Position Paper

Tribunal Bias

Introduction

1. Scots law has historically recognised the importance of preserving judicial integrity and has guarded against the taint and the perception of impartiality as part of the doctrine of natural justice and other associated principles.[1] Hume states that the law holds judges "to be strictly answerable for the pure and diligent discharge of their important trust" and notes that a remedy will exist "if by any sort of corruption, or partiality, or even neglect, they shall suffer the channels of justice to be polluted or obstructed."[2] Article 6(1) of the European Convention on Human Rights provides that everyone is "entitled to a fair and public hearing within a reasonable time by an *independent and impartial* tribunal established by law". When criminal charges are brought on indictment and as such tried by a jury then the law dictates that the same requirements of independence and impartiality apply given that the jury constitutes "a tribunal established by law" whilst exercising its judicial function.[3] Accordingly, "tribunal bias" is used throughout this paper to encompass any allegation of bias made against a judge or jury trying a criminal case.[4]

2. The Commission sometimes receives applications where an allegation of bias is made against the judge and/or jury who tried the case.[5] Whilst applications containing allegations of bias are reasonably frequent, they have only rarely formed the basis for a referral to the High Court from the Commission.[6] The following paper is intended to provide an insight into the Commission's understanding of the law surrounding tribunal bias. As an appendix to this paper, the Commission's approach to the difficult associated issue of interviewing jurors is outlined.

The Commission's Position

3. Bias has been defined as "the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's

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[1] See for example *Bradford v McLeod,* 1986 SLT 244.
[2] *Hume, Commentaries of the Law of Scotland Respecting Crimes.*
[3] See for example *McTeer v HMA & Gregory v United Kingdom* (1998) 25 E.H.R.R. 577.
[4] For a detailed consideration of the importance of judicial integrity and independence see the Bangalore Principles of Judicial Conduct available at https://www.un.org/ruleoflaw/files/Bangalore_principles.pdf
[5] See for example *Gray & O'Rourke v HMA* 2005 SLT 159.
[6] See *Carberry v HMA,* 2013 SCCR 587.

judgement".[7] Bias may arise because it is shown that a judge or juror was notably influenced by the presence of some such factor in trying the case but instances of this kind of actual or subjective bias, are rare. In such cases where actual bias can be proven, a miscarriage of justice would inevitably arise.[8]

4. **The law also affords broad protection against the mere *perception* of bias. Not only must justice be done, it must be seen to be done.[9] It is enough to show that there was a real *possibility* that the tribunal was biased without having to establish that bias influenced the eventual verdict. This type of bias is known as "objective bias" and is more frequently founded upon in the authorities.**

5. **The modern formulation of the test to be applied in cases concerning objective bias is to be found in *Porter v Magill;***

   "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." [10]

6. **In assessing whether there is a "real possibility" that a tribunal is biased the perspective of the fair minded and reasonable observer is adopted. This is an objective test. Such an individual cannot be assumed to have specialist knowledge of the law or the trial process.[11] Such an individual reserves judgement until he has seen and fully understands both sides of the argument.[12] He is informed on all relevant matters.[13] He is not unduly sensitive or suspicious.[14] As the European Court of Human Rights has noted whilst the standpoint of the person concerned (the accused) is important, it is not decisive. What is decisive is whether any allegation of bias can be objectively justified.[15] Each case will turn on its own unique circumstances.**

7. **The following examples are provided to show the breadth of issues which can arise where bias is alleged and how the courts apply the requisite tests;**

   a. **A series of newspaper articles which trenchantly criticised the adoption of the European Convention of Human Rights into domestic law which had been written by a High Court judge and published after he had adjudicated**

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[7] *Davidson v Scottish Ministers (no 2)* 2004 SLT 895.
[8] *McTeer v HMA,* 2003 JC 66.
[9] An oft quoted maxim originating in the dictum of Lord Heward in *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 which is equally applicable in Scotland see *Bradford v McLeod*.
[10] [2001] UKHL 67 as per Lord Hope of Craighead at para 103. The test has been adopted in Scotland see *Carberry v HMA.*
[11] *Godden v Cameron,* [2013] HCJAC 24.
[12] *Carberry v HMA.*
[13] *Helow v Secretary of State for the Home Department,* 2009 SC(HL) 1.
[14] *Carberry v HMA.*
[15] *Morice v France* (2016) 62 EHRR 1.

on an appeal based on the Convention was held to have impaired the objective impartiality of the court's decision.[16]

b. **Comments by a sheriff during a trial at the stage of a no case to answer submission that she was upholding the submission "with little enthusiasm" as she was "bound by the current rules of evidence" and "the requirement that there is corroboration" and that if the case had been tried under "a different system of law" she would have "no hesitation in allowing the case go to the jury" were held to have amounted to an apparent lack of impartiality as an objective observer would form the view that the sheriff had found the evidence of the complainer credible and reliable and that as such the court lacked impartiality.**[17]

c. **A member of the jury who failed to disclose that he had personal knowledge of the accused, including the fact that the accused had previously committed a serious assault on his son with a bottle in a case in which he was trying another serious assault charge was held to lead to the conclusion that the jury lacked the appearance of impartiality.**[18]

8. **The Commission considers that where an allegation is made that a tribunal lacked *independence* then regard must be had to the manner of the appointment of its members, their term of office, the existence of guarantees against outside pressures and the question of whether the body presents an appearance of independence.**[19] **In respect of the final consideration, the appearance of independence is assessed from an objective viewpoint.**[20] **The Commission notes that challenges to decisions involving the use of temporary judges in the High Court and legal advisors in the Justice of the Peace Court on the grounds of alleged lack of independence have failed.**[21]

9. **Submissions about judicial bias and independence may often entail reference to Article 6(1) of the European Convention of Human Rights and associated jurisprudence.**[22] **The Commission notes that the High Court has noted that domestic law is compliant with the principles of the Convention and that as such "there is no need to look further at these principles as if they found a separate code of law as distinct from an umbrella provision by which domestic principles can be tested."**[23] **That being said, the Commission considers that the European jurisprudence still offers useful guidance and an additional framework within**

[16] *Hoekstra* v HMA (no 2) 2000 JC 391.
[17] *Godden v Cameron.*
[18] *McTeer v HM.*
[19] *Findlay v United Kingdom,* (1997) 24 EHRR 221.
[20] *Starrs v Ruxton,* 2000 JC 208.
[21] *Clancy v Caird,* 2000 SC 411 & *Clark v Kelly,* 2003 SLT 308.
[22] For example, *Pullar v United Kingdom* 1996 SCCR 775.
[23] *Carberry v HMA,* 2013 SCR 587 at para 51.

which to test the relevant issues.[24] The Commission further observes that the right to a fair trial by an "independent and impartial" tribunal is "unqualified" and that it cannot be "subordinated to the public interest in the detection and prosecution of crime." [25]

Specific Considerations

10. In any allegation of bias made against a juror, before the Commission will itself instruct investigations into the matter, there must be material before it that is "*prima facie* sufficiently substantial, convincing and trustworthy to warrant an inquiry."[26]

11. The judicial oath is an important safeguard against bias and in the normal case it will be adequate proof of impartiality.[27] The Commission will not entertain any applications premised on unfounded allegations pertaining to a judge or juror's political, religious or social views. The whole concept of a trial by jury has inherent in it the possibility that conflicting personal views will exist amongst jurors.[28]

12. Further, when considering whether an allegation of bias against a jury can be objectively verified the Commission notes the decision of the European Court of Human Rights in *Pullar v United Kingdom* that the "additional safeguards" in Scottish practice of random jury selection and the judge's charge to the jury are important considerations.[29]

13. If an applicant who was legally represented is concerned that his reputation in a certain locale may have influenced the jury's verdict then the Commission will consider in the first instance if a plea of bar in trial was entered on behalf of the applicant. If it was not, the Commission notes that whilst not necessarily determinative of the matter the High Court has stated that in such situations it will not be considered a good ground of appeal that "measures not asked for, were not taken."[30]

14. In applications which allege that prejudicial pre-trial publicity has influenced the jury the Commission notes that in such cases account must be taken of the role of the trial judge and the specific directions that are likely to have been given. The

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[24] The High Court has itself often has had recourse to the European case law in determining appeals see for example *McTeer v HMA* at para 11.

[25] *Montogomery v HMA* 2001 S.L.T. 37.

[26] *McCadden v HMA,* 1985 SCCR 282. Please see appendix 1 for further details on the Commission's approach to this issue.

[27] See for example *Robbie the Pict v HMA,* 2003 JC 78 & *Haney v HMA (no 1)* 2003 JC 43. See http://www.scotland-judiciary.org.uk/22/0/Judicial-Independence for details of the oath taken by judges and Chapter 1 of the Jury Manual by the Judicial Institute for Scotland for details of the oath taken by jurors available at http://www.scotland-judiciary.org.uk/Upload/Documents/JuryManual2015.pdf

[28] *McCadden v HMA* as per Lord Justice Clerk Wheatley

[29] *Pullar v United Kingdom,* 1996 SCCR 755.

[30] *Carberry v HMA.*

Commission will also consider whether a plea of oppression was advanced during the proceedings.

15. **In cases concerning allegations of bias made against justices of the peace, sheriffs and judges if any of the aforementioned have disclosed at the outset of the case that they may have a qualifying interest, which may give rise to the appearance of apparent or objective bias and the applicant's legal representatives have not subsequently asked for the judge to recuse himself, then the Commission will consider that the court will have given itself a "badge of impartiality" and it is only in exceptional circumstances that any complaint of bias could subsequently be sustained.**

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Appendix 1 – Interviewing Jurors

Introduction

1. **One of the most troubling issues that has confronted the Commission is obtaining information that lies within the knowledge of one or more members of a trial jury. Concerned by the possibility that it might inadvertently find itself in contempt of court, the Commission has twice[31] in this regard exercised its power under s194D(3) of the Criminal Procedure (Scotland) Act 1995 to petition the court for an advisory opinion. On two occasions[32], the Commission has referred convictions to the court on the basis of information arising from such an investigation. Neither appeal was successful[33].**
2. **The issue is most likely to arise where there is an allegation that members of the jury have acted improperly. The modern archetype for such cases is the so-called "Googling juror", the individual who disregards his oath to try the case according to the evidence by seeking information about the accused from the internet. Whilst this issue has arisen in the Commission's case work, it has not achieved a level of prominence approaching that found in the rest of the United Kingdom.**

The Commission's Position

Scope of the Investigation

3. **Section 8(1) of the Contempt of Court Act 1981 provides:**

> ***"…it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by***

[31] *SCCRC Petrs* (2001) 2001 SCCR 775 and *SCCRC Petrs* (2010) 2010 SCCR 773
[32] *Gray & O'Rourke v HMA* 2005 SCCR 106 and *Carberry v HMA* 2013 SCCR 587
[33] The issue also arose is another reported case arising from a Commission review, *BM et al v SCCRC* [2006] CSOH 112, a judicial review of the Commission's decision not to refer the petitioners' cases to the court. That too was unsuccessful.

members of a jury in the course of their deliberations in any legal proceedings."

4. In *SCCRC Petrs (2001)* the Commission conceded that it was bound by this legislation. The Commission cannot conduct an investigation if to do so would amount to contempt of court. As to what would amount to a contempt of court within the terms of the 1981 Act, the court held that the word "deliberations" in s8(1) should be interpreted to mean any discussions occurring after the jury had been asked to retire to consider its verdict. The Commission proceeded to investigate and then refer the matter that was subsequently reported as *Gray & O'Rourke v HMA.*
5. In spite of this, the court in *Clow v HMA*[34], which was not a Commission case, expressed the view, in a postscript to the judgment, that "any inquiry into the words or actions of serving jurors should be made only by the court or in furtherance of orders made by it." In the course of the judgment, the court made reference to the decision of the House of Lords in *R v Mirza*[35] and that of the High Court in *Ready v HMA*[36], in which it was held that a "common law of confidentiality" applies from the point at which the jury is empanelled, at the start of the trial. This led the Commission again to petition the court, seeking guidance as to the circumstances, if any, under which it might conduct investigations into the workings of a jury.
6. This led to the decision in *SCCRC Petrs (2010)*. In that case, the court clarified that the remarks that it had made in *Clow* about investigations into jury-related issues were not intended to apply to the Commission. The court considered itself entitled to have confidence that the Commission would act with circumspection in the conduct of such enquiries. Nevertheless, the court took the view that the "common law of confidentiality" does apply from empanelment of the jury. This, however, is applicable only to matters "intrinsic" to the deliberations[37] of the jury. It is permissible for the Commission to investigate "extrinsic" matters (such as independent research that a juror conducts on the internet.)

[34] 2007 SCCR 201
[35] [2004] 2 Cr App R 8
[36] 2007 SLT 340
[37] The restrictive interpretation of the word "deliberations" in the 1981 Act is thus not applicable in relation to the common law.

7. **In summary, the Commission applies the following principles when determining the scope of any enquiry into the workings of the jury:**

   a. **The Commission will not enquire into discussions between jury members taking place after the jury was asked to consider its verdict**
   b. **The Commission considers itself entitled to conduct investigations into matters said to have taken place before the jury was asked to retire to consider its verdict provided that they are extrinsic to the jury's deliberations.**

Circumstances under Which the Commission Will Investigate

8. **Alleged jury impropriety is an issue that arises in ordinary criminal appeals as well as Commission business. Where appropriate, the court itself will instruct investigations. Before embarking upon such investigations, the court, following *McCadden v HMA*[38], will consider whether or not the material before it is "*prima facie* sufficiently substantial, convincing and trustworthy to warrant an inquiry." Whilst not, strictly speaking, directly bound[39] by the restrictions that the court imposes upon its own prospective enquiries, the Commission will, nevertheless, apply the same standard in deciding whether or not to proceed with an investigation into a jury-related matter. To do otherwise would, the Commission believes, be to fail to display the degree of "circumspection" that the court in *SCCRC Petrs (2010)* expected from the Commission.**

Specific Considerations

9. **The procedure to be adopted in cases in which the Commission seeks to interview jurors may be found in the Case Handling Procedures.**

[38] 1985 SCCR 282
[39] Although cf *R v Cottrell* [2008] 1 Cr App R 7, particularly at paragraphs 49 *et seq*