision of the tribunal be quashed. An award of damages may well be a more appropriate remedy for damage caused to a litigant by an unduly delayed trial. This is clearly so where the litigant has been acquitted or found not liable. While in the case of an unsuccessful litigant no doubt the quashing of the decision will be welcome it does not as such provide any relief which is commensurate with the loss which has been suffered. In the context of the present case, the quashing of the certificate in no way provides a remedy for any financial or other damage suffered by the appellants. No award of damages having been asked for in the present case, we are not required to address the question whether under our law as it currently stands the courts would be able to make such an award.

Questions as to the effect of delay may come before the court both before and after the decision of the tribunal. When they arise before the decision of the tribunal then it will often be appropriate to take into account both the danger of an unreliable verdict and the danger of other damage caused to the litigant by the delay. Both of these can be averted by a stay of proceedingsand may be averted by an order for speedy trial. However, when questions as to the effect of delay arise after the decision it seems to me that quashing is likely to be the appropriate remedy for delay resulting in unreliable conclusions by the tribunal whereas an award of damages is likely to be the appropriate remedy for delay resulting in damage to the litigants.

We did not have our attention drawn to any case where the verdict obtained at trial was quashed because of the lapse of time although the verdict was held to be safe notwithstanding the lapse of time. I do not consider it appropriate to quash the certificate merely because there was an undue delay in proceedings.

Equality of arms and the presumption of innocence

I turn now to the remaining aspects of Lord Lester's submissions as to fairness which can usefully be considered under the same heading.

Using terminology more familiar on the continent than here, he referred to the principle of equality of arms, a principle which he summarised as meaning that everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him under a substantial disadvantage vis-...-vis his opponent.

The disadvantages of which he complained related to delay, the auditor's alleged apparent bias in relation to the press conference and its aftermath, the fact that the auditor did not decide to proceed under section 19 of the Act and the fact that, in the Divisional Court, Dame Shirley Porter was required to give evidence and be cross-examined before the auditor had to put his case.

I have already set out my views as to delay and bias. I do not consider that the appellants' complaints in relation to either of these matters gain any extra strength from the invocation of the principle of equality of arms.

Lord Lester submits that by choosing to invoke section 20 rather than section 19 of the Act the auditor put Dame Shirley at a severe disadvantage. He makes a number of points: (1) by virtue of section 19(3) the court is precluded from making an adverse order if it is "satisfied

that the person [affected] acted reasonably or in the belief that the expenditure was authorised by law"; there is no such phrase in section 20; (2) section 20 imposes a burden on the person surcharged to appeal whereas if the auditor proceeds under section 19 it is he who has to apply to the court for a certificate: he has to swear an affidavit supporting his application, he goes first and the nature of his case appears before the person criticised has to reveal his hand; (3) in proceedings under section 19(3) the court can take into account ability to pay.

There are a number of answers to these submissions. As to the first, if a person acts reasonably and in the belief that the expenditure is authorised by law then he will not be guilty of wilful misconduct. So the point proceeds from a misconception: in this regard there is no significant distinction between the sections.

The second is more complicated. Lord Lester's original submission was that the auditor should have proceeded under section 19 rather than section 20. However, it was rightly pointed out that, once it appears to him that a loss has been caused by wilful misconduct, the auditor has no discretion whether to proceed under section 20. Lord Lester thereupon reformulated the point so as to submit that it was a misuse of the auditor's discretion not to proceed concurrently under section 19. Assuming, withoutso finding, that, had the auditor chosen to proceed thus it would have removed the procedural disadvantage of which Dame Shirley complains, I consider that it was well within the auditor's discretion to choose to proceed under only one of these sections. This course had the advantage of avoiding a yet further layer of complexity in what was already a complex case.

As to the third point, whilst it is true that section 20 does not permit account to be taken of ability to pay, that is the regime prescribed by Parliament. Given the duty to proceed under section 20, the fact that ability to pay is irrelevant under that section whereas it is relevant under section 19 is of no significance.

I turn therefore to consider Lord Lester's criticisms of the procedure adopted by the Divisional Court. He submits that: (1) the Divisional Court required, as a condition for allowing the appellants to pursue their appeals, that they each file affidavits and submit themselves to cross-examination upon them; (2) the auditor's report was admitted in evidence without the exclusion, which was imposed on the appellants' evidence, of inadmissible material; (3) the auditor was afforded a specially privileged status in that his report was accepted as cogent evidence without any requirement for him to submit himself to cross-examination; had cross-examination been permitted it might have been fruitful in two areas-as showing actual bias on the auditor's part and in relation to the calculation of loss; (4) by contrast, his advocate was permitted to cross-examine the appellants and their experts; (5) whereas the auditor was under no time constraints in producing his report, Dame Shirley's experts were under time constraints imposed by the court the result of one of which was that some valuation evidence was not admitted; moreover, the experts called by him were not themselves subject to time constraints comparable to those imposed upon those called by Dame Shirley; (6) in section 20 proceedings persons in the position of the appellants were effectively required to show cause why the auditor's report should not stand.

Lord Lester submits that the cumulative effect of these matters is that the appellants were in effect required to prove themselves not guilty of wilful misconduct and were also in effect required to prove that the loss which the auditor asserted had been incurred as a result of that misconduct had not been incurred. Moreover, he submits, the appellants were required to prove themselves not guilty at a time when the auditor had not declared his position in relation to the crucial issue, namely, the impact on the minds of the appellants of the legal advice received.

So far as the first of these submissions is concerned I do not accept it. While there is indeed a requirement under RSC Ord 98, r 3(3) that

"the appellant must file ... an affidavit stating-(a) the reasons stated by the auditor for his decision; (b) the date on which he received the auditor's statement; [and] (c) the facts on which he intends to rely at the hearing of the appeal ..."

it is perfectly possible to appeal against a certificate without asserting any facts. The reason why the appellants chose to file evidence of facts is because they no doubt recognised that the facts disclosed in the auditor's report called for an answer which could not be given by mere submission. This situation is no more a violation of any presumption of innocence than that which faces any person against whom a case has been made on the facts. Inany event it results from the provisions of the Rules of the Supreme Court which as such have not been challenged in this appeal.

The auditor's approach was that any burden of proof was on the objectors and that he should only make a finding of wilful default if he was sure that he should do so. The Divisional Court, on 1 May 1997, directed that "the ultimate burden of proof on appeal will be on the respondent". I am satisfied that looking at the procedures overall in substance the appellants were not required to prove their innocence of wilful misconduct but that the auditor and the Divisional Court were persuaded that the appellants had been guilty of wilful misconduct.

As to the suggestion that the auditor's report may have contained some evidentially inadmissible material and it was unfair not to exclude it in the Divisional Court, we have not heard detailed submissions. The fact is that the Rules provide for the whole of the report to be in evidence. That is no doubt because it reveals what the auditor took into account and is admissible on that basis because it is relevant to the inquiry which the appellate court is undertaking. In any event no suggestion of significant prejudice to the appellants is made under this head.

So far as lack of the opportunity for cross-examination of the auditor is concerned the complaint falls into two parts. The first concerns the inability to conduct a fishing cross-examination designed to elicit an admission that actual bias, of which the appellants had no evidence, in truth existed. I reject this complaint. Any tribunal's judgment is liable to be reversed on the grounds of actual bias by the tribunal but it is not a part of our procedures that the tribunal be required to submit itself to cross-examination just in order to see whether or no an admission of actual bias can be procured. Lord Lester's submissions have more force in the context of his submission that the Divisional Court may have given weight to the auditor's assertions of lack of bias. Since I however, as I have indicated, give no weight to these assertions I do not need to address this point. The second cross-examination point relates to the calculation of loss. Submissions were made to the effect that the appellants were unfairly prevented from cross-examining in relation to quantum. I desire to do no more than to say I was not impressed by this part of the appellants' case.

Even looking at all these matters cumulatively I am not persuaded that there has been unfairness justifying the allowing of the appeal.

JUDGMENTBY-3: ROBERT WALKER LJ

JUDGMENT-3:
ROBERT WALKER LJ:

I

Summary of events (1): up to April 1987

The local government area known as the City of Westminster covers a large part of central London and contains some sharply contrasting residential areas. These range from Mayfair,

Belgravia and Regent's Park to some far less fashionable areas in the vicinity of Queen's Park and the Harrow Road. For electoral purposes the city is divided into 23 wards which elect either two or three members, making up a total of 60 seats on the city council. The composition of the new council elected on 8 May 1986 was 32 Conservative members, 27 Labour members and one independent member.

A policy of designated sales of vacant council dwellings had been introduced by Westminster City Council in 1972 but until 1986 it was on a very small scale, producing only about 10 sales a year. An expansion to produce 65 to 70 sales a year was considered by the majority group in 1984. In mid-May 1986, soon after the local elections, Mrs Kirwan (then chairman of the housing committee) discussed expansion again with Mr England and other officers. Mr England wrote a briefing note for Mrs Kirwan in which he stated: "Were we able to go forward with a policy of wholesale disposal of stock as Wandsworth have done it will be virtually impossible for us to meet our statutory let alone our socially desirable rehousing commitments." (The elected members and officers principally concerned are identified in the overview at the beginning of the judgment of Kennedy LJ.)

On 3 June 1986 there was a discussion at the chairmen's group attended by (among others) Dame Shirley Porter, Mrs Kirwan, Mr Hartley and Mr **Weeks.** The chairmen's group was an influential group of Conservative members, including the leader and deputy leader, the chief whip (then Mr Barry Legg) and the chairmen of the principal committees of the council. It was described by some witnesses as Dame Shirley's cabinet. They met on a regular basis (sometimes with officers in attendance) under Dame Shirley's chairmanship. On 3 June they decided that major policy initiatives should come down from the chairmen's group and the policy and resources committee. The subjects discussed included "marginal wards". Marginal wards (or, as they were sometimes called, "target wards", "key wards" or even "key battlezone wards") are of central importance to the events of this period. As Dame Shirley explained in a paper entitled "Keeping Westminster Conservative" which she wrote in March 1988, 15 of the 23 wards within the City of Westminster were either safe Conservative (9 wards with 22 seats) or safe Labour (6 wards with 18 seats). Those wards would change hands only in a landslide. The other, marginal wards were as follows (the figure for majority indicating the gap between the least successful elected candidate and the most successful non-elected candidate at the 1986 election): Members Majority

Bayswater 3 Labour 156

Cavendish 3 Conservative 70

Hamilton Terrace 2 Conservative 128

Little Venice 3 Labour 36

Millbank 3 Labour 241

St James's 2 Conservative 130

Victoria 2 Conservative 248

West End 1 Conservative, 142

1 Independent

Shortly after the meeting of the chairmen's group Mrs Kirwan produced a note for Dame Shirley. The note stated that "the dangers of mass voting one way or another (i e nurses

about to be evicted from health service accommodation ... and homeless/down and outs who are not our natural supporters) cannot be overemphasised". The note recognised an increase in designated sales as a possibility but commented that "all these options will lessen our already stretched ability to meet our statutory requirements". The council's statutory obligations included those imposed by Part III of theHousing Act 1985 (Housing the Homeless) which re-enacted the Housing (Homeless Persons) Act 1977.

On 24 June 1986 Dame Shirley and Mr **Weeks** attended a special meeting of the chief officers' board. The board was told that the focus of attention would be winning the next election, and there was a reference to "social engineering". On the same day the chairmen's group decided to withdraw a paper on the homeless persons review from the housing committee. On 30 June Dame Shirley attended a working lunch with Jones Lang Wootton. Mr England, who was present, made a note referring to "economic justification for G[erry] mander on housing". That seems to have been the first, but it was not to be the last, reference in the case to Elbridge Gerry, who was Governor of Massachusetts at the beginning of the 19th century and gave his name to a form of manipulation for electoral advantage. The Divisional Court found that from July 1986, if not before, concentration on key wards was the policy of the majority party. On 1 September 1986 the policy unit produced a paper entitled "Homelessness/Gentrification". It stated that homelessness was reaching crisis proportions, and that the law should be changed. It continued:

"Within the present legislation we might (a) test the law to its limits ... (b) target additional homeless accommodation on specific and appropriate wards; (c) use property outside Westminster for both temporary and permanent accommodation. This could assist in relieving homelessness in Westminster; and in gentrification, to the extent that it frees suitable properties in the city. What is gentrification? In short, it is ensuring that the right people live in the right areas. The areas are relatively easy to define: target wards identified on the basis of electoral trends and results. Defining 'people' is much more difficult and is not strictly council business."

On the same day Mr England submitted a draft paper on "Gentrification" to Mr **Weeks.** Its conclusion was as follows:

"A number of initiatives are already in operation to improve home ownership in the city in both public and private sectors. The current economic and planning study will hopefully identify further areas where these schemes can be pushed forward. The major constraint unfortunately, at the present time, is the impact of the Housing (Homeless Persons) Act and the council's other statutory and high priority rehousing requirements, e g: medical cases and the need in many instances for rehousing to be available to prime the pump in getting further home ownership schemes off the ground. The rate of disposal of council stock must therefore be seen in this overall context."

The reference to the "current economic and planning study" was to a study already commissioned from PA Cambridge Economic Consultants ("PACEC"). On 2 September 1986 Dame Shirley sent a note to members of the chairmen's group entitled "Strategy to 1990". It stated, "Clearly our top priority is to win the 1990 elections." It listed "homelessness/gentrification" as one of the key issues relevant to electoral success. This and other papers were presented to a seminar of Conservative members on 6 September.

On 15 September there was a meeting with PACEC attended by Dame Shirley Porter, Mr **Weeks** and others. The consultants were shown (but didnot retain) some policy papers. Notes made by Mr Mark Kleiman of PACEC included the following:

"Getting the right people housed. Strategy-to push Labour voters out of marginal wards. Housing Dept can't say-privatise/gentrify council blocks in marginal wards-400 in b & b. But we could say-preserve economic base-need to boot out these blocks."

Ten days later Mr England wrote in a note to Mr Phillips:

"Initial discussions being held with [PACEC]. Report targeted for four months' time. The current feeling is that the consultants have grasped the key issues very quickly and are likely to produce a productive report."

The development of the policy of designated sales in key wards can be seen in the minutes of successive meetings of the chairmen's group on 23 September, 1 October and 16 November 1986 and 13 January and 27 January 1987. It is not necessary to summarise these minutes because it is not in dispute that the policy was being actively developed at this time, or that its purpose was to achieve electoral advantage for the Conservative group on the city council. By way of illustration, the meeting on 27 January considered a paper by Mr Alex Segal, a Conservative member of the housing committee, which stated the problem as he saw it:

"If it is accepted that owner-occupiers are more inclined to vote Conservative then we approach the city council elections in 1990 with an enormous handicap ... The short-term objective must be to target the marginal wards and, as a matter of utmost urgency, redress the imbalance by encouraging a pattern of tenure which is more likely to translate into Conservative votes."

On 23 January 1987 Dame Shirley, Mr **Weeks** and others met the PACEC representatives to discuss their preliminary findings. On 14 and 15 February there was a conference at the University Arms Hotel, Cambridge, organised by PACEC and attended by (among others) Dame Shirley, Mr **Weeks** and Mr Phillips (who was at about that time appointed as managing director). After the conference Dame Shirley sent a note to all Conservative members stating:

"We agreed at the seminar that we've got to target our efforts in key areas. The [PACEC] study shows that we've got to put a tremendous effort into providing affordable housing, community improvement and effective expansion room for our growing office sector. All this is going to require a tremendous amount of thought. David [**Weeks**], Barry [Legg] and I will continue to act as a strategy group, but we'll need to draw on other colleagues to help ensure that our corporate plan brings success."

By then the eight key wards had been identified. Two other wards (Churchill and Maida Vale) were also mentioned in some papers prepared at this time, but were not, as matters developed, regarded as key wards.

On 14 March 1987 the chairmen's group met and considered how the BSC policy (of which designated sales formed part) should be presented and implemented. A paper entitled "Handling" favoured a "broad-brush" approach and stated, under "Members' corporate role", "Chairmen will also have a key role in getting officers-especially chief officers-to 'think BSC' Chairmen can impart to officers a political awareness which will be essentialto the success of the strategy." Under "Officers' corporate role" it stated, "The managing director will lead and direct the officer input to BSC." On 17 March Mr England submitted an analysis "based on the designation of all council-owned properties in the key wards". The conclusion of this paper merits quotation in full since it contains the first, or almost the first, reference to obtaining legal advice:

"As previously reported to the housing sub-group, it is not possible in professional terms to justify the designation of all properties in the eight wards. The key ward analysis will have to flow from the PA Cambridge study. Neither is it possible to justify in an officer report, a greater degree of designation within those wards than is indicated in the first column of appendix 1. Any further designation in columns 2 and 3 would require a report by the chairman and would need justification by members as to the impact on the council's existing

allocation policies. Members would be advised to consult the city solicitor as to the 'reasonableness' of proceeding on this course of action and whether, in view of the reports which they have received on the council's annual housing priorities and homelessness statistics, the city council could find itself subject to judicial review in proceeding along this course."

The total in the first column (officer proposal) was 172. The total in the second column (members' sub-group, referring to a proposal made on 27 February 1987) was 249. The total in the third column (total designation) was 490, with the largest sub-totals in Millbank (225), Bayswater (124) and Little Venice (61).

On 20 March 1987 Mr Robert Lewis, the deputy city solicitor, wrote a note to Mrs Kirwan under the heading "Disposal Policy". He gave some general advice and concluded, "I'm sorry that the above is all rather general. I hope it at least reinforces the notes of caution that have already been expressed. If there is to be a major change of policy it is important to involve lawyers early on to minimise the risk of successful challenges."

On the following day a seminar for Conservative members was held at the London Business School. It was attended by Dame Shirley Porter, Mr **Weeks,** Mrs Kirwan and Mr Hartley, among others. Mrs Kirwan spoke against the designated sales policy. However there was general support at the seminar for BSC A later note (prepared for Dame Shirley and presented by her) referred back to BSC having been agreed at the seminar and set out the key elements of the policy:

"Targeting key areas

"Certain marginal wards require special attention. In these wards, targets for increasing our support are:

Bayswater 350

Cavendish 250

Hamilton Terrace 250

Little Venice 250

Millbank 450

St James's 250

Victoria 150

West 250

"Protecting the electoral base

"In addition to our goals in the targeted wards, we need to protect the electoral base in the wards that we have.

"Affordable housing

"A key element in BSC must be to attract home owners in Westminster. This means finding innovative ways of ensuring that the right sort of housing is available to the right sort of

buyer or tenant. And it must be available by October 1989."

October 1989 was the time at which the official lists would be prepared of those qualified to vote in the local elections in 1990.

On 24 March 1987 (possibly prompted, although there is no finding about this, by Mrs Kirwan having referred at the seminar to the advice of Mr Lewis) Dame Shirley Porter got an assistant, Mr Stuart Greenman, to fax a series of handwritten questions to Mr England and to Mr Ives, the city solicitor. The first three (of 15) questions to the director of housing were (with the original emphasis):

"1. How does he propose to achieve the target voter figures in the eight relevant wards by 1990? 2. Does he agree there are good decant possibilities in all eight wards? 3. Will he please give figures on numbers of units in each ward which will become available for sale?"

Mr England's replies to the first two were:

"1. The [PACEC] report was meant to set the targets for the eight relevant wards. There is very little support that officers can give to the eight target wards as opposed to the policies in other wards without the [PACEC] report. 2. No There are decant possibilities in the Millbank ward and possibly in the Bayswater ward but these will need to be considered in conjunction with the housing committee's other strategies and obligations."

In answer to the third question he repeated the figures in his paper of 17 March: "option 1 (officer suggestion 172); option 2 (members' sub-group suggestion 249); option 3 (party group suggestion total designation 490)" Mr England's replies reflect the expectation (also apparent in other papers prepared at this time) that the final PACEC report might provide a satisfactory objective basis for targeting designated sales in the key wards. The final draft of the report had by then been received but it is not clear when it was seen by officers other than Mr Phillips. The expectation was at least partially disappointed.

The seven questions put to the city solicitor and his replies (faxed on the same day) need to be set out in full. The questions were:

"1. Will the council's new policy on 100% designation for sale in the eight target wards conflict with its statutory obligations? 2. Given proposed annual figure of sales within the target wards, will this conflict with council's ability to house category A medical cases etc? 3. If there is any possibility of conflict, then what level of annual sales (and void creation) would enable council to continue to house category A medical cases etc. 4. Is there any possibility that this policy will lay the council open to (a) judicial review of its policy or (b) surcharging for illegality etc.5. What happens if Westminster is unable to fulfil all obligations, e g if it is overwhelmed by numbers of homeless families etc? 6. Is committee approval needed for any further designation? 7. Is there anything in the answers to the previous 15 questions put to director of housing which may put us ultra vires or in breach of our duty as a local authority under the law?"

Mr Ives's replies were:

"1. This is a question of fact not of law. If the policy is to be introduced then as a matter of law the reasons for its introduction have got to be carefully argued. The needs of the homeless and the impact of a decision to sell accommodation which might otherwise be available for them is a highly relevant consideration which will have to be balanced against the advantages of selling. It is fundamental that the arguments in favour of selling be soundly based and properly argued. Anything which smacks of political machinations will be viewed with great suspicion by the courts. 2. The same considerations apply as in the answer to 1 above. The needs of the medical cases like other housing requirements will have to be

put in the balance against each other. The courts will interfere if all issues are not put fairly to the committee or if the committee have considered all the relevant issues but arrive at a decision which no reasonable man could have arrived at. 3. A specific number cannot be given at this stage. Later it may be possible to give a broad indication of the parameters within which the council should work once the arguments in favour of sale have been developed and weighed against the disadvantages. The courts recognise that two reasonable people can legitimately hold differing views and will only interfere if a decision is perverse or unreasonable. 4. (A) Yes. The way to avoid successful challenge is to devise legitimate arguments and to ensure that all possible ramifications have been considered by those taking the decision. If this is done judicial review may be successfully resisted unless it can be demonstrated that the decision-takers have acted irrationally or relied on an irrelevant consideration. (B) For the district auditor to take action financial loss must have resulted either because expenditure has been incurred contrary to law (an abuse of power) or because loss has flowed from wilful misconduct of decision-takers. The possibility of surcharge exists but it will be necessary for those challenging to demonstrate that the loss flowed from the act of wilful misconduct. This re-emphasises the need for a good argument to be constructed in favour of sale. 5. The duty to provide accommodation is not limited by the ability of the council to find accommodation. The council must find accommodation. A consequence of increased sales would of course be an increase in the numbers housed in temporary accommodation. 6. Yes. 7. It is crucial that any report should critically examine a proposal to designate for sale. The advantages of sale have to be considered not from any ulterior motive but from the stand point of what is right in view of the council's role as a housing authority. A general policy of disposal is much more likely to be susceptible of challenge than decisions taken in respect of each block or each property. It might be sensible to go forward in stages rather than offer a broad target. Lawyers should be involved in consideration of any reports at the earliest possible stage. Since a general policy will inevitably draw fire the advice of counselshould be sought at an early stage so that if judicial review is commenced the prospects of successful challenge can be minimalised."

The auditor (who conducted interviews with Mr Ives, though Mr Ives did not give evidence either at the audit hearing or to the Divisional Court) said that parts of these replies might demonstrate an unfortunate choice of language. But he did not find that Mr Ives was encouraging or colluding in any sort of cover-up of an unlawful policy.

On the same day, 24 March 1987, the chairmen's group rejected a draft report prepared for the housing committee because it contained too many options. The group wanted to get on with designated sales. Two days later Mr England wrote a note to Mr Phillips about the problem which the group's decision posed for him, and suggested (as he had already discussed with Mrs Kirwan and Mr **Weeks)** a planted question about the level of designated sales. The planted question was asked by Mr Segal at the housing committee meeting on 1 April and the committee resolved that the director of housing should "report back to the committee on means by which designated sales can be increased without delay to an annual level of at least 250". By then two lists had been prepared, one by Mr England and one by the members' sub-group, as shown in the appendix to Mr England's paper of 17 March. On 3 April Mr Garry Peltzer Dunn, an officer in the housing department, produced a third list adding another 98 properties in Millbank, Bayswater and Little Venice, so as to bring the proposed total to 270. He produced a fourth list with a further 117 properties, almost all outside the key wards, on 9 April. The final PACEC report was eventually received on 10 April. On 14 April a fifth, consolidated list was prepared. It showed numbers of potential sales where vacancies were created otherwise than by transfers. 199 were in the eight key wards and 120 in the other wards.

Towards the end of April a discussion paper headed "Designated Sales" was prepared by Mr Hayler (the divisional director of housing) for Dame Shirley and the chairmen's group. It assumed a designated sales target of 250 dwellings a year. It contained a list which consisted of the fifth list, rearranged, together with 83 units on the Churchill Gardens estate in

Churchill ward. The paper recorded the city solicitor's strong advice

"that because the matter is inevitably going to prove contentious and because it raises a whole range of legal issues, it is imperative that counsel's advice be sought and obtained on the final shape of the committee report. The legal issues are not only the legality of the specific proposals ..."

The paper also noted that an increase in designated sales from 10-20 a year to 250 a year would have significant staffing and financial implications.

II

Summary of events (2): May to September 1987

That was where matters stood on 5 May 1987. There were three important meetings on that day and its events have been examined in great detail by the auditor, in the Divisional Court and in this court. At 9.45 a m Dame Shirley Porter called Mr Hayler and Mr Lewis to a meeting at which Mr Segal, Mr Phillips and Mr Albert Newman (a consultant) were also present. Dame Shirley told Mr Hayler that his discussion paper was notwhat was needed: "The policy was clear-the note needed to spell out how, not give options." Mr Lewis was told that leading counsel's advice must be obtained in the course of the day. A revised note was required for a meeting of the chairmen's group at 6 p m that day.

Mr Lewis was able to arrange a consultation with Mr Sullivan. It was held at 3 p m and attended by Mr Lewis, Mr England and Mr Hayler. It lasted for about one hour. Mr Sullivan received no written instructions or documents before the consultation. Mr Lewis made notes of the consultation (which were typed on the following day, omitting a reference to the decision being made "completely judge-proof") and Mr England prepared a note for the chairmen's group meeting on the evening of 5 May. Mr England thought that he read the note to Mr Lewis.

The auditor interviewed and heard oral evidence from Mr Lewis; he interviewed, but did not hear oral evidence at the audit hearing from, Mr England and Mr Hayler. The auditor found (volume 4, paragraph 237) that Mr Sullivan was told by Mr Lewis that he (Mr Lewis) believed that leading Conservative members on the council wished to secure electoral advantage by a policy of designated sales in marginal wards, and that Mr Sullivan confirmed Mr Lewis's view that it would be unlawful to concentrate sales in marginal wards or to select properties for sale by reference to electoral considerations. However the auditor found (volume 3B, paragraph 2810) that Mr Lewis did not take a full note of the consultation, and took a conscious decision not to record Mr Sullivan's advice as to what would be unlawful.

Mr England's note for the chairmen's group did not purport to be a full note of counsel's advice. Its structure was to suggest action to be followed in respect of the options set out in the discussion paper (which Dame Shirley had already dismissed as not what was wanted). It stated in relation to paragraph 2(i) (setting the designated sales target):

"Counsel advises that designated estates should be identified in both marginal and non-marginal wards in order to protect the council. The group will therefore need to decide whether the 250 target applies across the city or whether in fact 250 sales in marginal wards are required in which case following counsel's advice, somewhere in the region of 300-350 properties will need to be sold across the city. This will clearly exacerbate the problems of dealing with housing demand."

In relation to paragraph 5(iv) (which referred to the PACEC report as not justifying increased sales) it stated:

"The target set by housing committee is 'at least 250'. Counsel advises that this cannot be targeted solely in key wards, therefore the group will need to decide whether the final target is 250 or some greater figure which would yield 250 in the marginal wards. Counsel also advises that reference to affordable housing contained in the [PACEC] study should be included in the report. This [PACEC] report has now been released to the opposition."

No minutes, formal or informal, are extant for the meeting of the chairmen's group held that evening. Dame Shirley Porter and Mr **Weeks** were among those present. A sixth version of the list of properties to be designated was included in the papers before the group. The group decided,as the auditor recorded in his history of events (volume 4, paragraph 253), to adopt Mr England's suggestion for a higher target throughout the city in order to achieve 250 sales a year in the eight marginal wards.

The true significance of that decision, and of the way in which it was carried into effect, lies at the heart of this case. Mr **Weeks's** evidence to the Divisional Court, which the Divisional Court rejected as plainly untrue, was that the chairmen's group's policy of designated sales in marginal wards was abandoned "with relief". The Divisional Court's view, 96 LGR 157, 185, was that what happened was that Dame Shirley and Mr **Weeks,** as leading members of the group,

"were content, without further inquiry of Sullivan, [England], Lewis or anyone else, to adopt the suggestion in [England's] note that [the targeting policy] be dressed up in the city-wide clothes: neither claims this was a proper course. Their purpose throughout was to achieve unlawful electoral advantage."

On 13 May Mr Phillips produced a document headed "Designated Sales: Critical Path" laying down a detailed timetable for production of an officers' report to go before the housing committee on 8 July. It provided for the draft report to be submitted to counsel three times during May and June. Mr Ives questioned whether such frequent advice on drafts was necessary but Mr Phillips maintained his view (however, the programme for advice was not in the event followed). On 14 May there was a meeting of officers to discuss homelessness. The minutes record the view that 600-700 permanent dwellings were needed to house homeless persons. They also referred to "political objectives regarding the maintenance of stable residential communities within Westminster".

On 13 May Dame Shirley Porter was re-elected as leader of the Conservative group on the council, defeating Mrs Kirwan who stood against her. Shortly afterwards Mr Hartley replaced Mrs Kirwan as chairman of the housing committee.

On 20 May Mr Hayler sent a draft of the officers' report to Mr Ives. His covering note stated that one of the principal matters still to be included was a clear setting out of the three main options:

"option one-maintain the current balance of provision between sale and renting; option two-designate 250 casual vacancies for sale in relevant areas; option three-designate 400 approximately vacant units on estate for sale/rent via trusts."

On 29 May Mr Phillips, Mr Ives and Mr Hayler met Mr Richard Loftus (a property developer described in the file note as an adviser to Dame Shirley) to discuss proposals for the Westminster Housing Trust. The file note prepared by Mr Ives records Mr Loftus as having accepted "that the role of the housing trust was not strictly necessary and that its intervention was purely to sanitise what might otherwise appear to be politically motivated decisions". On the same day a revised draft of the officers' report was sent by Mr Hayler to Mr Phillips, Mr Ives and others. The options appeared in paragraph 82 as (1) maintain the present balance of policies and provision; (2) designate 250 voids per annum for sale; (3) designate 400 voids per annum for sale/higher rent. Against (2) and (3) are the manuscript

comments "No-we would need to designate far more to achieve 250 sales"and "ditto". The draft was accompanied by a seventh draft list identical to the sixth.

A third draft of the report was prepared in early June, following by a fourth draft on or about 8 June. The copy of the fourth draft which is in evidence shows the changes later made to it. In paragraph 7.6 the number of units of council accommodation required for the homeless has been altered in ink from 635 to 570 (with the marginal query "does counsel agree or can this be toned down?"). Option 2 is "increase designated sales by 250 per annum" (correcting the previous inapposite reference to voids but keeping the same number). Option 3 was "increase designated sales further and expand higher rented accommodation" altered in ink to "increase designated sales by 500 per annum".

Throughout this period there were numerous further meetings and memoranda passing between officers as to the ever-increasing problem of homelessness and its impact on designated sales. The officers involved included Mr Phillips, Mr Ken Hackney (a divisional director of housing) and Mr Nick Reiter (the head of the policy unit).

On 12 June (which was a Friday) Mr Lewis instructed Mr Sullivan by letter to review the latest draft of the officers' report. This draft was the fourth draft in its original state (that is, without the manuscript alterations mentioned above). There is no record of the content of Mr Sullivan's advice (for which he charged a fee of oe75 indicating chargeable time of about half an hour) but it seems likely that he approved the report with minor changes, and gave his advice by telephone.

On 11 June Dame Shirley's new appointments of chairmen and vice-chairmen of committees took effect. On 13 and 14 June she held a weekend strategy meeting outside London. Those in attendance included Mr **Weeks,** Mr Hartley, Mr Phillips and Mr Reiter. The papers circulated and discussed included papers entitled "Setting the scene" written by Dame Shirley; and (all written by Mr Reiter) "Building stable communities", "Targeting areas", "Protecting the electoral base" and "Affordable housing". The first paper began:

"We face a tremendous challenge. The electoral register for the 1990 elections will be compiled in just over two years' time. Some very ambitious policies must be implemented by then: providing a great deal of affordable housing in key areas; protecting the electoral base in other areas (for example, by controlling the impact of homelessness); and implementing the Conservative philosophy throughout Westminster ..."

A large part of the second paper has already been quoted with reference to an earlier seminar. On the copy of this paper in evidence there is written in ink in what is accepted to be Dame Shirley's handwriting: "These papers are written assuming that ALL know ALL."

On 17 June Mr Hartley and two Conservative members of the housing committee had a meeting with Mr England and other housing officers. Mr England's file note records that the members' main policy objective was to achieve a substantial increase in RTB sales and to achieve a minimum of 500 sales under the designated sales policy. At about the same time the fourth draft of the officers' report was further revised, including the alterations already mentioned. At the chief officers' board on 25 June thechief officers "were reminded of the paramount importance of the [BSC] strategy in the development of all council policy."

On 26 June Mr England sent a note to Mr Hartley enclosing:

"1. Final copy of the committee report; 2. an analysis of the estate by ward; 3. a suggested list of estates which would give approximately the target sales and where sale can be justified in terms of the four indicators included in the committee report. The city solicitor is concerned at the possibility of legal challenge if members individually designate estates which do not have a key indicator in the appendix. I have ignored the scattered properties

although we can discuss these when we meet on Monday morning."

Several points on this note call for explanation. The auditor recorded (volume 4, paragraph 331) that the second enclosure could not be identified, but may have been a document prepared by Mr Peltzer Dunn during the previous February. The third enclosure was a list of possible sales by ward, with a total of 4,285 properties (expected to produce 269 sales a year) in six of the key wards (Victoria and West End had very few council properties) and a total of 3,826 properties (expected to produce 220 sales a year) in ten other wards (Bryanston, Hyde Park, Knightsbridge, Lancaster Gate and St George's also had few council properties). The auditor identified this as the eighth list.

The report itself is summarised below but it is convenient to note at once that the "four indicators" referred to in Mr England's note are identified in paragraph 10.5 of the report (where they are referred to as options) and at the end of appendix 5 (where they are referred to as categories and are stated as (1) popular for home ownership, (2) above average level of turnover, (3) area identified by [PACEC] study and (4) unmodernised property).

The four indicators were also referred to in a note which Mr Lewis sent on the same day, 26 June, to Mr Hartley, stressing the importance of the list being drawn up by the housing committee on the basis of housing and planning issues. The documentary evidence suggests that officers were at this time anxious that responsibility for the selection of the final list should be that of the members on the committee (although ultimately it was essentially an officers' list which was approved, as the Divisional Court noted).

On 29 June the chairmen's group considered a draft paper on homelessness by Dr Michael Dutt (a joint vice-chairman of the housing committee who took his life after the release of the auditor's provisional views). The first two recommendations in the paper were:

"1. We should not accept that increasing designated sales should in any way be prevented by our statutory obligations for the homeless. The figures do not show that our statutory obligations are put in peril merely through an increase in designated sales."-Mr England annotated his copy: "? seems likely they do"-"2. We should take a definite decision to look outside Westminster for accommodation for the homeless, and be imaginative: prefabricated homes, mobile homes, houseboats, disused holiday camps are all possibilities."-Mr England annotated: "in public at committee?"

The list of properties was further revised (twice) by officers between 30 June and the housing committee meeting on 8 July. On 3 July (a Friday) written instructions were sent to Mr Sullivan by the city solicitor. The instructions were concerned with the council's policy towards the homeless. The instructions referred to the BSC policy as a key theme in the council's policies. A copy of the officers' report (in its final form) was included but counsel's attention was not drawn to the respects in which it differed from the draft sent to him on 12 June. Nor was he asked in terms to approve the report.

On the morning of Monday, 6 July Mr Sullivan was appearing in the Court of Appeal on behalf of Westminster City Council, instructed by Mr Lewis. It was a judicial review application which had no direct connection with this case. Mr Sullivan also had a consultation with other clients fixed for 2.30 p m Mr Sullivan stated in written statement to the auditor:

"It seems most probable that we managed to have a fairly hurried consultation at some time over the lunch period between the end of the Court of Appeal hearing and the beginning of the 2.30 consultation. In the circumstances it would have been the best we could do. The fact that any consultation had to be 'squeezed in' might explain why I did not endorse my backsheet, or send in a fee note. It might also explain why there appears to be no written record of the advice given. The fact that [Mr Lewis] persuaded me to have a consultation

over the lunch period is, I feel, eloquent testimony of his determination to obtain counsel's advice. Since I had no recollection of the consultation I am unable to say whether I did or did not approve the final version of the report. [Mr Lewis] is clear in his own mind that I did, and I would not question the genuineness of his belief. The instructions did not seek my approval and given the pressure of work described above, I suspect that I would have looked at the report in advance of the consultation only in so far as I thought it necessary to enable me to answer the specific questions in my instructions."

Mr Lewis told Mr England that Mr Sullivan had approved the report. But even if paragraph 7.6 had been drawn to his attention it is hard to see how counsel, whose task was to advise on matters of legal principle, could have said whether it was right for the director of housing to change his professional opinion as to the homelessness requirement from 635 units to 570 units.

On the same day, 6 July, there was a meeting with Mr Victor Hausner of PACEC. It was attended by Dame Shirley, Mr **Weeks,** Mr Hartley, Mr Phillips and others. One purpose of the meeting was to consider what further role PACEC had to play in the BSC policy. The minutes record that Dame Shirley "reaffirmed the agreed BSC programme of action as agreed by chairmen as an all-embracing strategic council policy with determined priorities for BSC initiatives". The minutes record that in discussion: "[Dame Shirley] and Peter Hartley felt that the city council had an agreed plan of action which could be clearly understood and implemented by officers, and that there was little need for an external catalyst ..." This meeting took place, it may be noted, two days before the officers' report was, after its long and difficult gestation, to be placed before the housingcommittee, which had delegated power to make a decision on behalf of the Westminster City Council. Dame Shirley Porter said in her affidavit sworn on 20 December 1996 (paragraph 239): "It was confidently expected by the majority party that its proposals would be approved by the housing committee bearing in mind the majority our party held on the council."

In preparation for the meeting of the housing committee on 8 July officers prepared briefing notes for Mr Hartley and Dr Dutt. Officers (Mr England and Mr Hayler) also attended a caucus meeting, at 6 p m on 8 July, of the Conservative members of the committee. The Divisional Court saw nothing improper in that provided that officers did not imperil their independence by political partiality. At this meeting the latest (tenth) version of the list of properties was disclosed to those backbench Conservative members of the committee who attended.

It is not clear whether all the Conservative members attended the caucus meeting but there were seven Conservative members at the housing committee meeting which began at 7 p m: Mr Hartley (chairman), Dr Dutt and Mrs Judith Warner (vice-chairmen), and Councillors Jenny Bianco, Karen Buxton, Richard Evans and Angela Hooper. Councillor Hooper was filling a casual vacancy for that meeting only. The opposition members at the meeting were Councillors Coleman, Gavin Millar, J B Provost, Jackie Rosenberg and Peter Wright.

The officers' report placed before the housing committee was headed "Review of Home Ownership". It was supported by various background papers including the PACEC report. Paragraph 2 ("Recommendations") contained some relatively uncontroversial matters. Paragraph 3 was headed "If the committee wish to increase the number of designated sales the following additional recommendations would be appropriate" and paragraph 3.1 was in these terms:

"That the following blocks be designated for sale [with a blank] (The committee is invited to select from appendix 5 those blocks comprising a total of 5,500 dwellings (which may be expected to produce approximately 250 voids per annum) or 11,000 dwellings (which may be expected to produce approximately 500 voids per annum)."

Paragraph 3.3 and appendix 4 referred to the selection of purchasers. Paragraph 3.4

proposed a measure of flexibility between RTB and designated sales. Paragraph 3.5 proposed a scheme of capital grants. Paragraph 3.6 recommended (if option 3 was adopted) the acquisition of new premises for a complete home ownership advice service.

Paragraphs 4 ("Background"), 5 ("The need to promote home ownership"), 6 ("The need for some control of home ownership"), 7 ("The need for social housing") and 8 ("The conflict between the demand for social housing and the need to promote home ownership in Westminster") set out the arguments on both sides in a way which the Divisional Court considered, 96 LGR 157, 193, to be "a fair and adequately comprehensive representation of the relevant issues." Paragraph 7.6 estimated the homelessness requirement at 570 units in accordance with the amendment already mentioned.

Paragraph 9 then introduced and set out the three options. Option 3 was stated as "Increase designated sales by 500 per annum (appendix 2, column 3)." That appendix set out the expected effects on differentcategories of those seeking housing by the council. The narrative in paragraph 9.5 spelt out the effects:

"Ability to meet homeless needs substantially reduced and significant increase in use of temporary accommodation; decanting requirements to be maintained; ability to house category A medical applicants drastically reduced. Tenant transfers reduced. Most other priority housing categories closed; allow existing secure tenants who have the right to buy to purchase designated flats ... introduce capital grants to existing secure tenants to buy privately owned accommodation inside or outside Westminster; home ownership increased by 500; introduce model clauses in leasehold disposals to ensure occupation by people as their main or principal home; investigate restrictions on resales of low-cost home ownership dwellings."

Paragraph 10 dealt with implementation, including (in paragraph 10.5, appendix 6) the four options or categories already noted. Paragraph 11 dealt with financial implications.

The proceedings at the meeting and the decisions which it reached were closely examined by the auditor and appear at various places in his findings (notably the conclusions in volume 2, paragraphs 871-890 and volume 4, paragraphs 367-390). On the review of home ownership (which was the seventh item on the agenda) the housing committee agreed to receive a deputation from the Bayswater co-ordinating group and to hear its representative. There was a vigorous debate in the committee. The committee then passed a resolution (by seven votes to five) of which paragraph (v) designated a list of 9,360 properties for sale, and paragraph (ix) was for the introduction of a scheme of capital grants.

The auditor found that Mr Hartley and Dr Dutt had taken into account electoral advantage to the Conservative Party and had sought to promote it by their votes. He found that Councillors Warner, Bianco, Buxton, Evans and Hooper may have been aware of the electoral objective but he was not satisfied that they sought to promote it by their votes. He found that Councillors Warner, Bianco and Hooper sought to exercise an independent judgment in relation to option 3, but that they relied on the officers' report and on Mr Hartley. He found that Councillors Evans and Buxton did not seek to, and did not, exercise any independent judgment in relation to option 3, but relied on the report and on Mr Hartley. The auditor found that none of these five members could exercise any independent judgment in relation to the list of properties. He concluded (volume 2, paragraph 884):

"that both the decision to increase the number of designated sales and the selection of the properties designated for sale were influenced by the electoral advantage of the majority party ... [That] is an irrelevant consideration which ought not to have been taken into account. I have concluded that both decisions were ultra vires and unlawful for this reason."

Under the council's standing orders the housing committee's decision had to be referred to

the next meeting of the council, which was to be on 29 July. The legality of the decision had already been questioned by Councillor Coleman and others, both in debate and in communications with officers. On 20 July Mr Lewis wrote to Mr Alan Wilkie (who had often acted for thecouncil as junior counsel to Mr Sullivan) explaining that the detailed financial arrangements consequent on the housing committee's decision were to be considered by an appointed members' panel ("AMP"). Mr Lewis wrote:

"We have learnt that the minority party is considering judicial review, mainly on the basis that no reasonable authority could decide the way we did in the light of the financial consequences (which are significant). In view of this, I am anxious for the AMP report to be scrutinised by yourself to make sure it, too, is 'judge-proof'."

On 23 July Mrs Kirwan wrote to Mr Rodney Brooke, the council's chief executive, expressing concern. She referred to the advice given to her by Mr Lewis on 20 March and asked to see counsel's opinions or notes of advice in consultation. Mr Lewis prepared a revised note of the consultation on 5 May and Mr Ives sent this to Mr Coleman. On 28 July there was an informal meeting of chairmen attended by Dame Shirley. The minutes recorded under "Monitoring" that figures were being prepared by Mr Reiter "to show which initiatives are most likely to achieve the electoral targets".

29 July 1987, the date of the full council meeting, was an eventful day. Mr England sent Mr Reiter a list of likely designated and RTB sales arranged by ward, with six of the eight key wards (that is, except Victoria and West End) listed first. Mr Brooke sent Mrs Kirwan a copy of the revised note of the consultation on 5 May, and stated that counsel had approved the officers' report and the AMP report. He told Mrs Kirwan that they were matters of report only so far as the council meeting was concerned. Dame Shirley sent a letter to all Conservative members of the council referring to the controversy and stating:

"At the last party meeting, I said that I would reassure you on this point. We took advice from a QC before preparing the report to housing committee. As you can see from the attached note, our legal advice is that our policy is 'completely judge-proof'. We all know how important the designated sales policy is to the success of our overall objectives. We are completely sure that it carries no risk of legal challenge."

On the same day Mr Millar wrote to Mr Ives expressing concern about the legality of the officers' report. Mr Ives telephoned Mr Wilkie and obtained advice from him. At the meeting Mr Ives addressed the council and stated that the report had been seen and approved by leading counsel before it went to the housing committee. Mr Ives also reported on his very recent advice from Mr Wilkie. The report was debated and adopted. On 3 August 1987 there was a working lunch of leading Conservative members and some officers. The agenda began: "The attached target schedules show the target for new electors in each of the eight key wards. They then show target figures for the various initiatives designed to achieve the increase in the electorate." A later paragraph stated: "The overwhelming message from these figures is that the council will have to rely very heavily on the housing trust/private sector and planning gain routes in order to achieve the electoral objectives in the key wards." "New electors" was, as the Divisional Court observed, a euphemism for "Conservative voters". There was a table for each of the eight marginal wards (including Victoria and West End) and for the eight wards overall in the following format:

BSC Targets

Totals for all eight wards

Target to 1989

New electors 2,200

RTB sales 260

Designated sales 260

Housing trust/private sector 1,195

Planning gain 650

Housing total 2,365

Enforce against hotels with homeless 11

Deal with other unlicensed hotels 19

Potential planning permissions (units) 994

Quality of life amount [illegible, but apparently about £1.1m].

At about the end of August 1987 Mr Reiter circulated to officers a draft paper entitled "BSC Campaign: Plan for Action". In relation to RTB and designated sales it stated the policy as being to maximise the number of sales "particularly in the key wards." Comment on the proposed housing trust was also directed towards the eight key wards. Annexed were detailed profiles of all eight key wards, with targets for "new residents" (another euphemism, as the Divisional Court noted, for Conservative voters).

On 2 September 1987 the AMP (consisting of members of the housing committee and the policy and resources committee) met but the meeting was disrupted. It was reconvened on 4 September, when it approved the recommendations before it.

On 5 and 6 September Dame Shirley held a strategy weekend attended by (among others) Mr **Weeks,** Mr Hartley, and Mr Phillips. The papers sent with the agenda included a paper prepared by Mr Reiter, "the BSC Campaign Plan for Action". It was very similar to the draft already mentioned. On 29 September the chairmen's group (attended by Dame Shirley, Mr **Weeks** and Mr Hartley) received "BSC Monitoring Report No 1" written by or at the direction of Mr Phillips. Under "RTB" it stated:

"The target across the eight areas is 256 sales in 1987/8. So far, we have achieved 79 (30% of the total). The immediate task is to pull out of the log jam those applications which arise in the key areas; give those applications priority; and sift the rest of the log jam. In the past, there has been no accurate measurement by ward of how many applications are stuck at each stage of the procedures. I have seconded a member of the VFM team to the housing department to research this information; and to devise a suitable data base for recording it in future."

Under "Designated sales" it stated:

"We have already identified 118 designated voids in the key areas, against a target of 137 for 1987/8. Most of these are in Bayswater (34 sales needed, 34 voids identified) and Millbank (70 sales needed, 68 voids identified). No sales had yet been completed: the first are expected towards the end of November. The figures to the end of August are ..."

and it set them out in detail (with none in Victoria or West End).

III

Summary of events (3): after September 1987

It would be an unnecessary protraction of what is already a long summary to recount in detail the events which occurred from the end of September 1987 until the formal objection made to the auditor (on 18 July 1989), the Panorama programme (19 July 1989) and the applications for leave to move for judicial review made to Hutchinson J (12 February 1990) and the Court of Appeal (14 June 1990); these applications were refused on the ground that an alternative procedure for a remedy was available, and had indeed already been invoked. But five main themes can be traced in the auditor's history of events and the documentary evidence: monitoring; steering groups; concentration of the BSC policy on key wards; opposition challenges; and the increasing financial and political problems associated with the council's statutory duties to homeless persons.

At a meeting on 11 October 1987 Mr **Weeks,** Mr Legg and Mr Phillips agreed to set up a BSC support group as had been proposed by Mr Reiter. It was to include various officers whose functions would include "monitoring of progress on BSC initiatives (e g RTB, designated sales)" for "clients" consisting of the chairmen's group, Mr Phillips and individual chairmen. The policy and resources committee was invited to give budgetary priority to BSC and support for BSC The second monitoring report was made to an informal meeting of chairmen (including Mr **Weeks** and Mr Hartley) on 3 November 1987. The third monitoring report was made at a chairmen's strategy day (also attended by Mr **Weeks** and Mr Hartley) on 5 December 1987. At a meeting on 12 January 1988 (attended by Mr **Weeks,** Mr Phillips and Mr Hausner among others) it was agreed that the monitoring system to drive BSC should be steered at member level by Mr **Weeks** and Mr Hartley and at officer level by Mr Phillips, Mr England and Mr Syd Sporle (a divisional director of planning and transportation).

Accordingly, in January 1988 the officers' and members' steering groups were established and from then on they met on a regular basis. The officers' steering group sometimes met as often as once a **week** during 1988, but its meetings became less frequent and in May 1989 it discontinued regular meetings because the BSC campaign was regarded as "self-running".

Monitoring continued until well into 1989. The documentary evidence shows that it was deliberately concentrated on the key wards, almost to the entire exclusion of the other wards, although at a council meeting on 27 April 1988 Dr Dutt, in reply to a question about monitoring key wards, stated that officers monitored all designated sales. Yet on the next day, 28 April 1988, the BSC members' steering group (attended by Mr **Weeks,** Dr Dutt, Mr Phillips and Mr England) received the monitoring report for April which referred to the need:

"to provide more precise and quantitative information on the targets for BSC actions and progress to date upon their achievements, particularly in those wards which have been identified as being key to the BSC initiative."

The report contained various statistics including a summary table for the eight key wards giving target voter figures. The group also received a paper on the rationale for key wards which said of designated sales, "there was atremendous demand. The problem was to generate vacancies in key wards. There was a limit of oe12m. So assisted purchases should perhaps be targeted."

At a chairmen's strategy weekend on 7 and 8 May 1988 held by Dame Shirley the meeting received a paper summarising progress on BSC, with tables referring to figures for "target voters" and a presentation by Mr England on home ownership. Mr England made a note in the following terms: "Should we be selling to cats. 1, 2-are they 'the right stuff'. Grass roots work? ... Why key wards-Victor [Hausner] to do paper on bringing eight key wards in." At a BSC members steering group meeting on 31 May statistics on five key wards (Little Venice, Victoria, Cavendish, St James's and West End) were presented by Mr England. "Target voter" figures were again produced and considered. It was agreed that Cavendish, St James's and

West End were to be the priority areas. Bar charts were regularly produced illustrating progress in the various key wards.

All this was taking place against a background of sustained questioning from opposition members on the council. Councillor Paul Dimoldenburg, the leader of the opposition, repeatedly pressed Mr Phillips for information on the selection of wards and the political neutrality of officers. Mr England's candid manuscript notes on his papers appear to show a mixture of bravado and apprehension: for instance at a meeting with Dr Dutt on 25 July 1988 he wrote: "Lab[our] bashing-fit facts to strategy plan" but also "Public audit ... explanation of eight wards ... can we justify why eight chosen and look at pattern of designated? Why did we pick them?-members will ask us ..." On 12 August 1988 Mr England wrote an internal memorandum as to Councillor Dimoldenburg's complaints. On 24 August Mr Ives suggested that Mr England should respond to three questions: "1. Why were these eight wards chosen? 2. By whom were these eight wards chosen? 3. Why and by whom are these eight wards regarded as 'key'?" Mr England appears never to have done so; when pressed he said on 27 October 1988 that he could not add to his memorandum of 12 August.

A defensive attitude to opposition questioning appears not to have been confined to officers. After a chairmen's strategy weekend on 17 and 18 September 1988 all the papers were shredded in order to avoid any leak. At about the same time it was decided that in future BSC reports should be given orally.

During 1988 there was mounting concern (apparent, for instance, in the minutes of informal meetings of chairmen on 18 October and 20 December 1988) as to the cost to Westminster of housing homeless persons. The need to achieve a saving of oe1m was perceived. One aspect of the problem was that many homeless families needed the largest units of accommodation, and much accommodation of that type had been designated and had become vacant but remained unsold. This problem was referred to in a memorandum on four-bedroom units written on 26 November 1987. Action was eventually taken more than a year later, on 6 February 1989, when five large family flats which had been vacant for a long time were "de-designated" to achieve a saving of oe150,000 a year.

On 9 May 1989 an informal chairmen's meeting received a report on homelessness which stated:

"We have no strategy for dealing with the long-term permanent rehousing obligation. The issue now is that we are taking many more cases a year than we are able to house. Unless the government repeals the legislation, or we can supply more accommodation, this will have a major financial impact on the city's community charge position in 1990-91 and beyond, despite the policies to contain temporary accommodation costs."

Savings of almost oe2m were required in order to avoid a supplementary estimate. The possibility was mentioned of returning to counsel to seek confirmation of the legality of existing policies. Mr Phillips wrote on his copy of the report: "Don't go to counsel-he'll want everything in the report."

The possibility of "de-designation" "in non-marginal wards only" was considered again at an informal meeting of chairmen on 18 July 1989 but the proposal was rejected. That was the same day as a formal notice of objection to the auditor was made by Councillor Coleman and 12 other Westminster electors. The Panorama programme followed the next day. The policy of designated sales effectively came to an end at a meeting of the housing committee on 30 October 1989, although "pipeline" sales continued into 1990.

The Panorama programme gave rise to intense activity. At a meeting of the full council on 26 July Dame Shirley stated that no one had taken the decision that quality of life schemes should be targeted as far as possible into the key wards. She denied that there were any

clear conclusions reached in the briefing note presented to her by Mr England in March 1987. She stated that no one was responsible for the decision that homeless families should be moved out of Westminster starting with the key wards, and said that no such decision had been taken. When she was asked about the BSC Campaign Plan for Action she stated that Panorama had refused to let the council have copies of the papers referred to. When she was asked which officers had prepared papers for the meeting on 14 March 1987 she said that officers would have provided data for members. When she was asked about officers collecting information on the eight key wards, she replied that, "at various times different wards have been key issues for study". Mr **Weeks** also spoke and gave an explanation of how policies had evolved.

On 28 July Mr Hayler gave an instruction that in future monitoring wards should be listed in alphabetical order (previously the eight key wards had always come first). On the same day Mr Phillips sent a memorandum to Mr Reiter referring to the folder "Chairmen's Weekend June 1987" obtained from Dame Shirley's papers. He wrote:

"Some of these documents, which came as news to me as to you, are plainly highly political ... It is absolutely vital that we establish, from our own sources and by asking the members directly concerned: (a) which papers were produced by officers, (b) which were produced by members, and (c) whether any of those in (b) involved the use of council resources. You agreed to let Mr Ives and myself have a complete set of the papers on the folder."

These papers were provided to Mr Phillips but not to Mr Ives. They were not disclosed to Mr Sullivan when he next gave advice.

On 22 August 1989 there was a meeting between Mr Phillips, Mr Ives, Mr Colin Wilson (who had succeeded Mr Lewis as deputy city solicitor) and Mr England. Mr England's notes under the heading "legality" state: "unlawful motive-selection of estates by members-discussed with MD and city solicitor who consider current policy to be legally dead". Reference was also made to Dame Shirley having requested a glossary of "difficult" terms.

The glossary was produced by Mr Reiter on 1 September 1989 on what was his last working day at Westminster. His glossary included the following:

"Key wards. The term is loosely used. Relates to wards where the level of stress, in terms of the [PACEC] study, is particularly high, and therefore where the implementation of [BSC] policies would be particularly important.

"How were the key wards identified? When the [PACEC] study was first commissioned members pointed at five wards where they felt, based on their observations, the problems of loss of middle income permanent residency was particularly acute. The [PACEC] study concluded that the problem was based rather in a swathe cutting across the centre of the city. The eight wards in question appear to have been identified as a result of discussion between members and Victor Hausner, based on the stress factors which the study had identified. It should be noted that, when the term key wards is used, it may not necessarily refer to the eight wards, but to wards which are key in terms of a particular policy or objective ...

"Numerical targets of electors. These appear to be guesstimates of what might be achieved in the given ward in terms of getting additional electoral registrations, if BSC was fully and effectively implemented. Electoral registration was perceived as the easiest and most straight forward way of measuring the impact of BSC policies."

Mr Sullivan was again instructed and gave oral and written advice which need not be set out. Nor is it necessary to go further into the unsuccessful applications for leave to move for

judicial review.

IV

Unfairness

I agree with all that Schiemann LJ has said on the issue of unfairness. I add some remarks of my own.

I agree with Schiemann LJ that there are serious criticisms to be made of the procedural course which this case has taken, from the original objection on 18 July 1989 to the hearing before the Divisional Court more than eight years later; but that they do not lead to the conclusion that the auditor's certificate should be quashed, and the appeal allowed, on the ground of unfairness. Some of the matters of criticism are inherent in the statutory scheme of audit, objection and surcharge laid down by the 1982 Act (and now re-enacted in the Audit Commission Act 1998). Those inherent difficulties are accentuated when the statutory scheme has to be applied to allegations as grave and as complex as those which the auditor had to investigate in this case. The enormous scale and protracted nature of the auditor's investigations must be deplored, but it was the auditor's duty to becareful and thorough, and he did (as his report records) encounter delays and difficulties in obtaining copies of relevant agenda, minutes, memoranda and other documents.

Other procedural problems arose from the decisions of Dame Shirley Porter and Mr **Weeks** not to give evidence at the audit hearing held by the auditor between October 1994 and February 1995. They were fully entitled not to give evidence to the auditor if they chose not to, but when they later decided to put in very lengthy affidavits before the Divisional Court (136 pages from Dame Shirley and 160 pages from Mr **Weeks)** it led to a position which was (to say the least) unusual and unsatisfactory. The Divisional Court (following the general guidance given by this court in Jones v Attorney General[1974] Ch 148) decided at a preliminary hearing on 1 May 1997 to admit affidavit evidence from and on behalf of the appellants in that court with cross-examination of deponents on their affidavits, subject to a proviso about possible abuse of process (which seems not to have arisen at the full hearing). The result was that the Divisional Court became the main tribunal of fact in relation to the appellants, but with the auditor's lengthy report, findings and history of events standing as the foundation on which the Divisional Court built.

The hearing of two rounds of oral evidence by two successive tribunals of fact has led to various submissions as to the burden and standard of proof before the Divisional Court. Each side criticised the Divisional Court for having imposed too high a burden on it. At the preliminary hearing the Divisional Court described its approach as following the House of Lords in Lloyd v McMahon[1987] AC 625 (and in particular what Lord Templeman said, at p 716). The Divisional Court regarded the ultimate burden of proof on the appeal as being on the auditor, and the standard of proof as being the high civil standard described by Lord Nicholls of Birkenhead in In re H (Minors) (Sexual Abuse: Standard of Proof)[1996] AC 563, 586-587. In my judgment the Divisional Court did not, in adopting that approach, err in favour of the auditor in relation to the liability of Dame Shirley Porter and Mr **Weeks.** It would be inappropriate, on this appeal by Dame Shirley and Mr **Weeks,** to express any definite view as to whether the Divisional Court erred in favour of the other persons (appellants before the Divisional Court) whom it acquitted of wilful misconduct.

V

Liability (1): reality and pretence

The essential task facing the auditor and the Divisional Court, as the twin tribunals of fact, was to distinguish between reality and pretence. There has been no real dispute about the

principles of law to be applied, and I can at this stage restrict myself to two citations. In R v Secretary of State for Foreign and Commonwealth Affairs, Ex p World Development Movement Ltd[1995] 1 WLR 386, 398 (the Pergau Dam case) Rose LJ said:

"The principle is correctly summarised by Professor Wade in Administrative Law, 7th ed (1994), p 413: 'statutory powers, however permissive, must be used with scrupulous attention to their true purposes and for reasons which are relevant and proper.' A political purpose can taint a decision with impropriety: see per Glidewell J in R v Inner London Education Authority, Ex p Westminster City Council [1986]1 WLR 28 and R v Governor of Brixton Prison, Ex p Soblen [1963] 2 QB 243, 302, where Lord Denning MR said, in relation to the decision to deport: 'If it was done for an authorised purpose, it was lawful. If it was done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object, it was unlawful.' "

In R v Derbyshire County Council, Ex p Times Supplements Ltd, 155 LGRev 123 (where the county council had decided to stop advertising teaching posts in "The Times Educational Supplement" because of a vendetta) Watkins LJ described the local authority's decision-making process in these terms, at p 127:

"It cannot possibly be gainsaid, I think, that the Labour group on the county council decided to sever all links with Mr Murdoch's publications, gave instructions through [the leader of the council] to that end, secured an immediate order from [the chief executive] imposing the ban and then set about trying to discover whether there was available the reality or semblance of a lawful excuse for that conduct. Obviously, the Labour group took its decision being unaware of any lawful reason for it. The officials of the county council had then to look about, with the help of learned counsel, in order to see whether, somewhere or other, a lawful consideration could be put before the forthcoming meeting of the education committee. In those circumstances the officials of the county council were presented, in my view, with an unenviable task which they performed by the production of a report which purported to show that the effective publication for the advertisement of teaching posts by the TES had suddenly become not so effective after all. Another outstanding fact is, in my judgment, that the subject of advertising in the TES would not have been on the agenda of the education committee were it not that the decision of the Labour group forced its inclusion. All of that, it was submitted, is really of no account. It is, it is maintained, only the conduct of the education committee and later of the county council itself with which we are concerned. It has to be shown that if bad faith there was, it was manifested at the respective meetings of those two bodies. That, in the last analysis, is, of course, true. But in examining what happened at those meetings, it is of the utmost importance, in my view, to keep well to the forefront of one's mind how the subject of advertising in the TES came to be placed on the agenda and how the report came to be prepared. It would be totally unrealistic to neglect to think of such a consideration when endeavouring to discover what was in the minds of the Labour councillors when they successfully voted for the move from the TES to The Guardian."

In this case attention is focused (although not exclusively, a point I shall come back to) on the decision taken by Westminster City Council's housing committee on 8 July 1987. Even though the target of 500 sales a year under option 3 was (in Mr England's own words) on the edge of perversity (because of the ever-worsening problem of homelessness in Westminster, and the city council's statutory duties under Part III of the Housing Act 1985) it might have been lawful and proper for the housing committee to have adopted a policy of 500 sales a year, spread through the 23 wards on a sound basis (which does not necessarily mean either an equal or aproportionate basis, since the wards differed so much in size and character). It is common ground that it would have been unlawful and improper to have adopted a policy of 250 sales a year concentrated in the eight marginal wards (or in six of those eight wards) in the hope of electoral advantage. The crucial issue is whether the appellants devoted a great deal of their considerable energy and enthusiasm, and a great deal of the council's financial resources, to the genuine pursuit of a lawful (though highly controversial) policy of the sort

described at the beginning of this paragraph, or whether they merely pretended to do so and their real purpose remained the improper purpose of targeting marginal wards in order to win the 1990 elections, but with an extension of the policy to other wards tacked on as camouflage. If it was no more than camouflage, it could not serve to turn an illegal purpose into a legal one: on the contrary, because of the more severe effect of the policy on homeless persons, it would exacerbate the seriousness of the illegality (this point is vividly made, in a totally different context, in G K Chesterton's short story "The Broken Sword").

The Divisional Court, which saw and heard evidence from the appellants, was in no doubt that there had been widespread and persistent pretence, and that Dame Shirley and Mr **Weeks** had lied to the court. It rejected, 96 LGR 157, 184, the evidence of Mr **Weeks** (that the policy of concentrating designated sales in marginal wards in the hope of electoral advantage was abandoned after counsel's advice on 5 May 1987) as "plainly untrue". I can see no reason why this court, which has not heard the witnesses, could or should depart from the Divisional Court's findings. There is ample documentary evidence to confirm, and virtually none to put against, those findings. Some of the most striking items of documentary evidence are mentioned in the first three sections of this judgment, and it is not necessary to repeat them. The overall impression throughout, from mid-1986 to mid-1989, is that the most influential members of the Conservative group on the city council, led by Dame Shirley and Mr **Weeks,** had electoral advantage as the overriding objective in formulating their housing policy, securing its adoption by the council, and implementing it with high priority given to the marginal wards. The city solicitor was correct when he wrote on the agenda for the working lunch on 3 August 1987, "This paper shows officers working for a Tory victory." The same comment could have been made about dozens of other similar papers produced at the expense of council tax payers in the city of Westminster. What occurred cannot realistically be described simply as officers providing factual information to elected members, nor simply as elected members allowing the occasional thought of possible electoral advantage to cross their minds.

The phraseology of the Divisional Court's judgment shows that it found that the conduct and utterances of the most influential members of the majority party (and especially Dame Shirley and Mr **Weeks)** were steeped in pretence. Pretence is symptomatic of a guilty conscience. "New residents" and "new electors" were euphemisms for potential Conservative voters. There was a "cover up" in relation to monitoring. Mr **Weeks** was content that officers should in their reports "mask" action which chairmen wished to take. The point is spelt out most clearly in the Divisional Court's conclusion as to the appellants, at p 185:

"Because [Dame Shirley Porter and Mr **Weeks**] knew the targeting policy was unlawful they were content, without further inquiry of Sullivan, [England], Lewis or anyone else, to adopt the suggestion in [England's] note that it be dressed up in city-wide clothes: neither claims this was a proper course. Their purpose throughout was to achieve unlawful electoral advantage. Knowledge of the unlawfulness and such deliberate dressing-up both inevitably point to, and we find, wilful misconduct on behalf of each of them."

That being the conclusion of the Divisional Court which saw and heard the appellants, it would in my view be a very strong thing for this court to reach a different conclusion, unless some error of law on the part of the Divisional Court is clearly demonstrated. There are, I think, three topics which have by their combined or cumulative effect led Kennedy and Schiemann LJJ to the conclusion that the appeal should be allowed. The first concerns the legal advice sought and obtained on behalf of the city council, in view of which (it is said) any misconduct on the part of the appellants cannot be characterised as wilful. The second is an amalgam of overlapping points including what Dame Shirley Porter referred to as "the great divide" (between party political inclinations and local authority decision-making), the relationship between the misconduct alleged and the particular decision taken by the housing committee on 8 July 1997, and associated issues of causation. The third is the apparent inconsistency in the conclusions of the Divisional Court that the appeals of Dame Shirley and

Mr **Weeks** should be dismissed (except as to quantum) but that those of Mr Hartley, Mr England and Mr Phillips should be allowed.

VI

Liability (2): legal advice

Counsel for the appellants submitted that the Divisional Court had criticised the auditor for dealing inadequately with the effect on the appellants' states of mind of the legal advice which they received, but then fell into the same error so far as Dame Shirley and Mr **Weeks** were concerned. It is therefore necessary to examine closely the section of the Divisional Court's judgment, at p 177 (headed "Legal advice"), which deals with this aspect. It begins with a summary of the legal advice given by the city solicitor and his deputy before 5 May, and then goes on to Mr Sullivan's advice on that day, concentrating on what it refers to as Mr England's note of conference. In fact the only document properly called a note of conference was prepared by Mr Lewis; Mr England's "Note to Leader" was a series of comments on an earlier discussion paper with two brief references to counsel's advice. Both are set out verbatim in the judgment, which continues, at p 178:

"In our judgment, the actual terms of Mr Sullivan's advice, save in relation to [Mr England], are immaterial for present purposes: it is material what if anything, by reason of [Mr England's] note or otherwise, each of the other appellants believed Mr Sullivan had advised. The note does not suggest that Mr Sullivan had advised that sales could be targeted in marginal wards for electoral advantage."

In fact Mr Sullivan had, as the auditor found, given unambiguous advice on this point (volume 4, paragraph 237):

"Mr Sullivan confirmed the view of Mr Lewis that it would be unlawful to concentrate sales in marginal wards or to select properties for sale by reference to party political or electoral considerations. The advice from Mr Sullivan on what Mr Lewis has described to me as the 'hidden agenda' included advice that the electoral marginality of wards was not a proper factor for council members and officers to take into account in selecting properties for inclusion in an extended programme of designated sales."

The judgment of the Divisional Court then briefly summarised later legal advice and reached conclusions, at p 179, as to Dame Shirley and Mr **Weeks** which are so important that they need to be set out in full:

"The position of [Dame Shirley Porter] in relation to legal advice was initially, as reflected in the opening skeleton argument on her behalf, that she never sought or received advice which could have led her to believe that it was open to the council to exercise its powers to secure an electoral advantage for the majority party. In her affidavit she said her duty as a councillor was 'to decide matters in council only upon considerations relevant to local government factors identified by officers'. In cross-examination she said she could see nothing wrong in targeting quality of life programmes in marginal wards but she gave no clear answer when asked whether a local authority's resources could be used to promote the advantage of a political party. In answer to the court she said she felt there must have been some proper local government considerations for targeting marginal wards but did not know whether these were in mind at the time. She also said that Mr Ives's advice that there must not be any ulterior motive came as no surprise in the light of her experience and she did not understand leading counsel's advice on 5 May to have differed from that of Mr Ives. In the light of this evidence, although we accept that [Dame Shirley] was always anxious to obtain and follow legal advice, it is, in our judgment, impossible for [her] to contend that she believed at any stage that targeting marginal wards for electoral advantage was legally permissible. [Mr **Weeks's**] evidence in cross-examination was that, as a result of counsel's

advice on 5 May it was clear 'that you could not just designate for 250 in the marginal wards' and that he greeted that advice 'with some relief' because a major aspect of contentiousness could be removed. He said that, following counsel's advice, he and other members 'immediately abandoned' talk of designating blocks in marginal wards and the lists produced 'after 5 May were constructed on other grounds'. Whether that evidence is credible we shall consider later. But it provides no basis whatever for suggesting that, if [Mr **Weeks**] continued to be party to a scheme for targeting designated sales in marginal wards for electoral advantage, he did so in reliance on legal advice."

Counsel for Dame Shirley suggested that the Divisional Court had misunderstood or misstated her evidence given in cross-examination and in answer to questions from all three members of the Divisional Court, but the transcript does not appear to me to support that suggestion. She could not say what proper local government reasons there might have been forconcentrating sales in the marginal wards. To the last question from Latham J she said: "I feel that there must have been some, but whether or not it was in mind, I do not know." She said in cross-examination that the policy did change, and she answered a question from Keene J by referring to a "whole change in emphasis", meaning (as I understand it) that by the time of the housing committee meeting on 8 July 1987 the policy of concentrating sales in marginal wards had been abandoned or at least substantially diluted. But in fact (as Mr Reiter's draft "BSC Campaign: Plan for Action" made plain within a matter of **weeks)** the policy of targeting marginal wards was continuing with renewed vigour.

The way in which Dame Shirley's case has been presented has varied from time to time. Only in this court, I think, has much emphasis been placed on her reliance on legal advice. In her oral evidence she said that she was well aware that local authority resources must not be used for party political ends, and that the legal advice which she received came as no surprise to her. She also said that it never occurred to her to ask to see Mr Sullivan's advice in writing. She did not contend, either in her oral evidence or through her counsel (apart from drawing attention to Mr Ives's unfortunate references to devising or constructing arguments), that she was relying on any legal advice to the effect that an unlawful policy could be made lawful by camouflage. On the basis of Mr England's "Note to Leader" it seems likely that Mr Sullivan's unambiguous advice was distorted in the course of transmission to Dame Shirley, although in the absence of any minutes of the meeting of the chairmen's group on the evening of 5 May 1987 (at which Mr England was present) it is impossible to gauge the degree of distortion. But as the Divisional Court found, she cannot at any stage have believed (either in reliance on legal advice or otherwise) that targeting marginal wards for electoral advantage was a lawful use of council resources.

In relation to Mr **Weeks** the position is similar, but if anything even clearer. Mr **Weeks** was present at the evening meeting on 5 May 1987 at which Mr England reported to the chairmen's group. He said in the course of his examination-in-chief:

"There was talk of designating blocks in marginal wards, which persisted until 5 May. Mr Sullivan advised through Mr England and Mr Lewis that that was not a wise thing to do and it might be controversial, so members immediately abandoned that. I abandoned it with some relief."

Dame Shirley said the same (without any reference to relief) in paragraph 72 of her affidavit and in cross-examination. The Divisional Court found, on ample grounds, that that evidence was false. Legal advice as to the propriety of a genuinely city-wide policy cannot be relied on as approval of the deceptive continuation of a policy (of targeting marginal wards for electoral advantage) which Mr Sullivan had in fact unambiguously disapproved.

I am not therefore persuaded that the Divisional Court dealt inadequately with the issue of legal advice. I find the Divisional Court's conclusions on this topic clear and convincing.

VII

Liability (3): "the great divide" and associated topics

The expression "wilful misconduct" in section 20 of the 1982 Act is capable of covering a variety of acts and omissions, including both formal and informal acts and a continuing course of conduct. That is to state the obvious but on this occasion it may be useful to do so, since there has throughout the hearing of this important and difficult appeal been a certain lack of focus, in my view at least, as to precisely what misconduct was alleged against the appellants, and the relationship between that alleged misconduct and the decision taken by the housing committee on 8 July 1987.

Sometimes misconduct may consist of a single decision made on behalf of a local authority by an individual acting under delegated powers, the decision being formally correct but invalid because made for improper and legally irrelevant reasons. One example is R v Port Talbot Borough Council, Ex p Jones [1988] 2 All ER 207, in which the borough housing officer, under pressure from the chairman of the housing committee, gave priority to rehousing another councillor for improper reasons. It may consist in the negligent performance or non-performance of routine duties, where no question of formal decision-making arises, as in Pooley v District Auditor No 8 Audit District (1964) 63 LGR 60, the case of the head caretaker who failed to take care of the supplies of solid fuel for his group of schools.

Where formal decision-making is involved and the decision-maker is not an individual but a committee, difficult inquiries may be necessary as to whether the decision of the committee as a whole (embodied in the voting majority) was tainted by some improper purpose not apparent on the face of the resolution, or the papers before the meeting. That is illustrated by a case alleging misfeasance in public office against a local authority itself, Jones v Swansea City Council [1990] 1 WLR 1453, reversing the decision of this court [1990] 1 WLR 54. Normally the purposes for which a local authority committee reaches a decision to exercise its powers will be inferred from the tabled papers (which will normally have been prepared by officers under a duty to act impartially). But if ulterior purposes are alleged, a closer inquiry becomes necessary. What Maugham LJ said in In re Magrath [1934] 2 KB 415, 434 ("in my view evidence is not admissible to show that some of the persons present and voting took a particular view of the resolution which they concurred in passing") was directed to the meaning of a resolution, not to any issue of ulterior purpose.

In this case the original objections, made under section 17 of the 1982 Act on the day before the Panorama programme, identified the decisions of the housing committee on designated sales and capital grants, and detailed objections under two heads: (i) the unlawfulness of the original decisions; and (ii) unlawfulness in implementation (see volume 4, appendix 6 of the auditor's report). In line with that the auditor made a very detailed investigation, not only of events leading up to the decisions on 8 July 1987, but also of the events of the next two years and beyond. Investigation of the consequences of the decision was of course necessary in order to quantify the loss caused by any wilful misconduct which the auditor found to be established. But it was also necessary in order to answer a question which is central to the issue of liability, that is whether or not the policy of concentrating sales in marginal wards for electoral advantage was, asDame Shirley Porter and Mr **Weeks** claimed, abandoned immediately after receipt of Mr Sullivan's advice.

The issue of misconduct cannot therefore, as I see it, be equated simply with the question of whether the appellants were (so to speak) vicariously responsible for the decision taken by the votes of Mr Hartley and his six Conservative colleagues. Both the auditor and the Divisional Court approached the issue more broadly, as whether the appellants had promoted, pursued or implemented a policy which was unlawful because of its improper purpose. In my view they were right to approach the issue in that way. But the decision of

the housing committee is plainly of crucial importance because it was (if assumed to be valid) the means by which the policy of the majority group became the official policy of the city council, with increasingly serious financial implications over the next two years as indicated in the third section of this judgment.

The decision of the housing committee was in fact the occasion on which, in Dame Shirley Porter's phrase, the policy passed "the great divide" between political aspiration and the exercise by a local authority of its statutory powers. Dame Shirley said in her affidavit (paragraph 14) that the auditor had failed to appreciate the difference between political discussion and the considerations which a councillor has to take into account in decision-making at meetings of the council or its committees. However she also said (paragraph 29):

"The dividing line between purely political matters and legitimate council matters is a narrow one and can become blurred. If it is considered that on any occasion an officer has inadvertently crossed the line then I would wish to make it plain that this would have been at the express or implicit instance of myself or other members and not at the instigation of the officer."

When that passage was put to Dame Shirley in the course of her cross-examination (in which she used the expression "the great divide" in her first substantive answer) she said:

"I believe that throughout my affidavit I have made it abundantly clear that there is a great divide and I know where the divide is. The divide is the moment that it gets into the council machinery. When we cease just to be thinking politically, and when we are working on a policy."

(The context shows that by "working on" the witness must have meant "carrying out at the expense of local government funds".)

Dame Shirley also made some spirited and realistic comments about the place of party politics in local government. Near the end of her cross-examination in the Divisional Court she said: "If you are saying to me that there should not be any politics in local government, then I have to come back and say then there is no point in having political parties and that, to me, is the whole essence of it." There Dame Shirley was acknowledging the fact that (for better or worse) local government, as well as national government, is now suffused with party politics. That inescapable fact has been clearly acknowledged in the Report of the Committee of Inquiry into the Conduct of Local Authority Business (the Widdicombe Report) (1986) (Cmnd 9797), para 4.17), which pointed out that the statutory scheme of local government barely acknowledges party politics, and "As a result insufficient distinction has been made between the fact of the existence of politics, which is a reality which any system of government must recognise and accommodate, and particular manifestations of politics that should not be sanctioned." (One of the rare statutory references to politics is in section 175(3) of the Local Government Act 1972, where the reference to political objects must be to party politics.)

However the courts have gone some way to recognise the reality of rival party political loyalties and organisations within the members of a local authority council who are meant, in theory, to make decisions as to the exercise of their powers in a collegiate and corporate manner. Realistic and helpful guidance was given in the three separate judgments given in this court in R v Waltham Forest London Borough Council, Ex p Baxter [1988] QB 419. See Sir John Donaldson MR, at pp 423-425, Stocker LJ, at p 427, and Russell LJ, at p 428, who said:

"Party loyalty, party unanimity, party policy, were all relevant considerations for the individual councillor. The vote becomes unlawful only when the councillor allows these considerations or any other outside influences so to dominate as to exclude other

considerations which are required for a balanced judgment. If, by blindly toeing the party line, the councillor deprives himself of any real choice or the exercise of any real discretion, then his vote can be impugned and any resolution supported by his vote potentially flawed."

It is important to note that in the Waltham Forestcase the only issue (at any rate in this court) was as to whether a council decision setting a rate was invalidated because four of those who voted with the majority had expressed different views at a party caucus meeting held just before. The issue of invalidity turned on a supposed abdication of individual judgment, not on ulterior purpose (except so far as blindly maintaining party solidarity might be described as being in itself an ulterior purpose).

Sometimes it may be difficult or even impossible to discern the precise point at which party political and electoral considerations come to play too large a part in a local authority's decision-making. That appears from several cases to which this court was referred, including R v Inner London Education Authority, Ex p Westminster City Council [1986] 1 WLR 28; R v Lewisham London Borough Council, Ex p Shell UK Ltd [1988] 1 All ER 938 and the Waltham Forest case [1988] QB 419. But, whatever difficulties may arise in borderline cases, it is common ground in this case that it would not have been lawful for the ruling Conservative group to adopt a new housing policy, and to incur heavy direct and indirect costs in pursuing it, with the purpose of improving its prospects of success at the local elections in 1990. The appellants' case was that the ruling group did not, after 5 May 1987, have such a policy. The Divisional Court rejected that case as based on false evidence.

I must try to pull these threads together by reference to the main submissions made on behalf of Dame Shirley by Mr McMullen (and adopted on behalf of Mr **Weeks** by Mr Cakebread). The Divisional Court found, 96 LGR 157, 181, that the decision of the housing committee on 8 July 1987 "was substantially influenced by a wish to alter the composition of the electorate by increasing the Conservative vote in marginal wards by the sale of council properties, and was therefore unlawful". Mr McMullen made atwo-pronged attack on this conclusion. In the first place, he argued, the decision was not unlawful, since (as the Divisional Court found) most members of the housing committee were not guilty of misconduct and did not themselves vote for option 3 for improper reasons. Mr McMullen also argued that the decision of the housing committee broke the chain of causation between any earlier misconduct on the part of the appellants (in devising and promoting the BSC policy, targeted at marginal wards, during the second half of 1986 and the first half of 1987) and the financial losses suffered in the next two years (and beyond) in consequence of the housing committee's decision.

Mr McMullen developed these twin submissions by reference to four matters: the joint report prepared by officers for the housing committee; the list of properties for designation in marginal and non-marginal wards; the motivation of Mr Hartley, the chairman of the housing committee, in voting for option 3 and the other resolutions; and the motivation of the other Conservative members of the committee (Councillors Dutt, Warner, Bianco, Buxton, Evans and Hooper).

Mr McMullen submitted that the Divisional Court had been right to conclude that the report was "in general fair and adequately comprehensive", and that the auditor's respondent's notice challenging that conclusion should be rejected. To my mind the Divisional Court's conclusion about the report cannot be faulted, if the report in its final form is considered simply as a text, without reference to its painful evolution as Mr England and other officers struggled with their professional consciences (it must be remembered what Mr England had written in his memorandum of 17 March 1987, and in his replies to Mr Greenman's faxed questions of 24 March). However it would be going too far to say, as was submitted, that the joint report did not hide anything. It did fail to disclose one absolutely crucial fact, that is what Mr England called the "hidden agenda" of the most influential members of the Conservative group to concentrate their efforts and resources on the eight marginal wards.

In the circumstances the approval given by leading counsel (at a hastily arranged lunchtime consultation, still without any proper written instructions) seems to me to add little if anything to the status or significance of the joint report.

I take much the same view of the list of properties approved by the housing committee. The Divisional Court discussed the evolution of the list and concluded, at p 194, that the auditor

"is unable to establish to the requisite standard of proof that the criteria or the lists were manipulated by officers for the purposes of securing party political advantage for the majority party. There is no evidence before us which casts doubt on the propriety of the criteria. Having listened with care to [Mr England's] explanations for the reduced proportion of designations in the non-key wards, we are unable to say that those explanations are specious."

That conclusion also is challenged in the auditor's respondent's notice. For my part I see more force in that challenge, but I am not prepared to differ from the findings of the Divisional Court which saw and heard Mr England being cross-examined on this point. Mr England's basic case on this point was set out in paragraph 227(1) of his affidavit: "My case on this has always been that once you seek to achieve 500 designated sales per annum acrossthe city (as opposed to 250) you have little choice as to which properties to select." That basic case, as elaborated and tested in cross-examination, seems to have been accepted (or at any rate not rejected) by the Divisional Court. The sheer scale of designation required for 500 sales a year made it almost inevitable that the 9,360 properties designated city-wide should include all those already provisionally identified in the six marginal wards which had a significant number of council properties. But assuming in the appellants' favour that the final list was (or may have been) objectively justifiable as a basis for a genuine city-wide policy of sales at the rate of 500 properties a year, I consider that the list does not by itself demonstrate that that ever was a genuine policy; and the facts as to the painful evolution of the list, through nine intermediate drafts, reflect Mr England's continuing doubts and anxieties about the matter.

In relation to what happened at the housing committee meeting, Mr Howell for the auditor has not challenged the Divisional Court's finding that most members of the committee were not guilty of misconduct and did not vote for option 3 for improper reasons. He did, however, contend that there was sufficient evidence that Mr Hartley and Dr Dutt were aware of the appellants' ulterior purposes, even though Mr Hartley was acquitted of wilful misconduct and no findings of individual misconduct were made against Dr Dutt after he had taken his own life. Since the resolutions were passed by seven votes to five that would arguably be sufficient to lead to the conclusion that the resolutions were improperly passed.

However, the decision of this court in R v Derbyshire County Council, Ex p Times Supplements Ltd, 155 LGRev 123 shows that it is permissible, and indeed necessary, to take a broader view of the realities of the decision-making process. The resolutions and the officers' report came to be before the housing committee as the result of a carefully planned strategy (involving a "planted" question) devised or approved by the appellants and other influential members of the Conservative group. Dame Shirley Porter realistically accepted that, once the resolutions were on the agenda, their approval (with option 3) was something which the majority party "confidently expected". Those committee members who were in the majority party, but outside the influential centre, followed the party line innocently (so far as any hidden agenda was concerned) but in some cases without exercising any independent judgment. (Councillor Hooper knew nothing about the details of housing problems and was asked to fill a casual vacancy about two hours before the committee meeting; Councillors Evans and Buxton were regular committee members but exercised no real judgment about the option 3.)

Since councillors are (at least in a non-technical sense) in the position of trustees of the

public funds which they control (see Attorney General ex rel Rea v Belfast Corpn (1855) 4 Ir Ch R 119, 143, 156) I would if necessary apply by analogy the principle which the Divisional Court derived from the decision of the Privy Council in Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378, 385, that a dishonest third party may be liable (as a constructive trustee) for a breach of trust perpetrated by a trustee acting innocently. But as all councillors were under the same statutory obligations of a fiduciary character, whether or not they were members of the housing committee, and as the appellants no longer rely on the material parts of paragraph 17 of Dame Shirley's notice of appeal, I do not find it necessary to go further intothat point. In my judgment the appellants' attack on this part of the Divisional Court's judgment fails on both fronts.

VIII

Liability (4): inconsistency

The appellants' counsel made some powerful submissions, developed in great detail, to the effect that the Divisional Court had acted inconsistently in allowing the appeals of Mr England, Mr Phillips and Mr Hartley, but dismissing the appeals (on liability) of Dame Shirley Porter and Mr **Weeks.** The appellants are, counsel submitted, entitled to equal treatment before the law. It is not open to this court to reverse the conclusions which the Divisional Court reached in relation to Mr Hartley (against whom the auditor sought leave to appeal, but failed to get it) or in relation to Mr England and Mr Phillips (against whom the auditor did not seek leave to appeal).

I have to say that I have found this the most difficult aspect of the whole of this difficult case. Mr Hartley, as chairman of the housing committee from 11 June 1987, was a member of the chairmen's group which acted as Dame Shirley's political cabinet, and Mr England and Mr Phillips were closely involved at all stages in the policy of targeting wards, including attendance at meetings of the chairmen's group and subsequently at the officers' steering group. Mr England's candid manuscript notes on his papers are eloquent testimony of his doubts and apprehensions at various stages. Mr England was the individual who, having attended the consultation with Mr Sullivan on 5 May 1987, was responsible for conveying counsel's advice to Dame Shirley Porter and the other members of the chairmen's group that evening. Mr England was primarily responsible for the evolution of both the officers' report and the list of properties, however much he sought to distance himself from the list and to foster what Mr Howell has called "the myth of the members' list". Counsel submitted that his acquittal, and that of Mr Hartley and Mr Phillips, make the adverse findings against Dame Shirley and Mr **Weeks** unsafe and that their appeals should be allowed on that ground.

This part of the case has caused me some anxiety. I accept Mr McMullen's submission that the auditor, not being in a position to seek to reverse the conclusions which the Divisional Court reached about Mr Hartley and the two officers, cannot be heard to say (as part of his case against Dame Shirley and Mr **Weeks)** that the Divisional Court was wrong about the others. I cannot completely avoid the feeling that there may have been some element of mercy in the Divisional Court's conclusions about Mr Hartley and the two officers, especially Mr England, who seems to have been most vulnerable to pressure from elected members. The Divisional Court found, 96 LGR 157, 186: "There is no evidence that any officer was exposed to overt intimidation or threats during the relevant period; but Lewis told the auditor about 'an atmosphere of fear'." The judgment then quotes some observations made by Mr **Weeks** and continues, at p 186:

"As [Mr **Weeks**] was deputy leader this gives a flavour of the attitude of the majority party to [the Westminster City Council] officers, for whom it could not have been pleasant working at this time. We take into account that such pressures may well have had an insidious effect on the officers,making them consciously or unconsciously reluctant to speak out robustly."

The structure of the first sentence may have gone awry, but its meaning is plain. It is to be observed that in a passage of her affidavit already quoted Dame Shirley Porter did, to her credit, seek to protect the council's officers, saying that they acted at the instance of herself or that of other elected members.

Section 20 of the 1982 Act does not leave any room for mercy, if wilful misconduct causing loss has been established, however grave the financial consequences. But, whether or not there was some element of mercy in the Divisional Court's conclusions, it could uphold the surcharge on Mr Hartley and the two officers only if satisfied that each was, on the totality of the evidence, guilty of wilful misconduct, and that his misconduct was causative of loss. The Divisional Court saw and heard oral evidence from each of the five appellants before it and had to reach conclusions in respect of each of them individually, not collectively.

In the case of Mr England its findings in relation to the officers' report and the list of properties (which the auditor has unsuccessfully challenged in this court), and its finding that Mr England made an honest attempt to pass on Mr Sullivan's advice, led it to the conclusion that Mr England was not guilty of wilful misconduct down to 8 July 1987, whatever his doubts and equivocations. As to the subsequent course of monitoring by the steering group, the Divisional Court found, at p 195:

"that he knew that it was inappropriate at the time, and that that is the explanation for his assistance to [Mr Phillips] in providing Councillor Dimoldenburg of the minority party with wholly misleading answers to what appear to us to be understandable and wholly proper questions. This does not, however, mean that he was guilty of wilful misconduct in relation to the policy of designated sales."

In relation to Mr Phillips the Divisional Court found that he must have realised that the policy of concentrating sales in marginal wards, as it was developing down to 5 May 1987, was improper. However it found, at p 202d, that from that date his state of mind must have been affected by the support being given by Mr England and Mr Lewis to "the policy determined by the chairmen's group on 5 May". The Divisional Court found misconduct established against Mr Phillips, but not wilful misconduct, either in relation to events down to 8 July 1987 or in relation to subsequent monitoring.

As to Mr Hartley, the Divisional Court considered him to have been his own worst enemy in the evidence which he gave to the court. It took account of his relatively late involvement in the development of the policy and his reliance on the advice of Mr England and Mr Lewis "who both knew as much, if not more, about the genesis and development of the policy as he did". It also took account of Mr Hartley's own strongly held view that the city council should be selling as much as possible of its housing stock, whatever ward it was in. It concluded, at p 199, that Mr Hartley's action

"was still unlawful and amounted to misconduct despite his own proper motive, because of the improper motive of others of which he was aware. But we are prepared to accept that he did not appreciate theunlawfulness of his conduct and genuinely believed that his own proper purpose rendered his actions lawful. Accordingly, his misconduct was not, in our judgment, wilful."

I do feel some unease about these conclusions. They seem to me to have an air of "absolution by association", which can be no more acceptable an approach than that of guilt by association. Nevertheless I cannot say that they are not conclusions which were open to the Divisional Court. I note also that the Divisional Court did not, in this part of its judgment, make any express findings as to whether (non-wilful) misconduct by any of these three individuals was causative of loss. The judgment went on to consider causation in relation to Dame Shirley Porter and Mr **Weeks** and found, in my view correctly, that the loss to the city council was caused by those appellants as the promoters of the policy. Had the Divisional

Court found it necessary to consider causation in relation to Mr Hartley and the two officers it might (especially in relation to the officers) have found a further ground for allowing their appeals in the lack of any sufficient causal link.

For all these reasons I would dismiss the appellants' appeals on the issue of liability.

IX

Quantum

In case this matter goes further I should deal with the issue of quantum. I do so on the footing that the sales policy was unlawful although the majority of this court have reached a different conclusion. The differences between sections 19 and 20 of the 1982 Act have already been noted. Whereas section 19 is concerned with unlawful expenditure, section 20 is (so far as now material) concerned with "a loss ... incurred or deficiency caused by the wilful misconduct of any person". The auditor made calculations under both section 19 and section 20 but only the latter are now material. It is clear that the scope of section 20 is not restricted to a loss or deficiency arising from expenditure: see Asher v Lacey [1973] 1 WLR 1412, the first round of the Clay Cross litigation. Neither side has based any submission on any perceived distinction between "loss" and "deficiency" and in what follows the simple expression "loss" will be used to cover both.

Both before the Divisional Court and (on a somewhat reduced scale) in this court the parties' submissions on quantum have been directed to various different items in a sort of balance sheet of items of loss, partly offset by items of gain, prepared by the auditor (volume 5, appendix 13 of his decision; the overall summary, apart from interest, is at paragraph 129, showing a total loss of about oe26.510m before interest). But before embarking on a detailed item-by-item scrutiny it is appropriate to note the way in which the issues as to quantum have developed, and to comment on some general submissions made to this court. In his note of preliminary findings issued on 13 January 1994 the auditor mentioned the sum of oe21.255m as the sum which he had to consider certifying. At the audit hearings (held between 19 October 1994 and 7 February 1995) the auditor heard evidence (on behalf of Dame Shirley Porter) as to quantum from three accountants, Mr Wheeler of Chantrey Vellacott, Mr Aldous of Robson Rhodes, and Mr Swinson of BDO Stoy Hayward. There was no evidence as to the valuation of the 618 dwellings sold under the designated sales policy.The auditor also received supplementary statements from Mr Aldous and Mr Swinson in April 1995. On 17 August 1995 the auditor sent out a "revised provisional calculation" of loss supported by various appendices, and invited representations on them. No representations were received on behalf of Dame Shirley Porter or Mr **Weeks.**

The Divisional Court had before it four experts' reports bearing on the issue of quantum: from Mr Swinson and Mr Adams-Cairns of Savills on behalf of Dame Shirley Porter, and from Mr Dallas of Coopers & Lybrand and Mr Scott-Barrett of Cluttons for the auditor. It also, of course, had before it the auditor's findings in volume 5 of his final report. The Divisional Court rejected a further supplementary report by Mr Adams-Cairns which was produced just before he gave oral evidence.

The appellants' case on these points was argued in this court by Mr McMullen. He submitted that the auditor's function is the equivalent of assessing damages, and that the damages should be compensatory, and measured by the loss to the person who is to be compensated. I readily accept the conclusion to which that submission leads, but it seems to me a rather roundabout way of getting there. Section 20 focuses on loss from the start and the diversion into damages is unnecessary, even though occasional references to damages can be gleaned from the authorities on surcharges, for instance R v Roberts [1908] 1 KB 407, 419.

For similar reasons little or no assistance is to be derived from submissions addressed to this

court about restitution and restitutionary damages. The expression "restitution" and its derivatives have different shades of meaning. In some contexts (and in particular in the traditional Latin phrase restitutio in integrum) it may be indistinguishable from compensation; restitutionary damages, as a term of art, must however be sharply distinguished from compensatory damages (see generally Attorney General v Blake [1998] Ch 439, 456-459, and the wealth of academic work there referred to); and sometimes a restitutionary remedy (such as an account of profits) is an alternative to damages of any sort, and the plaintiff must elect between them: see generally Inverugie Investments Ltd v Hackett [1995] 1 WLR 713, noting but refraining from comment on Ministry of Defence v Ashman (1993) 25 HLR 513. There is no suggestion whatsoever that either of the appellants has been unjustly enriched at the expense of the City of Westminster's ratepayers. The issue is what loss the ratepayers have suffered as a result of any wilful misconduct established against the appellants.

Any such loss must be measured in money. But it must be borne in mind (so far as damages provide any useful analogy here) that a successful plaintiff is not bound to lay out his damages in making good any physical loss to his property, and in practice he may be unable or unwilling to do so. As Lord Lloyd of Berwick said in Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344, 366, after citing the words of Viscount Haldane LC in British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673, 689:

"Note that Lord Haldane does not say that the plaintiff is always to be placed in the same situation physically as if the contract had been performed, but in as good a situation financially, so far as money can do it."

The Divisional Court may, with respect, have lost sight of that point when it said, 96 LGR 157, 205-206:

"To put the council back into the position in which it originally was as owner of the dwellings requires one to envisage the council going out into the market place to acquire comparable dwellings as replacements."

There is no suggestion in this case that the council was under a duty to acquire replacement dwellings, or that it did acquire them. The loss of part of its stock of social housing exacerbated the council's problems in performing its statutory duty to house the homeless, and that gave rise to a separate item of loss, which is one of the issues on this appeal. But the council could perform its statutory duty in a variety of ways, which were not limited to housing stock in the council's ownership. To provide for the cost of notional replacement of part of the housing stock by the acquisition of new dwellings, as well as its actual replacement by use of bed and breakfast accommodation or private sector lettings, would not in my view be the right approach. It will be necessary to come back to this point.

The Divisional Court approached the issue of the burden and standard of proof on the appeal as a whole

"by considering, in relation to each appellant, whether the auditor appears to have gone wrong in any respect and whether, having regard to the high standard of proof appropriate to the seriousness of the allegation ... on the material before us, wilful misconduct causing loss has been shown": see p 162.

The correctness of that approach is challenged by the auditor in his respondent's notice. Conversely paragraph 20 of Lady Porter's notice of appeal contends that the Divisional Court "failed to consider adequately or at all in the light of the burden and standard of proof applicable whether any loss was caused to the council".

The burden and standard of proof appropriate to the central issue of wilful misconduct is not relevant on the issue of quantum. If wilful misconduct is established proof of loss, and its quantification, must proceed in accordance with ordinary principles. Neither the auditor nor the court may speculate where there is no evidence. But in an area where judgments have to be formed on the basis of a mass of financial and statistical information (with some gaps) the auditor must do his best to reach a fair conclusion, erring if necessary in favour of those who are to be surcharged: see the observations of Lord Denning MR in Asher v Secretary of State for the Environment [1974] Ch 208, 222. If the auditor proceeds in that way the court will be slow to interfere with the exercise of his judgment, especially in circumstances where the persons surcharged have had the opportunity of challenging his data and his reasoning, but have not taken that opportunity. The Divisional Court was in my view quite right not to accede to the last-minute attempt to introduce new expert evidence challenging the valuations by Ellis & Co on which the auditor relied. It was not necessary for the auditor to require rigorous proof of every material fact, whether or not it had been put in issue, and had he done so the audit process would have been even more protracted and expensive than it was.

What the council lost as a result of the adoption of the unlawful designated sales policy was, in general terms, (i) 618 dwellings which formed part of its stock of social housing (at a time when it was already hard-pressed to perform its obligations under Part III of the Housing Act 1985 to house the homeless) together with (ii) funds used to pay capital grants which formed an integral part of the policy and (iii) the resources of its officers and others who were devoting their time and energy, at the council's expense, to promoting and carrying out the unlawful policy. However these losses were, as already noted, broken down into a number of items on both sides of a sort of balance sheet which the auditor set out in his final report; and Mr Swinson, the principal witness called on behalf of Dame Shirley Porter at the hearing before the Divisional Court, naturally adopted the same approach in his criticisms of the auditor's figures. (Indeed, the same approach can be seen in paragraph 11.4 of the original officers' report, dealing with financial implications.)

The figures put forward in the auditor's final report can be summarised as follows (with agreed corrections which mean that the totals in the Divisional Court judgment cannot be precisely reconciled): £m

1. Capital grants (most of which were 2.462

paid in 1987-88 and 1988-89)

2. Cost of keeping unsold property vacant 1.567

(mostly incurred in 1988-89 and 1989-90)

3. Losses resulting from sales 15.476

(a) discounts 7.922

(b) rent lost after sales (1989-95) 8.013

(c) subsidy lost after sales (1989-95) 4.237

(d) extra homelessness costs (1988-94) 2.089

4. Staff and professional costs (1988-90) 41.766

offset by

5. Interest on proceeds of sales (1989-95) (15.197)

6. Service charges on property sold (1989-95) (1.837)

7. Savings on landlord's outgoings (1989-95) (1.044)

8. Interest 23.688 5.157 28.845

It should be noted that most of the 618 dwellings were not sold outright but were let on long leases granted in consideration of substantial premiums, and references to sales include those disposals by way of long lease at a premium. Item 6 above refers to service charges payable to thecouncil as landlord under these long leases. The auditor took 8 July 1987 as the starting date for the purpose of assessing loss, disregarding the argument that some dwellings might have been kept empty in anticipation of the decision of the housing committee taken on that day. He took 31 October 1989 as the date on which the policy of designated sales was effectively discontinued. However what the auditor called "pipeline" sales continued until 4 May 1990, when the last of those sales was completed (see generally volume 5, appendix 13, paragraphs 56-63 of the auditor's final report).

Of the items set out above those numbered 1, 2, 3(b) and (c)-which were all relatively straightforward matters of computation-were not in the end challenged before the Divisional Court (although item 1 was challenged for the first time in this court). There was also relatively little between the experts on item 5 (interest on proceeds of sales) since the dispute was limited to how far the proceeds should be assumed to have been used to reduce the council's borrowings, as opposed to being used to swell the council's cash reserves. As the judgment of the Divisional Court records, both experts finally agreed that the proper approach was to assume a mixture of deposit and borrowing rates, and the Divisional Court accepted the evidence of Mr Dallas, which had not been challenged in cross-examination, as to the appropriate mixture.

In my judgment the belated challenge on capital grants (item 1) must fail. They were an integral part of the unlawful policy. Items 3(a) (discounts on vacant possession values), 3(d) (extra homelessness costs), 4 (staff and professional costs), 6 (service charge income), 7 (reduction in landlord's outgoings) and 8 (interest) were the main areas of controversy in the Divisional Court. The Divisional Court resolved all those issues in favour of the auditor except for the staff and professional costs, on which it reduced the auditor's figure of oe2.089m to oe1.146m by excluding the element of overhead and central costs (Mr Swinson, on behalf of Dame Shirley Porter, had been contending for a reduction to oe0.579m). The reduction made by the Divisional Court is challenged in the final paragraph of the auditor's respondent's notice. The Divisional Court's decision not to make any reduction in respect of discounts or interest is challenged in paragraphs 22 and 24 of Dame Shirley Porter's notice of appeal, which are adopted on behalf of Mr **Weeks.** The skeleton argument on behalf of Dame Shirley Porter (which is adopted on behalf of Mr **Weeks)** does not contain any submissions challenging liability for interest on the loss, but does raise points (not raised expressly in the notice of appeal) as to the extra homelessness costs, the service charge income and the savings on landlord's outgoings. In this court, therefore, the main issues as to quantum have been the discounts and staff and professional costs, with further subsidiary issues as to homelessness, service charge income and landlord's outgoings. Two of these points (staff and professional costs and landlord's outgoings) have something in common in that they depend partly on the choice between marginal and proportionate cost (the issue of construction actually before the House of Lords in Pepper v Hart [1993] AC 593) as the correct measure of loss.

It may be helpful to set out again the amounts at which the auditor quantified the disputed items of loss (or offset), with Mr Swinson's competing figure and the Divisional Court's conclusion:

(£m) Audito Swinson Div Ct

Discounts 15.476 nil 15.476

Extra costs

of homelessness 4.237 2.268 4.237

Staff, etc costs 2.089 0.579 1.146

Service charge income (1.836) (1.836)

(5.818)

Savings of outgoings (1.044) (1.044)

The largest difference between the parties, both in monetary terms and as a matter of principle, is over the inclusion in the loss of the difference between the open market value, with vacant possession, of the dwellings disposed of and the discounted prices at which they were actually disposed of. (The discount was 30% to purchasers who were not already tenants of the council, or were tenants but did not have the right to buy; it was a variable amount, but always more than 30%, for existing tenants with the right to buy.) The primary dispute was as to whether that was the right approach in principle: there was a secondary dispute over whether the undiscounted valuation figures produced by Ellis & Co should be accepted as evidence of open market, vacant possession values.

The Divisional Court noted the argument (deployed in the evidence of Mr Swinson) that vacant possession values were not the right starting point because, had the unlawful policy not been adopted, the dwellings would have continued to be held by the council as social housing let at rents below the level of full market rents. What the council had lost, therefore, was the capital value of a rental stream from the letting of social housing.

The judgment of the Divisional Court then cited the well known observations of Lord Blackburn in Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, 39 and stated, 96 LGR 157, 205-206 (in a passage part of which has already been set out):

"In the present case that restoration is not achieved by compensation based on the value of the dwellings 'to the council' assuming occupation of them at social rents. To put the council back into the position in which it originally was as owner of the dwellings requires one to envisage the council going out into the market place to acquire comparable dwellings as replacements. Whether it then chooses to let them at below market rents (and if so, how far below market level) or at full market rents in appropriate cases or to sell them under ministerial general consents at full market value or a discount is a matter for the council exercising its discretion in a proper way. As things stand, it has lost that opportunity. It is no answer to say that the designated dwellings sold as a result of the housing committee's decision of 8 July 1987 had sitting tenants at the date of that decision. It is agreed that all the dwellings disposed of as a result of that decision were sold with vacant possession- indeed, it was because they became vacant that they could be sold. All of them, therefore, were ones where during the relevant accounting periods the council came into full vacant possession. That is the proper basis for assessing the council's loss in respect of this item."

Mr Howell for the auditor did not seek to support the view that this was a "loss of a chance" case: see Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602, 1623-1624. He did, however, contend that the value of the lost dwellings to the council lay in enabling the council to discharge itsstatutory functions as a social landlord. The council could not, he

said, have discharged its functions by acquiring replacement dwellings already occupied by sitting tenants.

Since the council never even considered the acquisition of replacement dwellings there is a degree of unreality in debating whether vacant or let dwellings would have formed the subject matter of such an acquisition. The fundamental objection to this approach is that it loses sight of what the council lost as a result of adopting the unlawful policy of designated sales-that is, part of its stock of social housing. Had the designated dwellings, as they became vacant, not been boarded up and kept vacant until they were sold, they would have been available for reletting either to homeless persons or to others with priority needs. The focus on the fact that the dwellings were vacant at the time of sale seems to me to be, as Lord Hoffmann put it in Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997] AC 191, 211:

"the wrong place to begin. Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the [defendant] is liable must precede any consideration of the measure of damages."

In this case the relevant element of loss is the loss of part of the council's stock of social housing. It was not a loss in a commercial venture of selling dwellings with vacant possession. In my judgment the Divisional Court erred in its approach. It should have accepted the submission that there was no loss if the discounted prices actually received by the council exceeded the value of the dwellings as tenanted social housing. There was ample evidence that the discounted prices did exceed that value, and it is not necessary to go into the subsidiary issue as to Ellis & Co's valuations. Any other approach would, it seems to me, be inconsistent with the auditor's separate investigation and conclusion as to the additional costs of housing homeless persons which the council had to incur as a result of its own stock of social housing having been depleted by the designated sales policy.

It is convenient to take together the loss arising from additional staff and professional costs and the allowance for the reduction in landlord's liabilities for management and maintenance costs, since they raise the same point of principle, but with the auditor contending for a proportionate (rather than a marginal) approach to staff and professional costs, and the appellants contending for a proportionate (rather than a marginal) approach to the landlord's liabilities. If a consistent approach is taken neither side can succeed on both points. The Divisional Court was consistent in adopting a restrictive approach on both points and taking into account only such liabilities as could be identified as directly resulting from the additional costs of the designated sales policy or from the reduced landlord's liabilities, as the case might be. Of the inclusion of an element of the "overhead and central costs" of the policy the Divisional Court said, 96 LGR 157, 210a, that "Certainly this would be normal accounting practice, but the ascertainment of 'loss or deficiency' is not to be equated to a book-keeping exercise." Of Mr Swinson's evidence on the landlord's outgoings the court said, at p 211a, that "he was unable to identify any savings which the auditor has omittedand his own [proportionate] method is plainly inappropriate". In my view the Divisional Court was right in its consistently cautious approach to these two points. I would not depart from the figures of a loss of oe1.146m, and offsets of oe1.836m and oe1.044m, taken by the Divisional Court.

The last item which affects quantum is the additional cost of performing the council's statutory duty of housing the homeless. The auditor estimated this cost at oe4.237m and the Divisional Court accepted that figure (Mr Swinson had contended for oe2.268m). The auditor reached his figure by a complex four-stage process which can (with some sacrifice of precision) be described as follows. (1) The auditor calculated, for units of accommodation of different types (ranging from bedsitters to four-bedroom dwellings), the numbers of unit/**weeks** lost in each accounting period. (2) The auditor then reduced those figures by

giving a credit for the number of additional vacancies created by (i) the introduction of the grant system or (ii) existing council tenants purchasing flats under the designated sales policy. (3) The auditor then calculated the percentage of the units no longer available to house the homeless which would in practice have been used for that purpose at the relevant time (these percentages were within a broad range of about 65% to 95% for different types of accommodation). (4) There was then a final filter of matching the provisional figures for lost unit/**weeks** against unmet demand at the relevant time: if the figure for unmet demand for a particular type of unit was lower only the lower figure was taken. The resulting figures for lost unit/**weeks** were then costed against average marginal costs for private sector leasing or (if that was not available) bed and breakfast accommodation, which was a more expensive resource.

Mr Swinson in his evidence to the Divisional Court made three main criticisms of the auditor's approach, two of which were relied on in the appellants' submissions in this court. The first point is concerned with the number of vacant units at any given time. Mr Howell is, it seems to me, correct in saying that the appellants' written submissions do not do justice to the complexity of the calculations which the auditor made (in paragraphs 104-117 of appendix 13). The auditor was well aware that demand varied for units of different sizes, and that if a vacant unit such as a bedsitter would not be used to house a homeless family (for instance, because at the relevant time all the homeless needed larger units) it would not be kept vacant but would be used to house another priority applicant. Mr Swinson relied on another witness's comment that "you do not carry forward empty properties". Certainly it was not the council's practice, before the introduction of the designated sales policy, to leave any part of its stock of social housing empty for longer than was necessary. But once that policy was introduced, its inevitable consequence was that units were kept for sale and, once sold, were a permanent depletion of the housing stock. The Divisional Court recognised force in Mr Swinson's argument on this point, but saw it as counterbalanced by the auditor's "overgenerous approach" to the costing of alternative accommodation (to the extent, as the Divisional Court found, of oe1.541m). For my part I am not persuaded that there is any real force in the point about vacant units, but if there is it is amply counterbalanced by the costing point.

The other point relied on by the appellants in this court is concerned with the procedures adopted by the council in dealing with applicants who claimed to be homeless. An applicant who had not yet actually been housedwould be classified as either "under offer", "OK" or "not OK". Those who were "OK" had provided all the information which the council needed and the council had completed any necessary inquiries. In the case of those who were "not OK" further information or inquiries were needed and some but not all of the applicants would not move on into the "OK" and "under offer" categories.

The Divisional Court said on this point, at p 209:

"Had [the 'not OKs'] all eventually been refused, this would reduce the homelessness costs by about £600,000. It is unlikely that all would have been refused, although some no doubt would have been. No firm data exists on this. We take the view that some allowance should have been made for this element."

Again, however, the court was satisfied that any error had been compensated for by the auditor's approach to the costing. Mr McMullen criticised that as speculation, citing the observations of Forbes J in Tate & Lyle Food and Distribution Ltd v Greater London Council [1982] 1 WLR 149, 152. But he did not criticise the figure of £1.541m at which the Divisional Court quantified the "overgenerous approach" to costing, and in my view the Divisional Court reached a sensible conclusion well within the scope of permitted principles.

I would therefore reduce the principal sum certified by the auditor to £7.092m, to which must be added interest at the rate taken by the auditor.

JUDGMENTBY-4: LORD BINGHAM OF CORNHILL

JUDGMENT-4:
LORD BINGHAM OF CORNHILL:

1 My Lords, the issue in this appeal is whether the auditor should have certified any sum to be due to the Westminster City Council from Dame Shirley Porter and Mr David **Weeks** and, if so, in what amount.

2 The appellant, Mr John **Magill,** is the auditor. He was appointed by the Audit Commission under section 13 of the Local Government Finance Act 1982 to audit the accounts of Westminster City Council for the years 1987-88 to 1994-95. He conducted a very lengthy and detailed audit and certified under section 20 of the Act that three councillors and three officers had, by wilful misconduct, jointly and severally caused a loss of approximately oe31m to the council which they were liable to make good. All three of the councillors and two of the officers pursued appeals against the auditor's decision to the Queen's Bench Divisional Court (Rose LJ, Latham and Keene JJ). The councillors were Dame Shirley Porter, who was leader of the council at all material times, Mr David **Weeks,** who was deputy leader, and Mr Hartley, who from June 1987 was chairman of the council's housing committee. The two officers were Mr England, who was the council's director of housing, and Mr Phillips, who was managing director of the council. The Divisional Court upheld the auditor's finding that Dame Shirley Porter and Mr **Weeks** were liable, although it reduced the sum certified; it allowed the appeals of Mr Hartley and the two officers and quashed the auditor's certificate in relation to them: (1997) 96 LGR 157. On further appeal by Dame Shirley Porter and Mr **Weeks,** the Court of Appeal by a majority (Kennedy and Schiemann LJJ, Robert Walker LJ dissenting) upheld both appeals on liability: ante, p 370g [2000] 2 WLR 1420. Robert Walker LJ, although in favour of dismissing both appeals against liability, would have reduced the sum of the auditor's certificate: p 1504. On this quantum issue Kennedy LJ agreed with him (at p 371a) and Schiemann LJ (at p 389) expressed no opinion. The auditor now appeals to this House seeking to reinstate the certificate issued against Dame Shirley Porter and Mr **Weeks** in the sum certified by the Divisional Court. Mr Hartley and the two officers are no longer directly involved in the proceedings. It is necessary to decide whether the Court of Appeal was right to quash the certificateissued against Dame Shirley Porter and Mr **Weeks** and, if not, in what sum that certificate should have been issued.

3 My Lords, the facts giving rise to this appeal and much of the evidence have been summarised at some length by the Divisional Court 96 LGR 157, 164-166, 175-203, and by the Court of Appeal, ante, pp 373b-374f, 405g-425e and are the subject of a lengthy statement of facts agreed between the parties for purposes of this appeal. The facts and the evidence are crucial to the appeal, but it is unnecessary to repeat the detailed summaries already made. It is enough, for present purposes, to highlight some of the key events in the narrative, which I take from the agreed statement of facts.

4 The council comprised 60 councillors elected to represent 23 wards. As a result of the local government elections in May 1986, the overall Conservative party majority was reduced from 26 to 4. The close results of those elections prompted leading members of the council to consider how council policies could be developed in order to advance the electoral prospects of the Conservative party in the next local government election to be held in 1990. Dame Shirley Porter was determined that the Conservative party would have a greater majority at the 1990 elections than that which it had narrowly achieved in 1986. With this end in view, she reorganised the party's administrative and decision-making structure and herself chaired a group of committee chairmen. This body comprised herself as leader, Mr **Weeks,** the deputy leader, the majority party's chief whip and the chairmen of the council's committees. It was not a committee or sub-committee appointed by the council. It met on a regular basis, sometimes with officers in attendance. It developed and promoted policy. One of these

concerned the designation of council-owned properties for sale.

5 The council first introduced a policy of designated sales in 1972. Under this policy, blocks of council dwellings were designated and, when a dwelling in a designated block became vacant, it was not re-let but offered for sale to an approved applicant with the intention that all dwellings in designated blocks would become owner-occupied. Under the scheme as it was in July 1987, 10 to 20 sales per annum were generated from the 300 dwellings then designated. With a view to achieving greater success in the 1990 elections, the chairmen's group formulated a policy entitled "Building Stable Communities" (known for short as "BSC"). This included targets for increasing the numbers of Conservative voters in each of eight key wards, the target voter figures for those wards adding up to a total of 2,200. The eight most marginal wards in the election of May 1986 from the Conservative party's point of view were Bayswater, Cavendish, Hamilton Terrace, Little Venice, Millbank, St James's, Victoria and West End. Those eight wards were chosen in mid-February 1987 by some members of the majority party on the council (including Dame Shirley Porter and Councillor **Weeks)**, and were known as the "key wards". Both the eight key wards and the target voter figures (which envisaged an overall increase of 2,200 Conservative supporters in the eight key wards) were identified to officers in February 1987. The target voter figures remained the same thereafter and the achievement of those figures (including the contribution of designated sales to them) was monitored by leading members and officers. The references in contemporary documents to "new residents", "more electors" and "new electors" in many instances were euphemisms for "more potentialConservative voters", particularly in marginal wards. A major element of BSC was to increase designated sales of council properties in the eight key wards to potential owner-occupiers. It was believed that owner-occupiers would be more likely to vote Conservative. In some of the key wards there was very little council housing and few or no designated properties. But, even in respect of those wards, designated sales appeared on monitoring charts recording the progress towards the targets in the eight key wards. From July 1986, if not before, concentrating on marginal wards was majority party policy. The intention of the majority party was to develop council policies which would target marginal wards, including such housing policies as could affect the make-up of the electorate in those wards.

6 Very soon after the 1986 local government elections, the first suggestions for disposing of council housing, including increased designation, were made. On 19 May 1986, Mr England informed the then chairman of the housing committee that it would be virtually impossible for the council to meet its statutory obligations if a policy of wholesale disposal of council housing were to be adopted. On 3 June 1986 the chairmen's group decided that major policy initiatives should come down from it (and from the policy and resources committee) and it discussed marginal wards. On 5 June 1986 the chairman of the housing committee responded to Dame Shirley Porter's request for a note on "balancing the social mix" by identifying a number of factors contributing to the drop in the Conservative party's "natural support" and suggesting various options for increasing home ownership, including increased designated sales which would, however, lessen the council's "already stretched ability to meet our statutory requirements". On 24 June 1986 Dame Shirley Porter and Mr **Weeks** attended the chief officers' board when the officers were told that the focus of attention would be on winning the next election, and there was discussion of the majority party's objective of "social engineering including housing". On 30 June 1986 a working lunch, attended by Dame Shirley Porter and others, was held to discuss a prospective planning study: Mr England made a note of the discussion which included references such as "economic justification for gmander on hsg", "who is a Tory voter?", "gentrification" and "will company lets vote Tory?". On 29 July 1986 Dame Shirley Porter had a discussion with Mr Phillips concerning properties in key wards, voting records and decanting and she asked Mr England for information in respect of key wards. By the beginning of September 1986 the council's policy unit had prepared a paper on "homelessness/gentrification". It stated that "homelessness is reaching crisis proportions" and described "gentrification" as:

"ensuring that the right people live in the right areas. The areas are relatively easy to define: target wards identified on the basis of electoral trends and results. Defining 'people' is much more difficult and not strictly council business ... the housing/planning study should be used to define which initiatives are likely to produce the desired results, and in which areas."

On 1 September 1986 Mr England produced a paper for Mr **Weeks** on "Gentrification" in which he identified the major constraints on initiatives to increase home ownership as the duties to the homeless and other high priority rehousing requirements.

7 Dame Shirley Porter wrote a paper setting out her "Strategy to 1990" in which she gave top priority to winning the 1990 elections. Two of the key issues identified in the "Strategy to 1990" in relation to electoral success were "homelessness/gentrification" and how best to use the study about to be commissioned from consultants. The paper prepared by the policy unit on "homelessness/gentrification" formed part of Dame Shirley Porter's paper. Her "Strategy to 1990" was agreed by the chairmen's group on 2 September 1986 and on 3 September was circulated by the head of the policy unit to all chief officers. Officers recommended that the consultants' study should be used to establish the key wards and the need for increased home ownership in them. At a meeting on 15 September 1986 with representatives of the consultants, attended by Dame Shirley Porter and Mr **Weeks,** there was a discussion of a strategy "to push Labour voters out of marginal wards. Housing Dept can't say privatise/gentrify council blocks in marginal wards-400 in B & B but we could say-preserve economic base-need to boot out these blocks". Reference was also made to an aim to "preserve local communities-but boot out certain categories" and to community groups which "don't vote Tory". Dame Shirley Porter told the consultants "we want the right answers". In January 1987 a paper on home ownership was written at Dame Shirley Porter's request by the then vice-chairman of the housing committee, Mr Segal. That paper, written in advance of the consultants' report, identified the short-term objective as being "to target the marginal wards and, as a matter of the utmost urgency, redress the imbalance by encouraging a pattern of tenure which is more likely to translate into Conservative votes". The paper assumed that owner-occupiers were more inclined to vote Conservative and drew attention to the low proportion of owner-occupiers in Westminster relative to the national average. It called for the council to reappraise its designation policy and to "identify far more blocks particularly in key marginal wards". The paper was submitted to, and generally endorsed, by the chairmen's group at its meeting on 27 January 1987. Further work on designated sales in marginal wards followed. At least from the time of this paper in January 1987, targeting designated sales in marginal wards was firm political policy. The chairmen's group decided on 24 March 1987 to adopt a target of 250 designated sales per annum in the marginal wards. At that meeting, attended by Dame Shirley Porter and Mr **Weeks,** she stated: "need a peg in the [consultants'] report". The chairmen's group also considered a draft report. Dame Shirley Porter indicated that she did not want the report to go into detail because it exposed the other sales policies for discussion, notwithstanding that the report had been prepared, according to Mr England, to give members a "smokescreen" to identify the designated area for growth. Mr England explained to the managing director in a memorandum dated 26 March 1987 that the intention was to plant a question at the housing committee on 1 April 1987 in order to obtain authority for officers to provide a report on how to increase designated sales to at least 250 per annum, and that he intended to report back "once we have [the consultants'] steer on 250 in certain wards".

8 By this stage legal concerns were beginning to surface. On 20 March 1987 the deputy city solicitor advised the then chairman of the housing committee on the need to have sufficient justification for a major change in policy on designated sales, reinforcing (as he put it) the notes of caution thathad already been expressed. On 24 March 1987 one of Dame Shirley Porter's aides (Mr Greenman) addressed certain questions to the director of housing and the city solicitor. In response to the first question addressed to him, namely, whether the council's new policy on 100% designation for sale in the eight target wards would conflict with the council's statutory obligations, the city solicitor replied on 24 March 1987 to Dame

Shirley Porter that:

"If the policy is to be introduced then as a matter of law the reasons for its introduction have got to be carefully argued. The needs of the homeless and the impact of a decision to sell accommodation which might otherwise be available for them is a highly relevant consideration which will have to be balanced against the advantages of selling. It is fundamental that the arguments in favour of selling be soundly based and properly argued. Anything which smacks of political machinations will be viewed with great suspicion by the courts."

A further question was addressed: "Is there any possibility that this policy will lay the council open to (a) judicial review of its policy or (b) surcharging for illegality etc". To this question the city solicitor replied:

"(a) Yes. The way to avoid successful challenge is to devise legitimate arguments and to ensure that all possible ramifications have been considered by those taking the decision. If this is done judicial review may be successfully resisted unless it can be demonstrated that the decision takers have acted irrationally or relied on an irrelevant consideration.

(b) ... The possibility of surcharge exists but it will be necessary for those challenging to demonstrate that the loss flowed from the act of wilful misconduct. This re-emphasises the need for a good argument to be constructed in favour of sale."

In response to a further question the city solicitor said:

"It is crucial that any report should critically examine a proposal to designate for sale. The advantages of sale have to be considered not from any ulterior motive but from the standpoint of what is right in view of the council's role as a housing authority. A general policy of disposal is much more likely to be susceptible of challenge than decisions taken in respect of each block or each property. It might be sensible to go forward in stages rather than offer a broad target. Lawyers should be involved in consideration of any reports at the earliest possible stage. Since a general policy will inevitably draw fire the advice of counsel should be sought at an early stage so that if judicial review is commenced the prospects of successful challenge can be minimised."

9 The consultants' report was received by the council on about 10 April 1987. The Divisional Court found that Dame Shirley Porter plainly hoped and was deeply interested in the possibility that the report would provide a peg on which to hang the policy of increasing designated sales in marginal wards. Both she and Mr **Weeks** knew that, without the consultants' support, the officers could not provide professional justification for designation only in the eight wards. In fact, the consultants' report gave no such support. The report did not identify the eight key wards. Of the five "stress" wards itconsidered, only two were among the eight key wards. On its face the report gave no support for any increase in designated sales. It recommended that the council should exercise its powers with a view to "making available a supply of low and medium priced rented housing".

10 Before receipt of this report, on 17 March 1987, a memorandum from the director of housing to the chairmen's group advised that, with the scale of designation then proposed, namely of all council properties in the eight key wards (490 sales per annum), the council might find it impossible to meet its statutory obligations to a number of homeless households; that it was not possible in professional terms to justify a designation of all properties in the eight key wards given the impact on the homeless and other priority cases; that the "key ward analysis" would have to be provided by the forthcoming consultants' study; and that members should seek legal advice on the reasonableness of the proposed course of action. In a further memorandum on the following day, the director of housing advised Dame Shirley Porter in addition that it was necessary to consider providing additional

properties for the homeless and "non-statutory groups" in non-key wards but that the time required for such provision might conflict "with the objective of achieving the number of sales within the three year period". A later discussion paper on designated sales, prepared in the housing department and presented to Dame Shirley Porter and the chairmen's group on 5 May 1987, stated that the housing committee would need to set the number of designated sales per annum to be achieved and select the relevant properties for designation. It recorded that the city solicitor and secretary had advised that it was imperative that counsel's advice should be obtained on the final shape of the committee report and that there were four further matters for decision by the committee. The fourth of these was:

"Given the inevitable impact on rented supply ... should the council's target be 250 per annum or will this have an impact on the council's re-housing abilities which could not be justified? The [consultants'] report suggests a need to supplement the rented supply. There is nothing in the [consultants'] report which at the moment would justify a designated sales programme on the scale presently proposed."

Having read this discussion paper, Dame Shirley Porter summoned its author and the deputy city solicitor to her office at 9.45 a m on 5 May 1987. She told the author that the paper was not what was required; that the policy was clear; and that the note needed to spell out how it was to be achieved, not give options. She told the deputy city solicitor to obtain leading counsel's advice. She also required that a revised note be prepared for the chairmen's group meeting that evening.

11 That afternoon, Mr Jeremy Sullivan saw the deputy city solicitor, Mr England and the author of the discussion paper in consultation. He was informed that the majority group wished to target sales in marginal wards for electoral advantage. He advised that the council could not lawfully sell 250 properties per annum in the marginal wards alone. He advised that properties had to be designated for proper reasons, across the whole of the city and not in particular wards and that, in identifying properties to be designated, the same criteria had to be applied across the whole city and, ultimately, choice made without reference to anything other than those proper criteria. He also advised on a number of other matters, including thelegality of a scheme of capital grants which was not ultimately adopted. Following this consultation, Mr England wrote a note to Dame Shirley Porter suggesting action in relation to the matters identified in the discussion paper. The note was relayed to the chairmen's group at its meeting on the evening of 5 May 1987. That meeting was attended (among others) by Dame Shirley Porter, Mr **Weeks** and Mr Hartley. In interview on 5 November 1992, in his affidavit and in cross-examination Mr England accepted that Mr Sullivan had not advised that marginality of a ward was a proper factor when designating for sale. In the course of his note Mr England stated:

"The housing committee has already decided that the designated sales target should be 'at least 250' ... Counsel advises that designated estates should be identified in both marginal and non-marginal wards in order to protect the council. The Group will, therefore, need to decide whether the 250 target applies across the city or whether in fact 250 sales in marginal wards are required in which case following counsel's advice, somewhere in the region of 300-350 properties will need to be sold across the city. This will clearly exacerbate the problems of dealing with housing demand ...

"The target set by the housing committee is 'at least 250'. Counsel advises that this cannot be targeted solely in key wards, therefore, the Group will have to decide whether the final target is 250 or some greater figure which would yield 250 in the marginal wards. Counsel also advises that reference to affordable housing contained in the [consultants'] study should be included in the report. This report has now been released to the opposition.

"The housing committee has set a target of at least 250. If the Group wishes to go for a larger global target in order to achieve 250 in the marginal wards, this will require a decision

by the committee. Counsel confirms that the report should be considered at the same meeting."

On the evening of 5 May 1987, the chairmen's group agreed to target designated sales city-wide in order to produce the agreed number of designated sales in marginal wards. The group decided to adopt the course described in Mr England's note of increasing the number of designated sales so as to be able to achieve the policy objective of 250 sales per annum in the marginal wards.

12 On 13 May 1987, Dame Shirley Porter was re-elected leader and Mr **Weeks** deputy leader of the majority party. Dame Shirley Porter appointed Mr **Weeks** as lead chairman for BSC with responsibility for ensuring that its performance met time-scales. She appointed Mr Hartley to be chairman of the housing committee.

13 The chairmen's group met on 13-14 June 1987. In a note by Dame Shirley Porter presented to the meeting it was stated that:

"We face a tremendous challenge. The electoral register for the 1990 elections will be compiled in just over two years' time. Some very ambitious policies must be implemented by then: providing a great deal of affordable housing in key areas; protecting the electoral base in other areas ... There is very little time to achieve these radical policy objectives ..."

In a note by Dame Shirley Porter on BSC the key elements of the policy were summarised. One of these was the targeting of key areas, under which heading the voter targets for the eight marginal wards, in the total of 2,200 voters already mentioned, were listed. The note said that:

"A key element in BSC must be to attract homeowners into Westminster. This means finding innovative ways of ensuring that the right sort of housing is available to the right sort of buyer or tenant. And it must be available by October 1989."

October 1989 was the qualifying date for inclusion in the electoral register for the 1990 local government elections. At this meeting the chairmen's group endorsed the target of 500 sales per annum across the council area in order to produce the number of sales desired in the marginal wards. Mr Hartley, the new chairman of the housing committee, knew that the policy for designated sales which he had to carry forward was to produce 250 sales in the marginal wards, in order to improve the Conservative vote in those wards. The target of 500 was passed on to officers, and members agreed that they would select at the housing committee the estates they wished to see designated for sale. A meeting was held on 6 July 1987, two days before the housing committee was to meet, attended by Dame Shirley Porter, Mr **Weeks,** Mr Hartley and others to discuss how to monitor the impact of BSC policies on each key ward in the context of electoral considerations and to monitor targets for such policies including designated sales. It was recorded that "the leader reaffirmed the agreed BSC programme of action as agreed by chairmen as an all embracing strategic council policy with priorities for BSC initiatives" and that both she and Mr Hartley "felt that the city council had an agreed plan of action which could be clearly understood and implemented by officers".

14 At the meeting of the housing committee on 8 July 1987, Mr Hartley presented a joint report in which option 3, designation of sufficient properties to produce 500 sales per annum, was the majority party's preferred option. That option was placed before the committee because Dame Shirley Porter and Mr **Weeks** hoped to increase the Conservative vote in marginal wards by selling each year 250 council properties in those wards. They knew, or had every reason to believe, that as adoption of option 3 was Conservative policy, promulgated by Mr Hartley as chairman of the committee, it would become council policy. There was no instance of the housing committee, at this time, not adopting the majority

party's policy. Mr Hartley knew that he was promoting this policy in order to produce 250 sales per annum in the eight marginal wards in order to increase the number of Conservative party voters in them. He also knew that, in supporting this policy, it would be adopted by the housing committee. The committee resolved to designate a number of specific properties for sale which were expected to produce 500 sales per annum. The committee further resolved to introduce a scheme of capital grants. 20,697 properties had been identified in the joint report to the committee as eligible for designation. Of these, 5,912 dwellings (29%) were in the eight key wards, 13,633 dwellings (66%) were in the other fifteen wards and there were in addition 1,152 scattered miscellaneous properties. The list of properties to be designated was not recommended by officers; it was presented by the chairman of the housing committee. 9,360 dwellings were designated, including all the scattered miscellaneous properties. 74% of all eligible dwellings in the eight key wards were designated; only 28% of all eligible properties in the other wards were designated.

15 There were seven Conservative party members who voted at the meeting of the housing committee: Councillors Hartley, Dutt, Warner, Bianco, Buxton, Evans and Hooper. Councillors Hartley, Dutt, Evans, Hooper and Bianco were appointed to be members of the housing committee by Dame Shirley Porter acting as the chairman of the Policy and Resources Committee. For five of these members (Councillors Hartley, Dutt, Evans, Buxton and Hooper) it was the first meeting of the housing committee they had attended as voting members. There were five members of the committee who were members of the Labour Party. Designated sales was the seventh of eighteen items on the agenda. The committee adopted the list proposed by Councillor Hartley by seven votes to five. The Conservative members voted in favour; the opposition members voted against.

16 At a meeting on 29 July 1987 the council received a report from the housing committee. The city solicitor informed the council that a report on designated sales had been prepared following a consultation with leading counsel and that it had been seen and approved by leading counsel before it went to the housing committee. The council voted to receive the report.

17 The achievement of the electoral targets set out in the BSC campaign "plan for action", including those for designated sales, was monitored by the chairmen's group and by members' and officers' steering groups. On 14 September 1987, the chairmen's group decided that the managing director of the council should produce a BSC monitoring report to every other of its meetings, and confidential BSC monitoring reports were produced to such meetings on a number of dates thereafter. The reports considered what progress was being made in each of the eight key wards towards the sales target for that ward in 1987-88. Two reports which were presented to the policy and resources committee of the council, in October 1987 and May 1988, referred to BSC but did not refer to the key wards, the targets established for them or the system established to secure the achievement of those targets. Documents which were intended for public consumption did "not speak to key wards". In 1988, opposition members of the council raised questions about why the key/marginal wards were being monitored. There were deliberate attempts by officers to conceal the system of monitoring which had been established by giving deliberately misleading answers to proper questions from members of the minority party on the council. Under this pressure from the opposition, the BSC members' steering group (which Mr **Weeks** chaired) sought, but was unable to find, a rationale (other than their electoral marginality) for the selection of the eight key wards. On 12 April 1988 the chairmen's group, with Dame Shirley Porter and Mr **Weeks** in attendance, were informed that the BSC members' steering group would consider a BSC monitoring report (in the form requested by the chairmen) and a "rationale for key wards" at its meeting on 28 April 1988. Item 3 on the agenda for that meeting was "Rationale for Key Wards". This took the form of a paper by an officer, which did not provide any rationale for the selection of the eight key wards. The minutes recorded that "the paper looked at ways of going public on targeted wards. It was agreed that no such paper should be a formal document; each ward should be taken individually". Mr England's note of the

meeting, under "area approach"recorded "Minority Party interest ... not easy to confirm just the 8 ... Keep on Dodging???". Subsequent attempts were made to find a rationale (other than their electoral marginality) for the eight key wards. On 25 July 1988 Mr England met with Dr Dutt and discussed (among other things) "explanation for eight wards", "public audit ... can we justify why eight were chosen" and "why did we pick them? Members will ask us", and Mr England's action list as a result of the meeting included "key wards-find defence of eight wards". In a memorandum dated 24 August 1988, the city solicitor asked why the eight wards were chosen, by whom they were chosen and why they were regarded as key, but those questions were never answered.

18 On 19 July 1989 the BBC transmitted a "Panorama" programme on the designated sales policy in Westminster. Charts presented to the BSC members' steering group after 28 July 1989 recorded rights to buy and designated sales in all 23 wards in the city, not just the eight key wards. The auditor was appointed following objections made by a number of local government electors in letters dated 18 July, 20 July and 8 November 1989.

The underlying legal principles

19 The legal principles which underlie the auditor's findings against Dame Shirley Porter and Mr **Weeks** are not in the main controversial, but since they are the bedrock of his decision they should be briefly summarised.

(1) Powers conferred on a local authority may be exercised for the public purpose for which the powers were conferred and not otherwise. A very clear statement of this principle is to be found in Wade & Forsyth, Administrative Law, 8th ed (2000), pp 356-357. The corresponding passage in an earlier edition of that work was expressly approved by Lord Bridge of Harwich in R v Tower Hamlets London Borough Council, Ex p Chetnik Developments Ltd [1988] AC 858, 872:

"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely-that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended."

The principle is routinely applied, as by Neill LJ in Credit Suisse v Allerdale Borough Council [1997] QB 306, 333 who described it as "a general principle of public law".

(2) Such powers are exercised by or on the delegation of councillors. It is misconduct in a councillor to exercise or be party to the exercise of such powers otherwise than for the public purpose for which the powers were conferred. Where public powers are conferred on a council, it is the body of elected councillors who must exercise those powers save to the extent that such exercise is lawfully delegated to groups of councillors or to officers. All will act in the name or on behalf of the council. It follows from the proposition that public powers are conferred as if upon trust that those who exercise powers in a manner inconsistent with the public purpose for which the powers were conferred betray that trust and so misconduct themselves. This is an old and very important principle. It was clearly expressed by the Lord Chancellor of Ireland in Attorney General v Belfast Corpn (1855) 4 Ir Ch R 119, 160-161:

"Municipal corporations would cease to be tangible bodies for any purpose of redress on account of a breach of trust, if the individuals who constitute its executive, and by whom the injury has been committed, cannot be made responsible. They are a collection of persons doing acts that, when done, are the acts of the corporation, but which are induced by the individuals who recommend and support them; and this court holds that persons who withdraw themselves from the duties of their office may be rendered equally answerable for the acts of those whom they allow, by their absence, to have exclusive dominion over the corporate property ... As the trustees of the corporate estate, nominated by the legislature, and appointed by their fellow-citizens, it is their duty to attend to the interests of the

corporation, conduct themselves honestly and uprightly, and to see that every one acts for the interests of the trust over which he and they are placed."

(3) If the councillors misconduct themselves knowingly or recklessly it is regarded by the law as wilful misconduct. The auditor's power to surcharge councillors under section 20(1)(b) of the 1982 Act is dependent on a finding of wilful misconduct. That expression was defined by Webster J in Graham v Teesdale (1981) 81 LGR 117, 123 to mean "deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not". That definition was approved by the Court of Appeal in Lloyd v McMahon [1987] AC 625, 646-647, 655 and 674 and by the House of Lords, at pp 697 and 702. It was adopted by the Divisional Court in the present case 96 LGR 157, 167-168. It was also accepted by the Court of Appeal: ante, pp 385e-386a. There was no challenge to this definition before the House and I would accept it as representing the intention of Parliament when using this expression.

(4) If the wilful misconduct of a councillor is found to have caused loss to a local authority the councillor is liable to make good such loss to the council. This is the rule now laid down in section 20(1) of the 1982 Act. But it is not a new rule. A similar provision was expressed in section 247(7) of the Public Health Act 1875 (38 & 39 Vict, c 55), section 228(1)(d) of the Local Government Act 1933 and in section 161(4) of the Local Government Act 1972 (although in the two earlier sections the reference was to "negligence or misconduct" and not to "wilful misconduct"). Even before these statutory provisions the law had been declared in clear terms. One such statement may be found in Attorney General v Wilson (1840) Cr & Ph 1, 23-27 where Lord Cottenham LC said:

"The true way of viewing this is to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interests and property; and if such agents exercise those functions for the purposes of injuring its interests and alienating its property, shall the corporation be estopped in this court from complaining because the act done was ostensibly an act of the corporation? ... As members of the governing body, it was their duty as the corporation, whose trustees and agents they, in that respect, were, to preserve and protect the property confided to them; instead of which, having previously, as they supposed, placed the property, by the deeds of the 30 May 1835, in a convenient position for that purpose, they take measures for alienating that property,with the avowed design of depriving the corporation of it; and, with this view, they procure trusts to be declared, and transfers of part of the property to be made to the several other defendants in this cause, for purposes in no manner connected with the purposes to which the funds were devoted, and for which it was their duty to protect and preserve them. This was not only a breach of trust and a violation of duty towards the corporation, whose agents and trustees they were, but an act of spoliation against all the inhabitants of Leeds liable to the borough rate; every individual of whom had an interest in the fund, for his exoneration, pro tanto, from the borough rate. If any other agent or trustee had so dealt with property over which the owner had given him control, can there be any doubt but that such agent or trustee would, in this court, be made responsible for so much of the alienated property as could not be recovered in specie? But if Lord Hardwicke was right in the Charitable Corpn case, and I am right in this case, in considering the authors of the wrong as agents or trustees of the corporation, then the two cases are identical. I cannot doubt, therefore, that the plaintiffs are entitled to redress against the three trustees and those members of the governing body who were instrumental in carrying into effect the acts complained of; and it is proved that the five defendants fall under that description."

(5) Powers conferred on a local authority may not lawfully be exercised to promote the electoral advantage of a political party. Support for this principle may be found in R v Board of Education [1910] 2 KB 165, 181 where Farwell LJ said:

"If this means that the Board were hampered by political considerations, I can only say that such considerations are pre-eminently extraneous, and that no political consequence can justify the Board in allowing their judgment and discretion to be influenced thereby."

This passage was accepted by Lord Upjohn in Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, 1058, 1061. In R v Port Talbot Borough Council, Ex p Jones [1988] 2 All ER 207, 214, where council accommodation had been allocated to an applicant in order that she should be the better able to fight an election, Nolan J regarded that decision as based on irrelevant considerations.

20 Counsel for Dame Shirley Porter and Mr **Weeks** urged upon the House what were said to be the realities of party politics. Councillors elected as members of a political party and forming part of that party group on the council could not be expected to be oblivious to considerations of party political advantage. So long as they had reasons for taking action other than purely partisan political reasons their conduct could not be impugned. Reliance was placed on observations of Kennedy LJ in the Court of Appeal, ante, p 386d-e:

"Some of the submissions advanced on behalf of the auditor have been framed in such a way as to suggest that any councillor who allows the possibility of electoral advantage even to cross his mind before he decides upon a course of action is guilty of misconduct. That seems to me to be unreal. In local, as in national, politics many if not most decisions carry an electoral price tag, and all politicians are aware of it. In most cases they cannot seriously be expected to disregard it, but they know that if theaction which they take is to withstand scrutiny (to be 'judge-proof') there must be sound local government reasons, not just excuses, on which they can rely."

Schiemann LJ, ante, pp 390c-d, 391c-d, spoke to similar effect:

"Whether or not the decision of the housing committee was unlawful depends, in the circumstances of this case, on the motivation of the committee at the time of the vote. If its motive was purely to secure electoral advantage for the Conservative Party then the decision was unlawful. If purely Housing Act considerations were its motivation then its decision would be lawful ... There is a complication. Frequently individual persons act from mixed motives. Further, group decisions may have multiple motivations-in part because there are many votes cast and in part because each voter may himself have several motivations ... It is legitimate for councillors to desire that their party should win the next election. Our political system works on the basis that they desire that because they think that the policies to which their party is wedded are in the public interest and will require years to be achieved. There is nothing disgraceful or unlawful in councillors having that desire. For this court to hold otherwise would depart from our theory of democracy and current reality."

21 Whatever the difficulties of application which may arise in a borderline case, I do not consider the overriding principle to be in doubt. Elected politicians of course wish to act in a manner which will commend them and their party (when, as is now usual, they belong to one) to the electorate. Such an ambition is the life blood of democracy and a potent spur to responsible decision-taking and administration. Councillors do not act improperly or unlawfully if, exercising public powers for a public purpose for which such powers were conferred, they hope that such exercise will earn the gratitude and support of the electorate and thus strengthen their electoral position. The law would indeed part company with the realities of party politics if it were to hold otherwise. But a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party. The power at issue in the present case is section 32 of the Housing Act 1985, which conferred power on local authorities to dispose of land held by them subject to conditions specified in the Act. Thus a local authority could dispose of its property, subject to the provisions of the Act, to promote any public purpose for which such power was conferred, but could not lawfully do so for the

purpose of promoting the electoral advantage of any party represented on the council.

22 The House was referred to a number of cases in which the part which political allegiance may properly play in local government has been explored: R v Sheffield City Council, Ex p Chadwick (1985) 84 LGR 563; R v Waltham Forest London Borough Council, Ex p Baxter [1988] QB 419; Jones v Swansea City Council [1990] 1 WLR 54; R v Bradford City Metropolitan Council, Ex p Wilson[1990] 2 QB 375; R v Local Comr for Administration in North and North-East England, Ex p Liverpool City Council [2001] 1 All ER 462. These cases show that while councillors may lawfully support a policy adopted by their party they must not abdicate theirresponsibility and duty of exercising personal judgment. There is nothing in these cases to suggest that a councillor may support a policy not for valid local government reasons but with the object of obtaining an electoral advantage.

The findings made against Dame Shirley Porter and Mr **Weeks**

23 Reference has already been made to the detailed and protracted investigation conducted by the auditor. Details are given in the judgment of the Divisional Court 96 LGR 157, 161-162. He made very lengthy findings. The Divisional Court in its turn received a mass of written material, heard evidence from Dame Shirley Porter and Mr **Weeks** and conducted a hearing extending over 23 sitting days. The decision of the auditor and the Divisional Court adverse to Dame Shirley Porter and Mr **Weeks** rested on four main findings.

24 The first of these findings was that the Westminster City Council adopted a policy the object of which was to achieve a specified annual level of sales of properties owned by the council in the eight marginal wards with the intention that the properties thus vacated should be sold to new residents who, as owner-occupiers, might reasonably be expected to vote Con-servative and so increase the electoral strength of the Conservative Party in those wards in the 1990 council elections. The auditor put his conclusions on this point in a number of different ways. It is enough to quote paragraph 53(2)(d)(v) of his summary of his findings and views:

"both the decision to increase the number of designated sales and the selection of the properties designated for sale were influenced by an irrelevant consideration, namely the electoral advantage of the majority party. I have found that the electoral advantage of the majority party was the driving force behind the policy of increased designated sales and that that consideration was the predominant consideration which influenced both the decision to increase designated sales by 500 per annum and the selection of properties designated for sale. My view is that the council was engaged in gerrymandering, which I have found is a disgraceful and improper purpose, and not a purpose for which a local authority may act."

The Divisional Court, at pp 164-165, accepted this conclusion:

"In the 1986 local government elections the Conservative Party on the council were returned with a very small majority. With a view to greater success in the 1990 elections, the party formulated a policy of 'building stable communities'. A major element in this policy was to increase designated sales of council properties in eight key marginal wards to potential owner-occupiers. It was believed that owner-occupiers would be more likely to vote Conservative ... On 8 July 1987 the housing committee, having received a much amended joint report from council officials, resolved to extend the programme of designated sales so as to produce 500 sales per annum city-wide and introduced a scheme for capital grants of oe15,000 to encourage tenants to move. On 29 July 1987 the council refused to overturn the committee's decision. Thereafter, the progress of the policy in marginal wards was monitored."

In the Court of Appeal Robert Walker LJ could see no reason why that court, which had not heard the witnesses, could or should depart from the Divisional Court's findings, which there

was ample documentary evidence to confirm and virtually no evidence to contradict. These conclusions are clearly accepted in the agreed findings briefly summarised in paragraphs 4-18 above.

25 Nothing that the House has heard gives any ground for doubting the correctness of the conclusion of the auditor and the Divisional Court on this point. It follows from the legal principles already summarised that the council's policy was unlawful because directed to the pursuit of electoral advantage and not the achievement of proper housing objectives.

26 The decision of the auditor and the Divisional Court adverse to Dame Shirley Porter and Mr **Weeks** was based, secondly, on the conclusion that they were both party to the adoption and implementation of this unlawful policy.

27 With regard to Dame Shirley Porter the auditor found, at p 417, para 1147 of his decision:

"I find as a fact that Councillor Lady Porter was one of the members responsible for determining the direction and content of the policy of the majority group on the council. She formulated the 'Strategy to 1990' which aimed to give top priority in the development of council policies to electoral success. I find that, after the local government elections in May 1986, her top priority was to secure that the Conservative Party was successful in the local government elections for the council in 1990 and she ensured that the policies of the council on matters such as home ownership and homelessness were directed to that end. I find as a fact that she was concerned to secure an increase in the number of home owners and a reduction in the number of homeless households accommodated in marginal (or key) wards by 1990, in order to increase the number of likely Conservative voters in those wards in the 1990 local government elections. For her, the designated sales policy was a means to that end."

The auditor made similar findings concerning Mr **Weeks,** p 578, paras 1579-1580:

"I have found that Councillor **Weeks** was one of the members responsible for determining the direction and content of the policy of the majority group on the council. He was aware of, and supported, the Leader's 'Strategy to 1990' which aimed to give top priority in the development of council policies to electoral success. He was aware of, and supported, the initial housing strategy, evolved after the May 1986 local government elections, which involved concentration of activity in marginal wards to help the Conservative party to win the 1990 local government elections, including increased designated sales. I have found as a fact that he was concerned to secure an increase in the number of home owners and a reduction in the number of homeless households accommodated in marginal (or key) wards by 1990, in order to increase the number of likely Conservative voters in those wards in the 1990 local government elections. For him, the designated sales policy was a means to that end.

"I have found that thereafter, Councillor **Weeks** promoted and supported the Leader's 'Strategy to 1990' and a policy of targeting designated sales and other Council policies in marginal wards in order to secure electoral advantage for the Conservative Party."

The Divisional Court reached similar conclusions, at pp 175, 176 and 183:

"[Dame Shirley Porter] was by title leader of the majority party and by personality a leader not a follower. Targeting marginal wards was, probably from the end of July 1986 at the latest, central to her political objectives, as a succession of contemporaneous documents makes plain ... [Mr **Weeks**] said that the idea of targeting designated sales in marginal wards had 'not got to a detailed stage by March 1987': it was still 'pretty loose' and remained so, even after 5 May. Although he was the lead BSC chairman monitoring the performance of other chairmen, he said he had no direct responsibility for designated sales policy which was a matter 'wholly within the ... view of the housing committee'. We reject this. As we have

said, one of [Dame Shirley Porter's] central objectives from July 1986 was targeting marginal wards and we accept [Mr England's] evidence that, at least from the time of the Segal paper in January 1987, targeting designated sales in marginal wards was firm political policy. As deputy leader and, as he admitted, one who worked closely with the leader and was 'the details man', [Mr **Weeks**] was well aware of [Dame Shirley Porter's] objectives and determination and we find that one of his roles was to ensure by supervision that the housing committee fulfilled the objectives of the leader and the majority party, particularly in targeting designated sales in marginal wards. Whereas in his affidavit he said that key wards were not selected because of their marginality, in his oral evidence he said that marginality was the reason for their selection ... We find that designated sales in marginal wards was, as [Mr Hartley] put it, very much [Dame Shirley Porter's] 'baby' and it was embraced by the chairmen's group including [Mr **Weeks**]. We have no hesitation in finding that the eight wards were identified in early 1987 by members of the majority party because they were marginal, albeit that there were also particular problems to be addressed in some of them, such as those in the central activity zone."

In the Court of Appeal Robert Walker LJ summarised the facts at considerable length, but expressed his conclusion briefly, ante, p 428e-f:

"The overall impression throughout, from mid-1986 to mid-1989, is that the most influential members of the Conservative group on the city council, led by Dame Shirley and Mr **Weeks,** had electoral advantage as the overriding objective in formulating their housing policy, securing its adoption by the council, and implementing it with high priority given to the marginal wards."

28 These findings again are clearly accepted in the agreed findings already summarised. There is no reason to doubt their correctness.

29 The third finding crucial to the decision against Dame Shirley Porter and Mr **Weeks** is that they both knew the designated sales policy targeted onmarginal wards to be unlawful. The auditor found, at p 500 of his decision, paras 1363-1364:

"I find as a fact that Councillor Lady Porter knew that Council facilities could not lawfully be used for party political purposes and that the council was not entitled to exercise its powers or expend its resources to promote the electoral advantage of her party. As she told Councillor Peter Bradley, in answer to a question from him at a meeting of the council on 10 June 1987: 'As the member well knows, council facilities must not be used for party political purposes.'

"I find as a fact that although Councillor Lady Porter may have believed that leading counsel had advised that the council could lawfully extend its programme of designated sales on the basis of the joint report without acting inconsistently with its statutory duties to the homeless, Councillor Lady Porter knew that it was unlawful and wrong for the council to exercise its powers to secure an electoral advantage for any political party or to gerrymander or, in pursuit of such advantage for her party, she was at least recklessly indifferent as to whether it was right or wrong."

Save for the reference to Dame Shirley Porter's answer to Councillor Peter Bradley, the auditor made identical findings in relation to Mr **Weeks,** p 584, paras 1597-1598.

30 The Divisional Court made a number of findings on this point, at pp 184-185:

"[Dame Shirley Porter] failed to explain to us why and by whom the eight wards were identified. In our judgment, this failure is explicable not by the effect of the subsequent passage of time on recollection but by the realisation on her part that the more knowledge of detail which she admitted the more closely she would become identified with a policy of

targeting designated sales to enhance Conservative prospects in marginal wards which she knew in 1987 and knows now was unlawful ... From March 1987 when [Dame Shirley Porter] saw [the city solicitor's] answer to the Greenman questions she knew, as she asserts in her affidavit, that the advantages of sale had to 'be considered not from any ulterior motive but from the standpoint of what is right in view of the council's role as a housing authority'. She told us that she was not surprised by that advice and that she did not understand counsel's advice on 5 May to be any different. If this is true, [Dame Shirley Porter] cannot have thought that the suggestion of increasing the numbers city-wide came from Sullivan, because this would have left untouched the continuing ulterior motive in relation to marginal wards which [the city solicitor] had advised against. Clearly there was nothing in Sullivan's advice, as reported by [Mr England], which legitimated designated sales targeted in marginal wards. Indeed, on 10 June [Dame Shirley Porter] answered a question at a council meeting in these terms: 'Council facilities must not be used for party political purposes'. As all members and officers of the council well knew, council properties could not be sold for these purposes. [The city solicitor's] view expressed to the auditor, was that 'everyone in the Conservative Party in Westminster would have known that they could not take party political advantage into account in deciding this policy' ...Because [Dame Shirley Porter] and [Mr **Weeks**] knew the targeting policy was unlawful they were content, without further inquiry of Sullivan, [Mr England], [the deputy city solicitor] or anyone else, to adopt the suggestion in [Mr England's] note that it be dressed up in city-wide clothes: neither claims this was a proper course. Their purpose throughout was to achieve unlawful electoral advantage. Knowledge of the unlawfulness and such deliberate dressing-up both inevitably point to, and we find, wilful misconduct on behalf of each of them."

In the Court of Appeal Robert Walker LJ concluded, ante, p 431e, that Dame Shirley Porter cannot at any stage have believed that targeting marginal wards for electoral advantage was a lawful use of council resources, and that the position was similar but even clearer in relation to Mr **Weeks.**

31 Both Dame Shirley Porter and Mr **Weeks,** in their respective printed cases, accept that they knew that the council could not use its powers for electoral advantage. They plainly did know that. It follows, subject to the points discussed below, that in adopting and implementing the designated sales policy both acted in a way they knew to be unlawful.

32 Fourthly, it was found that the designated sales policy promoted and implemented by Dame Shirley Porter and Mr **Weeks** caused financial loss to the council. The auditor's conclusion (p 499, para 1361) was as follows:

"The fact that Councillor Lady Porter was not present at the meeting of the housing committee on 8 July 1987 or at the meetings of the Appointed Members' Panels on 4 September 1987, and did not, at those meetings, vote for the extended designated sales policy, which she had sought to procure, does not mean that she was not responsible for the consequences of those decisions. Without Councillor Lady Porter's promotion and support there would have been no proposal put to the housing committee for an increased programme of designated sales, targeted in the key/marginal wards and on the scale proposed. I find as a fact that she was one of those responsible for the decisions taken and the consequences which ensued. The resulting financial consequences were caused, in my view, by her misconduct."

An identical finding was made in relation to Mr **Weeks:** p 583, para 1595. The Divisional Court found 96 LGR 157, 204, that such loss as resulted to the council from the decisions taken by the housing committee and the council in July 1987 was caused by the wilful misconduct of Dame Shirley Porter and Mr **Weeks.** In the Court of Appeal Robert Walker LJ, ante, p 439b accepted that conclusion. But Dame Shirley Porter and Mr **Weeks** have raised an issue on causation which it is necessary to consider in more detail below.

33 In argument before the House, counsel for Dame Shirley Porter and Mr **Weeks** raised a large number of points in resistance to the auditor's appeal. The three most substantial of these arguments are considered in the sections which follow.

Reliance on legal advice

34 On behalf of Dame Shirley Porter and Mr **Weeks** it was argued before the House that whatever the lawfulness or unlawfulness of thedesignated sales policy they acted, in promoting it after 5 May 1987, in accordance with what they believed to be legal advice given to the council and were accordingly not guilty of wilful misconduct.

35 The auditor's findings on this matter in relation to Dame Shirley Porter were set out in paras 1362 and 1366 of his decision, at pp 499-500:

"I find as a fact that Councillor Lady Porter did not act reasonably or in the belief that any expenditure resulting from the decisions of the housing committee and the appointed Members' Panels, was authorised by law. Councillor Lady Porter did not receive any legal advice which could have led her to believe that it was open to the council to engage in gerrymandering or to exercise its powers to secure an electoral advantage for the Conservative Party. She does not claim that the council was engaged in gerrymandering or in exercising its powers to secure an electoral advantage for the Conservative Party. She does not claim that she received legal advice that it was lawful for the council to engage in gerrymandering or to exercise its powers to secure an electoral advantage for the Conservative Party. On the contrary, she received legal advice from the City Solicitor that the council was not entitled to exercise its powers for an ulterior purpose. Neither this advice nor the advice from Mr Sullivan QC gave any support for targeting designation in the key/marginal wards to promote the electoral advantage of the Conservative Party. As Councillor Lady Porter was aware, that could not lawfully be done.

"I am further strengthened in my conclusion by the evasive, false and misleading evidence given to me by Councillor Lady Porter in interview as to the reason for the selection of the eight key wards, the nature of the targets adopted and the monitoring which took place against those targets and by the misleading answers she gave in response to questions at Council meetings. Councillor Lady Porter did not admit that the designated sales policy was introduced for the purpose of securing electoral advantage for the Conservative Party in the 1990 local government elections in the City of Westminster. If Councillor Lady Porter had believed that the policy of adopting an extended programme of designated sales in order to secure electoral advantage for the Conservative Party was legally acceptable and supported by legal advice, she had ample opportunity to tell me that this was what the council was doing and that she had received legal advice that it was lawful for the council so to do."

In relation to Mr **Weeks,** very similar findings were made in paras 1596 and 1600, at pp 583-585.

36 The Divisional Court found as follows, at p 179:

"The position of [Dame Shirley Porter] in relation to legal advice was initially, as reflected in the opening skeleton argument on her behalf, that she never sought or received advice which could have led her to believe that it was open to the council to exercise its powers to secure an electoral advantage for the majority party. In her affidavit she said her duty as a councillor was 'to decide matters in council only upon considerations relevant to local government factors identified by officers' ... She also said that [the city solicitor's] advice that there must not be any ulterior motive came as no surprise in the light of her experience and she did notunderstand leading counsel's advice on 5 May to have differed from that of [the city solicitor]. In the light of this evidence, although we accept that [Dame Shirley Porter] was always anxious to obtain and follow legal advice, it is, in our judgment,

impossible for [Dame Shirley Porter] to contend that she believed at any stage that targeting marginal wards for electoral advantage was legally permissible."

The Divisional Court then, in relation to Mr **Weeks,** found, at p 179:

"[Mr **Weeks's**] evidence in cross-examination was that, as a result of counsel's advice on 5 May it was clear 'that you could not just designate for 250 in the marginal wards' and that he greeted that advice 'with some relief' because a major aspect of contentiousness could be removed. He said that, following counsel's advice, he and other members 'immediately abandoned' talk of designating blocks in marginal wards and the lists produced 'after 5 May were constructed on other grounds'. Whether that evidence is credible we shall consider later. But it provides no basis whatever for suggesting that, if [Mr **Weeks**] continued to be party to a scheme for targeting designated sales in marginal wards for electoral advantage, he did so in reliance on legal advice."

37 In the Court of Appeal Robert Walker LJ, in a passage to part of which reference has already been made, said, ante, p 431b-e:

"The way in which Dame Shirley's case has been presented has varied from time to time. Only in this court, I think, has much emphasis been placed on her reliance on legal advice. In her oral evidence she said that she was well aware that local authority resources must not be used for party political ends, and that the legal advice which she received came as no surprise to her. She also said that it never occurred to her to ask to see Mr Sullivan's advice in writing. She did not contend, either in her oral evidence or through her counsel (apart from drawing attention to [the city solicitor's] unfortunate references to devising or constructing arguments), that she was relying on any legal advice to the effect that an unlawful policy could be made lawful by camouflage. On the basis of Mr England's 'Note to Leader' it seems likely that Mr Sullivan's unambiguous advice was distorted in the course of transmission to Dame Shirley, although in the absence of any minutes of the meeting of the chairmen's group on the evening of 5 May 1987 (at which Mr England was present) it is impossible to gauge the degree of distortion. But as the Divisional Court found, she cannot at any stage have believed (either in reliance on legal advice or otherwise) that targeting marginal wards for electoral advantage was a lawful use of council resources."

As already noted, Robert Walker LJ considered the position of Mr **Weeks** to be similar but if anything even clearer.

38 Counsel for Dame Shirley Porter and Mr **Weeks** naturally placed much reliance on the contrary views expressed by the majority in the Court of Appeal. In the course of his judgment, ante, pp 387-388, Kennedy LJ said:

"I remind myself that the Divisional Court had the advantage of seeing the two appellants, as well as others, when they gave evidence, and clearly that court was not particularly impressed by these two appellants, butwhat I cannot follow is how the court was able to find these appellants guilty of wilful misconduct having regard to its conclusions in relation to those important factual issues which I set out at the beginning of this section of the judgment, conclusions which led the court to conclude that three out of five appeals must be allowed. I recognise that long before 5 May 1987 Dame Shirley, but not Mr **Weeks,** had received legal advice from [the city solicitor], but on 5 May 1987 the possibility of targeting sales in marginal wards for political gain was put to leading counsel of considerable standing. Mr England, who received and reported upon counsel's advice, was led to believe that designating city-wide would not be unlawful merely because it met Dame Shirley's objective of 250 in marginal wards. The judgment of the Divisional Court simply does not explain why the advice of leading counsel did not affect Dame Shirley and Mr **Weeks** as it affected Mr England, and for that matter Mr Hartley and Mr Phillips, and I cannot make good the omission because there seems to have been no reason to make any distinction. The

Divisional Court said that the purpose of the appellant throughout was 'to achieve unlawful electoral advantage'. The use of the word 'unlawful' begs the question. Their submission is that having taken legal advice they, like the others, believed that electoral advantage could lawfully be pursued by the route envisaged in Mr England's report of his consultation with Mr Sullivan, and thereafter the route chosen was, they believed, entirely legitimate ... I recognise, of course, that in the Divisional Court the appellants contended that the great increase in the number of designated properties was not promoted in order to achieve 250 sales per annum in marginal wards, and that the Divisional Court held otherwise, but in all essential matters the records speak for themselves. On 5 May 1987 counsel and the officers who attended on him knew all there was to know about Dame Shirley's ambition as to sales in marginal wards. The Divisional Court was critical of both appellants for saying that, in the light of Mr Sullivan's advice, the policy was abandoned. The court said, 96 LGR 157, 185, that they 'lied', but on any view option 3 was not the proposal which Mr Sullivan was asked to consider. It was only formulated as a result of his advice. As Mr McMullen pointed out, those who wish to offend against the law do not usually consult lawyers of good reputation, give them access to all relevant information, and then act in accordance with their understanding of the lawyer's advice, arranging for further advice to be obtained as events progress. In most cases where a breach of section 20 has been found proved, the evidence shows an unwillingness to obtain or a defiance of legal advice. That is not this case."

Schiemann LJ, ante, p 394e-f, said:

"As the division of opinion in this court shows, there is no doubt that the borderline between what is permissible and what is not permissible in the context of what Dame Shirley was trying to achieve is not easily perceived by lawyers and even less easily perceived by laymen. It is clear to me that Dame Shirley was seeking to avoid doing anything illegal and that this was the reason why she laid bare her hopes to her legal advisers and asked for legal advice."

39 The issue of inconsistency of findings is one which I consider separately below. The issue here is whether the majority of the Court of Appeal had any sustainable grounds for rejecting the very clear conclusions reached by the primary fact-finders, the auditor and the Divisional Court. Before the auditor Dame Shirley Porter and Mr **Weeks** did not contend that they had pursued the designated sales policy on legal advice. At that stage they were seeking to distance themselves from the policy. In the Divisional Court they contended that the policy had been abandoned after 5 May 1987, a contention found by that court to be dishonest and untrue. Only in the Court of Appeal was the case made that reliance had been placed on legal advice, as Robert Walker LJ pointed out in the passage quoted in paragraph 37 above. It is not clear to me how the Court of Appeal majority felt able to reject the very clear findings of the auditor and the Divisional Court, which in my opinion are entitled to stand. But I draw attention to two particular, in my view fatal, weaknesses in the majority reasoning. First, it is simply not true that Mr Sullivan was given access to all relevant information or that Dame Shirley laid bare her hopes to her legal advisers. Mr Sullivan received no written instructions and gave no written advice. There were two questions which the council should have put to him. The first was whether it was lawful to promote a policy of designating council properties for sale in marginal wards for the purpose of securing an electoral advantage for the majority party at the forthcoming council elections. That question was put to Mr Sullivan and he answered it in the negative, as he was bound to do. The second, follow-up, question should have been whether, if that policy would be unlawful, the policy would become lawful if, with the same objective, and in order to conceal the targeting of sales in marginal wards, the designated sales policy were extended across the City of Westminster. That question was never put. No one, including Dame Shirley Porter and Mr **Weeks,** could have had any doubt at all what the answer would have been if it had. Mr Sullivan was never told of the course on which the council proposed to embark or had embarked. The second weakness is found in the history of pretence, obfuscation and prevarication which surrounded the policy from May 1987 onwards. If the policy was genuinely believed to be lawful, albeit controversial, there was no need for such intensive camouflage.

40 I can for my part see no reason to question the very clear findings made by the auditor and the Divisional Court on this question.

Inconsistency

41 The auditor's findings of wilful misconduct against Mr Hartley, Mr England and Mr Phillips were not upheld by the Divisional Court, and it is argued on behalf of Dame Shirley Porter and Mr **Weeks** that they cannot fairly or rationally be found liable if those others are to be exonerated. The inconsistency, as he saw it, of the Divisional Court findings was the main ground upon which Kennedy LJ allowed the appeal by Dame Shirley Porter and Mr **Weeks.**

42 In the case of Mr Hartley the Divisional Court found his conduct to be unlawful and so to amount to misconduct because of the improper motives of others of which he was aware. But the Divisional Court was prepared to accept that he did not appreciate the unlawfulness of his conduct and genuinely believed that his own overriding belief in wider homeownership rendered his conduct lawful: p 199. It accordingly found that his misconduct was not wilful.

43 In the case of Mr England the Divisional Court found that he was not guilty of wilful misconduct down to 8 July 1987, whatever his doubts and equivocations, and although critical of his conduct thereafter the Divisional Court did not find him guilty of wilful misconduct: p 195.

44 The Divisional Court found that Mr Phillips was guilty of misconduct. But it was not prepared to conclude that he must have known that what was proposed was unlawful as well as improper: p 202. The Divisional Court considered whether he was reckless. In the results it was not satisfied to the standard required that he had been reckless: p 203.

45 Robert Walker LJ found this the most difficult aspect of the whole case and it caused him some anxiety (p 437f) and unease (p 439a-b) and he thought there had perhaps been some element of mercy in the Divisional Court's conclusions: pp 437, 438. But he could not say they were not conclusions which were open to the Divisional Court (p 439a-b). I share Robert Walker LJ's anxiety and unease. It is understandable that the Divisional Court was reluctant to be excessively critical of officers, who were subject to considerable pressure from elected members, as the Divisional Court pointed out: p 186. Mr Hartley's conduct does not earn that measure of indulgence. But the Divisional Court had the advantage of hearing these three witnesses. It was rightly alert to the high standard required before a finding of this gravity could be sustained. It may very well be that Messrs Hartley, England and Phillips were fortunate to be exonerated, to the limited extent that they were exonerated. But the findings made against Dame Shirley Porter and Mr **Weeks** were, in truth, very strong. They were the leader and deputy leader of the council, and were respectively the prime architect and midwife of this policy. I am satisfied that no injustice is done to either of them by upholding the findings of the auditor and the Divisional Court.

Causation

46 At the forefront of their submissions on behalf of Dame Shirley Porter and Mr **Weeks** counsel advanced an argument to the effect that whatever the impropriety or unlawfulness of their clients' purpose and motive this did not render the decision of the housing committee on 8 July 1987 unlawful. That was a decision lawfully made by the members of the committee (not including Dame Shirley Porter and Mr **Weeks)** for lawful housing reasons, untainted by the unlawful designated sales policy, and accordingly anything which happened thereafter was not attributable to any unlawful motivation on the part of Dame Shirley Porter and Mr **Weeks.** As Schiemann LJ made plain, ante, pp 393d-395e of his judgment, this was an argument which particularly impressed him (although he made plain, ante, p 395d-e, that he did not accept that Dame Shirley Porter had been either dishonest or improperly

motivated). In my opinion this argument must be rejected. It is an agreed fact (recited in paragraph 14 above) that once the city-wide designated sales policy had been adopted by the majority party it was to all intents and purposes bound to be approved by the committee. The auditor concluded (p 325 of his decision, para 885):

"In the event that taking into account party electoral advantage does not invalidate a decision unless it becomes the dominant factor, I give my view as to whether party electoral advantage was such a dominant factor. I have concluded that the overwhelming inference to be drawn from the evidence is that party electoral advantage was the dominant consideration which influenced the housing committee in reaching a decision to adopt option 3 (increase designated sales by 500 per annum) and in selecting the properties designated for sale. I find as a fact that the electoral advantage of the majority party was the driving force behind the policy of increased designated sales and that that consideration was the predominant consideration which influenced both the decision to adopt option 3 and the selection of the properties designated for sale."

The conclusion of the Divisional Court on the committee's decision of 8 July 1987 (at p 181) is one that I would, for my part, accept:

"In our view this decision was substantially influenced by a wish to alter the composition of the electorate by increasing the Conservative vote in marginal wards by the sale of council properties, and was therefore unlawful. The policy proposed at the meeting by [Mr Hartley] and adopted by the committee was one which gave effect to this purpose, whatever may have been the reasons for the votes of individual members. It is perfectly possible, in law and common sense, for a corrupt principal to cause a result through an innocent agent or (in the context discussed by Lord Nicholls of Birkenhead in Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378, 385) a dishonest third party to be liable for a breach of trust perpetrated by a trustee acting innocently. In the present case, whatever the reasons of individual members for voting as they did, the option for which they voted was placed before the committee, in part at least, in order to achieve the improper purpose to which we have referred."

47 If however it is appropriate to inquire into the motivation of the majority party members who voted for option 3 in the committee on 8 July 1987, the conclusion does not assist Dame Shirley Porter and Mr **Weeks.** Whatever his own reasons for supporting that option, Mr Hartley was very well aware of the purpose which underlay the policy. He was, as already noted, found guilty of misconduct by the Divisional Court. In the auditor's decision he said that the late Dr Dutt, who was vice-chairman of the committee,

"was also aware of the objective to increase the majority party's voting strength in marginal wards by the adoption of an extended programme of designated sales in those wards. In my view, he took into account the electoral advantage of the Conservative Party and sought to promote it in his voting and otherwise."

(The auditor in his provisional findings expressed conclusions adverse to Dr Dutt, who disputed those findings and took his own life. The auditor, in his decision, made no finding of personal liability against Dr Dutt.) If those two tainted votes are discounted, the majority party had no majority of votes on the committee. The auditor found that Councillor Warner tried toexercise an independent judgment but was influenced by the joint report laid before the committee (which contained no hint of the true purpose of the policy) and by the views of Mr Hartley (p 323, para 879). The same finding was made in relation to Councillors Bianco and Hooper, save that they were unable to and did not exercise any independent judgment in relation to adoption of the list of properties for designation circulated at the meeting, which had been devised by officers working with the chairman to achieve target numbers of sales in certain marginal wards in order to secure an electorate advantage for the majority party in those wards (pp 323-324, para 880). In the case of Councillors Evans and Buxton the auditor

found that they neither sought to exercise nor exercised any independent judgment in relation to voting for the adoption for option 3: they simply relied on the joint report and the views of Mr Hartley. The inescapable truth is that while the chairman and vice-chairman of the committee knew of the purpose which underlay option 3, the back bench members were in no position to exercise an informed independent judgment because they were never given a clear picture of why the policy had been adopted and what it was intended to achieve. The committee was used by the party leadership to secure approval of a policy of which the purpose was never fully explained. In my opinion there was no informed exercise of independent judgment by members of the committee such as could break the chain of causation between the conduct of Dame Shirley Porter and Mr **Weeks** and the consequences which followed.

The liability of Dame Shirley Porter and Mr **Weeks**

48 The Divisional Court's findings adverse to Dame Shirley Porter and Mr **Weeks,** reached on a mass of evidence, were fully justified, if not inevitable. The Court of Appeal majority erred in departing from them. The passage of time and the familiarity of the accusations made against Dame Shirley Porter and Mr **Weeks** cannot and should not obscure the unpalatable truth that this was a deliberate, blatant and dishonest misuse of public power. It was a misuse of power by both of them not for the purpose of financial gain but for that of electoral advantage. In that sense it was corrupt. The auditor may have been strictly wrong to describe their conduct as gerrymandering, but it was certainly unlawful and he was right to stigmatise it as disgraceful.

Preparation of papers

49 The auditor held Dame Shirley Porter and Mr **Weeks** responsible for a sum amounting (with interest) to oe10,126 attributable to the cost of preparing papers relating to the promotion of the electoral advantage of the majority party. The basis of his finding was that this was an unlawful misuse of the time of council officers. There is no dispute concerning the quantum of this sum. The Court of Appeal held by a majority that since Dame Shirley Porter and Mr **Weeks** did not transgress, the cost of preparing these papers could not be laid at their door: ante, p 389c-d. For reasons already given, I would hold that they did transgress and would hold them liable to make good this sum.

Quantum

50 The power of local authorities to dispose of land held by them under section 32(1) of the Housing Act 1985 was subject to the consent of the secretary of state. By section 34(2) of that Act the secretary of state's consent could be given generally, and was so given by a ministerial letter issued in 1981 and continuing to have effect under the 1985 Act by virtue of section 2(2) of the Housing (Consequential Provisions) Act 1985. By paragraph B(2) of this letter it was stated:

"A local authority may dispose of any house, if that house is vacant, to any individual who intends to use it as his only or principal home, provided that the disposal is effected for a price, consideration or rent which is equal to the current market value of the house with vacant possession."

It was also open to a local authority to dispose of properties at a discount of between 30% and 70%, which is what the council in fact did.

51 As explained by the Divisional Court, at p 204 of its judgment, the auditor certified in accordance with section 20(1) of the Local Government Finance Act 1982 that some oe31.67m was due jointly and severally from Dame Shirley Porter and Mr **Weeks** (in addition, at that stage, to Mr Hartley, Mr England, Mr Phillips and another officer). This was a

net sum, arrived at by calculating the gross loss or deficiency and then deducting from that figure the financial benefits enjoyed by the council as a result of the sale of designated dwellings, such as the reduced cost of management and maintenance of the council-owned housing stock. The net sum also allowed for interest on the net losses. Most of the items in the auditor's computation are not (subject to liability) in dispute. But there is one major issue: the treatment of the discounts allowed by the council on selling designated properties pursuant to what must, for present purposes, be treated as an unlawful policy. The auditor based his calculation on the open market value, with vacant possession, of the properties sold. He did not reduce his calculated figure of loss to reflect the discounted prices at which the council sold, and at which the council would have sold even if the policy had been a lawful one, if pursuant to a lawful policy the council would have sold at all. On this basis he reached a loss figure under this head of £15.476m.

52 Robert Walker LJ (with, as already noted, the assent of Kennedy LJ on this point) took a different view. He said, ante, p 445d-f:

"In this case the relevant element of loss is the loss of part of the council's stock of social housing. It was not a loss in a commercial venture of selling dwellings with vacant possession. In my judgment the Divisional Court erred in its approach. It should have accepted the submission that there was no loss if the discounted prices actually received by the council exceeded the value of the dwellings as tenanted social housing. There was ample evidence that the discounted prices did exceed that value, and it is not necessary to go into the subsidiary issue as to Ellis & Co's valuations. Any other approach would, it seems to me, be inconsistent with the auditor's separate investigation and conclusion as to the additional costs of housing homeless persons which the council had toincur as a result of its own stock of social housing having been depleted by the designated sales policy."

On this basis he would have disallowed the full sum for which the auditor held Dame Shirley Porter and Mr **Weeks** liable under this head.

53 Although the sum involved is very considerable, the point which divides the parties is (as it seems to me) a very narrow one. Should the prices at which the council actually sold be compared with the prices at which it would have sold if selling in lawful pursuance of its powers under section 32? If so, it has suffered no loss under this head. Or should the prices at which the council actually sold be compared with the open market value of the properties with vacant possession at the time of sale? If so, it has suffered the loss certified by the auditor.

54 Section 20(1) of the 1982 Act provides for the certification by the auditor of the amount of a loss or deficiency incurred or caused by the wilful misconduct of any person. It is that amount which is due and recoverable for the benefit of the body which has suffered the loss or deficiency. The underlying principle is one of compensation, to put the body which has suffered the loss or deficiency in the same position as it would have been in had the wilful misconduct which caused the loss or deficiency never occurred.

55 In this case the council was the freehold owner of a number of properties. The wilful misconduct of Dame Shirley Porter and Mr **Weeks** caused the sale of some of those properties pursuant to an unlawful policy of designated sales. Thus the council parted with those properties. The council did not lose the full market value of the properties because it received discounted prices for them. But it lost the difference between the full market value of the properties and the discounted prices received. Had the council wished to replace the properties sold under the unlawful policy it would have had to pay the full market value of comparable properties. I do not think it is open to those responsible for an unlawful sales policy to contend that if the properties had been sold under a lawful policy they would have been sold at equally discounted prices since, if the policy of the council had been lawful the council might never have sold the properties at all, and it is in any event a matter for the

owner of an asset to decide whether he will exploit its value to the maximum extent or not. A wrongdoer is not entitled to reap the benefit of a benign policy which might, but only might, have been pursued by the owner had it not been unlawfully deprived of the asset.

56 I do not for my part detect any element of double counting in the auditor's calculation, which is in my opinion correct.

Impartiality, fairness and delay

57 Before the Divisional Court and in the Court of Appeal Dame Shirley Porter and Mr **Weeks** challenged the impartiality of the auditor, the fairness of his investigation and the time taken to carry out the audit. This challenge was very fully considered by the Divisional Court, but failed both in that court and in the Court of Appeal. The challenge has been further pursued before the House. It must in my opinion be rejected for the detailed reasons given by my noble and learned friend Lord Hope of Craighead.

58 For all these reasons I would allow the auditor's appeal and restore his certificate in the sum upheld by the Divisional Court. The parties (andWestminster City Council, if so advised) are invited to make written submissions on costs. I would in conclusion pay tribute to the clear and comprehensive judgment of the Divisional Court.

JUDGMENTBY-5: LORD STEYN

JUDGMENT-5:
LORD STEYN:

59 My Lords, I am in complete agreement with the opinion of Lord Bingham of Cornhill. I am also in complete agreement with the reasons given by my noble and learned friend Lord Hope of Craighead in regard to the issues of impartiality, fairness and delay. I would therefore also allow the auditor's appeal and restore the certificate in the sum upheld by the Divisional Court.

JUDGMENTBY-6: LORD HOPE OF CRAIGHEAD

JUDGMENT-6:
LORD HOPE OF CRAIGHEAD:

60 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill. I agree with all that he has said on the issue of liability and, subject to some observations of my own, with what he has said on the issue of quantum. I wish to concentrate in this speech with the remaining issues in the case, which are those of impartiality, fairness and delay.

Introduction

61 In the Court of Appeal four matters were identified under the broad heading of unfairness: ante, p 396c-d per Schiemann LJ. These were (a) apparent bias on the part of the auditor, (b) unreasonable delay on the part both of the auditor and on the part of the Divisional Court in confirming the decision by the auditor, (c) failure on the part of the Divisional Court to hold a fair balance between the auditor and Dame Shirley Porter and (d) breach by the Divisional Court of the presumption of innocence. The Court of Appeal was not persuaded that there had been any unfairness which would justify allowing the appeal.

62 Before your Lordships the respondents have contended that the Court of Appeal should have upheld their appeals on the ground that the proceedings were unfair, applying common law principles as understood before the coming into force of the relevant provisions of the

Human Rights Act 1998. They also contend that the auditor violated their Convention rights and that, as victims, they are entitled to rely directly on those rights under the 1998 Act. In addition they contend that the Divisional Court violated their Convention rights, that these are legal proceedings brought by the auditor and they are entitled to rely on that violation in these proceedings under the Act. The main thrust of their contentions on the issue of unfairness was directed to their arguments that the auditor lacked the Convention requirements of independence and impartiality, that he gave the appearance of bias contrary to the requirements of the common law and that there was unreasonable delay.

63 Before dealing with the substance of the points raised by these arguments I must first outline the statutory background and set out the facts. I shall then deal with a preliminary question which must be addressed. This is whether it is open to the respondents to rely directly on the provisions of the Human Rights Act 1998 in this appeal. I shall explain why, notwithstanding the decision of this House in R v Kansal (No 2) [2002] 2 AC 69, I consider it appropriate to deal with the merits ofthe points which have been raised on the assumption that they can do so. As to the merits, I shall deal first with the questions relating to independence and impartiality and to the appearance of bias on the part of the auditor. I shall then deal with the issue of delay. Finally I shall deal with the points which have been raised about the conduct of the hearing by the Divisional Court.

The statutory background

64 Provision has been made for many years in local government legislation to protect ratepayers against losses caused by unlawful expenditure or wilful misconduct on the part of members or senior officers of local authorities. Procedures were laid down for the audit of local authority accounts and, in the event of unlawful expenditure or wilful misconduct by of a member or senior officer, for the surcharge of that member or officer on a certificate given by the auditor. The provisions which were in force during the period to which this case relates were those in Part III of the Local Government Finance Act 1982. These provisions were repealed by and re-enacted in the Audit Commission Act 1998, but I shall concentrate on those which are to be found in the 1982 Act.

65 Prior to the coming into force of the 1982 Act local authorities and other bodies subject to audit were able to choose whether their accounts should be audited by a district auditor appointed by the Secretary of State or by a private auditor. The Layfield Committee of Inquiry into Local Government Finance (1976) (Cmnd 6453) considered that it was wrong in principle that any public body should be able to choose its own auditor. It recommended that the audit service should be made completely independent of both central government and local authorities, with a head of local audit reporting to a specially constituted higher institution: ch 6, paras 18, 30-31. Section 11 of the 1982 Act provided for the establishment of a body to be known as the Audit Commission for Local Authorities in England and Wales. Section 12 provided that local authority accounts were in future to be subject to audit by an auditor or auditors appointed by the Commission. Section 13 provided that an auditor appointed by the Commission to audit the accounts might be an officer of the Commission, an individual with prescribed qualifications who was not such an officer or a firm of such individuals. Section 14 provided that the Commission was to prepare and keep under review a code of audit practice prescribing the way in which auditors were to carry out their functions under the Act. It was to be laid before Parliament and approved by a resolution of each House. Section 15 sets out the general duties of auditors when auditing accounts in accordance with Part III of the Act. Among these, in terms of subsection (3), is the auditor's duty to consider whether in the public interest he should make a report on any matter coming to his notice in the course of the audit.

66 That, in brief, was the system under which Mr John **Magill** was appointed by the Commission under sections 12 and 13 of the 1982 Act. His task was to audit the Council's accounts for the years 1987-88 to 1994-95. The Code of Audit Practice for Local Authorities

and the National Health Service in England and Wales 1990 stated in paragraph 10 that, in order that his opinions, conclusions, judgments and recommendations would be and would be seen to be impartial, he was to maintain an independent and objective attitude of mind and ensure that his independence was notimpaired in any way. Paragraph 15 of the Code stated that the audit was to be carried out in a professional and timely fashion. His duties and powers in respect of hearing objections by local government electors and in regard to loss due to wilful misconduct were those set out in sections 17, 19 and 20 of the Act.

67 Section 17(1) of the 1982 Act deals with the right of members of the public to inspect the accounts to be audited and all books and other documents relating to them, and subsection (2) of the section provides that at the request of any local government elector the auditor shall give the elector, or any representative of his, an opportunity to question him about the accounts. Sections 17(3) and 17(4) provide:

"(3) Subject to subsection (4) below, any local government elector ... or any representative of his, may attend before the auditor and make objections-(a) as to any matter in respect of which the auditor could take action under section 19 or 20 below; or (b) as to any other matter in respect of which the auditor could make a report under section 15(3) above.

"(4) No objection may be made under subsection (3) above by or on behalf of a local government elector unless the auditor has previously received written notice of the proposed objection and of the grounds on which it is to be made."

68 Section 19(1) of the Act provides that, where it appears to the auditor that any item of account is contrary to law, he may apply to the court for a declaration that the item of account was unlawful except where it is sanctioned by the Secretary of State. Where the court is persuaded that it should make the declaration, it has power under section 19(2) to order any person responsible for incurring or authorising the unlawful expenditure to repay it in whole or in part to the body in question, if the expenditure exceeded oe2,000 to order the person responsible who was a member of a local authority to be disqualified from being a member of a local authority and to order rectification of the accounts.

69 Section 20(1) of the 1982 Act provides:

"Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act-(a) that any person has failed to bring into account any sum which should have been so included and that the failure has not been sanctioned by the Secretary of State; or (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person, he shall certify that the sum or, as the case may be, the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the body in question (or, in the case of a parish meeting, the chairman of the meeting) may recover that sum or amount for the benefit of that body; and if the auditor certifies under this section that any sum or amount is due from two or more persons, they shall be jointly and severally liable for that sum or amount."

70 Section 20(2)(b) of the 1982 Act provides that a person who is aggrieved by a decision of an auditor to certify under that section that a sum or amount is due from him may require the auditor to state in writing the reasons for his decision. Section 20(3) provides:

"Any such person who is aggrieved by such a decision may appeal against the decision to the court and-(a) in the case of a decision to certify that any sum or amount is due from any person, the court may confirm, vary or quash the decision and give any certificate which the auditor could have given; (b) in the case of a decision not to certify that any sum or amount is due from any person, the court may confirm the decision or quash it and give any certificate which the auditor could have given; and any certificate given under this subsection shall be treated for the purposes of subsection (1) above and the following provisions of this

section as if it had been given by the auditor under subsection (1) above."

Section 20(4) provides for the disqualification of a member of a local authority if a certificate relates to a loss or deficiency caused by his wilful misconduct and the amount due from him exceeds £2,000.

The facts in outline

71 This narrative begins where that set out in paragraphs 4 to 18 of Lord Bingham's speech breaks off. Like him, I have taken much of it from the agreed statement of facts.

72 By letters dated 18 and 20 July 1989 Councillor Neale Coleman, an opposition member of the housing committee, and a number of other local government electors made objections to the auditor under section 17(3) of the 1982 Act and invited him to take action under sections 19 and 20 of the Act and to make a report in the public interest under section 15(3). 28 individuals were named or referred to in the objections as persons against whom the objectors invited the auditor to take action. They included the respondents Dame Shirley Porter and Mr **Weeks.** By letter dated 8 November 1989 Councillor Coleman made further submissions in support of the original objection and added a further objection. Following receipt of the objections the auditor embarked on an investigation, the main stages of which were as follows.

73 In October 1989 the auditor requested a formal response from the council to the initial objections. The council provided its formal response on 27 November 1989. On 5 December 1989 he asked the Council if it wished to supplement that formal response to deal with the matters raised in the letter of 8 November. On 1 May 1990 the council provided its supplementary response to the auditor. During the period from June to December 1990 he carried out a review of the documentation at City Hall and obtained preliminary legal advice on matters arising from the objection. The documentation was extensive but it was incomplete, and he asked the council to provide further documents. In December 1990 he commenced his programme of interviews. From January to April 1991 he visited council offices to inspect further documents made available by the council, requested further documents and continued his programme of interviews. He completed his initial round of interviews in November 1992. He reviewed the evidence which he had received by that date, obtained further legal advice and in January 1993 began a second round of interviews which lasted from January to July 1993. He found it necessary to conduct further interviews in September and October 1993.

74 On 29 September 1993, at the request of counsel and solicitors acting for Dame Shirley Porter the auditor issued a preliminary provisionalindication of net expenditure and loss. He invited representations by 15 October 1993. Written submissions on this preliminary indication were made on 15 October 1993 on behalf of Dame Shirley Porter and on 27 October 1993 by Mr **Weeks.** On 13 January 1994 the auditor gave notice of his provisional findings to ten individuals and provided copies of them to the objectors and to the council. He invited those concerned to indicate whether they wished him to hold an oral hearing. He made a public statement on the same date which representatives of the media were invited to attend. This statement attracted widespread publicity. Recordings of the auditor reading parts of the statement appeared on television news, and the statement was referred to and discussed in Parliament and the media. Three parties and the council, but not Dame Shirley Porter or Mr **Weeks,** then requested the auditor to hold an oral hearing and the auditor agreed to do so. All parties were informed on 25 March 1994 that there would be an oral hearing starting on 17 October 1994.

75 The public statement by the auditor raised questions about his impartiality. Solicitors for Mr Phillips and Dame Shirley Porter applied to the Audit Commission on 29 March and 19 April 1994 to replace Mr **Magill** with a new auditor. The Audit Commission refused to do so.

At a preliminary meeting on June 1994 applications were made on behalf of Dame Shirley Porter and Mr Phillips that the auditor should disqualify himself from further consideration of the objections. On 7 October 1994 the auditor held a meeting to consider oral submissions on this matter. Written representations in support of the application were made on behalf of, among others, Mr **Weeks.** Further oral submissions were made on behalf of Dame Shirley Porter on 17 October 1994. The auditor decided that he should not disqualify himself. He gave his reasons in writing on 18 October 1994.

76 The auditor held an audit hearing which sat for a total of 32 days between 19 October 1994 and 7 February 1995. He received further representations and evidence after the hearing. On 17 August 1995 he circulated a revised provisional calculation of net expenditure and loss. He invited representations on this calculation by 5 October 1995. He received representations on it from the objectors. The parties were informed by him that notification of the arrangements for the issuing of his decision would be given on 21 March 1996. On 19 March 1996 the solicitors for Dame Shirley Porter wrote to the Audit Commission to request an investigation into the auditor's conduct. On 16 April 1996 the Audit Commission rejected her complaint. On 9 May 1996 the auditor issued his decision on the objections, in which he issued certificates in the sum of oe31.677m against Dame Shirley Porter and Mr **Weeks** and four others. They appealed to the Divisional Court. The appeal by one of the other four was stayed on the ground of ill health. The appeals by Dame Shirley Porter and Mr **Weeks** and the other three were heard between 1 October and 4 November 1997. On 19 December 1997 the Divisional Court dismissed their appeals but allowed the appeals by the three others. Their appeals to the Court of Appeal were heard between 22 and 26 March 1999. On 30 April 1999, the Court of Appeal allowed the appeals by Dame Shirley Porter and Mr **Weeks.**

77 There are two key points in this history in regard to the respondent's argument about the fairness of the conduct of the proceedings by the auditor and the conduct of the Divisional Court when it dismissed their appeal. Thefirst relates to the auditor's public statement on 13 January 1994. It is said that his conduct on this occasion gave rise to the appearance of bias on his part which could only be cured in the Divisional Court by quashing his certificate. The second relates to delay. The auditor issued his report and the certificate of surcharge on 9 May 1996. The respondents say that this was 15 months after the conclusion of the audit hearing on 7 February 1995, almost seven years after the objection was made on 18 July 1989, nearly nine years after the decision of the housing committee of 8 July 1987 against which the objection was taken and exactly ten years after start of the events following the local government elections on 8 May 1986. They contend that there had been such excessive delay that for the Divisional Court to quash the decision was the only appropriate remedy.

The Human Rights Act 1998

78 The respondents' argument on unfairness was presented on the assumption that they were entitled under section 22(4) of the Human Rights Act 1998 to rely in these proceedings on an alleged infringement of their Convention rights by acts of the auditor and of the Divisional Court, all of which took place before the relevant sections of that Act were brought into force on 2 October 2000. It assumed that these are proceedings by or at the instance of Mr **Magill** as auditor, and that an auditor appointed by the Audit Commission under section 12 and 13 of the Local Government Finance Act 1982 was a public authority within the meaning of section 6(1) of the 1998 Act. It also assumed that section 22(4), which states that section 7(1)(b) applies to proceedings by or at the instigation of a public authority whenever the act in question took place, applies to an appeal in these proceedings.

79 Mr Howell did not challenge the proposition, which I would accept, that an auditor appointed by the Audit Commission to audit the accounts of a local authority is a public authority. But he submitted that the proceedings which were conducted by the auditor and by the Divisional Court in the appeal to that court under section 20(3) of the 1982 Act were proceedings by or at the instigation of the objectors and not the auditor. He also submitted,

following observations which I made in R v Lambert [2001] 3 WLR 206, that the acts of the Divisional Court which were complained of were outside the scope of section 7(1)(b) of the 1998 Act as they were acts of a court. I would reject both of these arguments.

80 As to the first point, the function of the auditor under Part III of the 1982 Act is to audit the accounts which require to be audited. It is his duty to satisfy himself by examination of the accounts and otherwise that the requirements of the statute have been complied with, that proper practices have been observed and proper arrangements have been made to obtain value for money in the use of resources: section 15(1). He must also consider whether, in the public interest, he should make a report on any matter coming to his notice in the course of the audit in order that it may be considered by the body concerned or brought to the attention of the public: section 15(3). He has power under sections 19 and 20 to declare an item of account unlawful and to recover a loss incurred or deficiency caused by wilful misconduct irrespective of whether there has been any objection to the accounts. It is in that context that the right of any local government elector under section 17(3) to attend before the auditor and make objections as to any matter in respect of which he could take action under section 19 or 20,or as to any matter in respect of which he could make a report under section 15(3), must be seen. The essence of these proceedings, from start to finish, is that they are proceedings by the auditor.

81 As to the second point, it has now been held in R v Kansal (No 2) [2002] 2 AC 69 that section 7(1)(b) of the 1998 Act applies to acts of courts and tribunals in the same way as it applies to acts of other public authorities. There has been no suggestion that the acts of the Divisional Court which are complained of are acts to which section 6(2) of that Act applies. It has not been argued that, as the result of primary legislation, the court could not have acted differently or it was acting so as to give effect to primary legislation which could not be read or given effect in a way which was compatible with the respondents' Convention rights. It follows that the acts of the Divisional Court which are under challenge are in the same position in this respect as the acts of the auditor.

82 There remains however the question whether the benefit of retrospectivity under section 22(4) of the 1998 Act is available at the stage of an appeal. The hearing of this appeal took place before judgment was delivered in R v Kansal (No 2). In that case it was held that section 22(4) does not apply to an appeal against a conviction which took place before 2 October 2000. One of the points which I made in my dissenting judgment was that I did not see how it would be possible to confine the decision in that case to criminal cases only: see para 48 of my judgment. But this point has yet to be decided in a civil appeal, and it is perhaps still open to argument. As your Lordships did not hear any argument on it, I would prefer to approach the respondents' submissions as to fairness on the assumption that they are entitled to rely on their Convention rights in this appeal irrespective of the fact that all the acts in question took place before 2 October 2000.

Whether the proceedings are civil or criminal

83 On the assumption that they were entitled in this appeal to rely on their Convention rights, the respondents submitted that in substance the proceedings under section 20 of the 1982 Act were in the nature of a criminal charge. This argument was considered and rejected by the auditor. It was also rejected by the Divisional Court, which held that English law treats the matter as one of civil not criminal liability (1997) 96 LGR 157, 171d. Schiemann LJ did not mention the question of classification when he was dealing in the Court of Appeal with the issues of fairness [2000] 2 WLR 1420, 1453-1463. But this question was addressed by Mr McMullen in the course of his argument in this House, and it is the subject of detailed submissions in his written case. The Strasbourg cases were reviewed by Lord Bingham of Cornhill in McIntosh v Lord Advocate [2001] 3 WLR 107, 114-119, where the issue was whether a person against whom an application had been made for a confiscation order was, by virtue of that application, charged with a criminal offence: see also Phillips v United

Kingdom (2001) 11 BHRC 280.

84 For the purposes of the Convention the category into which the proceedings are placed by domestic law, while relevant, is not the only consideration. The court is required to look at the substance of the matter rather than its form, to look behind the appearances and to investigate the realities of the procedure: Deweer v Belgium (1980) 2 EHRR 439, 458, para 44. The nature of the offence and the nature and degree of severity of thesanction must be taken into account also. As to the sanction, the question is whether, by reason of its nature and degree of severity, it amounts to a penalty in the sense of punishment: Engel v The Netherlands (No 1) (1976) 1 EHRR 647, 678-679, paras 82, 83; Lutz v Germany (1987) 10 EHRR 182, 197, para 54; Demicoli v Malta (1991) 14 EHRR 47, 62-63, para 34. For example, Engel v The Netherlands concerned proceedings in a military court for disciplinary offences for which one of the sanctions liable to be imposed as punishment was deprivation of liberty. In Demicoli v Malta too the applicant was at risk of imprisonment if the fine was not paid. In AP, MP and TP v Switzerland (1997) 26 EHRR 541, 559 para 42, the court said that it attached great weight to the domestic court's finding that the fine in question was penal in character and depended on the "guilt" of the offending taxpayer. In DC, HS and AD v United Kingdom [2000] BCC 710 the European Court held that proceedings for the disqualification of directors on the ground of unfitness under section 6 of the Company Directors Disqualification Act 1986 were inherently regulatory in character, and that for this reason they could not be said to involve the determination of a criminal charge within the meaning of article 6(1) of the Convention.

85 I consider that the nature of the proceedings under section 20 of the 1982 Act is compensatory and regulatory, not punitive. Section 20(1) provides that the amount certifiable by the auditor, where it appears to him that a loss has been incurred or deficiency caused by wilful misconduct, is the amount of the loss or deficiency and that both he and the body in question may recover that amount for the benefit of that body. The object of the procedure is to compensate the body concerned, and the measure of the compensation is the amount of the loss suffered. In the present case the amount certified was very large, but the nature of the proceedings does not alter depending on the amount certified. No fine is involved, nor does the section provide for a penalty by way of imprisonment. Section 20(4) provides for the respondents' disqualification from being members of a local authority. But this outcome is similar to that where a trustee is removed after being found to have been in serious breach of trust, or a person is disqualified from acting as a director of a company. In my opinion measures of the kind provided for by section 20, which apply to persons having a special status or responsibility and are compensatory and regulatory rather than penal in character, lie outside the criminal sphere for the purposes of article 6 of the Convention.

86 For these reasons I would hold that section 20 of the 1982 Act does not involve the making of a criminal charge within the meaning of article 6. But that does not mean that the respondents lack protection. They are entitled to all the protections afforded to them by article 6(1), the first sentence of which provides that in the determination of his civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The independence and impartiality of the auditor

87 The protections which article 6(1) lays down are that, in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. As I shall explain later when dealingwith delay, I consider that this sentence creates a number of rights which, although closely related, can and should be considered separately. The rights to a fair hearing, to a public hearing and to a hearing within a reasonable time are separate and distinct rights from the right to a hearing before an independent and impartial tribunal established by law. This means that a complaint that one of these rights was breached

cannot be answered by showing that the other rights were not breached. Although the overriding question is whether there was a fair trial, it is no answer to a complaint that the tribunal was not independent or was not impartial to show that it conducted a fair hearing within a reasonable time and that the hearing took place in public: see Millar v Dickson 2001 SLT 988, 994d-e per Lord Bingham of Cornhill and my own observations in that case, at p 1003c-f. Under this heading the question is whether the auditor lacked the independence and impartiality which is required by article 6(1).

88 There is a close relationship between the concept of independence and that of impartiality. In Findlay v United Kingdom (1997) 24 EHRR 221, 244-245, para 73 the European Court said:

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

"As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.

"The concepts of independence and objective impartiality are closely linked ..."

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

89 I shall leave over to the next heading the question whether the auditor's public statement on 13 January 1994 showed that he lacked the appearance of impartiality for the purposes of the article 6(1) Convention right. At this stage the matter for consideration is the respondents' complaint that the circumstances and nature of his appointment and the investigation which he then conducted were such that the requirements of independence and impartiality in his case were not satisfied. At the heart of the argument is the multiplicity of roles which were being performed by the auditor. The respondents say that the procedure which he adopted on receipt of the objections violated their Convention right because he acted as investigator, prosecutor and judge in the investigation which he carried out. He conducted the investigation, took the decision whether there was a case to answer, tried the case, assessed the loss and then appeared in the Divisional Court to defend his decision and his conduct.

90 The Divisional Court said 96 LGR 157, 168e-f that the 1982 Act imposes on the auditor the roles of investigator, prosecutor and judge which might be thought an almost impossible burden, and it referred to therecommendation in para 223 of the Third Report of the Nolan Committee on Standards in Public Life: Standards of Conduct in Local Government in England, Scotland and Wales (1997) (Cm 3702-1), which has now been implemented for England and Wales by Part III of the Local Government Act 2000, that surcharging by an auditor be abolished and replaced by other remedies. At p 169g, the court said, after reviewing his conduct of the hearing, that it was not persuaded that the auditor's final conclusions could be impeached on the grounds of unfairness. But, at p 172e-f, it said that it appeared to it that the roles which the auditor played would not meet the requirements of independence and apparent impartiality demanded by the Convention.

91 In my opinion the conduct of the auditor requires to be looked at as a whole and in the context of the procedure which is laid down in the statute. Part III of the 1982 Act starts, as one would expect, by placing the responsibility for auditing the accounts on the auditor. It

seeks to ensure his independence from the body whose accounts he is auditing by requiring in sections 12 and 13 that his appointment is to be by the Audit Commission and not by the body itself. His responsibilities include making reports under section 15 on any matter coming to his notice in the course of the audit and dealing with objections made by any local government elector under section 17. Where objections are made, it is his duty to consider under section 17(3) whether they relate to any matter in respect of which he could take action under section 19 (items contrary to law) or section 20 (wilful misconduct) or to any matter in respect of which he could make a report under section 15. The Act does not enable him to pass this responsibility to someone else. It is his duty, as the person in charge of the audit within the context of which the objections are made, to deal with them himself and, if they are well founded, to take such action as he is required to take on them by the statute. The auditing process, which is in his hands, is not complete until this has been done.

92 That being the structure of the procedure laid down by the statute, there is inevitably some force in the criticism that, where accusations of wilful misconduct are involved, the auditor is being required to act not only as an investigator but also as prosecutor and as judge. But this problem has been recognised and dealt with in section 20(3). It provides not only that any person aggrieved by his decision may appeal against the decision to the court but also that the court "may confirm, vary or quash the decision and give any certificate which the auditor could have given". The solution to the problem which section 20(3) provides is that of a complete rehearing by the Divisional Court. The court can exercise afresh all the powers of decision which were given to the auditor. In Lloyd v McMahon [1987] AC 625, 697f-g Lord Keith of Kinkel said that, while there might be extreme cases where it would be appropriate to quash the auditor's decision, the court has a discretion, where it considers that justice can properly be done by its own investigation of the merits, to follow that course.

93 In Kingsley v United Kingdom The Times, 9 January 2001 (Application No 35605/97), 7 November 2000, the European Court said in paragraph 51 that, even if an adjudicatory body determining disputes over "civil rights and obligations" does not comply with article 6(1), there is no breach of the article if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and doesprovide the guarantees of article 6 (1); see also Bryan v United Kingdom (1995) 21 EHRR 342, 360-361, paras 44 and 46. The court went on to say this in Kingsley v United Kingdom, at para 58:

"The court considers that it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body. Thus where, as here, complaint is made of a lack of impartiality on the part of the decision-making body, the concept of 'full jurisdiction' involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and to remit the case for a new decision by an impartial body."

The powers which the Divisional Court has been given by section 20(3) fully satisfy these requirements. Not only does it have power to quash the decision taken by the auditor. It has power to rehear the case, and to take a fresh decision itself in the exercise of the powers given to the auditor. In R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] 2 WLR 1389, 1407c-d Lord Slynn of Hadley observed that the principle of judicial control did not go so far as to provide for a complete rehearing on the merits of the decision. In the case of the procedure governed by section 20 (3) however a rehearing on the merits can be conducted, and that is what was done in this case.

94 In these circumstances it is not necessary to examine the various grounds on which the procedure adopted by the auditor was criticised. The issue at this stage is whether the

Divisional Court satisfied the requirements of article 6(1) in regard to the scope of the jurisdiction which it was entitled to exercise. I would answer this question in the affirmative. There has been no suggestion that the proceedings in that court, which were conducted with conspicuous care and attention to detail, lacked the appearance of independence and impartiality. In my opinion those elements of the respondents' article 6(1) Convention rights were fully protected by the proceedings in the Divisional Court, having regard to the powers which that court was entitled to exercise.

Apparent bias

95 I turn now to the question whether the auditor's certificate should have been quashed on the ground of apparent bias. The respondents submit that the way in which the auditor conducted himself when he made his statement on 13 January 1994 indicated an appearance of bias on his part which affected all stages of his investigation both before and after that date. Both the article 6(1) Convention right to an independent and impartial tribunal and the respondents' rights to an unbiased judge at common law as it was understood before the coming into effect of the relevant provisions of the Human Rights Act 1998 are invoked under this heading.

96 As I have said, the statement which the auditor made on 13 January 1994 received considerable publicity on television and in the newspapers. The Divisional Court saw video recordings of the relevant item on the 1 p m and 9 p m BBC TV news. The following description of the event is given in its judgment 96 LGR 157, 173:

"a televised announcement was arranged at which the auditor himself appeared and, although he said that his views were provisional, he expressed them in florid language and supported them by reference to the thoroughness of the investigation which he claimed to have carried out. There was a further feature of the event which should have had no place in the middle of a quasi-judicial inquiry. A stack of ring binders on the desk at which the auditor sat bearing the name of his firm for the benefit of the cameras was, ostensibly, under the protection of a security guard: unless it was being implied that the persons under investigation might wish to steal the documents, it is not clear what was the purpose of this posturing."

97 In the reasons which he gave on 18 October 1994 for deciding not to disqualify himself the auditor said that he was mindful of the serious nature of the allegations made against the respondents, that he had been careful to give them a full opportunity to respond to these allegations and his provisional findings, that he retained an open mind and that he was not biased against any individual or the council. He went on to say:

"114. I am not biased. I have acted fairly and will continue to do so. I will exercise impartial, independent and objective judgment. I will reach a decision on the evidence and submissions before me. I will not reach any decision adverse to the council and/or to any respondent unless I am satisfied on the basis of the evidence that I am under a duty to do so. All parties will get a fair hearing from me.

115. In my consideration of the disqualification application, I have sought to apply the test formulated in R v Gough[1993] AC 646, namely 'whether, in all the circumstances of the case, there appeared to be a real danger of bias ...'. In my view, a person having ascertained the relevant circumstances would not consider that I will regard unfairly any person's case with disfavour. It has been suggested that I will find it difficult to depart from my provisional findings and views because of the publicity given to these. I feel no such inhibition. Nor, in my view, is there any ground on which I should reasonably be thought to be so inhibited. I have always made it plain that before reaching any conclusion I will consider any representations made to me. In my view, that is a process which necessarily conveys to any reasonable person the point that my conclusions may not coincide with my provisional

findings and views. My view is that no real danger of bias exists and nor is there any other basis on which I should disqualify myself."

98 The Divisional Court set out its conclusions on this issue in this way 96 LGR 157, 174:

"In the light of the material before us, including, in particular, the auditor's reasons for declining to recuse himself, we accept that, despite such inferences to the contrary as might have been drawn from the press conference, the auditor did have an open mind and was justified in continuing with the subsequent hearings. We note that he did not confirm his preliminary findings in respect of those who gave evidence at those hearings. The error of judgment which we find he made, in holding the press conference as he did, did not, in our view, demonstrate bias on his part. He was at pains to stress the provisional nature of his findings and it is pertinent that in his final decision he made no finding of wilfulmisconduct against three people in relation to whom he had, provisionally, been minded so to find. In any event, as with the investigation, any possible unfairness to the appellants has been cured by the hearing before us."

99 The test for apparent bias which the auditor sought to apply to himself, and was applied in its turn by the Divisional Court, was that which was described in R v Gough [1993] AC 646 by Lord Goff of Chieveley where he said, at p 670:

"I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily have been available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ..."

100 The "reasonable likelihood" and "real danger" tests which Lord Goff described in R v Gough have been criticised by the High Court of Australia on the ground that they tend to emphasise the court's view of the facts and to place inadequate emphasis on the public perception of the irregular incident: Webb v The Queen (1994) 181 CLR 41, 50, per Mason CJ and McHugh J. There is an uneasy tension between these tests and that which was adopted in Scotland by the High Court of Justiciary in Bradford v McLeod 1986 SLT 244. Following Eve J's reference in Law v Chartered Institute of Patent Agents [1919] 2 Ch 276 (which was not referred to in R v Gough), the High Court of Justiciary adopted a test which looked at the question whether there was suspicion of bias through the eyes of the reasonable man who was aware of the circumstances: see also Millar v Dickson 2001 SLT 988, 1002-1003. This approach, which has been described as "the reasonable apprehension of bias" test, is in line with that adopted in most common law jurisdictions. It is also in line with that which the Strasbourg court has adopted, which looks at the question whether there was a risk of bias objectively in the light of the circumstances which the court has identified: Piersack v Belgium (1982) 5 EHRR 169, 179-180, paras 30-31; De Cubber v Belgium (1984) 7 EHRR 236, 246, para 30; Pullar v United Kingdom (1996) 22 EHRR 391, 402-403, para 30. In Hauschildt v Denmark (1989) 12 EHRR 266, 279, para 48 the court also observed that, in considering whether there was a legitimate reason to fear that a judge lacks impartiality, the standpoint of the accused is important but not decisive: "What is decisive is whether this fear can be held objectively justified."

101 The English courts have been reluctant, for obvious reasons, to depart from the test

which Lord Goff of Chieveley so carefully formulated inR v Gough. In R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2) [2000] 1 AC 119, 136a-c Lord Browne-Wilkinson said that it was unnecessary in that case to determine whether it needed to be reviewed in the light of subsequent decisions in Canada, New Zealand and Australia. I said, at p 142f-g, that, although the tests in Scotland and England were described differently, their application was likely in practice to lead to results that were so similar as to be indistinguishable. The Court of Appeal, having examined the question whether the "real danger" test might lead to a different result from that which the informed observer would reach on the same facts, concluded in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451, 477 that in the overwhelming majority of cases the application of the two tests would lead to the same outcome.

102 In my opinion however it is now possible to set this debate to rest. The Court of Appeal took the opportunity in In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 711a-b, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in R v Gough had not commanded universal approval. At p 711b-c he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review R v Gough to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp 726-727:

"85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in R v Gough is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

103 I respectfully suggest that your Lordships should now approve the modest adjustment of the test in R v Gough set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. 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.

104 Turning to the facts, there are two points that need to be made at the outset. The first relates to the auditor's own assertion that he was not biased. The Divisional Court said, at p 174a-b, that it had had particular regard to his reasons for declining to recuse himself in reaching its conclusion that he had an open mind and was justified in continuing with the subsequent hearings. I would agree that the reasons that he gave were relevant, but an examination of them shows that they consisted largely of assertions that he was unbiased. Looking at the matter from the standpoint of the fair-minded and informed observer, protestations of that kind are unlikely to be helpful. I think that Schiemann LJ adopted the right approach in the Court of Appeal when he said that he would give no weight to the auditor's reasons: ante, p 400c. The second point relates to the emphasis which the respondents place on how the auditor's conduct appeared from the standpoint of the complainer. There is, as I have said, some support in the jurisprudence of the Strasbourg

court for the proposition that the standpoint of the complainer is important. But in Hauschildt v Denmark 12 EHRR 266, 279, para 48 the court emphasised that what is decisive is whether any fears expressed by the complainer are objectively justified. The complainer's fears are clearly relevant at the initial stage when the court has to decide whether the complaint is one that should be investigated. But they lose their importance once the stage is reached of looking at the matter objectively.

105 I think that it is plain, as the Divisional Court observed, at p 174b, that the auditor made an error of judgment when he decided to make his statement in public at a press conference. The main impression which this would have conveyed to the fair-minded observer was that the purpose of this exercise was to attract publicity to himself, and perhaps also to his firm. It was an exercise in self-promotion in which he should not have indulged. But it is quite another matter to conclude from this that there was a real possibility that he was biased. Schiemann LJ said, at p 1457d-e, that there was room for a casual observer to form the view after the press conference that the auditor might be biased. Nevertheless he concluded, at p 1457h, having examined the facts more closely, that there was no real danger that this was so. I would take the same view. The question is what the fair-minded and informed observer would have thought, and whether his conclusion would have been that there was real possibility of bias. The auditor's conduct must be seen in the context of the investigation which he was carrying out, which had generated a great deal of public interest. A statement as to his progress would not have been inappropriate. His error was to make it at a press conference. This created the risk of unfair reporting, but there was nothing in the words he used to indicate that there was a real possibility that he was biased. He was at pains to point out to the press that his findings were provisional. There is no reason to doubt his word on this point, as his subsequent conduct demonstrates. I would hold, looking at the matter objectively, that a real possibility that he was biased has not been demonstrated.

Unreasonable delay

106 The respondents' argument under this heading is directed to their article 6(1) Convention right to the determination of their civil rights and obligations within a reasonable time. They contend that the auditor wasguilty of inordinate delay in breach of the article 6(1) requirement and that they were at an unfair disadvantage due to delay when they were giving evidence before the Divisional Court. They also submit, under reference to constitutional provisions considered by the Privy Council, that they had a right to a determination within a reasonable time at common law which did not require them to demonstrate actual prejudice: Bell v Director of Public Prosecutions[1985] AC 937; Director of Public Prosecutions v Tokai [1996] AC 856. The Divisional Court held, at p 169d-e, that the test at common law was whether delay had given rise to such prejudice that no fair trial could be held: Tan v Cameron [1992] 2 AC 205, 222-224, per Lord Mustill. In its judgment no such prejudice was shown, and in the Court of Appeal Schiemann LJ was of the same opinion: ante, p 401e-f. The respondents say that the approach taken by these courts was wrong in law, as there was no requirement to show actual prejudice. The nature of the common law right which they asserted in your Lordships' House appeared to me to be virtually indistinguishable in this respect from the right under article 6(1), so I do not need to dwell on this part of their argument. I shall deal with the issue of delay on the assumption that the test which they must satisfy is that which requires to be satisfied to demonstrate that there was a breach of the Convention right and that prejudice, while relevant if it exists, does not require to be demonstrated.

107 In their overall complaint about delay they have included the time which elapsed from the local government elections on 8 May 1986 and the decision of the housing committee on 8 July 1987. The period that has elapsed since the event in question may be a relevant factor when considering the question whether the delay was unreasonable. But they accept that the obligation under the Convention relates only to the conduct of the proceedings. Time usually begins to run in civil cases for the purposes of article 6(1) from the date when the

proceedings in question are initiated: Ausiello v Italy (1996) 24 EHRR 568, 571, para 18. I would hold that time began to run in this case from the date when the objections which gave rise to the investigation were received by the auditor, and that it includes the stage of the appeal to the Divisional Court. The period under review can therefore be divided into four distinct periods: (a) that from the receipt of the original objection on 18 July 1989 to the issuing by the auditor of his provisional views on 13 January 1994; (b) that from 13 January 1994 to the end of the audit hearing on 7 February 1995; (c) that from 7 February 1995 to the issuing by the auditor of his decision and the certificates of surcharge on 9 May 1996; and (d) that from 9 May 1996 to the decision of the Divisional Court, which was given on 19 December 1997. No complaint is made about any delay after that date.

108 I would also hold that the right in article 6(1) to a determination within a reasonable time is an independent right, and that it is to be distinguished from the article 6(1) right to a fair trial. As I have already indicated, that seems to me to follow from the wording of the first sentence of the article which creates a number of rights which, although closely related, can and should be considered separately. This means that it is no answer to a complaint that one of these rights was breached that the other rights were not. To take a simple example, the fact that the hearing took place in public does not deprive the applicant of his right to a hearing before an independent and impartial tribunal established by law.

109 I would respectfully follow Lord Steyn's observation in Darmalingum v The State[2000] 1 WLR 2303 about the effect of section 10(1) of the Constitution of Mauritius when he said that the reasonable time requirement is a separate guarantee. It is not to be seen simply as part of the overriding right to a fair trial, nor does it require the person concerned to show that he has been prejudiced by the delay. In Flowers v The Queen [2000] 1 WLR 2396 a differently constituted Board, following Bell v Director of Public Prosecutions [1985] AC 937, held that prejudice was one of four factors to be taken into account in considering the right to a fair hearing within a reasonable time in section 20(1) of the Constitution of Jamaica. In the context of article 6(1) of the Convention however the way this right was construed in Darmalingum v The State seems to me to be preferable. In Crummock (Scotland) Ltd v HM Advocate 2000 SLT 677, 679a-b, Lord Weir, delivering the opinion of the High Court of Justiciary, said that under article 6(1) it was not necessary for an accused to show that prejudice has been, or is likely to be, caused, as a result of delay. The article 6(1) guarantee of a hearing within a reasonable time is not subject to any words of limitation, nor is this a case where other rights than those expressly stated are being read into the article as implied rights which are capable of modification on grounds of proportionality: see Brown v Stott [2001] 2 WLR 817, 851b-e; R (Pretty) v Director of Public Prosecutions [2002] 1 AC 800, para 90. The only question is whether, having regard to all the circumstances of the case, the time taken to determine the person's rights and obligations was unreasonable.

110 In K"nig v Federal Republic of Germany (1978) 2 EHHR 170, 197, para 99 the European Court gave the following guidance as to the test to be applied in civil proceedings on the question of delay:

"The reasonableness of the duration of proceedings covered by article 6(1) of the Convention must be assessed in each case according to its circumstances. When inquiring into the reasonableness of the duration of criminal proceedings, the court has had regard, inter alia, to the complexity of the case, to the applicant's conduct and to the manner in which the matter was dealt with by the administrative and judicial authorities. The court, like those appearing before it, considers that the same criteria must serve in the present case as the basis for its examination of the question whether the duration of the proceedings before the administrative courts exceeded the reasonable time stipulated by article 6(1)."

111 Applying this test to the facts, it will be convenient to examine separately the conduct of the auditor and that of the Divisional Court. I start with the Divisional Court. It seems to me that there is no basis whatever for the suggestion that there was an unreasonable delay at

this stage. The auditor issued his certificate in May 1996. It was not until December 1996 that the respondents filed their evidence on the main issues. The accounting evidence was not filed until April 1997. A procedural hearing was heard shortly afterwards in May 1997. The case proceeded to a hearing in the Divisional Court in October 1997, which lasted for 23 days. Judgment was given on 19 December 1997. I would conclude without any difficulty, having regard to the complexity of the issues and the volume of evidence thathad to be prepared and presented, that the proceedings in that court were concluded within a reasonable time.

112 As for the conduct of the investigation by the auditor, there is a much more extended timetable. A period of about 3 years elapsed between the receipt of the first objection in July 1989 and the issuing of the provisional findings in January 1994. A further period of about two years and five months then elapsed before he issued his decision and the certificates of surcharge. But this brief narrative has to be seen in the light of the nature of the exercise on which he was engaged. The Divisional Court, at p 161c-d, described his investigation as vast. It referred, at p 169d, to its mammoth nature, bearing in mind that the objections related to 28 individuals. I do not need to go over the details which are set out in the agreed statement of facts. I have already provided my own summary in an earlier part of this judgment, and some further details are given by the Divisional Court at pp 161-162 and 168.

113 In my opinion the most striking feature which emerges from all the facts relating to the conduct of the investigation by the auditor is that, far from causing delay by inaction, he was constantly in action. He was seeking out information wherever it could be found, often with considerable difficulty. He was interviewing and re-interviewing many witnesses, recovering and perusing thousands of documents, calculating amounts of loss and expenditure and then gathering all this information together into a decision which eventually extended to almost 2000 pages including the appendices. It has been suggested that his investigation was over-elaborate. There are comments to that effect in the Divisional Court's judgment, at p 161d. But the auditor had to form his own judgment on this matter. He had to take account of the importance of the exercise to all parties, including those who were at risk of being surcharged, and he was entitled to have regard to its obvious political sensitivity. I would attach particular significance to these factors and to the fact that it has not been suggested that the auditor caused delay at any stage by inactivity.

114 Applying the test described in K"nig v Federal Republic of Germany 2 EHRR 170, 197, para 99 which directs attention to the complexity of the case, the applicant's conduct and the manner in which the matter was dealt with by the authorities, and leaving aside the question whether the respondents have shown that they were prejudiced, I would hold that the proceedings did not exceed the reasonable time requirement which article 6(1) lays down.

115 In view of the conclusion which I have reached I do not need to deal with the respondents' submissions about the remedy to which they were entitled if there had been undue delay. Schiemann LJ, said, at p 1460f, that it would not have been appropriate in that event to quash the auditor's certificate. He had in mind the remedy which was available in the Divisional Court to ensure that, despite the delay, there was a fair trial and the possibility instead of a remedy in damages. The appellant supported this approach. But these are difficult issues, and I would prefer to reserve my opinion on them.

The Divisional Court

116 The respondents submit that the Divisional Court made errors of law by applying the wrong tests to their arguments on apparent bias anddelay. Their argument is that it dealt with the case as if their complaint was one of actual bias and with their complaint of delay on the basis that it was necessary to establish prejudice. It is true that the Divisional Court took particular account of the auditor's assertions that he was not biased and that, basing itself on the common law authorities, it had regard to the question whether the delay resulted in

prejudice. But I do not think that, read as a whole, the judgment is vulnerable to such serious criticism that their decision to uphold the certificates against Dame Shirley Porter and Mr **Weeks** should, as the respondents assert, have been set aside by the Court of Appeal on that ground alone. Mistakes of law of this kind, if they are made, do not in themselves amount to breaches of the article 6 Convention rights of the kind which must inevitably attract that remedy. They can be corrected on appeal. I have taken full account of the respondents' arguments in my review of their case on unfairness and of their criticisms of this part of the Divisional Court's reasoning.

117 They also submit that the Divisional Court ought to have quashed the certificates on the ground that the injury done to her public reputation by reason of the auditor's conduct in making his statement at a press conference was so severe that to quash the certificate was the only possible remedy. I would reject this argument also. The question which the Divisional Court had to address was whether the defects in the investigation conducted by the auditor were so prejudicial to the respondents that it should in its discretion quash the certificates or whether it should proceed to a rehearing on the merits and decide the issue on the evidence presented to the court: see Lloyd v McMahon [1987] AC 625, 716f-g per Lord Templeman. Various factors had to be taken into account in this case, including the inevitable consequence of the passage of time on the recollection of witnesses to which the Divisional Court refers, at p 162d-e. But the fact that the press conference gave rise to adverse publicity, albeit that this was severe, would not of itself have justified quashing the certificates. There were other interests to be taken into account, namely those of the objectors and of the council and its electors. The respondents were given the opportunity, to which they were entitled, to raise the issue in the context of their arguments on unfairness. In my opinion their rights were sufficiently protected by the way in which this issue was examined in that court and by the remedies that were available to them by way of appeal.

Conclusion on unfairness

118 For these reasons I would hold that the proceedings as a whole did not infringe the respondents' Convention rights and that there was no unfairness at common law on the ground either of apparent bias or of delay.

Quantum

119 The auditor included in the amount which he certified under section 20(1)(b) of the Local Government Finance Act 1982 as one of the items of loss in consequence of the respondents' wilful misconduct a sum amounting to oe15.476m for discounts on the sale of dwellings sold at a discount. He took as the measure of this loss the difference between the open market value of the dwellings with vacant possession, as estimated at the time of the sales by the council's valuers, Ellis & Co, for the purpose ofarriving at a discounted price, and the discounted prices at which they were actually disposed of. Most of the dwellings included in this item were not sold outright but were let on long leases granted in consideration of substantial premiums. For convenience however all the transactions were referred to as sales. The discount was 30% to purchasers who were not already tenants of the council. For existing tenants with the right to buy it was a variable amount, but it was always more than 30%.

120 As the Divisional Court said 96 LGR 157, 205b, the question whether this amount was properly certified was by far the most significant issue in terms of quantum. Two main challenges to the auditor's approach to it were advanced in that court. The first, which raised an issue of principle, was whether the auditor was right to use the open market value of the unoccupied dwellings as his starting point. The second was directed to the figures which he used for assessing their market value which, it was said, were unreliable. The Divisional Court upheld the auditors' approach on both points. It concluded, at p 207e, that the loss arising from the sales at a discount was correctly calculated at oe15.476m.

121 The issue whether this amount was correctly calculated was raised again in the Court of Appeal. Robert Walker LJ said, ante, p 445d-f, that in his judgment the Divisional Court erred in its approach, as it should have accepted the submission that there was no loss if the discounted prices actually received by the council exceeded the value of the dwellings as tenanted social housing. His conclusion on this issue was rendered academic by the decision of the majority to allow the appeals and discharge the certificates. Kennedy LJ said, ante, p 371a, that he agreed with that part of the judgment of Robert Walker LJ which dealt with quantum, but Schiemann LJ said, ante, p 389f, that he preferred to express no opinion on the point. As your Lordships have decided to allow the appeal, the issue as to quantum is once again a live issue. The auditor submits that the amount which was found to have been correctly calculated by the Divisional Court should be included in the certificates.

122 It may be convenient for me to set out again the provisions of section 20(1) of the 1982 Act:

"Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act-(a) that any person has failed to bring into account any sum which should have been so included and that the failure has not been sanctioned by the Secretary of State; or (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person, he shall certify that the sum or, as the case may be, the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the body in question (or, in the case of a parish meeting, the chairman of that meeting) may recover that sum or amount for the benefit of that body ..."

123 The task of the auditor in this case was to certify the amount of the loss or deficiency caused by the wilful misconduct. The loss or deficiency which he identified as due to wilful misconduct fell into two distinct parts. The first part consisted of expenditure incurred in the preparation of papers for the purpose of discussing the promotion of the electoral advantage of the majority party. This part raised no issue of principle. It was simply a matter of arriving at an appropriate figure to restore to the council'saccount the amount of the expenditure. The auditor made a broad estimate under this heading of oe5,000 which, when interest was added, amounted to oe10,126. No appeal was taken against the calculation of this amount. By far the greater part of the loss which he identified fell into the second part. This was the result of the resolution of the housing committee on 8 July 1987 to extend the programme of designated sales of dwellings from the council's social housing stock. After agreed corrections in the Divisional Court, the total amount of this loss was oe26.462m. The figure of oe15.476m for losses resulting from sales of dwellings at a discount is included in this figure.

124 The auditor's approach, as explained by him in paragraph 43 of his report, was a simple one. He said that the sale of property such as housing accommodation at less than its market value involves a loss or deficiency to the authority which is equal to the difference between the market value of the asset and the proceeds of sale. In his view, the amount of this difference was the amount that should be certified as due from any person by whose wilful misconduct that loss or deficiency has been incurred. It is this approach that the respondents have challenged as being wrong in principle.

125 I agree that the sale of a dwelling which is unoccupied at less than its open market value with vacant possession can be regarded as producing a loss or deficiency for the purposes of section 20(1)(b) of the 1982 Act. This assumes that those who were responsible for the sale were under a duty to obtain a full price for it, measured by its value with vacant possession in the open market. But I do not think that this can be regarded as a universal rule. The proper starting point is to identify the act of wilful misconduct. The next step is to determine what items of loss, if any, were caused by it. In the case of the designated dwellings, the act of wilful misconduct for which the respondents must be held accountable was the promotion of the policy which the housing committee adopted on 8 July 1987. The effect of its

resolution was to remove the designated dwellings from the council's social housing stock as they became vacant. What the council lost as a result of the adoption of the policy were 618 dwellings from its social housing stock. Its capacity to perform its obligation to house the homeless under Part III of the Housing Act 1985 was correspondingly reduced.

126 Nevertheless, when these dwellings became vacant they could have been sold with vacant possession on the open market. Robert Walker LJ said, ante, p 445d-f, that there was no loss to the council so long as the discounted prices actually received by it exceeded the value of the dwellings as tenanted social housing. They exceeded this value in all cases, so he was of the view that the auditor ought to have found that their sale did not result in any loss or deficiency. But I agree with Lord Bingham that the principle which underlies the statutory procedure is one of compensation. What the auditor is directed by section 20(1) to certify is the amount of the loss or deficiency, and it is for the benefit of the body that the amount certified is recoverable. The aim of the procedure is to put the body in the same position that it would have been in but for the wilful misconduct. Applying this approach, the loss to the council due to the sales for which it ought to be compensated was the difference between the full market price of the dwellings and the discounted prices which were received for them.

127 That however does not conclude the argument. This is because the auditor included in his calculation of this amount a sum amounting to oe4.237m for extra homelessness costs. These costs were directly attributable to the removal of the designated dwellings from the social housing stock. Robert Walker LJ said, at p 1502d, that to include this figure in the amount of the loss or deficiency as well as a figure for loss on the sale of the dwellings at a discount would result in double counting. In his view it would be inconsistent with the auditor's decision to include an amount for homelessness costs due to the depletion of the council's social housing stock to assume that those dwellings would have been sold with vacant possession at their full value on the open market.

128 I think that there is considerable force in the point which Robert Walker LJ made on this issue in his careful judgment. It seems to me that these two items were arrived at by the auditor on two different and arguably inconsistent assumptions. On the one hand the figure of oe15.476m representing the loss arising from sales at a discount assumes that the council would, but for the unlawful policy, have obtained full value for dwellings as they no longer required to be treated as part of the social housing stock when they were sold. On the other hand the figure of oe4.237m for extra homelessness costs is based upon costs for which it is assumed the council should be compensated on the ground that the dwellings ought to have been retained for social housing purposes. The principle of compensation requires that the council should be fully compensated, but it does not permit the council to be overcompensated. An auditor who seeks to apply this principle must guard against the risk of double counting. The effect of doing so would be to penalise the person from whom the amount was due, which is not the object of the procedure. It would also enable the body to recover more than was needed to make good the loss or deficiency.

129 In my opinion however the point about double counting is not free from difficulty. The principles are clear enough, but they depend for their application on the facts. It seems to me that the point ought to have been raised when the facts about the extra costs of homelessness were being inquired into by the auditor or by the Divisional Court. That was not done, with the result that your Lordships do not have the findings of fact which would be needed to disturb the calculations made by the auditor on this issue. With some hesitation therefore I have come to the conclusion, in agreement with your Lordships, that it would not be right to hold that the auditor fell into the obvious trap of double counting and that the sum upheld by the Divisional Court should not be departed from.

Conclusion

130 I too would allow the auditor's appeal and restore his certificate in the sum upheld by the Divisional Court.

JUDGMENTBY-7: LORD HOBHOUSE OF WOODBOROUGH

JUDGMENT-7:
LORD HOBHOUSE OF WOODBOROUGH:

131 My Lords, I agree that the appeal should be allowed and the judgment of the Divisional Court restored as proposed by my noble and learned friends, Lord Bingham of Cornhill and Lord Hope of Craighead and for the reasons which they have given. The question of quantum referred to in the penultimate section of Lord Bingham's speech gave me some anxiety but was effectively concluded by the limited way in which the arguments ofthe respondents were put. The respondents (no doubt for some good reason) did not deploy or support by evidence the arguments which might have displaced the valid primary measure of the council's capital account loss. I agree that what Robert Walker LJ said in his judgment, at p 1502, did not, on examination, suffice to displace the primary measure nor did it show that there had been any double counting.

JUDGMENTBY-8: LORD SCOTT OF FOSCOTE

JUDGMENT-8:
LORD SCOTT OF FOSCOTE:

132 My Lords, this is a case about political corruption. The corruption was not money corruption. No one took a bribe. No one sought or received money for political favours. But there are other forms of corruption, often less easily detectable and therefore more insidious. Gerrymandering, the manipulation of constituency boundaries for party political advantage, is a clear form of political corruption. So, too, would be any misuse of municipal powers, intended for use in the general public interest but used instead for party political advantage. Who can doubt that the selective use of municipal powers in order to obtain party political advantage represents political corruption? Political corruption, if unchecked, engenders cynicism about elections, about politicians and their motives and damages the reputation of democratic government. Like Viola's "worm i' the bud" it feeds upon democratic institutions from within (Twelfth Night).

133 When detected and exposed it must be expected, or at least it must be hoped, that political corruption will receive its just deserts at the polls. Detection and exposure is, however, often difficult and, where it happens, is usually attributable to determined efforts by political opponents or by investigative journalists or by both in tandem. But, where local government is concerned, there is an additional very important bulwark guarding against misconduct. The Local Government Finance Act 1982 (now repealed but in force until 11 September 1998) required the annual accounts of a local authority to be audited by an independent auditor appointed by the Audit Commission (sections 12 and 13). The auditor had to satisfy himself that the local authority's accounts were in order (section 15(1) and (2)) and, also, had to "consider whether, in the public interest, he should make a report on any matter coming to his notice in the course of the audit in order that it may be considered by the [local authority] concerned or brought to the attention of the public ...": section 15(3).

134 If, in the course of the audit, it came to the attention of the auditor that municipal powers had been used not in the general public interest but, selectively, for party political advantage, it was plainly right that the political corruption in question should be exposed in a report under section 15(3).

135 Section 16 of the Act gave the auditor extensive powers to obtain documents and information for the purposes of the statutory functions. These included the power to require

any officer or member of the local authority "to give him such information or explanation as he thinks necessary ...": section 16(2). Any report made by the auditor under section 15(3) became a public document open to inspection by any member of the public (section 18A).

136 The statutory provisions to which I have referred provided an institutional means whereby political corruption consisting of the use of municipal powers for party political advantage might be detected andcauterized by public exposure. These provisions were repealed by the Audit Commission Act 1998 but replaced by provisions in Part II of that Act which are to much the same effect (see, in particular, section 8 of the 1998 Act).

137 In addition, however, where the misconduct in question had caused loss to the local authority, section 20 of the 1982 Act enabled the auditor to require those responsible to make good the loss. Section 20(1) provided:

"(1) Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act ... (a) ... or (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person, he shall certify that ... the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the [local authority] in question ... may recover that ... amount for the benefit of that [local authority] ..."

138 Subsection (3) permitted an appeal against the auditor's certificate to be made to the court. Subsection (4) applied where a certificate requiring payment of more than oe2,000 had been made, or upheld, and disqualified the individual concerned from being a member of any local authority for a period of five years. And subsection (5) required payment of the certified sum to be made within fourteen days of the certificate becoming final.

139 The purpose of a section 20 certificate was compensatory, not penal. Its purpose was not to punish the wrongdoer but to require the quantified loss caused to the local authority by the "wilful misconduct" to be made good. There was no element of discretion. If the officer or member had been guilty of "wilful misconduct" as a result of which loss had been incurred it was the duty of the auditor to issue a section 20 certificate specifying the amount of the loss. Of course, it will not be every case of political corruption, or other misconduct, in local government that will lead to financial loss to the local authority concerned. But many will do so and, in those cases, the powers and duties of auditors under section 20 of the 1982 Act (and under section 19 as well, although nothing turns on that section in this case) constituted, in my opinion, powerful and valuable protection to the public.

140 Section 20 of the 1982 Act was replaced by section 18 of the 1998 Act which was to the same effect. But section 18 of the 1998 Act has been repealed by the Local Government Act 2000 and not replaced. The 2000 Act also substantially recast the investigation and report provisions that had been contained first in the 1982 Act and then in the 1998 Act. The institutional protection provided by statute against political corruption and other misconduct by members of local authorities is now confined to the investigation, report and publicity for which the 2000 Act and an amended version of section 17 of the 1998 Act (formerly section 19 of the 1982 Act) make provision. There is now no statutory provision directed to restitution or compensation for loss caused by any wrongdoing that the investigation and report may have exposed. Certificates such as those issued against and challenged by Dame Shirley Porter and Mr David **Weeks** in the present case cannot now be issued. Local authorities that want to recover from delinquent councillors the loss caused by the delinquency must now do so by means of legal remedies available under the general law. However, section 20 of the 1982 Act was in force at the time the events material to thiscase took place and the propriety of the auditor's certificates against Dame Shirley and Mr **Weeks** must be tested on that footing.

141 My Lords, I have had the advantage of reading in draft the opinion on this appeal of my

noble and learned friend, Lord Bingham of Cornhill. As Lord Bingham has observed, the facts that have given rise to the appeal are set out at some length in the judgments of the Divisional Court and the Court of Appeal. Lord Bingham has highlighted some of the key events. I gratefully adopt and need not repeat those highlights.

142 The factual findings made by the auditor, Mr John **Magill,** and by the Divisional Court against Dame Shirley Porter and Mr David **Weeks** were findings that justify being described as findings of political corruption. Dame Shirley and Mr **Weeks,** having appealed unsuccessfully to the Divisional Court, appealed successfully to the Court of Appeal. Mr **Magill** has appealed to this House. For the purposes of this appeal the parties have prepared a statement of agreed facts and issues. The contents of the statement were agreed by Mr Howell on behalf of Mr **Magill,** by Mr McMullen on behalf of Dame Shirley and by Mr Cakebread of counsel on behalf of Mr **Weeks.** The contents of the statement, in my opinion, endorse the essential findings of the auditor and of the Divisional Court regarding the conduct of Dame Shirley and Mr **Weeks** and justify the description of that conduct as political corruption. Thus:

(1) As a consequence of local government elections in May 1986 reducing the Conservative majority from 26 to 4, Dame Shirley, the leader of the Conservatives on the Westminster Council, was determined that a greater majority should be achieved at the 1990 elections (paragraphs 9 and 10 of the statement).

(2) Eight marginal wards, the "key wards", were identified. The intention of Dame Shirley and Mr **Weeks** was to reduce the number of Labour voters and increase the number of Conservative voters in these key wards. The target was an overall increase of 2,200 Conservative supporters in these wards (paragraphs 13 to 15).

(3) This increase was to be brought about by selling council-owned residential properties in the eight key wards when they became vacant. It was believed that owner-occupiers were more likely to vote Conservative than were council tenants (paragraphs 16 and 28).

(4) The Director of Housing advised in May 1986 and again in March 1987 that if all council properties in the eight key wards were designated for selling, the council would not be able to meet its statutory housing obligations (paragraphs 18 and 29).

(5) Nonetheless, at a meeting on 24 March 1987, attended by Dame Shirley and Mr **Weeks,** it was decided to sell annually 250 properties in the eight key wards (paragraph 35).

(6) On 5 May 1987 Mr Sullivan met council officials in consultation. He was informed that the majority (Conservative) group wished to target sales in marginal wards for electoral advantage. He advised that this would not be lawful, that the designation of properties for sale had to be done for proper reasons and that, in identifying the properties to be sold, the same criteria had to be applied across the whole city (paragraph 40).

(7) The critical paragraph in the agreed statement of facts is paragraph 42. It reads:

"On the evening of 5 May 1987, the chairmen's group agreed to target designated sales city-wide in order to produce the agreed number of designated sales in marginal wards. The group decided to adopt the course ... of increasing the number of designated sales so as to be able to achieve the policy objective of 250 sales per annum in the marginal wards."

143 That was the policy eventually carried into effect via the housing committee decision on 8 July 1987 (paragraph 58 of the statement). It led to the sale of 618 council properties (some were let on long leases for substantial premiums). It is clear that the policy was adopted by the chairmen's group, led by Dame Shirley and Mr **Weeks,** and was thereafter promoted by Dame Shirley and Mr **Weeks,** as well as by others, not in order to achieve sales

city-wide but in order to achieve 250 sales per annum in the eight key wards. And those sales were for the purpose of replacing probable Labour voters by probable Conservative voters. The city-wide policy was no more than a cloak to give apparent legality to the sales in the eight key wards which leading counsel had rightly warned would be unlawful unless part of a city-wide policy adopted for a proper reason. The sales of the 618 properties involved the exercise of local government powers to sell council properties (see section 32, Housing Act 1985) not for the purpose for which those powers were granted but in order to increase the number of Conservative voters in marginal wards. It has not been in dispute before your Lordships that this purpose for selling is an unlawful purpose.

144 In the Court of Appeal Kennedy LJ commented on the political reality that many government decisions, whether at local government level or in central government, are taken with an eye to the electoral effect they may have. He said, ante, p 386d:

"Some of the submissions advanced on behalf of the auditor have been framed in such a way as to suggest that any councillor who allows the possibility of electoral advantage even to cross his mind before he decides upon a course of action is guilty of misconduct ... In local, as in national, politics many if not most decisions carry an electoral price tag, and all politicians are aware of it."

Kennedy LJ was, of course, correct. But there is all the difference in the world between a policy adopted for naked political advantage but spuriously justified by reference to a purpose which, had it been the true purpose, would have been legitimate, and a policy adopted for a legitimate purpose and seen to carry with it significant political advantage. The agreed statement of facts places the policy adopted by the chairmen's group on 5 May 1987 fairly and squarely in the former category.

145 My Lords, there are three issues which arise on this appeal on which I wish to comment. The first is whether Dame Shirley and Mr **Weeks** were, for section 20 purposes, guilty of wilful misconduct. The second is whether, if they were, that misconduct was causative of loss to the council. The third is how such loss should be quantified. But, my Lords, the backcloth to each of these issues is that Dame Shirley and Mr **Weeks** stand convicted of political corruption. They stand so convicted on the basis of facts which are not now in dispute.

Wilful misconduct

146 It has been submitted on behalf of Dame Shirley and Mr **Weeks** that whether or not their conduct in promoting the policy of designated sales in the eight key wards was misconduct, it lacked the quality of being "wilful". This, it is said, is because, relying on advice which they believed had been given by Mr Sullivan, they did not realise that the policy was unlawful. In Lloyd v McMahon [1987] AC 625 Woolf LJ said that misconduct "would only be wilful if the councillors were doing something which they knew to be wrong or about which they were recklessly indifferent as to whether it was wrong or not" (p 674). It has been common ground before your Lordships that this is the correct test.

147 It is said that, in reliance on Mr England's note of what Mr Sullivan had said in consultation on 5 May 1987, Dame Shirley and Mr **Weeks** thought that it would be lawful for them to achieve their purpose of designating properties for sale in the eight key wards in order to achieve annual sales of 250 properties in those wards provided that there were similar designations of properties for sale city-wide. Mr England's note reads, so far as material, as follows:

"Counsel advises that designated estates should be identified in marginal and non-marginal wards in order to protect the council. The group will, therefore, need to decide whether the 250 target applies across the city or whether in fact 250 sales in marginal wards are required in which case following counsel's advice, somewhere in the region of 300-350 properties will

need to be sold across the city."

148 But Dame Shirley and Mr **Weeks** knew that a policy adopted for the purpose of electoral advantage in the key wards would be unlawful. And nothing in Mr England's note of what Mr Sullivan had said, or indeed in what Mr Sullivan had actually said, indicated that the adoption of the city-wide policy in order to achieve the unlawful electoral purpose in the eight key wards would be any less unlawful than the adoption for that purpose of a policy in respect of the eight key wards alone. As Lord Bingham has noted in paragraph 39 of his opinion, Mr Sullivan was never asked the critical question, namely, whether the designated sales policy would become lawful if, with the same objective, the designated sales policy were extended city-wide. I agree with Lord Bingham that no reason for doubting the clear findings, adverse to Dame Shirley and Mr **Weeks,** of the auditor and the Divisional Court has been shown.

Causation

149 Dame Shirley and Mr **Weeks** rely on the housing committee's decision of 8 July 1987 as breaking the chain of causation. The designated sales policy was implemented because the housing committee had resolved to adopt it. If the housing committee had not so resolved, the policy would not have been implemented. Neither Dame Shirley nor Mr **Weeks** was a member of the housing committee. Neither of them was present at the 8 July meeting. Mr McMullen submitted that a city-wide designated sales policy was a policy capable of being a lawful one. So it was. He submitted that the housing committee resolution that adopted the policy was capable of being a lawful resolution. I agree. He submitted that if a majority of members of thecommittee voted in favour of the resolution for reasons that were lawful, then the resolution would have been lawful, notwithstanding that misconduct on the part of the leader of the council and her deputy had attended the formulation and promotion of the policy adopted by the resolution. Again, I agree.

150 It was argued on behalf of Mr **Magill** that even if the resolution were a lawful one, nonetheless the misconduct of Dame Shirley and Mr **Weeks** was not spent and could still be regarded, for section 20 purposes, as having "caused the loss". But for their misconduct, the designated sales policy would not have been formulated and placed before the housing committee for approval. I agree that, applying a "but for" test, it could be said that their misconduct had caused the loss. But I do not think that that is enough. If the housing committee resolution was a lawful one, then it was lawful for it to be implemented by the council. Its implementation was within the statutory powers of the council. This is not a case in which the council lacked power to carry out the property sales contemplated by the policy.

151 So, if the improper electoral advantage in the eight key wards, the purpose of the designated sales policy, had been made plain at the housing committee meeting and had been repudiated by a majority of those present who had then voted in favour of the policy for unimpeachable reasons, it would have been plain that the misconduct had become spent even if, without the misconduct, the policy would never have found its way to the committee. I find it difficult to follow why the case would be different if, without an explicit disclosure and repudiation of the policy, a lawful resolution adopting the policy were passed. I accept that a corrupt principal can attain his unlawful object via the medium of an innocent agent (see Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378, 385), but I do not think a local authority committee can be treated as merely an agent for the leader of the council, no matter how influential he or she may be. I am, therefore, disposed to agree with Mr McMullen, and to disagree with the Divisional Court (see 96 LGR, 157, 181), that if the housing committee resolution could be shown to have been a lawful resolution, the causative effect of Dame Shirley's and Mr **Weeks'** misconduct would, for section 20 purposes, be spent.

152 There were twelve members of the housing committee. Seven of them voted in favour of the designated sales policy. Five voted against. Of the seven, two of them, Mr Hartley and Dr

Dutt, were found guilty of misconduct by the auditor. Each, in the auditor's opinion, "took into account the electoral advantage of the Conservative party and sought to promote it in his voting". The auditor issued a section 20 certificate against Mr Hartley but Mr Hartley succeeded on appeal to the Divisional Court. In the view of the Divisional Court he was guilty of misconduct but not of wilful misconduct: see p 199. It follows, however, from the finding of misconduct that Mr Hartley's vote at the housing committee meeting was invalid.

153 As to Dr Dutt, he took his own life before the auditor made his final findings. The auditor, in his report, said:

"My provisional findings and views were adverse to Dr Dutt ... In letters to me Dr Dutt disputed my provisional findings and views. Shortlythereafter, he took his own life. I make no findings of personal liability of Dr Dutt": para 1903.

154 Mr McMullen has submitted that Dr Dutt must be treated as exonerated from misconduct. I do not agree. Dr Dutt was exonerated from wilful misconduct, but the provisional findings of misconduct were unchanged. In my opinion Dr Dutt's vote falls into the same state as that of Mr Hartley. It was invalid. As for the other five members of the committee who voted in favour of the resolution, they so voted because the resolution was Conservative party policy. They did not know that the purpose of the resolution was to obtain electoral advantage in the eight key wards. They did not know that that was the reason why the policy had been adopted. They may very well have supposed that the resolution reflected their party's general dislike of social housing and bias in favour of owner occupation. I do not think, in these circumstances, that their votes can be disregarded on the ground that they were invalid. But their votes were insufficient in number to carry the resolution. Five valid votes in favour of the resolution and five against would have produced a tie which, in theory, could have been resolved by the chairman's casting vote. But the chairman was Mr Hartley and any casting vote of his would, for the reasons already discussed, have been an invalid vote.

155 In my opinion, therefore, the resolution purportedly passed at the housing committee meeting was not a valid resolution, the wilful misconduct of Dame Shirley and Mr **Weeks** in promoting the policy purportedly adopted by the resolution was not spent and the chain of causation was not broken. In my opinion, their misconduct caused, for section 20 purposes, the 618 sales by the council that produced the loss.

Quantification of the loss

156 The issue is whether Robert Walker LJ's disagreement with the basis on which the Divisional Court had quantified the loss was correct.

157 The 618 designated properties were sold with vacant possession. They were sold by the council at a discount against their vacant possession market value. The council had power to sell at a discount. If the sales had been lawful, no complaint about the discount could have been made. The question is whether, the sales being unlawful, the amount of the discount represents an item of loss caused by the wilful misconduct. The rival arguments, as I understand them, are these.

(1) The properties were, before being designated for sale and becoming vacant, occupied by council tenants. Their value so tenanted was a good deal less than their value with vacant possession. If, on becoming vacant, they had been re-let to those on the council's waiting list for social housing, their value so re-let would, similarly, have been a good deal less than their value with vacant possession. The amount of the discount at which the properties were sold may be taken, on a rough and ready footing, as representing the difference in value between the properties let as social housing and the properties with vacant possession. So, if the council recover the amount of the discount the council will be in a better financial position

than it would have been if the unlawful designated sales policy had never been adopted. This argument, expressed by Robert Walker LJ more lucidlythan I have done, was concurred in by Kennedy LJ. It has been espoused by Mr McMullen and Mr Cakebread.

(2) The alternative argument proceeds like this. The council has a statutory housing obligation and a long list of people who need to be housed. The unlawful sales reduced the council's stock of social housing. In order to replenish its stock and restore the position to what it was before the sales took place, the council would have to purchase properties in the open market. It would have to pay vacant possession prices. Accordingly, the loss it suffered by reason of the misconduct included the discounts at which the properties were sold. This was the approach of the Divisional Count. It was supported by Mr Howell.

158 The answer to the question as to which approach is the right one does not, in my opinion, depend at all upon the manner in which the properties appeared in the council's accounts. The quantification of loss for section 20 purposes should, in my view, apply the same principles as are applicable to quantification of damages in tort. As a result of the wrongful acts of Dame Shirley and Mr **Weeks** the council suffered loss. What was that loss? It lost the properties that were sold, but it received the purchase price that was paid for them. Immediately before sale, the properties were vacant. They were sold with vacant possession but the council did not receive a vacant possession price. In my opinion, the discount represented a true loss suffered by the council. Interest on the discounted purchase price since its receipt and interest on the amount of the discount from the date of the sale ought, on the assumption that interest rates more or less reflect rates of inflation in property values, to enable the council to replace the sold housing stock. Thus, to treat the discounts as items of loss seems to me to produce a just result, in line with the intentions underlying section 20.

159 The problem, as it seems to me, with Robert Walker LJ's approach, is that it attributes no value to the benefit to the council of owning properties which are available to be used for social housing. The sale of the properties deprived the council of that benefit. The council can restore that benefit only by purchasing similar properties in the open market. The value of that benefit can be taken, again on a rough and ready basis, as being equivalent to the discounts.

160 To allow the council to recover the discounts as items of loss does not, in my opinion, involve any element of double counting. A separate item of loss allowed by the Divisional Court was £4.237m, representing extra costs of housing homeless people which the council had to incur as a result of its own stock of social housing having been depleted by the sales of the 618 properties. Robert Walker LJ thought that to allow the discounts to be recovered as well as the £4.237m would be inconsistent and involve double counting. I do not think so. The £4.237m covered the extra costs of homelessness over the period starting from the date on which the properties, on becoming vacant, were available for reletting and ending on the date of the auditor's certificate. Thereafter the loss of the 618 properties from the housing stock is covered by the capital sum received (or receivable) by the council (i e the discounted proceeds of sale plus the amount of the discounts) that enables it to replace the sold properties. There is no double counting.

Bias and unfairness

161 There was a fourth issue raised by Dame Shirley and Mr **Weeks.** They submitted that the manner in which the auditor had gone about his task of fact finding was attended by at least the appearance of bias against them and that that feature of the case, coupled with the time it has taken for the case to come to finality, represented such a degree of unfairness as to infringe their right to a fair trial (see article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms). These submissions fail, in my opinion, for the reasons given by my noble and learned friend Lord Hope of Craighead. I want

to add just one comment on the issue of unfairness.

162 One of the most striking features of the case is the enormous amount that under the auditor's certificates Dame Shirley and Mr **Weeks** were adjudged liable to pay. The amount, £31m-odd, seems enormous not because it does not accurately reflect the loss caused to the council by Dame Shirley's and Mr **Weeks's** misconduct but because it is so out of line with what most people would regard as a proportionate punishment for their misconduct. There is, I think, an almost instinctive feeling that the requirement that they pay the certified amount is unfair.

163 This instinctive feeling, however, overlooks the very important fact that the purpose of a section 20 certificate is to compensate the local authority for loss. The purpose is not one of punishment. Nor does the amount to be certified lie in the discretion of the certifying auditor. If wilful misconduct has been proved it is his duty to certify the full amount of the loss thereby caused. The size of the amount so certified can no more represent an article 6 unfairness than can the size of an award of damages for tort or breach of contract. Since, for the reasons given by Lord Hope, there was no procedural unfairness in the proceedings which have culminated in the appeal to this House, there is no further ECHR point that can be taken.

Conclusion

164 For the reasons given in this opinion in addition to those given by Lord Bingham, with which I am in full agreement, I would allow the appeal and restore the order of the Divisional Court.

DISPOSITION:
COURT OF APPEAL -- Appeal allowed; leave to appeal

19 May. The Court of Appeal ordered the auditor to pay the appellants' costs in the High Court and the Court of Appeal on the standard basis other than those in relation to the appeal to the Court of Appeal on the question of fairness but refused the appellants' application for expenses against Westminster City Council pursuant to section 18(10) of the Audit Commission Act 1998. Leave to appeal from the order for costs was refused.

HOUSE OF LORDS -- Appeals allowed; Order of Court of Appeal of 30 April 1999 set aside; Order of Divisional Court of 19 December 1997, as amended, restored.

SOLICITORS:
Rowe & Maw; Nicholson Graham & Jones

SLD; DECP

671

***256** The **King** v. **Sussex Justices., ex parte. McCarthy.**

King's Bench Division

KBD

Lord Hewart C.J., Lush, and Sankey JJ.

1923 Nov. 9.

Justices--Possibility of Bias--Justices' Clerk present as Justices' Consultation--Justices' Clerk interested professionally in Civil Proceedings arising out of Subject Matter of Complaint.

Arising out of a collision between a motor vehicle belonging to the applicant and one belonging to W., a summons was taken out by the police against the applicant for having driven his motor vehicle in a manner dangerous to the public. At the hearing of the summons the acting clerk to the justices was a member of the firm of solicitors who were acting for W. in a claim for damages against the applicant for injuries received in the collision. At the conclusion of the evidence the justices retired to consider their decision, the acting clerk retiring with them in case they should desire to be advised on any point of law. The justices convicted the applicant, and it was stated on affidavit that they came to that conclusion without consulting the acting clerk, who in fact abstained from referring to the case:-
Held, that the conviction must be quashed, as it was improper for the acting clerk, having regard to his firm's relation to the case, to be present with the justices when they were considering their decision.
RULE NISI for a writ of certiorari to bring up, for the purpose of being quashed, a conviction of McCarthy, the applicant for the rule, for having driven a motor car on a certain highway in a manner which was dangerous to the public, having regard to all the circumstances of the case.
On August 21, 1923, a collision took place between a motor cycle driven by the applicant and a motor cycle and side-car driven by one Whitworth, and it was alleged that the latter and his wife sustained injuries in the collision. In respect of those injuries Messrs. Langham, Son & Douglas, solicitors, Hastings, by a letter dated August 28, 1923, made a claim on behalf of Whitworth against the applicant for damages, and the police, after making inquiries into the circumstances of the collision, applied for and obtained a summons against the applicant for driving his motor cycle in a manner dangerous to the public. At the hearing of that summons on September 22, 1923, the applicant's solicitor, who stated in his affidavit that he had no knowledge of the officials of the court, inquired whether Mr. F. G. Langham, the***257** clerk to the justices and a member of the said firm of Langham, Son & Douglas, was then sitting as clerk, and was informed that he was not, but had appointed a deputy for that day. The case was then heard, and at the conclusion of the evidence the justices retired to consider their decision, the deputy clerk retiring with them. When the justices returned into court they intimated that they had decided to convict the applicant, and they imposed a fine of 10l. and costs. Thereupon the applicant's solicitor brought to the notice of the justices the fact, of which he said he had only become aware when the justices retired, that the deputy clerk was a brother of Mr. F. G. Langham, and was himself a partner in the firm of Langham, Son & Douglas, and so was interested as solicitor for Whitworth in the civil proceedings arising out of the collision in respect of which they had convicted the applicant. The solicitor in his affidavit stated that had he known the above facts he would have taken the objection before the case began. This rule was thereafter obtained on the ground that it was irregular for the deputy clerk in the circumstances to retire with the justices when considering their decision.
In their affidavit the justices stated that the clerk to the justices, Mr. F. G. Langham, was on holiday at the date of the hearing and had no knowledge of the proceedings, that in his absence his brother and partner Mr. E. H. Langham acted as his deputy, that no formal objection was taken to the latter acting, that at the conclusion of the evidence the justices retired, the deputy clerk retiring with them in the usual way, taking with him the notes of the evidence in case they should be required, or in case the justices should desire to be advised upon any point of law, that in fact the justices came to their decision to convict the applicant without consulting the deputy clerk, who scrupulously abstained from referring to the case, and that the justices were not in any way biased by the fact that a member of the deputy clerk's firm had written the said letter before action. The justices added that it appeared to them that the applicant's solicitor must have had knowledge of the deputy clerk's connection***258** with the firm of Langham, Son & Douglas, and that he waived any formal objection; and that if a formal objection had been taken at the commencement of the

proceedings the justices would have followed their usual course in such circumstances by adjourning the hearing and requesting the clerk to arrange with one of his colleagues from a neighbouring division to act at the adjourned hearing.
Russell Davies for the justices showed cause. However undesirable it may have been in the circumstances for the deputy clerk to retire with the justices when they were considering their decision, the fact that he did so does not invalidate the conviction, seeing that he took no part in the justices' deliberations.
[LORD HEWART C.J. In a recent unreported case, this Court quashed a conviction where the chief constable, who was then prosecuting, retired with the justices.]
There it was not the duty of the chief constable to retire with the justices; here it was the duty of the deputy clerk to do so in case the justices should desire to consult him upon any point of law. If, however, there was any irregularity in the proceedings, the applicant, through his solicitor, must be taken to have waived it.
[He referred to Reg. v. Brakenridge. [FN1]]

FN1 (1884) 48 J. P. 293.

W. T. Monckton for the superintendent of police, who had been served with the rule.
H. D. Samuels in support of the rule was not called upon.

LORD HEWART C.J.
stated the grounds of the rule and continued: It is clear that the deputy clerk was a member of the firm of solicitors engaged in the conduct of proceedings for damages against the applicant in respect of the same collision as that which gave rise to the charge that the justices were considering. It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came***259*** to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. Speaking for myself, I accept the statements contained in the justices' affidavit, but they show very clearly that the deputy clerk was connected with the case in a capacity which made it right that he should scrupulously abstain from referring to the matter in any way, although he retired with the justices; in other words, his one position was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction. In those circumstances I am satisfied that this conviction must be quashed, unless it can be shown that the applicant or his solicitor was aware of the point that might be taken, refrained from taking it, and took his chance of an acquittal on the facts, and then, on a conviction being recorded, decided to take the point. On the facts I am satisfied that there has been no waiver of the irregularity, and, that being so, the rule must be made absolute and the conviction quashed.

LUSH J.

I agree. It must be clearly understood that if justices allow their clerk to be present at their consultation when either he or his firm is professionally engaged in those proceedings or in other proceedings involving the same***260*** subject matter, it is irrelevant to inquire whether the clerk did or did not give advice and influence the justices. What is objectionable is his presence at the consultation, when he is in a position which necessarily makes it impossible for him to give absolutely impartial advice. I have no doubt that these justices did not intend to do anything irregular or wrong, but they have placed themselves in an impossible position by allowing the clerk in those circumstances to retire with them into their consultation room. The result, there being no waiver, is that the conviction must be quashed.

SANKEY J.

I agree.

Representation

Solicitor for applicant: W. C. Crocker.
Solicitors for justices: Pettitt & Ramsay, for
Langham, Son & Douglas, Hastings.
Solicitors for police superintendent: Taylor, Willcocks & Co., for F. Lawson Lewis, Eastbourne.

Rule absolute; conviction quashed. (J. S. H.)

[1924] 1 K.B. 256

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