HOUSE OF LORDS

SESSION 2007–08

[2008] UKHL 62

on appeal from:[2007] CSIH 5

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Helow (AP) (Appellant) *v* Secretary of State for the Home Department and another (Respondents) (Scotland)

Appellate Committee

Lord Hope of Craighead
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Cullen of Whitekirk
Lord Mance

Counsel

Appellant:
Mungo Bovey QC
Scott Blair
(Instructed by Drummond Miller LLP)

First Respondent:
Lord Davidson of Glen Clova QC
Colin Tyre QC
Ailsa Carmichael
(Instructed by Office of the Solicitor to the Advocate General for Scotland)

Second Respondent:
Gerry Moynihan QC
(Instructed by Office of the Solicitor to the Scottish Executive)

Hearing dates:

16 and 17 JUNE 2008

ON

WEDNESDAY 22 OCTOBER 2008

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LORD HOPE OF CRAIGHEAD

My Lords,

1. The fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word "he"), she has attributes which many of us might struggle to attain to.

2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

3. Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

4. The context is crucially important in a case such as this. As my noble and learned friend Lord Mance whose speech I have had the advantage of reading in draft has explained, the appellant's argument depends entirely on the judgment that the observer would make of the fact that Lady Cosgrove was, at all relevant times, a member of the International Association of Jewish Lawyers and Jurists. As a member of the Association, she must be assumed to have received its quarterly publication, "Justice", all of whose editions are readily accessible on the Association's website. She was present at a meeting held in Edinburgh on 30 November 1997 when, in the presence of a number of other distinguished Jewish members of the legal profession, a Scottish Branch of the Association was inaugurated. There is no suggestion that she either did or said anything after that date which associated her either one way or the other with views that were being expressed on behalf of the Association. It was on the some of the contents of some of the more recent issues of "Justice", and those contents only, that Mr Bovey QC for the appellant concentrated in presenting his argument. The question is to what extent, if at all, the picture presented by this material would indicate to the observer, taking everything else into account, that there was a real possibility that Lady Cosgrove was biased.

5. There is no doubt that some of the articles that have been published in Justice, including messages by the Association's President, Judge Hadassa Ben-Itto, are fervently pro-Israeli. Inevitably, given the conflicts that have been taking place in the region, such a partisan stance carries with it sentiments that are hostile to those that people in Israel feel are ranged against them. It is not difficult to find publicity being given in "Justice" to views that are markedly antipathetic to the Palestinian Liberation Organisation with whom the appellant, who is an ethnic Palestinian, has connections. Had there been anything to indicate that Lady Cosgrove had by word or deed associated herself with these views so as to indicate that they were her views too, I would have had no difficulty in concluding that the test of apparent bias set out in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, para 103 was satisfied.

6. But the fair-minded and informed observer would, as I have said, put the material published in "Justice" on which Mr Bovey relied into its context. The first point is that the material on which he relied was a one-sided selection of what has been published. It is incomplete. If one is looking for a balanced and fair-minded presentation of what is available to the reader one would need to see the other side. It is clear from the contents listed at the front of each edition that some of the material that was published was of genuine interest to a lawyer. From to time, for example, articles were published about judgments issued by the courts in Israel including its Supreme Court. Other aspects of Jewish and Israeli law were also sometimes dealt with. This is important, as it provides an explanation of why, leaving aside all the highly charged political material, the publication might be thought to of interest to a Jewish lawyer living outside Israel. It is not only Jewish lawyers in this country who value information about judgments issued by the Supreme Court. But Jewish lawyers in particular might be thought to have a particular interest in keeping themselves informed about its activities.

7. The second point relates to the nature of the Jewish diaspora. There is an affinity between Jewish people everywhere that expresses itself in participation in bodies such as the Association's UK and Scottish Branches out of sympathy with Jews who live in Israel. But, as Judge Ben-Itto herself recognised in one of her policy statements, it is well known that not all Jews agree with the views as to how Israel's problems should be solved that have been expressed by the Israel government. The editorial board of "Justice" is located in Israel and the journal itself in published in Tel Aviv. Its members live every day in the cauldron of public opinion which has been generated by the circumstances to which people on all sides are exposed in that country. A Jewish reader living abroad would be expected to recognise the partisan nature of some of the material that appeared in it. Statements by Ariel Sharon, for example, contain exactly the kind of sentiments about the problems that Israel faces that he would have been expected to express in his capacity as Prime Minister. The greater the geographic separation, the more likely it is that the educated reader will feel detached from the pressures that give rise to them. No fair-minded person would think that a judge who regularly takes one of the leading national newspapers circulating in this country was, simply by doing so, associating himself or herself with everything that was printed in it. In principle, this case is no different.

8. The Extra Division referred in its discussion section of its opinion to the fact that the judge had taken the judicial oath: [2007] CSIH 5; 2007 SC 303, para 44. This is, of course, a factor to be taken into

account along with all the other facts. In this case, however, where the issue is whether a judge having access to this material is to be associated with its contents, I would attach more weight to the other factor that the Division mentioned. The judge can be assumed, by virtue of the office for which she has been selected, to be intelligent and well able to form her own views about anything that she reads. She can be assumed to be capable of detaching her own mind from things that they contain which she does not agree with. This is why the complete absence of anything said or done by her to associate herself with the published material that the appellant complains of is so crucial to what the observer would make of this case. In the absence of anything of that kind there is no basis on which the observer would conclude that there was a reasonable possibility that the judge was biased.

9. For these reasons, and for those given by my noble and learned friends Lord Rodger of Earlsferry and Lord Mance with which I agree, I would dismiss the appeal and affirm the Extra Division's interlocutors.

LORD RODGER OF EARLSFERRY

My Lords,

10. I have had the advantage of considering the speeches of my noble and learned friends, Lord Hope of Craighead and Lord Mance, in draft. I agree with them. I add some remarks of my own, only because the challenge in the case is to the integrity of the justice system in Scotland. This is a matter of general concern, as was indeed indicated by the presence at the hearing of Mr Moynihan QC representing the Lord Advocate, not only as a Scottish minister with responsibility for the courts but also acting in the public interest.

11. The appellant is a Palestinian by birth. She avers that her family were supporters of the Palestinian Liberation Organisation. More particularly, she was actively involved in the preparation of a lawsuit brought in Belgium, alleging that the then Prime Minister of Israel, Mr Sharon, was personally responsible for the massacre in the Sabra and Shatila camps in Lebanon in September 1982. She avers that, in consequence, she is at risk of harm not only from Israeli agents, but also from Lebanese agents and, because of her links with the Palestinian Liberation Organisation, from Syrian agents. On that basis she claimed

asylum in this country, but her application was refused by the Home Secretary and, on appeal, by an adjudicator. The appellant was refused leave to appeal by the Immigration Appeal Tribunal. She then lodged a petition in the Court of Session seeking a review of that refusal under section 101 of the Nationality, Immigration and Asylum Act 2002. The petition was considered by Lady Cosgrove who dismissed it.

12. The appellant makes no criticism of Lady Cosgrove's reasons for dismissing her petition. Instead, in a petition to the nobile officium, she craved the court to set aside Lady Cosgrove's interlocutor on the ground that it was vitiated for "apparent bias and want of objective impartiality".

13. The appellant does not suggest that the judge could not be impartial merely because she is Jewish. Rather, the contention is that, by virtue of her membership of the International Association of Jewish Lawyers and Jurists, Lady Cosgrove gave the appearance of being the kind of supporter of Israel who could not be expected to take an impartial view of a petition for review concerning a claim for asylum based on the petitioner's support for the Palestinian Liberation Organisation and involvement in the legal proceedings against Mr Sharon.

14. The legal test to be applied in cases of apparent bias is to be found in the speech of my noble and learned friend, Lord Hope of Craighead, in *Porter v Magill* [2002] 2 AC 357, 494H:

> "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."

It is equally well established that the fair-minded observer is not unduly sensitive or suspicious: *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53, per Kirby J.

15. If all that the appellant could have pointed to was the aims of the Association, her petition could not possibly have got off the ground, since they are unexceptionable. The Association's website at the relevant period explained that:

> "The Association strives to promote Human Rights goals such as the prevention of war crimes, the punishment of war criminals, the prohibition of weapons of mass destruction, and international co-operation based on the rule of law and the fair implementation of international covenants and conventions.
>
> The Association particularly addresses issues that are on the agenda of the Jewish people everywhere, and is particularly committed to combat racism, xenophobia, anti-semitism and denial of the Holocaust."

The same web page records that among the founders of the Association were a justice of the Supreme Court of Israel and Justice Goldberg of the United States Supreme Court. Lord Woolf is an Honorary Deputy President of the Association.

16. Counsel for the appellant submitted that it was necessary to look below the surface, however. He pointed to various articles in the Association's journal, "Justice", referred to by Lord Mance. These included criticisms of the Belgian case against Mr Sharon. Understandably, counsel drew particular attention to the messages and addresses of the President of the Association, Judge Hadassa Ben-Itto. As a member of the Association, Lady Cosgrove would have received its journal and, counsel argued, there was nothing to show that she had ever dissociated herself from the views expressed by the President. So noscitur a sociis: the observer would identify Lady Cosgrove's views from the company that she kept in an association whose President expressed extreme pro-Israeli sentiments.

17. In particular, at a conference held by the Association in December 2001, about three months after 9/11, the President said:

> "As a matter of personal choice I define myself as a Jew, a Zionist, an Israeli and a member of the legal community, in that order."

This appeared in the Winter 2001 issue of "Justice". In my view, a judge who defined herself in that way would indeed be unable to deal with the appellant's petition: a fair-minded and informed observer would readily

conclude that there was more than a real possibility that such a judge was biased. The Advocate General accepted that.

18. But it is not suggested that Lady Cosgrove has ever said anything remotely comparable. Nor is it suggested that she has ever expressed support for the more extreme views expressed by the President of the Association or in any of the articles in "Justice". In that situation there is, as a matter of general principle, no basis for fixing her with the views of the President or other contributors. She is, quite simply, an intelligent and educated individual whose reaction to the articles – supposing that she had read them – is quite unknown.

19. Moreover, those who were conducting the affairs of the Association during the relevant period were well aware that, in actual fact, members of the Association held widely differing views. The journal specifically says that the views of individuals and organisations published in it are their own and that inclusion in it does not necessarily imply endorsement by the Association. Even when referring to the issues confronting Israel, in her address to the international conference in December 2001, the President acknowledged that "We know for a fact that the members of this Association are as divided on these issues as are Israelis and Jews everywhere."

20. I am accordingly satisfied that the fair-minded and informed observer would not impute to Lady Cosgrove the published views of other members, by reason only of her membership of the Association.

21. Mr Bovey QC had a second line of attack. He suggested that the observer would think that, by reading "Justice", Lady Cosgrove might well have absorbed the more extreme views expressed in its pages by a process of osmosis. So there would be a real possibility that, as a result, she would be biased in dealing with the appellant's petition.

22. I accept that much of the material from the journal, which the House was shown, could be described as highly partisan. But the selection was, naturally, skewed in the direction of contributions of that character. Reading this selection all at once is an artificial exercise. The lists of contents of the issues show that, as would be expected in a journal of an organisation with the aims set out above, many articles are of quite a different character. Even the issue for Winter 2001, containing the text of the polemical address by the President in December 2001 and

other partisan material, included a scholarly article on "Integrity as a Value" in Jewish Law and a factual account of a judgment of the Supreme Court of Israel about the broadcasting of a particular programme on the Sabbath. So, for purposes of considering their impact, the selected articles have to be seen as simply part of the contents of the relevant issues. Moreover, the journal appears quarterly: anyone reading an article would be unlikely to retain any clear recollection of a similar article in an earlier issue. This would greatly reduce the chances of the articles having a cumulative effect on the reader.

23. So the hypothetical observer would have to consider whether there was a real risk that these articles, read at perhaps quarterly intervals, over a period of years would have so affected Lady Cosgrove as to make it impossible for her to judge the petition impartially. In assessing the position, the observer would take into account the fact that Lady Cosgrove was a professional judge. Even lay people acting as jurors are expected to be able to put aside any prejudices they may have. Judges have the advantage of years of relevant training and experience. Like jurors, they swear an oath to decide impartially. While these factors do not, of course, guarantee impartiality, they are undoubtedly relevant when considering whether there is a real possibility that the decision of a professional judge was biased. Taking all these matters into account, I am satisfied that the fair-minded observer would not consider that there had been any real possibility of bias in Lady Cosgrove's case.

24. In my view the decision of the Extra Division was correct and the appeal should be dismissed.

LORD WALKER OF GESTINGTHORPE

My Lords,

25. I agree that this appeal should be dismissed, for reasons set out in the opinions of all your Lordships. But I have reached that conclusion rather less readily, I think, than some of your Lordships.

26. Those who take on the responsibility of judicial office have to exercise a measure of restraint in associating themselves publicly with controversial causes. I agree with my noble and learned friend Lord

Mance that a judge who expressed or endorsed the views put forward in December 2001 by an Israeli judge, speaking publicly and formally as President of the International Association of Jewish Lawyers and Jurists ("IAJLJ"), would not be a fit person to adjudicate on a case to which Ms Helow was a party, and to which the Sabra and Shatila massacres were relevant.

27. It is said that there is insufficient evidence that Lady Cosgrove did endorse those views. I accept that, and for that reason I would dismiss this appeal. But I do not accept that membership of an association such as the IAJLJ can be equated with subscribing to a daily or weekly newspaper, or that there is any room for conjecture that Lady Cosgrove may simply have omitted to cancel her annual subscription to the IAJLJ. She had been a high-profile member of the Scottish Branch at its inaugural meeting. Moreover the fair-minded and informed observer would be tending towards complacency if he treated the fact of having taken the judicial oath as a panacea.

LORD CULLEN OF WHITEKIRK

My Lords,

28. The primary argument for the appellant was that the informed and fair-minded observer, having considered the relevant facts, would conclude that, by reason of her being a member of The International Association of Jewish Lawyers and Jurists, there was a real possibility of bias on the part of Lady Cosgrove. It was asserted the Association had, or had acquired, a "strong commitment to causes and beliefs at odds with the causes and beliefs espoused by the appellant". That assertion gained no support from the stated aims and objects of the Association, as published on its website. However, the appellant's counsel relied on the views expressed in articles and pronouncements by the Association's representatives and officials which appeared in its quarterly journals. I am indebted to the noble and learned Lord Mance for his survey of them. While these views were without doubt strongly partisan in tone, they were drawn from a small selection of the total material appearing in the journal over a period of years. An informed and fair-mined observer who took account of what appeared in the issues of the journal would no doubt take an overall view and not simply concentrate on parts. Examinations of the lists of contents shows that the journals also included articles on matters of legal interest, the type of

articles which one would expect to find in a periodical for lawyers and judges.

29. Critical to the appellant's argument was the assumption that by reason of her membership Lady Cosgrove shared the views expressed in these articles and pronouncements. However, beyond the bare facts that she was a member throughout the relevant period and had helped to found the Scottish branch of the Association in 1997, there is nothing to indicate what part, if any, she had taken in the activities of Association. The informed and fair-minded observer would proceed on an assumption only if on an objective basis. While he or she would no doubt assume that as a member of the Association Lady Cosgrove regularly received copies of the journal, there is nothing to suggest that she endorsed or was interested in, let alone read, the articles and pronouncements founded on by the appellant's counsel, as opposed to articles on matters of legal interest. Furthermore, as the President of the Association recognised, it could not be assumed that the members of the Association, who lived in a wide range of countries, were all of one mind in regard to the controversies in which Israel was embroiled. Thus there was not, in my opinion, an objective basis for the assumption on which the appellant's argument depended.

30. The alternative argument for the appellant was that there was a real possibility of bias by reason of Lady Cosgrove having been influenced by the views expressed in the articles and pronouncements founded on by the appellant's counsel. This argument runs into the same difficulty in the lack of an objective basis for the assumption that Lady Cosgrove would have read and been receptive to these views. That assumption also involves the inherent unlikelihood that Lady Cosgrove, despite her training and experience as a judge, would not have been able to put aside what she had read.

31. For these reasons and those given by my noble and learned friends, Lord Hope of Craighead, Lord Rodger of Earlsferry and Lord Mance, with which I agree, I would dismiss the appeal and affirm the Extra Division's interlocutors.

LORD MANCE

My Lords,

32. The appellant, Miss Fatima Helow, appeals against an Interlocutor of 16 January 2007 whereby the Extra Division of the Inner House of the Court of Session refused the prayer in her petition seeking to hold vitiated for apparent bias and want of objective impartiality an interlocutor of the Lord Ordinary, Lady Cosgrove, of 24 November 2004 which had refused her petition under section 101(2) of the Nationality, Immigration and Asylum Act 2002.

33. The appellant is a Palestinian who arrived in the United Kingdom in August 2001 and claimed asylum here on 4 September 2001. After refusal of that claim, notice of decision to remove her to Lebanon was given on 16 December 2003. Her appeal against that notice was dismissed by the Adjudicator, Mr K R Forbes, on 27 May 2004. She sought permission to appeal against such dismissal by lengthy grounds of appeal, supplemented by letters dated 11 June and 22 July 2004. Permission was refused by the Vice-President, Mr Allan Mackey, of the Immigration Appeal Tribunal ("IAT") on 29 September 2004 with short nine-line reasons. The appellant filed a further lengthy grounds (covering 25 pages) seeking review of that refusal by the Court of Session. The matter was in the ordinary course allocated to Lady Cosgrove to deal with on the papers. After seeking and obtaining from the parties a copy of the letter of 11 June 2004, she affirmed the decision to refuse permission to appeal in reasons extending to just over four pages.

34. The appellant's case, in seeking asylum and resisting removal, was and is that she and her family were involved politically with the PLO, that she was in September 1982 living with other family members in the Sabra/Shatila refugee camp when it was attacked, that numbers of her relatives were killed in the attack, that she had maintained publicly that Mr Ariel Sharon, later Prime Minister of Israel, was implicated in the massacre through the Israeli Defence Force, that in August 2001 she had assisted Belgian lawyers investigating the massacre and was involved in a criminal complaint brought in Belgium against Mr Sharon by survivors, that she was regarded as holding political opinions which were anti-Israeli, anti-Lebanese and anti-Syrian, and would be risk from Israeli, Lebanese and Syrian authorities as well as anti-Arafat and pro-

Syrian and pro-Lebanese factions, were she to be required to return to Lebanon.

35. The Adjudicator did not accept the credibility of the appellant's account in a number of respects. One related to her late statement that she had taken part in a television programme with one Elie Hobeika or Hubeika, leader of the Lebanese Phalange special security troops allegedly involved in the massacre and later killed in a bomb blast on 24 January 2002, whose denial of involvement in the massacre she said that she had challenged in the interview. The Adjudicator regarded this as a late assertion regarding a "crucial" connection, which would if true have been mentioned earlier, and did not believe that there had been any such television appearance, although adding that "Even if she had appeared her concerns were directed solely at Hobeika. She does not claim that she put forward her own views or widened her list of targets". Another point on credibility made by the Adjudicator related to a lack of contemporary medical evidence to show that she was suffering from or being treated for post-traumatic stress syndrome at the time of the hearing as she had maintained.

36. The letter dated 22 July 2004 with which the appellant supplemented her application to the IAT contained material, including a videotape and transcript, confirming that she had indeed taken part as she had stated in a television interview broadcast on 8 August 2001, and a statement from her explaining why the video had not previously been produced and commenting on the transcript. This statement explained that the transcript showed not only that she was present in the Shatila camp in 1982 and outspoken in blaming both the Lebanese and the Israelis for the massacre, but also that Mr Hobeika has been prepared to give evidence to convict Israelis in relation to the massacre, and repeated the suspicion which she had uttered before the Adjudicator that Mr Hobeika had been killed by Israelis for this reason. The statement also took issue with the Adjudicator's statements that she had directed her claims solely at Mr Hobeika, and had not widened her targets. On the contrary, it maintained, she had in the broadcast held Israelis assisted by Lebanese soldiers to be responsible for the massacre. The letter dated 22 July 2004 also contained a doctor's letter dated 19 August 2002 regarding her medical condition and an explanation as to why it had not previously been produced.

37. The matters mentioned in the preceding three paragraphs were referred to in the grounds put before Lady Cosgrove. It was submitted that, since the IAT had only mentioned the letter of 11 June 2004, it

cannot have considered the further evidence, lodged with the letter of 22 July 2004, confirming the appellant's account regarding the television interview, and cannot have conducted the requisite balancing exercise in deciding whether or not to admit the fresh evidence. The IAT's decision was further challenged on the grounds of inadequate reasoning, and error of law in failing to apply the proper test of a "real prospect of success". Lady Cosgrove analysed the new evidence, and considered that the material regarding the television broadcast gave no reason to think that the Adjudicator's conclusions regarding the safety of return to Lebanon were not sustainable generally or that the petitioner was suffering from a medical condition at the time of the hearing before the Adjudicator. In her decision dated 24 November 2004, she found herself quite unable to hold that the IAT had erred in the exercise of its discretion or in law in refusing to give permission to appeal and considered that its reasons were sufficient and adequate. No criticism is made of and no point is made on Lady Cosgrove's reasoning or decision as such.

38. The submission regarding apparent bias and want of objective impartiality on the part of Lady Cosgrove arises from research on the web undertaken by the appellant's legal advisers after Lady Cosgrove's refusal of the petition under section 101(2). This revealed on 30 November 2004 that Lady Cosgrove is a member of The International Association of Jewish Lawyers and Jurists ("the Association"), and later that she as a member of the Outer House together with Lord Caplan of the Inner House was a founder member of a Scottish branch of the Association, welcoming participants to an inaugural meeting in Parliament House, the Court of Session's home, on 30 November 1997. The fact that Lady Cosgrove is Jewish is of itself, rightly, not relied upon. But it is submitted that the Association "has a strong commitment to causes and beliefs at odds with the causes and beliefs espoused by the appellant", this on the basis that the Association is "anti-Palestinian …., anti-Moslem …., anti-pathetic to the PLO …., supportive of Israel ..., supportive of Ariel Sharon ..., critical of the legal action against Mr Sharon …., a campaigning organisation …., [using] immoderate expression …., one-sided …., and recruiting members as activists ….". These epithets are alleged to be justified by the contents of various policy statements, presidential messages and contributors' articles published or reproduced in the Association's quarterly publication "Justice" in years ranging from 1994 to 2004.

39. The basic legal test applicable is not in issue. The question is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there existed a real possibility that

the judge was biased, by reason in this case of her membership of the Association: *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357. The question is one of law, to be answered in the light of the relevant facts, which may include a statement from the judge as to what he or she knew at the time, although the court is not necessarily bound to accept any such statement at face value, there can be no question of cross-examining the judge on it, and no attention will be paid to any statement by the judge as to the impact of any knowledge on his or her mind: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, para. 19 per Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-C. The fair minded and informed observer is "neither complacent nor unduly sensitive or suspicious", to adopt Kirby J's neat phrase in *Johnson v Johnson* (2000) 201 CLR 488, para 53, which was approved by my noble and learned friends Lord Hope of Craighead and Baroness Hale of Richmond in *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2; 2006 SC (HL) 71, paras 17 and 39.

40. The appellant also invokes or seeks assistance from the principle of automatic disqualification applied in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119. It was there held that a judge was automatically disqualified not merely if he or she had a pecuniary interest in the outcome of the case, but also if his or her decision would lead to the promotion of a cause in which he or she was involved together with one of the parties. In that case the judge's involvement was as the chairman and a director of Amnesty International Charity Ltd, a charity wholly controlled by Amnesty International which had intervened in the case as a party to support the prosecution's application for the extradition of Senator Pinochet to Spain. However, in my opinion the present case is a long way away from *Ex p Pinochet*, since the Association was not a party to or in any way concerned with (or so far as appears even aware of) the proceedings involving Miss Helow. Even where proceedings are brought by, for example, a bar association, mere membership of the association, as opposed to active involvement in its affairs or in the institution of the proceedings, may not bring the principle in *Ex p Pinochet* into play: *Meerabux v Attorney General of Belize* [2005] UKPC 12; [2005] 2 AC 513, esp at para 24 per Lord Hope of Craighead. I consider, therefore, that it is the principles mentioned in the previous paragraph that govern the present appeal.

41. There has, in this case, been no statement obtained, or so far as appears sought, from the judge. The petition seeking to vitiate Lady Cosgrove's decision of 24 November 2004 is based exclusively on material taken from the internet and from the Association's quarterly

publication "Justice". No material or information has been put forward to show or suggest that Lady Cosgrove had any involvement with the Association other than her membership and her welcoming appearance at the opening of its Scottish branch in 1997. A fair-minded observer would assume that, had she been an active member, some trace of this would have appeared.

42. The basis upon which it is suggested that a fair-minded observer would conclude that Lady Cosgrove's membership of the Association gave rise to a real possibility of bias has fluctuated between two poles: one, that the fair-minded observer would think that the views put forward by the Association represented views which she shared as a member, the other, that, if the fair-minded observer did distinguish between the Association and its members, he or she would think that Lady Cosgrove may have been "influenced" by the views expressed by the Association of which she was a member.

43. If the epithets quoted in para 38 above represented an accurate characterisation of the Association and its aims, then the basis on which bias was alleged would not much matter. It would not be appropriate for a judge to join a one-sided, anti-Palestinian and anti-Moslem Jewish campaigning organisation using immoderate expression, and still less so for such a judge to decide a case involving an activist Palestinian Muslim who had engaged in criticism and pursuit of alleged illegal conduct by Israelis. The express aims and objects of the Association, as published on the Association's website, are however very different from those suggested by the stated epithets. They appear under the heading "Pursuing human rights" as follows:

> "The International Association of Jewish Lawyers and Jurists strives to advance human rights everywhere, including the prevention of war crimes, the punishment of war criminals, the prohibition of weapons of mass destruction, and international co-operation based on the rule of law and the fair implementation of international covenants and conventions.
>
> The Association is especially committed to issues that are on the agenda of the Jewish people, and works to combat racism, xenophobia, anti-Semitism, Holocaust denial and negation of the State of Israel.

> IAJLJ was founded in 1969. Among its founders were Supreme Court Justices Haim Cohn of Israel, Arthur Goldberg of the United States and Nobel Prize laureate René Cassin of France. Our membership comprises lawyers, judges, judicial officers and academic jurists in more than 50 countries who are active locally and internationally as the need arises. Membership is open to lawyers and jurists of all creeds who share our aims.
>
> The Association has Category II Status as a non-governmental organization (NGO) at the United Nations, enabling it to participate in the deliberations of various UN bodies. In this capacity, the representative of the Association has been actively involved in the work of the Commission on Human Rights in Geneva and of related bodies, and will now be engaged with the work of the United Nations Human Rights Council, which has replaced the Commission on Human Rights.
>
> The Association also publishes **Justice** …. which examines a variety of relevant issues and current topics and is mailed to thousands of lawyers and jurists throughout the world..."

44. Membership was invited on the website in the following terms:

> "Membership in the International Association of Jewish Lawyers and Jurists is by direct individual membership. Lawyers and Jurists who share the aims of the Association as described on this site, are invited to join the IAJLJ by filling out the enclosed membership form and mailing it to us together with the annual membership fee for the current year."

The relevant form contained this declaration:

> "I hereby apply to become a member of The International Association of Jewish Lawyers and Jurists. I declare that I approve the aims and objects of the Association and

undertake to comply with the Articles and Rules of the Association."

45. Clearly, there is nothing objectionable about the aims and objects of the Association as stated on its website and to which its members had expressly to subscribe. The appellant's case is that the Association had in practice acquired a different and unbalanced character as shown, it is said, by the material exhibited and relied upon in support of the petition. I would observe at once, however, that the material exhibited and relied upon is selective rather than representative. It consists of those statements and articles which in the appellant's or her advisers' submission advance the case made regarding the character and purposes of the Association. Accordingly, it is necessary to be cautious about drawing general conclusions from it about the Association's character or about the significance of such material as regards any individual member. It is clear from those indexes to issues of "Justice" which have been exhibited that there are many other articles not exhibited on subjects likely to have been of legal interest and of a character which any legal journal would be expected to contain. The second point is that any approach which assumes that a member of the Association would have read all or even most of the selected material is highly suspect, particularly when one is without any overview of the other material not selected. It is common experience for a member of an organisation receiving its regular publication to do little more than glance at its contents table or page, reading only the occasional item appearing to be of particular interest.

46. It is, nevertheless, necessary to look at the material which has been selected and exhibited. This falls into three main categories: speeches made and reproduced or articles written by third party contributors; "policy statements" by the Association's United Nations' representative (in most cases Mr D Lack); and speeches or messages by the Association's President (in most cases Judge Hadassa Ben-Itto, an Israeli judge). Starting with speeches and articles by third parties, each contents page of "Justice" carries the unsurprising disclaimer "Views of individuals and organisations published in JUSTICE are their own, and inclusion in this publication does not necessarily imply endorsement by the Association". Individual phrases from speeches and articles must be read in this light. Apart from this, the presentations and articles published in "Justice" do not anyway appear to go generally beyond legitimate expression of reasoned views; and they certainly do not appear objectionable in a way which justifies any criticism of the Association for publishing them or justifies any conclusion that the Association must implicitly have agreed with or endorsed them. An

example is the article cited in support of the proposition that the Association is anti-Palestinian: "The Current Conflict – Legal Aspects", by Colonel Daniel Reisner, Head of the International Law Department ("ILD") of the Israeli army, published in edition No 30 of "Justice". The article was the text of a presentation made by Colonel Reisner to an international conference on *Standing by Israel in Time of Emergency* organised by the Association and the Jewish Agency in Jerusalem in December 2001. In it he said at one point that "The Palestinians believe that while we are constrained by rules of morality and legality, they are not". Colonel Reisner went on to say that "As a lawyer, it is my job to make sure that the Army will fight lawfully and morally", and he also welcomed the supervision of the Israeli Supreme Court. Although the first passage is a generalisation which, taken literally, must be far too broad, no other passage is suggested to be objectionable and the article appears generally to be a useful account of the ILD's activities and approach.

47. The "Winter 2002" edition of "Justice" (No 30, evidently published early in 2002) reproduces the text of five other presentations at the December 2001 conference, on three of which reliance is placed in various respects, one entitled "Anti-Israel Bias in the International Arena: Politicisation of International Criminal Law" by Alan Baker, Legal Adviser of Israel's Foreign Ministry, another "Geneva: Israel being Singled Out and Discriminated Against, Fighting Back, with Few but very Important Allies" by Israel's Ambassador to the United Nations, Mr Yaakov Levy. The senior Israeli officials who gave these presentations clearly felt strongly that Israel was receiving a raw deal in international fora, particularly the United Nations, but such expressions of view, backed by specific instances, are legitimate. They would not justify a description of such officials as "anti-Moslem", a phrase which suggests general prejudice against anything Muslim. Still less can they support a case that the Association is anti-Moslem.

48. Reliance is also placed on presentations and articles by third parties which contain references to Mr Sharon and to the Belgian legal proceedings against him. A warm greeting by Mr Sharon to the December 2001 conference was reproduced in edition No 30 of "Justice" and is relied upon for the assertion that the Association is supportive of Mr Sharon. But this greeting was made in the context of the December 2001 international conference in Jerusalem at a time when Mr Sharon was Prime Minister of Israel and is on any view unsurprising in such a context. Criticisms directed - by Mr Alan Baker in the presentation already mentioned and by others in the later Spring 2003 and Summer 2004 editions of "Justice" - at the Belgian prosecution

instituted against Mr Sharon as a politically motivated abuse are covered by the disclaimer and are again in terms which, however forceful, remain within the bounds of legitimate expression of view. The material exhibited from the Spring 2003 edition includes well-informed articles by an academic and two Belgian lawyers. They went to the legal aspects of what Mr Alan Baker had in his article described as the "extremely wide and liberal system of universal jurisdiction" in relation to international crimes which the Belgian legislator had, as Mr Baker put it, introduced as "a well intentioned if perhaps a somewhat naïve action".

49. The Spring 2003 edition also included a powerfully expressed article, to which considerable attention appears to have been given below, by Professor Yoav Gelber, Head of the School of History at Haifa University. In it he described the background to the Sabra/Shatila massacre and his personal frustration at the Israeli government's initial refusal to investigate the massacre and said that "The evasive answers given by Begin and his ministers to the media and the public made me feel cheated". He went on to record that he had as a result resigned his membership of another commission of inquiry, that within a week the government had given in to pressure to appoint a judicially chaired commission to investigate the massacre, and that its report, although not finding any office holder directly responsible, criticised several including Mr Begin, and led to Mr Sharon being required to resign from his post. Finally, he described how the Phalange had come to terms with the Syrians and how Mr Hobeika had served them to his last day. He concluded that "The lawsuit submitted in Belgium is no more than a propagandist attempt – using a very peculiar situation that Belgian law has created – to blame Israel for a domestic Lebanese act of revenge and to remind a forgetful world of [the Palestinian refugees'] continued existence in the their camps". As is evident, this is an article which was by no means one-sided in its attitude to Israel's past conduct. In the Summer 2004 edition Israel's Minister of Justice described how the prosecution of Mr Sharon had finally ended when Belgian law was changed at the instance of the United States (faced with suits against President Bush, Secretary of State Powell and others). Forcefully expressed though both these contributions once again are, I find it difficult to see what relevance or influence a fair-minded observer would think they had or might have for or on a professional judge in the United Kingdom, charged with the resolution of an issue such as that put before Lady Cosgrove, even if she happened to read them. It would be a very poor judge whose decision on the question whether the IAT erred in law in refusing permission to appeal was affected by descriptions by Israeli contributors of the Belgian proceedings as propagandist or

political, and this is so even if she happened herself to share the same view.

50. The President's speeches or messages and the policy statements give rise to different considerations, in so far as they are not subject to any disclaimer and came from the Association's leading figure or were made on the Association's behalf. It may be true, as the Inner House observed, that one underlying theme is a demand for fair treatment for Israel, not so much on the basis that Israel had never done any wrong, as on the basis that Israel was being made the only target of blame for any wrong. But it is also true that the speeches, messages and statements take a very strong, verging on the strident, stance, pro-Israeli and highly critical of the Palestinian Authority and PLO, they are not confined to legal issues and they include what may be described as political or campaigning material of a nature and in terms unfamiliar in a legal journal. The majority of the policy statements on the Association's website relate to the Association's activity as a non-governmental organisation with Category II Status at the United Nations enabling it to participate in the deliberations of various United Nations' bodies, particularly the Commission on Human Rights in Geneva. Thus, from 2000 through to 2004, the Association's representative with the Commission issued a number of policy statements very critical of the Arab League, Islamic extremist groups and the Palestinian Authority for lies about Israel, for denial of Israel's right of existence, for racist or anti-Semitic statements towards Israel, for rejection of Israel's offer to accept virtually all their reasonable demands, and for the support of terror or a terror campaign against Israel. (Two such policy statements were made jointly with the World Jewish Congress, the banner of which organisation's website evidently bears the slogan "All Jews are responsible for one another". However, to seek to deduce from this association by the Association with the World Jewish Congress some conclusion relevant to Lady Cosgrove's suitability to adjudicate upon Miss Helow's application seems to me to go on any view too far into remote considerations.)

51. The President in statements in "Justice" and elsewhere extended her early criticism of Moslem fundamentalism in September 1994 to later, more general criticism of the Palestinian leadership. She said in Spring 2001 that such leadership had done nothing to curb and had even promoted incitement against Israel, in Autumn 2001 that it had chosen a path of violence, and in Spring 2004 that she was "sometimes told not to blame Moslems, only the radical fundamentalist elements", but that "at the expense of not being politically correct, the truth must be told. Today, it is not only radical groups like Hamas which are using the

Protocols [the alleged 'Protocols of the Elders of Zion'] as a means to de-legitimize both the Jews and the Jewish State". Her address to the December 2001 conference (reproduced in edition No 30 of "Justice") was in even less commonplace terms and represents perhaps the highpoint of the appellant's case. She opened in this unusual way: "Let me be very personal. Let me speak not as a public figure, not as President of this Association, but as a person who constantly needs to define her own priorities, her own commitments. As a matter of personal choice I define myself as a Jew, a Zionist, an Israeli and a member of the legal community, in that order". Later she spoke of the welcome given by Jews and Israelis to the United Nations as the focal point for enforcing human rights, but of the bitter disillusion which had followed, because "We are still being discriminated against both as Jews and as the Jewish State". She criticised the Belgian prosecution of Mr Sharon, saying "…absent on the Belgian dock are those who actually committed the murders in Sabra and Shatila. The only one they propose to place in the dock is the Israeli Prime Minister. One group of Arabs killed another group of Arabs in a most brutal massacre, and I did not hear of the Lebanese government setting up a public committee of inquiry, as did Israel, or being censured in the United Nations, let alone being accused in a criminal court".

52. President Hadassa Ben-Itto ended her address to the December 2001 conference by recognising the existence of differences of view, but with a general call for solidarity, for support for Israel and the United States in a fight against terror and for support for the Association and the Israeli security forces, in these terms:

> "We have carefully organized this Jerusalem conference to supply you with relevant information, to expose you to the views of experts on important relevant subjects. Each one must decide for himself how to use this information; you will each define to yourself the extent of your commitment. Each one will decide how to deal with the enormous dilemmas that face us, and on which we must take a stand if we wish to sound credible.
>
> You may say: this conference is about solidarity, about standing together, and of course it is. By coming here you have made a statement: you have said that terror will not bring us down, you have said that Israel is not alone.

So, why then am I burdening you with all these controversial issues? Why do I speak on this occasion of internal conflicts that are part of the political agenda in Israel? I do so because if you wish to do more than make a statement, if you are ready to be our emissaries abroad, if you are willing to confront the elements that are constantly at work creating a hostile world opinion against us, often using not only distorted facts but also sophisticated arguments, you must be well armed, not only with facts but also with ready answers to questions aired daily in the international media.

I hope I have succeeded in posing this partial list of questions as objectively as possible. I myself do not have a ready answer to all of them, so, obviously, I have no answers for you. We know for a fact that the members of this Association are as divided on these issues as are Israelis and Jews everywhere. Our contribution is therefore limited to offering you as many facts as possible. The speakers you will hear were not chosen for their views but rather for their expertise. We shall continue to be as informative as possible both in our international meetings, through our publication *JUSTICE*, and through our site on the Internet.

We urge those who have not yet formally joined our Association, to do so. When we speak out in public, including at the UN bodies, we need to speak in a strong voice representing large numbers of Jewish lawyers. By coming here to stand with us at this Jerusalem conference, I hope you are expressing not only your solidarity with Israel, but also your support for the aims of our Association, what we stand for and what we do.

Bless you all for being here today. In these difficult times having convened in Jerusalem in such impressive numbers is no mean achievement in itself.

May I conclude by sending a message of support to the Israeli security forces, both army and police, who are out there defending us daily, at great risk. We send our condolences to the bereaved families who lost their beloved ones in heinous acts of terror, and best wishes for a speedy recovery to all those wounded in these attacks.

> We also send our condolences to the American people who have suffered such a tremendous loss in a barbaric attack on September 11. We who have been exposed to ongoing terror for so long, feel their anguish and share their anger. We congratulate the American President and his government for their firm commitment to fight terror all the way to victory, and we wish them and all those who support them success in this unique endeavour to save civilization."

53. In my opinion a judge who had expressed, or was President of an Association which had expressed, views of the nature summarised and set out above could not sit on an application such as that which Lady Cosgrove determined. A fair-minded observer would regard such a judge as too closely and overtly committed to supporting the cause of Israel generally and of Mr Sharon in relation to the Sabra/Shatila massacre. It would not be appropriate for her to decide a case in which the appellant was relying on her past conduct and condemnation regarding Israel's and Mr Sharon's involvement in the Sabra/Shatila massacre as a main basis for her fear of reprisals if she was returned to Lebanon. But the President - when she said that she was speaking personally, when she invited solidarity and support and when she recognised the existence of internal conflicts and divisions of opinion within Israel – was, correctly, acknowledging that she could not either determine or reflect the views of any individual member. There is nothing save membership of the Association to link Lady Cosgrove and the President. There is no suggestion that Lady Cosgrove was in Jerusalem in December 2001 to hear the President's greeting. There is no question of Lady Cosgrove having committed herself expressly to any such views as the President or any other spokesperson for the Association expressed. There is nothing to show that she was even aware that they were being expressed. Lady Cosgrove is in these respects, and apart from her membership, in no different position to any judge, who may or may not have private views about issues which come before the court, but who is expected to put them aside and decide the case according to the law.

54. Would Lady Cosgrove by virtue of her membership alone be taken to subscribe to or approve all that the Association's President or spokesperson may publish or communicate to organs such as the United Nations Human Rights Commission? In my opinion, the answer is a clear negative. Membership of such an association - for a subscription most unlikely to be regarded as in any way burdensome - connotes no form of approval or endorsement of that which is said or done by the

association's representatives or officers. In the case of Lady Cosgrove, membership may connote an interest in the content of legal articles none of which may be included in the material exhibited. Or it may be or have become effectively formal - connoting little if anything more than a failure to review and cancel the annual subscription or a general willingness to subscribe to an organisation believed to stand simply for the unobjectionable aims and objects to which every member had to subscribe.

55. It is no doubt possible to conceive of circumstances involving words or conduct so extreme that members might be expected to become aware of them and disassociate themselves by resignation if they did not approve or wish to be thought to approve of them. But the present material falls far short of involving such circumstances. Lord Nimmo Smith giving the opinion of the Inner House 2007 SC 303, para 44 said: "we do not accept that it could reasonably be assumed by any fair-minded and informed observer that every member of this apparently very large and widely-based international organisation (with wide and generally-expressed aims which are beyond criticism) would necessarily share all the views apparently expressed by its representatives in the ways, and on the occasions, referred to. ….. It must not be forgotten that, although the concentration in the hearing before us was necessarily on certain views apparently expressed on particular matters (especially on what was said to be the 'material aspect of the case', the question of Israeli responsibility in respect of the Sabra/Shatila massacre), these represented only a very small proportion of the many views expressed on diverse and varying issues over many years". My only comment would be that the relevant question is not whether it can be concluded that a member would "necessarily" share the views of the Association's representatives. But I cannot think that a fair-minded and informed observer would in the light of Lady Cosgrove's continuing membership alone conclude that there was a real possibility that the Association's President was in substance speaking on Lady Cosgrove's behalf or that Lady Cosgrove was in any way endorsing or associating herself with statements of the character presently in issue made by the President or Mr Lack or anyone else speaking on the Association's behalf in public or to bodies such as the United Nations Commission on Human Rights

56. The other basis on which the case is put involves the submission that, by virtue of her membership and receipt of "Justice", Lady Cosgrove may have been influenced, albeit subconsciously, by the content and general attitude of some of the material, particularly once again the policy statements and President's speeches or messages. In my view, that submission must be categorically rejected, even if one

assumes that Lady Cosgrove ever read and digested such material. Judges read a great deal of material which is designed to influence them, but which they are trained to analyse and to accept, reject or use as appropriate. A person may well subscribe to or read publications in order to inform him or herself about views different to his or hers. The suggestion that mere membership gives rise in the eyes of a fair-minded observer to a real possibility of unconscious influence, through some form of osmosis, by materials in the relevant association's periodical which would be available to be read by the member is a blanket proposition of great potential width that I reject without hesitation.

57. It remains to mention two considerations to which attention was paid during submissions. The first is the oath that Lady Cosgrove will as a judge have taken, in familiar terms: "I, ... , do swear that I will well and truly serve our Sovereign …. in the office of Judge of the Court of Session, and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or illwill. So help me God." In *R v S(RD)* [1997] 3 SCR 484, L'Heureux-Dubé and McLachlin JJ identified the taking of the judicial oath as often the most significant occasion in the career of a judge (para 116), and said (para 117) that "Courts have rightly recognised that there is a presumption that judges will carry out their oath of office. … This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with 'cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias." At para 119, they went on to say that

> "The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial 'does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognise, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the

> judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind'".

So viewed, the judicial oath appears to me more a symbol than of itself a guarantee of the impartiality that any professional judge is by training and experience expected to practise and display. But on no view can it or a judge's professional status and experience be more than one factor which a fair-minded observer would have in mind when forming his or her objective judgment as to the risk of bias.

58. The other consideration is that Lady Cosgrove did not volunteer a reference to her membership of the Association. Had she disclosed this, the very fact of disclosure could have been seen by a fair-minded observer as a "badge of impartiality", as showing that "she ha[d] nothing to hide and [was] fully conscious of the factors which might be apprehended to influence … her judgment": *Davidson v Scottish Ministers (No 2)* 2005 1 SC (HL) 7, paras 19 and 54, per Lord Bingham of Cornhill and Lord Hope of Craighead. Again, however, this can only be one factor, and a marginal one at best. Thus, to take two opposite extremes, disclosure could not avoid an objection to a judge who in the light of the matter disclosed clearly ought not to hear the case; and non-disclosure could not be relevant, if a fair-minded and informed observer would not have thought that there was anything even to consider disclosing. In the present case, I do not consider Lady Cosgrove's failure to disclose her membership of the Association to be a factor which would carry any great weight in the balancing of factors which a fair-minded and informed observer must be assumed to undertake. A fair-minded and informed observer would I think be much more likely to conclude that it never crossed her mind that her membership involved anything which it was relevant for her to disclose.

59. For these reasons, I would dismiss this appeal and affirm the decision of the Extra Division of the Inner House refusing the prayer of the appellant's petition.