APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Justice Clerk

Lord Kirkwood

Lord Osborne

Appeal No: Misc. 117/02

OPINION OF THE COURT

delivered by

THE LORD JUSTICE CLERK

in

PETITION

to the *nobile officium*

by

ROBBIE THE PICT

Petitioner;

against

HER MAJESTY'S ADVOCATE

Respondent:

_____

Petitioner: Party

Respondent: Turnbull, QC, AD; Crown Agent

10 December 2002

Introduction

[1] The Skye Bridge is a toll bridge. The authority for the charging of tolls is the Invergarry - Kyle of Lochalsh Trunk Road (A87) Extension (Skye Bridge Crossing) Toll Order 1992 (the 1992 order) which was made in virtue of powers conferred by the New Roads and Street Works Act 1991 (the 1991 Act). Since the bridge was opened in 1992 local protesters, of whom the petitioner is the best known, have campaigned against the imposition of tolls. The issue has come before the courts on numerous occasions and in numerous ways.

[2] For the purpose of this decision, we can take up the history at 19 November 1998 when the petitioner and three others were convicted in the Sheriff Court at Dingwall on charges of contravening section 38(1) of the 1991 Act for their refusal on various occasions, without reasonable excuse, to pay the toll. They appealed by stated case. Their basic point was that the toll collectors lacked proper authority. On 16 December 1999 a Division of the court consisting of Lord Sutherland, Lord Marnoch and Lord Cowie refused the appeals (*Smith and Others v PF Dingwall*, 16 December 1999, unrepd.).

[3] On 24 February 1998 Stella Anderson and Alexander Coghill were convicted at Dingwall on similar charges. They appealed on the same point. On 13 July 2001 a Division consisting of Lord Kirkwood, Lord Penrose and Lord Osborne refused the appeals (*Anderson and Coghill v PF Dingwall*, 13 July 2001, unrepd.). In refusing the appeals the court considered itself bound by the decision in *Smith* (*supra*).

[4] On 24 October 2001 the petitioner lodged a petition to the *nobile officium* of the court in which he craved the court to set aside the decision of the court dated 16 December 1999. The petition was heard by a Division consisting of Lord Justice General Cullen, Lord Macfadyen and Lady Cosgrove. On 21 December 2001 the court dismissed the petition as incompetent.

[5] On 29 March 2002 the petitioner lodged the present petition to the *nobile officium* to have the decision of the court dated 21 December 2001 set aside. He craves the court to find that

> "the opinion and procedural conduct of the Lord Justice General Lord Cullen was sufficiently flawed in law to invite a well-informed observer to conclude that a miscarriage of justice has indeed occurred."

On 31 May 2002 this petition was heard before a Division consisting of Lord Kirkwood, Lord MacLean and Lord Caplan. On that occasion the petitioner objected to the participation of Lord Kirkwood and Lord MacLean. He objected to Lord Kirkwood because of his previous participation in the case of *Anderson and Coghill* (*supra*). Lord Kirkwood declined to recuse himself; but in the course of the hearing, for other reasons, Lord MacLean felt it necessary to do so. The petition therefore had to be continued to be heard before a differently constituted court.

[6] This petition came before us for the continued hearing. At that hearing, the petitioner took three preliminary objections to the composition of the court. We confined the hearing to a debate on those objections, which the petitioner presented with courtesy and tact.

The preliminary objections

[7] The first objection was that none of us could properly take part in the case since the present Lord Advocate is the respondent and each of us was appointed to the bench by the Lord Advocate of the day. The petitioner submitted that the Lord Advocate is the public prosecutor in the prosecutions relating to the Skye Bridge tolls. He is also a member of the Scottish Cabinet. He represents the Crown, which is in a commercial relationship with the company that developed the bridge. It would therefore be the perception of an informed observer that none of us could be impartial in dealing with the case.

[8] The second objection related to Lord Kirkwood. The petitioner submitted that Lord Kirkwood could not properly take part in the proceedings since he had presided over the Division that on 13 July 2001 refused the appeals in *Anderson and Coghill* (*supra*). Having formed an adverse view on those appeals, Lord Kirkwood could not be seen to approach the decision on the present petition in an impartial and objective spirit.

[9] The third objection related to Lord Osborne. The petitioner submitted that Lord Osborne could not properly take part in the proceedings since he is a member of the Speculative Society. The petitioner alleges that other members of the Society include Sir Ian Noble, the Chairman of the Skye Bridge Company, Lord James Douglas-Hamilton, who was the Minister with responsibility for the construction and financing of the bridge, and Lord Justice General Cullen, who presided over the Division whose decision the petitioner seeks to have set aside in this process. The Speculative Society, according to the petitioner, is a closed debating society that has been described in its own literature as a secret sodality and a brotherhood bound by intangible ties of shared loyalty and common tradition. According to the petitioner, each member of the Society has a personal four-digit number and signs a members' roll. The secrecy of the members was, he submitted, similar to that of freemasons. For a better understanding of the matter, the petitioner invited us to read the *History of the Speculative Society* (1968), to which Lord Osborne contributed a chapter. The petitioner further submitted that in a series of judgments relating to the Skye Bridge tolls, 12 out of 14 involved the participation of judges who are members of the Speculative Society. He said that there was widespread public disquiet about the influence of the Speculative Society amongst the judiciary. He referred to recent media comments on the subject. He submitted that in this case, as in numerous previous cases, there was an appearance of bias, actual or potential.

[10] The petitioner argued that the three matters complained of also constituted breaches of the petitioner's right to a fair trial under article 6 of the European Convention on Human Rights ("the Convention").

[11] The petitioner's fallback position was that, notwithstanding these objections, he was prepared to have the petition dealt with by this court provided that the court acknowledged that it was "institutionally compromised" and narrated that expressly in its decision.

Submissions for the Crown

[12] The advocate depute submitted that the first objection was groundless. Each court that had been convened in cases relating to the Skye Bridge Tolls had consisted of judges who had been validly appointed in accordance with the law. Each court was therefore validly constituted. If that had not been the case, the decisions of this court would have been incompetent for generations. If there was anything in the objection, no judge of this court could sit in any criminal case, since all prosecutions were in practice brought in the name of the Lord Advocate. The Convention had no bearing on the matter. All that it required was a

fair trial before an impartial tribunal. There was no reason to doubt the impartiality of the court.

[13] As to the second objection, the advocate depute said that the substantive question raised by this petition had been debated before the previous Division. That had taken place after the decision in *Anderson and Coghill* (*supra*). The arguments had been canvassed fully before Lord MacLean withdrew from the case. Since the same points would be re-heard, there was no reason for Lord Kirkwood not to take part.

[14] The advocate depute submitted that the third objection was groundless. The issue in the case was one of law. It did not involve the court's passing judgment on the actings of any of the individuals to whom the petitioner had referred. The Society was merely an association of graduates of Edinburgh University. The allegation of secrecy had not been vouched, nor had the petitioner shown why membership of the Society could create any reasonable suspicion of bias, real or apparent. In short, there was nothing peculiar to the membership of the Society that had any bearing on the decision on this petition. The judicial oaths taken by the members of the court were proof against any suspicion of bias.

Decision

[15] We are prepared to deal with the petitioner's objections only on the basis that each is either well-founded or groundless. If it is well-founded, it should be sustained. If it is not, it should be rejected outright. We are not prepared to accede to a proposal by a litigant that we should give judgment on such objections while admitting to being "institutionally compromised," whatever that may mean. It is not for a litigant to stipulate the basis on which he will agree to accept the court's jurisdiction.

[16] This objection raises an important question as to the extent to which, and the means by which, a litigant can influence the composition of the court. Until 1933, it was possible for a litigant in the Court of Session to nominate the Lord Ordinary or the Division who would hear his case. That right was abolished by section 5 of the Administration of Justice (Scotland) Act 1933. In modern practice, with the exception of the agreed nomination permitted in a petition for summary trial (RC 77.3(d)), no party in the Court of Session has the right to decide by whom his case will be tried. To our knowledge, no such right has existed in the High Court, at any rate in modern times. Conversely, in both the Court of Session and the High Court no party has had the right to decide by whom his case shall not be tried. It is not open to a party, by the mere making of an objection, to exclude from his case any judge whose participation is not to his liking (cf. *Locabail (UK) Ltd v Bayfield Properties Ltd*, [2000] QB 451, at p. 479; and cases there cited). A judge who considers that there is a sound objection to his participation in a case has a duty to recuse himself at once. If he is in doubt, he should disclose his difficulty to the parties. But if he considers that there is no sound objection to his participation, it is his plain duty to proceed with the case (*Locabail (UK) Ltd v Bayfield Properties Ltd*, *supra*).

(i) Appointment by the Lord Advocate

[17] In our opinion, this objection is groundless. It proceeds on a fundamental misunderstanding of the constitutional position. Until 2001, judges of the Court of Session and the High Court were appointed by Her Majesty on the recommendation of the Secretary of State (*Stair Memorial Encyclopaedia*, vol. 6, para. 929) or, in the period between 1 July

1999 and April 2001, the First Minister. The Lord Advocate of the day was invariably consulted. He played a significant, though not necessarily decisive, role in that process; but the appointment was not his to make. Each of us was appointed to the bench during that period. None of us was therefore appointed by the Lord Advocate of the day. The present Lord Advocate was not involved in the appointment of any of us. For these reasons alone, we consider that this objection is without merit.

[18] In any event, the submission for the petitioner overlooks the fact that the Lord Advocate appears in litigations in only a representative capacity. In our opinion, even if any of us had been appointed by the present Lord Advocate or any of his predecessors, no fair-minded and informed observer, having considered the facts, could have concluded that there was a real possibility of bias on the part of the court (*Porter v Magill*, [2002] 2 WLR 37; *Millar v Dickson*, 2002 SC(PC) 30). We therefore reject this submission.

[19] However, since the petitioner's objection would apply to all judges appointed before April 2001, we should record that after that date an *ad hoc* Judicial Appointments Committee was established as a precursor to a formal Judicial Appointments Board. After public advertisement, the Committee considered a number of applications for judicial appointment. It interviewed candidates and made recommendations to the First Minister. Four judges were appointed by this process in 2001. The Committee was superseded in May 2002 by the Judicial Appointments Board, on whose recommendation one judge has been appointed and installed since we heard this case.

[20] We explained to the petitioner at the hearing that, if his objection was sound, the only judges whom it would not affect would be those four judges who had been appointed on the recommendation of the Committee. In that event, the appointment of a bench of three of those four would have seemed to present a solution; but in fact that would simply have raised another problem, since two of them are members of the Speculative Society, which is of course the subject of the third objection. We should record that the recent appointment of Lord Brodie, who is immune to any of these objections, would have enabled the court to overcome that difficulty.

(ii) Lord Kirkwood's participation in the judgment dated 13 July 2001

[21] In our opinion, this objection is worthless and it is our duty to repel it. It is illogical that it has been made against Lord Kirkwood only, because Lord Osborne was also a member of the court in the *Anderson and Coghill* cases. In *Anderson and Coghill* the appeals raised a pure question of law concerning the 1991 Act and the 1992 Order. That question was unrelated to the issue in this petition. Applying the test to which we have referred in our discussion of the previous objection, we consider that it is fanciful to suggest that Lord Kirkwood could not approach the issue in this petition with an open mind. The objection was unsound when it was advanced at the previous hearing and was rightly repelled. It remains unsound. Lord Kirkwood's judicial oath is a conclusive answer to it.

(iii) The Speculative Society

[22] In our view this objection raises a different point from that on which the petitioner himself relied. The petitioner has asked us to decide that membership of the Speculative Society is *per se* a ground of disqualification in this case; but before the court comes to that question, it must first decide whether a judge who is a member of the Society should rule on

it. Since the petitioner did not notify the court of this objection before the hearing, Lord Osborne was given no prior opportunity to consider it.

[23] This objection is materially distinguishable from that made against Lord Kirkwood. Whereas the objection against Lord Kirkwood can be ruled on as a straightforward matter of law, this objection involves an assessment of the impact, if any, of membership of a private society on the integrity of the judicial process. It involves contentious questions of fact, none of which are within judicial knowledge, and the making of a judgment on the significance of such facts as are established.

[24] In our opinion, the objective appearance of impartiality that is required by both Scots law and the Convention necessitates that a judge who is a member of the Society should not take part in a decision on the question. Lord Osborne is in that position and therefore recuses himself. Without reaching any conclusion on the factual allegations of the petitioner, or on the proposition that membership of the Speculative Society is a ground of disqualification in this case, we conclude that the hearing on this objection should proceed before a bench of judges who are not members of the Society.

Interlocutor

[25] We shall pronounce an interlocutor repelling the petitioner's first and second objections. We shall decline to deal with the third objection, for the reasons given in this Opinion, and shall appoint the further hearing on that objection to which we have referred.