Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Review of Judicial Appointments in Northern Ireland: Attorney General for Northern Ireland

1 March 2012

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Colum Eastwood
Mr Seán Lynch
Mr Alban Maginness
Mr Basil McCrea
Mr Peter Weir

Witnesses:
Mr John Larkin QC Attorney General for Northern Ireland

The Chairperson: I welcome the Attorney General for Northern Ireland, Mr John Larkin QC. This session will be recorded by Hansard. If you want to outline briefly your submission, I am sure that members will have some questions for you after that.

Mr John Larkin QC (Attorney General for Northern Ireland): Let me thank you formally for asking me to attend today to assist with your deliberations, as the Committee explores the hugely important issue of judicial appointments, particularly the amendments effected by schedules 2 to 5 of the Northern Ireland Act 2009. As always, I am delighted to assist the Committee. Central to my role as Attorney General is upholding the rule of law. It is in that context that I want to make some general comments and observations about what the Committee may wish to consider as part of its review.

First, I want to touch on the merit principle. As you know, schedule 3 to the Act continues the statutory requirement that appointments or recommendations for appointment to a listed judicial office be based solely on merit. In one sense, there may be very little that is new in that, because any rational system of appointment should seek to appoint those who are best for the job. A fundamental question about the Northern Ireland Judicial Appointments Commission (NIJAC) is whether the highest score at one or more interviews or exercises is necessarily indicative that one has identified the best candidate. I note that research commissioned by NIJAC found that few respondents could define merit clearly and that the methodology used to assess candidates was unfamiliar to many applicants. Indeed, it appears that those who had previous public-sector experience were the most comfortable with the NIJAC

recruitment method. I understand that NIJAC has put in place arrangements that have enabled the public and the professions to get a better sense of what the judicial world and the judicial role are all about, and it has published questions and model answers to some of its written tests. It has also done useful work in enabling potential applicants for judicial office to better understand judicial life and its implications.

Judicial training for those interested in a career in the judiciary might also be considered. That was recommended by Baroness Neuberger in her 2010 advisory panel report on judicial diversity and is useful work. It would be helpful if potential candidates could reflect on whether they were truly suited for the work of a judge; that would allow them to identify and develop, at a pre-appointment stage, the necessary skills that might be prerequisites for judicial appointment. Training is particularly relevant when the candidate at issue is a specialist lawyer and a generalist post is under consideration.

It is also worth considering whether the top candidate on an individual scoring system is what is truly desired or whether a process could identify several candidates as being worthy of appointment. That would allow a judgement to be made on whether someone, for example, has the particular criminal law or family law experience that is needed to fill the particular vacancy under consideration. It is essential that the selection process identify those who will be the best judges, and, to do that, it may be insufficient to rely solely on a candidate's past prowess as a lawyer. Historically, that method has served us quite well, and, under the old style of appointment, we identified judges on the basis of their success, typically, at the Bar. However, there is no necessary correlation between success as an advocate, which requires one set of skills, and success as a judge, which may require an additional set of skills.

As you will know, Chairperson, the NIJAC merit system does not operate formally for appointments to the Court of Appeal or the position of Lord Chief Justice. Although there was an ad-hoc selection process that led to the selection of the current Lord Chief Justice, appointments to the Court of Appeal appear to have been based, for some time, on seniority among existing judges of the High Court. The 2009 Act introduced a requirement that the Prime Minister consult NIJAC before making those appointments. However, if the NIJAC system is considered the best one, there seems to be no clear reason for senior appointments not to be made in accordance with it. The point is perhaps particularly important in relation to Court of Appeal Appointments. Appointment solely on the basis of mere seniority involves a formal departure from the merit principle, and some of the qualities that go towards making a good appellant judge may not be those that necessarily go towards making a good judge at first instance and vice versa. Mere length of service alone does not seem to be the wisest basis for appointment.

I will now move on to another area that may be of interest to the Committee: ministerial involvement or that of the legislature in judicial appointments. Stepping back from the detail and looking at the larger question of principle, I have been struck by what the former permanent secretary of the Lord Chancellor's Department, Sir Thomas Legg QC, said about that issue and the constitutional principles that are engaged on two separate occasions. The first was in an article that he wrote for the journal 'Public Law' in 2001; the second was his written evidence to the Select Committee of the House of Lords, which is, as you will know, looking at the issue. In his 2001 article he wrote:

"appointing judges is not merely a technical and professional exercise, although that is one element. It is a political act in the broad sense and it should be the responsibility of a political authority. In our constitution that means accountable Ministers."

That would have been before the establishment of the Judicial Appointments Commission in England and NIJAC here. Of course, that was written before the establishment of the Judicial Appointments Commission in England and NIJAC here. Interestingly, in June 2011, he offered the following in his written evidence. The 2005 Act, he said:

"strikes the balance of roles and powers too far towards the judges and too far away from the Executive".

As I have mentioned, the House of Lords Select Committee on the Constitution, before which Sir Thomas was giving evidence, is due to report this month on its inquiry into the judicial appointments

process. Interestingly, it has focused to date on two key questions. Who is responsible for the appointment of judges? And what are the substantive criteria governing those appointments?

I know that there is a horror in certain circles of any involvement of the legislature in judicial appointment, but, for my part, I think that there is much to be said for further exploration of Sir Thomas Legg's suggestion in paragraphs 11 to 14 of his written evidence and how that might work in the context of the Assembly. Sir Thomas proposes that, for appointments to the UK Supreme Court, the Lord Chancellor should select a candidate from a list of four or five potential appointees; that is, persons who are eminently appointable. That candidate would then be considered by a joint committee of both Houses of Parliament and, while there would be a reasonable presumption in favour of the candidate, the Committee, after a public interview, could either accept or reject the candidate.

Coming back to our local position, the Committee may wish to consider whether it is ultimately healthy, in constitutional terms, for High Court judges to be appointed by a commission dominated by the higher judiciary, as is, at present, the reality, or whether there should be greater involvement by the executive and the legislature.

Finally, in relation to the issue of judicial removals which, as you know, has arisen only on one occasion, in the case of Sir Jonah Barrington in the early 1830s. I see no real reason why there should not be a restoration of the classic constitutional position, that removal of a judge of the Court of Judicature in Northern Ireland should be possible by Her Majesty only following a resolution of both Houses of Parliament.

The Chairperson: Thank you very much, Mr Larkin. There are a couple of points that I want to pick up on. The more recent one that you talked about is the political process. Obviously, in Northern Ireland there is a particular reason why the Office of the First Minister and deputy First Minister (OFMDFM) is removed from doing that. Trying to move from the current position to one of greater political scope will present a particular challenge. We will have to overcome a lot of the political issues that people have about it. I am intrigued by the proposition that the House of Commons and the House of Lords might be involved in that as a joint Committee. Are you suggesting that this Committee, dare I say it, would scrutinise judicial appointments and we would have a vote to say "You are going to be appointed"? Is that an option?

Mr Larkin: Of course it is an option. You will know, Chairman, that I express myself carefully, I trust. These are issues that are worthy of further exploration. You will be familiar with the role of the United States Senate in judicial appointments and that of the Judiciary Committee of the United States Senate, which is obviously central to the exercise of appointment. Under the United States constitution, as you all know, the President nominates by and with the advice of the Senate. The Senate has a huge blocking role in relation to a range of judicial appointments, not merely with regard to the nine judges of the United States Supreme Court, which cases we tend to hear about. It also has a role in appointment of federal judges at appellate and district level.

The Chairperson: I have a lot of interest in how that particular system operates. It gives politicians a much greater role in the appointment of the judiciary, but when I put that into the Northern Ireland context and its political realities, it is extremely difficult. Nevertheless, it is interesting.

Let me pick up on one of your other options: that the Lord Chief Justice would appoint judges to the Court of Appeal. Is that right?

Mr Larkin: No. What happens at present is that appointments to the Court of Appeal are made, as a matter of strict constitutional propriety, by Her Majesty on the recommendation of the Prime Minister. The Prime Minister has to consult NIJAC and, I think, also the Lord Chief Justice, before he puts forward a candidate's name. In practice, and this has been the position for some time, appointments to the Court of Appeal are made on the basis of mere seniority.

The Chairperson: Before I pick up on that point, I want to tease out this suggestion about the Assembly, the legislature, having a role in scrutinising appointments. Politicians are supposed to resolve the difficulties here, but how could you overcome the political sensitivities here when the final appointment is not going to be by a politician. That is not going to happen. It is not going to be

through OFMDFM. How could this legislature have a role in scrutinising potential appointments to the judiciary?

Mr Larkin: Far be it from me to attempt to circumvent the extent of the creative imagination that exists both in this room and elsewhere in the Assembly, but it strikes me that — if I can focus on what may be negative aspects of the system that we are currently working — there is at least a danger of the creation of a self-perpetuating mandarin class of judges appointing themselves. Appointing very clever people, bright people, very accomplished lawyers, but doing so in a way that is, to all intents and purposes, immune from broader constitutional scrutiny. Historically, we do not have an absolute separation of powers under our constitution. In many ways, it is valuable that we do not have an absolute, rigid separation of powers in our constitution. There is absolutely no impairment of judicial independence or impartiality caused by the appointment being made by the executive and that appointment by the executive being accountable to the legislature. There are modalities of that accountability to be considered. Many examples exist — we have discussed the United States — but there are also possible modifications of that. One would not, in putting that forward as a matter for investigation, lose sight of some of the unfortunate aspects of the US experience, for example. People will be familiar with the Bork nomination and how that became hugely politicised in a very intemperate and what many would regard as a very unjust way, possibly resulting in the loss of an otherwise exceptional candidate for Supreme Court appointment. The issue will be to attempt to confine scrutiny by a legislature, or a Committee of a legislature, to the issues that are legitimately in play.

The Chairperson: The Justice Committee could scrutinise individuals and establish a qualified pool of recruits. I have heard that phrase before in a policing context. That could be handed over to a non-political appointments body.

Mr Larkin: The model that Sir Thomas Legg suggests for the UK Supreme Court is that the Lord Chancellor will identify from a pool and put forward his selection of an individual to a joint Committee. The joint Committee would then have a look at that candidate in an interview, as it is described, which is nonetheless open to the public, and will take a view.

Mr Weir: I thank Mr Larkin for his evidence. I will pick up on a couple of points, taking the previous position first. I have a little bit of scepticism, first of all, about what we have seen in America. What I would like, and I suspect that would be fairly widespread, is to get the best people possible filling the roles. From what I have picked up in America, there is a tendency — hopefully the American principle does not apply to the election of MLAs —

The Chairperson: Speak for yourself. *[Laughter.]*

Mr Weir: There is a tendency, from what I have seen in America, that, at times, those who are deemed less controversial people, and who may even be seen to be less able, but may not rock the boat as much for either side, will then get preferment, and that is not necessarily on the basis of merit. I see certain degrees of weakness. I am sceptical. I think you described the people who tend to reach the upper echelons of the judiciary, rightly, as clever, bright people. I am not sure that putting clever, bright people through the mincer of an Assembly Committee, even one as august as the current Justice Committee, will necessarily produce the highest quality, or an improvement in the quality of judicial appointments, but I will leave that aside.

May I probe you on the merit principle, John? You raised a concern that, in certain circumstances, the merit principle does not apply and a level of seniority takes effect. I infer a degree of criticism from that comment. You also said that a simple interview situation has limitations in that they often do not produce the best person on merit. Will you comment on whether there is a case for looking at the interview process? You mentioned that, depending on where the vacancy is, you may be looking for someone with particular experience in criminal law, for example.

You also made a very valid point that there are different skills and that the best advocate will not necessarily be the best judge. I wonder whether that is an argument for a slightly more flexible approach to the interview process. Perhaps the scoring system of the interview could be weighted differently and vary a little bit from circumstance to circumstance. To use an obvious pun, there may be merit in doing that to try to reach the best person for the job on merit. Will you comment on that?

Mr Larkin: These are hugely difficult issues. As you know, the legal community in this jurisdiction is a small one. Across that community, there tends to be a good deal of knowledge about abilities and so forth. However, the understandable rigidity of the NICS recruitment system confines one very much to a competence-based interview. I have had the unpleasant experience of interviewing candidates who are known to me personally as excellent lawyers but who simply did not perform well before an interview panel that I chaired. Yet it is not open to me — one can quite see why — to turn round to my colleagues and say, "That was a bad answer today, but that person is great." We cannot do that.

There needs to be a tailoring of assessment exercises, which may include role play or giving presentations. I make this general criticism of aspects of the NICS recruitment system: a purely competence-based system will not always deliver. It delivers an eminently defensible outcome, and, for various reasons, we have been very happy to have that in this jurisdiction. It does not necessarily always guarantee the best outcome in an individual case. Happily, NIJAC, of course, will say that it does not employ a purely competence-based system. However, and I base this solely on my personal experience of recruiting lawyers, I have seen people, who are outstanding lawyers by any reckoning, not do well on the day.

Mr Weir: I appreciate that, John. I concur with the idea of having a certain level of tailoring and flexibility, and placing people in situations that are a little bit outside the comfort zone of a set four questions. I have seen that being done in other cases. I found it particularly useful when I was on an interview panel for a headmaster's job. We gave the candidates a role play exercise that, in many ways, teased out more than the pre-prepared answers.

I am sure that, like you, we have all found ourselves in interview situations in which we have some knowledge of the person but he or she dies not perform well at interview. However, I presume that you are not saying that the flexibility should be such that knowledge of how good a person is outside the interview can be brought into any scoring system. That would place judges in a very different sphere from any other walk of life. We have all seen people perform badly at interview, but, with the best will in the world, that is effectively that person's tough luck.

Mr Larkin: That is right. I reassure you that, sadly for both me and the candidates, that is what happened on those occasions too. I look, again, at a process of which I have some experience, namely the process that has led to the selection of Queen's Counsel. There, heavy use is made of referees, not simply the old-style reference with which many of us will be familiar in that you are about to be appointed but the employer has a check that this person is not quite as he or she appears.

If memory serves me right, and I am sure that I will be assisted if I get this wrong, an issue in the last two QC appointment processes was integrity. Ex hypothesi, integrity is probably not something on which the candidate is necessarily the best authority because the con man will assure everyone that he is a person of boundless integrity. What matters more is the view of well-informed observers as to that person's integrity. So, in the case of an advocate —

Mr Weir: We can say that QCs have been con man-proofed. *[Laughter.]*We are all well aware of the referee providing a check just to make sure that the person is not a fraud. How do you see that being extended?

Mr Larkin: It really does play a part.

Mr Weir: For those of us who are in less hallowed circles in the appointment of QCs, maybe you will explain how it operates.

Mr Larkin: It plays a part in the appointments of Queen's Counsel and, already, in NIJAC in that people are asked to identify persons, typically judges, who can speak about their work. I suppose the difficulty from the candidate's perspective is that, if they do that, they themselves have no control over what the —

Mr Weir: Is then the judge or whoever they have nominated interviewed in some way as part of the process?

Mr Larkin: It is largely a written exercise.

Mr Weir: A written exercise. OK.

Mr A Maginness: I thank the Attorney General for his submission: a very intriguing submission at that. NIJAC seems to have considerable power. It has the power to appoint judges up to the High Court. It seems also that that power has been extended to the Court of Appeal and to the Lord Chief Justice, in a sense anyway.

Mr Larkin: They are consulted, but they do not handle the process.

Mr A Maginness: As far as the Court of Appeal is concerned, it is simply on seniority anyway, as is customary, so they simply count how many years you have served in the High Court and tell the Prime Minister, I presume. That is, in essence, what they are doing.

Mr Larkin: It is. It is an exercise in identifying who is most senior but that is known in one sense. At any given time with regard to the Court of Judicature in Northern Ireland it is not always possible to say who the senior puisne judge is.

Mr A Maginness: In any event, another interesting power that it has relates to the numerical complement of judges. It seems quite extraordinary that that independent and unaccountable body should determine the number of judges that we have.

Mr Larkin: I agree. That is, par excellence, a matter for politically accountable judgements.

Mr A Maginness: That is a new power, is it not?

Mr Larkin: It is.

Mr A Maginness: We also have the removal of judges. I suppose that not necessarily NIJAC does that, but the Lord Chief Justice can remove a judge by establishing a tribunal that looks into whatever a judge is supposed to have done wrong, and report back. That tribunal can say that the judge is guilty of such and such and should, therefore, be removed. It is then up to the Lord Chief Justice to determine whether or not to remove that judge. He has that discretion.

Mr Larkin: For some lower judicial posts, but the High Court is the paradigm of the constitutional interplay between the legislature, the Executive and the judicial branch of Government. Its classic position as I have described it is that there will be an address. Now, the limitation is that the address can only be moved by the Prime Minister, and it can be made only if there has been a prior determination by the tribunal of which you speak.

Mr A Maginness: Yes, but there is still a discretion with the Lord Chief Justice. The Lord Chief Justice can say that the tribunal has got it wrong.

Mr Larkin: I am not sure of the precise modalities in relation to the High Court. The discretion might exist about whether or not to refer it all. I speak subject to correction, but, having referred it, there would be little room for manoeuvre if the tribunal were to report in a particular way that an address should be made.

Mr A Maginness: Is that a new power?

Mr Larkin: It is. Previously, any MP could have introduced a motion praying for removal.

Mr A Maginness: Yes, they could have put it in front of the House of Commons or the House of Lords. The other point is that the Lord Chief Justice is not simply the Lord Chief Justice. He is head of the judiciary, and, formerly, the Lord Chancellor held that position.

Mr Larkin: The position is very complex. As you know, in 1920, some of the functions of the Lord Chancellor of Ireland migrated to the office of Lord Chief Justice of Northern Ireland. Oddly, they also seemed to migrate to the Governor of Northern Ireland, and there was an uneven distribution. The Lord Chancellor of England and Wales has only in relatively recent times become involved more overtly in the judicial business of this jurisdiction. Therefore, you are absolutely right that many of the functions that were exercised by the Lord Chancellor are now exercised by the Lord Chief Justice. Of course, some that were exercised by the Lord Chancellor are now exercised by the Minister of Justice.

Mr A Maginness: The Lord Chief Justice is head of the judiciary and is also chair of NIJAC. Is it in statute that he be chair?

Mr Larkin: From memory, I think that it is, but I speak subject to correction.

Mr A Maginness: The head of the judiciary is the head of the body that appoints the judges, and that is made up of three senior judges, including the Lord Chief Justice, and the Bar, the Law Society and five lay members. The weight in that body lies with the senior judges.

Mr Larkin: It does. Even if, as seems to be case numerically based on your analysis, the higher judiciary does not form a majority, there is no doubt that, de facto, it is the dominating element in NIJAC.

Mr A Maginness: Yes, so, in a sense, the senior judges determine the number of judges, and who should become a judge.

Mr Larkin: That is absolutely right. One can speak of it as a constitutional issue of a hermetically sealed circularity of judges largely appointing judges.

Mr A Maginness: Do you think that that is a healthy situation?

Mr Larkin: Put the way that I have put it, no. *[Laughter.]*

Mr A Maginness: I have a couple of final points, Chairman, if you will indulge me. In your letter, you said that NIJAC might be less transparent than more traditional methods of appointment. What did you mean by that?

Mr Larkin: One can flesh that out by posing the following: if a Minister makes a judicial appointment, that Minister can be questioned about that appointment on the Floor of the Assembly. You cannot question NIJAC on the Floor of the Assembly.

Mr A Maginness: NIJAC is unaccountable to the Assembly as such. It is not even accountable to OFMDFM.

Mr Larkin: OFMDFM is responsible for pay and rations, to use the well-worn phrase. However, I do not think that it has a policy.

Mr A Maginness: Mr Allister, in his letter, suggests that the pay-and-rations element should be with the Department of Justice. However, that would not make any real difference in terms of accountability.

Mr Larkin: That is probably correct.

Mr A Maginness: I was intrigued by one other point that you made. An alternative that the Committee may wish to explore and which would certainly be less expensive than NIJAC would be to have judicial appointments and reappointments handled through the Lord Chief Justice's office with the assistance of HR Connect. In a sense, do we not already have that, except that it is a more expensive model — or more ornate model?

Mr Larkin: You anticipated my answer. I float that for further investigation on the issue of expense.

Mr A Maginness: Yes. It costs £1·4 million a year and has 18 members of staff. There would be no real difference, however, between NIJAC and the Lord Chief Justice's doing appointments in a contracted office.

Mr Larkin: You are absolutely correct. Among the ideas that I am throwing out for further investigation and reflection is the constitutional issue. Quite separate from that is the issue that you have identified, which is purely one of expense. If you are resolutely committed to a NIJAC-type model, may it be NIJAC that delivers it, it could, probably, be done much more cheaply through the Lord Chief Justice's office if that were desired.

The Chairperson: I want to pick up on that. As regards your role as the guardian of the rule of law on behalf of the people of Northern Ireland, where does that scenario or picture that has been painted of senior judges who are responsible for the number and appointment of judges reflect on people's confidence in the rule of law? Is there a view on whether that is damaging to people's confidence in the law?

Mr Larkin: I would not say "damaging", Chairman. However, if I use the phrase, "guardian of the constitution" and asked, for example, a series of law students to say who is evoked by that, they will almost certainly say it is judges and the judiciary. However, the phrase "guardian of the constitution" was first used in a UK constitutional context by Sir William Blackstone in the early parts of his commentaries on the laws of England in the late eighteenth century. By "guardian of the constitution", he was actually referring to Members of Parliament. There has been a shift — in some ways, an understandable shift — and emphasis put on the role of the judiciary. Members of Parliament and legislatures are, as Sir William Blackstone said, "guardians of the constitution" and have a vital role in that regard. We downplay that role as a community, ultimately, at our peril.

Mr McCartney: Thank you very much for your presentation. In our previous discussion, we talked about the independence of the judiciary. We were cautioned not to stray too far. We have to watch that we do not stray into the merits of the judiciary in this particular discussion.

As regards appointments, how did it come into place that the Lord Justice of Appeal and the Lord Chief Justice were not appointment by the merit system? Was that just by convention?

Mr Larkin: It was not done by the NIJAC system. In the case of the Lord Chief Justice, he was appointed following the establishment of ad hoc committee for that purpose. One has to be very clear that he was not simply appointed on seniority. Therefore, a very deliberate attempt was made by establishing that ad hoc system to identify the best candidate.

Mr McCartney: At that particular time, with regard to the Lord Justice of Appeal and the Lord Chief Justice, if a vacancy were open, was it open for application or filled by appointment?

Mr Larkin: Typically, and certainly recently, there has been no opening of a process. The most recent appointments to the office of Lord Justice of Appeal have been simply the senior puisne judges. Readers of Mr Hain's book will know that in the frankly scandalous passage in which he discusses a very senior member of the judiciary, he refers to the fact that that person's name was passed to him. It was simply a formal process, and you can rest assured that, regrettably, from the tone of Mr Hain's book, had he had a free hand he would not have appointed that person to the Court of Appeal. However, he felt constrained to do it, simply because, although he does not say so in the book, that person was the senior puisne judge.

Mr McCartney: Therefore if a Justice of Appeal is being appointed, it could be someone who is not aware that they are even being considered.

Mr Larkin: That person will know, because they will be the senior puisne judge. We will not name names, but there is a judge holding that office right now.

Mr McCartney: Therefore the idea is that the senior Lord Justice of Appeal is a named person; it is not a generic thing.

Mr Larkin: It has been the practice that the senior puisne judge in the High Court is appointed to the Court of Appeal when a vacancy arises. As far as one can tell, it is done purely on seniority.

Mr McCartney: Would there be any basis, given that other appointments are made on the merit principle, for saying that that system could be challenged in law? Would equality law not apply in such a case? Could someone ask why all appointments are not made on merit? I am not questioning the process, but technically speaking —

Mr Larkin: Chairperson, I am happy to say that I have not turned my mind to that very large question.

The Chairperson: Forgive my ignorance, but how do you become a senior puisne judge?

Mr Larkin: In the High Court? Again, by seniority.

The Chairperson: OK. Is seniority identified purely by length of service? You get the job because you have been in another job for x number of years?

Mr Larkin: Yes. Let us take it to the realm of the abstract so that we do not appear to be discussing individual judges. In jurisdiction A, which applies purely the seniority system, you might have a senior High Court judge who is inadequate or senile. Purely on seniority, she or he will graduate to the Court of Appeal ahead of the genius who was appointed last year.

The Chairperson: You referred to Mr Hain's book. What was the point of his even having a role if he felt constrained that it was just an automatic sign-off? Did that not give it a veneer of democracy? If he felt that he did not want to do it but had to, why was it ever even part of the process?

Mr Larkin: It is because of the constitutional formalities. The sovereign, I imagine, does not, save in very rare cases, have a personal acquaintance with the candidates for judicial office who are proposed to her. Nonetheless, that is where the appointment comes from.

The Chairperson: I ask because if you were to have any kind of democratic role in the process, it would need to be meaningful; it should not just be a façade or gloss or a box-ticking exercise.

Mr Larkin: Absolutely. Of course, the gloss is what exists at present because NIJAC does not appoint; it puts forward a recommendation that must be accepted. If a Minister — and indeed the public — concluded, on what to him seemed very good grounds, that a particular candidate was a disaster, in human terms, that Minister is powerless.

The Chairperson: Is it correct that, in a Northern Ireland context, NIJAC makes a recommendation to the Lord Chief Justice and that has to be approved?

Mr Larkin: The recommendation is not made to the Lord Chief Justice.

The Chairperson: Does the Lord Chief Justice have a role in approving judges for the other courts?

Mr Larkin: Yes, but I think that I am right in saying that county court judges are appointed by royal warrant. They will show you their warrants of appointment.

Mr McCartney: Is there no mechanism whereby he can say that he does not feel that it is a proper appointment, and it can then go back to NIJAC?

Mr Larkin: That system previously existed; however, it no longer exists.

Mr A Maginness: Was the previous position that NIJAC made a recommendation to the Lord Chancellor, and the Lord Chancellor had to accept it?

Mr Larkin: Under the former system that applied to the previous High Court competition, the Lord Chancellor had a second bite at the cherry; he could invite further consideration, but he could not refuse an appointment.

Mr A Maginness: If NIJAC reconsidered and still felt that Mr X was the right candidate, would the Lord Chancellor have to accept that recommendation?

Mr Larkin: Yes.

Mr A Maginness: What is the situation now? The Lord Chief Justice is the head of the judiciary. Does NIJAC simply tell him that it feels that Mr X is the best candidate?

Mr Larkin: That would be correct of judicial appointments that come within the NIJAC scheme for which the formal appointment is in the gift of the Lord Chief Justice. For the purposes of constitutional formality, NIJAC is the recommender. However, the appointer to whom the recommendation is made has no grounds for declining to make the appointment.

Mr A Maginness: For the more senior positions, would the appointer be the Queen in most instances?

Mr Larkin: Yes.

Mr A Maginness: Therefore, it is automatic. Is there a sense in which the Lord Chief Justice, as the chairman of NIJAC, recommends appointments to himself? That would be absurd.

Mr Larkin: No. I cannot identify the judicial offices for which the Lord Chief Justice is the appointer. He chairs the commission that will select his future colleagues, but there is nothing exceptional about that.

Mr A Maginness: That is exceptional.

Mr Larkin: I have been engaged in legal recruitment exercises through which, with the assistance of a panel, I have selected people who will be my colleagues.

Mr A Maginness: If, for example, I was ambitious enough to want to become a High Court judge, would I not try to keep on the right side of the person who will appoint me?

Mr Larkin: Yes, but that brings us back to Mr Weir's question about how we identify merit. In those circumstances, it is hard to imagine a candidate being asked how many times he or she had played golf with the Lord Chief Justice in the past six months.

Mr Weir: And mysteriously lost on every occasion. *[Laughter.]*

Mr Larkin: Yes; that is the important part.

Mr Weir: Those three-foot putts can be tricky.

Mr Lynch: It seems to be an outdated system under which the Lord Chief Justice is powerless. How long will the review take? How will it come to a conclusion? Who has the power?

Mr Larkin: There are two reviews. There is the review that the Committee has embarked on, and, of course, that is a matter over which you are guardians of the timetable. The House of Lords Select Committee will, I think, report in the next month or so.

The Chairperson: You highlighted the senate system, but are there other models to which you could point us?

Mr Larkin: One interesting way is to look at how you recruit from judges to the higher courts, and we have some experience of how the German judiciary is organised. One thing that one learns from the German experience is how you can combine an absolute commitment to judicial independence, such as that which we all share and value, with quite flexible ways of working it out in practice. For a German judge to be promoted from, for example, a first instance position to the Court of Appeal, account is not taken of the quality of judgements because, in one sense, who is to tell which is a good

and which is a bad judgement? Another judge? It is taken on the basis efficiency. You look at, for example, a judge who began in January 2009 with 600 files and ended that year with 400 files; there is a net diminution. If he ends the year with more files, he will never go to the Court of Appeal.

Another interesting point about identifying suitability for appellate work is that, in Germany, there is a flat salary structure. The difference between a minor judicial office and the most elevated post is, in salary terms, perhaps between the equivalent of a district judge in the criminal courts here and the Lord Chief Justice. The actual difference — again, I speak subject to correction — is very flat indeed, whereas here it is quite substantial, as you know.

The German judiciary is also open to taking what are, essentially, the equivalent of judicial career breaks. The Brussels office of the Bavarian State Government has the benefit of a serving judge who is, during his time there, simply working as an official in the service of the Bavarian State Administration. He will go back and will resume being a judge, and he will have exactly the same formal commitment to judicial independence when he resumes that. However, in the meantime, the Bavarian Government have the advantage of that set of skills being deployed in the service of that region in Europe. Introducing a similar practice here would be nothing short of a legal and cultural tsunami. Ultimately, the work patterns of some of our European colleagues have to be seriously looked at.

The Chairperson: If the Lord Chief Justice's office, rather than NIJAC, were dealing with appointments, what would the judicial appointments ombudsman's role be in scrutinising that work?

Mr Larkin: It would be exactly the same. Needless to say, it would be idle to think that moving those responsibilities to the Lord Chief Justice's office would not have resource implications for that office. However, it could be done much more cheaply, because it may be different if some of the quite populist tribunals go to NIJAC, but, right now, NIJAC does not run that many competitions in any given year.

The Chairperson: Therefore would a different number of people be involved in advising the Lord Chief Justice?

Mr Larkin: It is quite a technical HR job or series of jobs. When you look at how relatively few competitions NIJAC runs at present, one wonders whether it could not, with a little resource addition in the Lord Chief Justice's office, be done quite easily there. If you are committed to an unmodified NIJAC model, bear in mind that the expertise and the sense of what is required will be there.

The Chairperson: In essence, you are rearranging the deck chairs to make it more cost-effective; you are not fundamentally changing how it operates.

Mr McCartney: In your experience, has there ever been an instance of a senior judge not moving into the Court of Appeal?

Mr Larkin: Once the practice of seniority began, no. As you know, between 1920 and 1972 appointment to the then Supreme Court of Judicature in Northern Ireland was not devolved; it was a matter for the Lord Chancellor. He would, of course, have consulted the Prime Minister of Northern Ireland and, often, the Lord Chief Justice of Northern Ireland. I have seen a little of the interesting work being done on the history of judicial appointments during that time. For example, there is correspondence from a disappointed candidate for the Court of Appeal in the early 1960s, I think, who complained that he was not sufficiently well considered. At that stage, it was not mere seniority; it was simply a judgement by the Lord Chancellor as to who was the best candidate for promotion.

The Chairperson: If you are applying the merit principle at one level, why not at all levels if that is what you believe to be the best process?

Mr Larkin: Indeed, and that is the suggestion that I throw out to the Committee, Chairman.

Mr S Anderson: Is there any possibility that an appointment based on seniority may not be made for the most experienced judge for promotion? Could that happen?

Mr Larkin: Yes. There are several permutations. Mere length of service is not necessarily to be equated with experience; nor, as I suggested, is it to be equated with merit. That is why I suggested that appointment may involve a formal bypass of the merit principle. On occasion, the fact that you have appointed on seniority might also lead, coincidentally, to the selection of the best candidate for the job. However, you would not be doing it on merit; you would be doing it on seniority, on the basis —

Mr S Anderson: Is there somewhere in between that involves experience and merit?

Mr Larkin: Certainly. As we know, experience is a powerful tool in the recruitment assessment exercise.

Mr S Anderson: In the judiciary, yes.

The Chairperson: OK. That was interesting. Thank you, Mr Larkin.

Mr Larkin: Thank you, Chairman.