LSLA RESPONSE TO DCA CONSULTATION PAPER CP15/06
"RETURN TO PRACTICE BY FORMER SALARIED JUDGES"

Overview

The DCA paper announced as part of a drive to achieve greater diversity among judges that salaried judges would be allowed to return to practice, and set out some safeguards intended to lay down the terms on which ex-judges may return to practice. There is apparently a concern that applicants for judicial office are likely to be deterred from applying by the prospect of being unable to return to practice.

Consultation was invited on the safeguards only, and not on the policy decision. This document is the response of the London Solicitors Litigation Association ('LSLA').

The London Solicitors Litigation Association (LSLA) is over 50 years old and represents the interests of a wide range of litigators in London handling a broad range of civil and commercial litigation. Through about 800 solicitor members and strong links with a wide number of professional bodies, it represents nearly all civil litigation practices in London. The LSLA operates through a Committee of 24 members which include members of the Civil Justice Council, Civil Procedure Rules Committee, Law Society Civil Litigation Committee, the Commercial Court Users Committee, the Supreme Court Lists Group and local Law Societies. The Association has a long track record of responding to consultation papers and has drawn on a wide range of views in responding to the current consultation paper.

A survey of the LSLA's members on the broad questions was conducted by email. The views of those who responded to that survey will appear in this paper. It is right to emphasise at the outset that throughout this process there has been no resistance expressed to the goal of achieving greater diversity on the bench.

The proposal involves the removal of the prohibition on returning to practice and the imposition of safeguards - very unwieldy concept and wording. For brevity we shall refer to the combination as "permission-with-safeguards".

The policy decision - a "done deal"

The policy decision to permit former salaried judges to return to practice has already been taken. In the earlier consultations (2004-2006) the LSLA was not involved. From the LSLA's internal survey it appears that about half of the respondents are in principle against permitting salaried judges to return to practice.

Impact on reputation of our judges and on London as a forum of choice.

The reputation of the judiciary of England and Wales is second to none. Apart from occasional individual lapses (which tend to relate more to their private lives than to their judicial function), and apart from occasional criticisms of judges about their being wrong or intemperate or rude, the judiciary of England and Wales has a well-deserved reputation for being impartial, unbiased and incorruptible. It is thought by some of our members that any change to the status of our judges which might have the effect of jeopardising that reputation would be a retrograde step, and that permitting judges to return to practice is one such change. There is a further concern that while the LSLA is keen to promote London as a forum for international litigation and arbitration, any change which undermines the international reputation of the English judiciary would detract to some extent from London as a forum of choice.

Perception

One of the apparent concerns about allowing judges to return to practice is the risk of bias or partiality by serving judges in favour of those with whom they intend to have some later commercial link (such as employment), and of ex-judges exerting undue influence after returning to practice over judges, court staff and advocates. The DCA paper considered the risk of actual occurrences and of the perception of bias or influence.

Great emphasis has been placed in many of the replies we have received from our members on perception. Many are concerned that while the risk of actual bias or undue influence may be modest, the same cannot be said for the perception experienced not only by members of the legal professions, but particularly by clients and the lay public. The importance of public perception and of public confidence in the system is borne out by the House of Lords decision in *Lawal v Northern Spirit* (a case in which there was no suggestion of actual bias) referred to below: "Public perception of the possibility of unconscious bias is the key."

Is there in fact any prohibition?

The DCA Consultation Paper starts with and frequently repeats the assumption that there is a prohibition on the holders of salaried judicial office returning to legal practice on ceasing to hold judicial office. The authority for this proposition is not stated. According to the DCA Paper, this "prohibition" is "reflected in the terms and conditions of service on appointment to judicial service". The current (August 2006) outline of terms and conditions of service for High Court judges in England and Wales states in Paragraph 2 under the heading 'Prohibition on Practice": "The Lord Chancellor also regards a judgeship as a lifetime appointment. Any offer of appointment is therefore made on the understanding that appointees will not return to practice." That appears to be the high point of the authority for the view that there is a prohibition on return to practice. Among the responses to the LSLA's survey is the express denial by an authoritative commentator of the existence of any such prohibition. The view has also been expressed that whereas there has in fact been no prohibition hitherto, the introduction of the proposed safeguards

will accidentally create an indirect prohibition, and to that extent the permission-with-safeguards proposal sets out to address a problem which does not exist.

Awkward comparisons

The DCA Consultation Paper relates only to salaried judges. Whatever the status of the alleged prohibition may be, there has never been any prohibition on former judges acting as arbitrators or mediators, or going into commerce. It is also the fact that much judicial work is carried out by non-salaried judges, part-timers and deputies. These lawyers emerge from private practice, spend a short time on the bench and return immediately to private practice without there ever having been any suggestion of partiality or corruptibility arising from this arrangement. The proponents of permitting a return to practice appear to rely heavily on the integrity of those who are appointed and, in so far as the risk of actual bias or undue influence is concerned, that reliance is probably justified. To the extent, however, that there is a problem with the layman's perception, the integrity of the judges is probably not enough: if a judge decides against a claimant and later – even two years later – the same judge is employed by the defendant's solicitors, the claimant's suspicion that the decision might have been tainted by the judge's self-interest is unlikely to be set at rest by the bland assertion that all our judges have integrity.

A case which puts the problem neatly into perspective is *Lawal v Northern Spirit Ltd [2003] UKHL 35.* In employment tribunals the terms of appointment of part-time chairmen specifically provide that "in order to ensure that there are no allegations of bias, no part-time chairman may … appear as an advocate before any employment tribunal in the whole of the region [to which they have been assigned to sit as a chairman"]. In the EAT, however, the terms of appointment do not place any restriction on the part-time judges continuing to appear as counsel in the EAT. In the EAT a QC appeared for the respondent. One of the two lay members had previously sat with the QC in his capacity as part-time judge. The appellant argued that it was objectionable in principle for the EAT to hear argument from one of its own members, and asserted that there was a real possibility of bias in breach on Art 6(1) of the ECHR and of the common law test of bias. The EAT rejected the "recorder objection", as did the CA, with one dissenting judgment. The HL upheld the dissenting judgment and the "recorder objection", finding that the EAT practice tended to undermine public confidence in the system and should be discontinued.

The experience of other comparable jurisdictions

It is understood anecdotally that similar debates have recently taken place in both Ireland and South Africa with the result broadly that although return to practice is permitted in those jurisdictions, subject to safeguards, the numbers actually returning to practice are tiny in each case and the permission has not in fact made any impact on judicial diversity.

Will it work?

Will the permission-with-safeguards contribute to diversity on the bench? More than two thirds of the LSLA's members believe that permission-with-safeguards will not in fact contribute to diversity.

Miscellaneous details

1. The evidence apparently available to the DCA of the impact of the permission-with-safeguards regime on diversity is not provided.

2. The DCA does not provide any authority or source for the assertion that there is a prohibition on judges returning to practice other than the outline of terms and conditions of service for High Court judges in England and Wales.

3. While there are frequent references to former judges being employed by solicitors, there is no reference to an ex-judge becoming a partner in a law firm, which appears on the present wording of the safeguards to be permitted (and must be an oversight).

4. Assuming there is a five-year minimum period of service on the bench as one of the safeguards, there is no attempt to describe the circumstances in which a judge might find herself or himself if he or she resigned within the minimum period. It appears to suggest that someone who resigned within the minimum period would (a) be prohibited immediately from returning to practice and (b) forever unable to shake off the disqualification of having resigned early.

Proposed safeguards

One or two of our members consider that there is no need for safeguards in connection with the proposed removal of the prohibition and that judges should simply be allowed to return to practice immediately on resignation and without any qualification. The consultation paper assumes the need for certain safeguards. About half of our members approve of safeguards in principle and believe that the proposed safeguards (or something like them) will allay any concerns about the removal of the prohibition.

The proposed safeguards are the following:-

1. A minimum period of five years on the bench. After return to practice

2. A two-year prohibition on conducting any oral or written advocacy

3. A five-year prohibition on conducting oral or written advocacy before judges at the same level as the former judge, or at a lower level.

4. A two-year prohibition on taking up employment with any firm which had appeared before the former judge for a final decision in a matter (whether as litigant, advocate or legal adviser).

5. Appropriate enforcement machinery for each of the five professional bodies whose members are likely to be affected.

The view of the LSLA is that safeguards are necessary for their own sake and to assist in dispelling the adverse perception which will arise from allowing return to practice.

The LSLA members also consider that – assuming return to practice is allowed and that safeguards are to be applied - the safeguards proposed in the consultation paper are by and large appropriate. Other safeguards have been suggested, such as an obligation to abandon any judicial title.

The effect of the two-year and five-year prohibitions in combination is such that they might trap the salaried judge on the bench. The resigning judge (who, one assumes, would have had advocacy experience) could only be employed by (or become a partner in) a firm which was content not to use his advocacy services for two years, or for up to five years in certain courts and which had not appeared before him for two years. Unless the resigning judge wanted a change from advocacy to some other discipline within the law this safeguard might have the effect of making it impossible for a judge to resign. Setting aside the possibility (which has been raised) that a prohibition on return to practice, or the proposed safeguards, might be held to be void as being in unreasonable restraint of trade, the commercial reality may well be that the firm would find it very difficult to justify employing an ex-judge who was not allowed to do any advocacy at all for two years and then for the next three years not allowed to do any advocacy in the courts other than courts more senior than those in which he had sat. (The point has also been raised that in certain specialist areas the two-year prohibition on employment might rule out any employment in that field for two years, as all or most of the firms in that specialist field will have appeared before the judge.)

While these comments focus on the perspective of solicitors, similar considerations must apply to an ex-judge going back into practice as a barrister. It is difficult to see how any barrister could easily submit himself to the prohibitions on advocacy. It is thought by many of our members that the proposed safeguards will undermine the effect of the permission-with-safeguards proposal because the safeguards are so onerous on the ex-judge that the proposed permission may in practical terms turn out to be an empty gesture. Expressed another way, imposing the proposed safeguards may have much the same effect as re-introducing the prohibition.

Scope of the problem and the effect of the permission-with-safeguards

The permission-with-safeguards proposal does <u>not</u> affect the following:-

(1) non-salaried judges
(2) judges who want to stay on the bench
(3) judges who on resigning from the bench are content either to do nothing or to confine their activities to sitting as an arbitrator or mediating, or to do anything other than return to practice as a barrister or solicitor (or trade mark agent/patent agent or legal executive)
(4) those who (foreseeing that they could not later finance the prohibition periods) decide against applying for judicial appointment in the first place, and
(5) those who resign within the minimum judicial service period [and for whom there appears to be no way back into practice].

The proposal affects only those who fulfil all the following requirements:

(a) they successfully apply, and
(b) they survive or tolerate life on the bench for the minimum period (the proposal is five years), and
(c) they wish to leave the bench after the minimum period, and
(d) they can afford to finance the prohibition periods, and
(e) they want to go back into practice, and
(f) they were not deterred in advance of application for appointment by the prospect of having to finance the prohibition periods.

The LSLA's expectation is that the number of judges likely to be affected by the proposal is very small and the number of applicants for judicial appointment likely to be encouraged by the permission-with-safeguards regime smaller still. A very small take-up of the permission-with-safeguards appears to have been the experience in South Africa and Ireland.

Enforcement machinery

The consultation paper correctly sets out the need for the proposed safeguards to be enforced, but does not go into any detail about the mechanism by which that could be carried out other than to suggest that five professional bodies are likely to have to be involved: the Bar Council, the Law Society, the Institute of Legal Executives, the Chartered Institute of Patent Agents and the Institute of Trade Mark Agents. We believe that some enforcement machinery would inevitably be required, and furthermore there would have to be some mechanism in place to ensure that there was co-ordination in enforcement between the five bodies involved. One method of enforcing might be to require any ex-judge after returning to practice to file with his relevant professional organisation an annual return confirming express compliance with the various safeguards. This mechanism would shift the burden of most of the work from the professional organisation to the individual, but there may be a preference for mechanisms which necessitate a more direct approach by each professional organisation. On either basis there will inevitably be an enforcement burden imposed on five professional bodies. In view of the modest scope of the problem and the limited effect of the removal of the prohibition, it might be thought that the cost spread across five professional organisations of setting up and maintaining the enforcement machinery was disproportionate.

Conclusions

1. Half of the LSLA members think that salaried judges should not be allowed to return to practice at all.

2. If return to practice is allowed, it is thought that safeguards must be applied.

3. The proposed safeguards are appropriate

4. If rigorous safeguards are applied the result may be that the effect of the permission is substantially diluted or even eliminated.

5. The permission-with-safeguards regime will apply to very few people.

6. The LSLA does not expect that the permission-with-safeguards regime will contribute to diversity on the bench.

7. Diversity on the bench is more likely to be achieved by increasing judicial salaries and improving judges' pensions and security, and

8. The proposal will impose on at least five professional bodies a substantial (and perhaps disproportionate) supervisory role, the cost of which will have to be borne by their members.

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