Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Judicial Appointments and Competition for a High Court Judge

7 November 2013

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 Tom Elliott
Mr William Humphrey
Mr Seán Lynch
Mr Alban Maginness
Ms Rosaleen McCorley

Witnesses:
His Honour Judge Desmond Marrinan

The Chairperson: I formally welcome His Honour Judge Marrinan. You are very welcome to the Committee. Normal protocol is that Hansard will record the meeting verbatim, and it will be published in due course. We are here to listen to what you have to say, and we will take our time to do that. We are very pleased that you have come to the Committee. I recognise the challenges that that will have presented to you, and I commend you for taking this step. I assure you that we are here to listen carefully to what you have to say. Mr Marrinan, I hand over to you to make your opening remarks. Please feel at liberty to take your time to do so.

His Honour Judge Desmond Marrinan: Thank you, Mr Chairman and members of the Committee, for inviting me to attend your session. I prepared some opening remarks, and I thought that, for your convenience, it might be a good idea to write them out. I gave them to Miss Darrah, so I hope that you have copies. I do not like addressing people by reading from a document. I am always apologising to juries for reading my remarks, but, sometimes in life, it is important to get things right, and this is an important meeting. Therefore, I committed it to writing rather than trying to do it extempore. I should say in passing that, probably for the first time in my life, having been a barrister for many years and a judge for 10, I now realise how nerve-racking it is for a witness, so I will be a lot nicer to witnesses in future. With that preamble out of the way, you will forgive me for reading some of what I am going to say.

I will give you a brief CV first. Again, I provided a copy of that for everyone. My name is Desmond Marrinan, and I was born in Belfast in 1948. I was educated at St Malachy's College in Belfast and took my degree in law at Queen's University in Belfast in 1971. I was awarded a first-class honours degree and the McCain medal for jurisprudence in the same year. I was called to the Bar a year later, and, for some years, I lectured in constitutional and administrative law at Queen's before practising full time at the Bar. I had an extensive and varied practice at the Bar, dealing primarily with commercial

law, professional negligence, personal injuries and criminal law. I was one of the inquiry team of counsel in the Kincora inquiry into the abuse of children. I was junior counsel in the first case to go from Northern Ireland to the European Court of Justice in Luxembourg, and I have been counsel in cases heard in the House of Lords. In 2003, after a competition, I was appointed a County Court judge. In 2008, I was appointed Recorder of Londonderry, serving in that capacity until 2011. I was previously secretary to the Bar Counsel of Northern Ireland and, from 2008 to 2010, I was appointed an external examiner to the Institute of Professional Legal Studies, the body that trains Bar and Law Society students. At present, I am the assigned County Court judge for the division of Antrim; I deal primarily with serious criminal trials. Among my referees for the post that I am going to talk to you about — the competition for High Court judge — were Lord Kerr, formerly Lord Chief Justice of Northern Ireland; Lord Justice Nicholson, formerly the senior Lord Justice in the Court of Appeal; and Mr Justice Burgess, as he is now, formerly Recorder of Belfast and the most senior County Court judge at the time of my application.

My opening remarks are as follows. In April 2009, the Northern Ireland Judicial Appointments Commission (NIJAC) was requested to run a competition for the appointment of a High Court judge, a vacancy created by the elevation of Lord Kerr to the Supreme Court. The closing date for applications was 28 August 2009. The short list and interview methodology and benchmarks for competences to be tested were agreed at a meeting of the selection committee of the commission on 12 August 2009. In the folder of documents that you should have, I have given you copies of some, not all, of the key documents. I gave the original files to the Chairman. There is too much to copy, but I have given you some key documents in the small file.

It will be noted from this document that, at interview stage, a minimum benchmark overall score of 60% was deemed appropriate for this level of judicial responsibility. At a further shortlist meeting held on 29 September 2009, the selection committee decided that its original benchmark scores for interview stage were not testing enough for this level of judicial office and raised them significantly to an overall required benchmark of 79%. That is in copy note 2. That is important later, as you will see, because I achieved far more than that in the competition. In fact, at first interview I achieved 85·5%, and in the second interview, which should never have happened, I achieved 84·5%. I was successful in the shortlisting process and went forward to interview on 16 October 2009 at the offices of the Northern Ireland Judicial Appointments Commission at the Head Line Building.

On the evening of the first interview, I was phoned at home by the then chief executive of the commission and told that the commission could not decide — his words — between two candidates and had resolved to conduct a second interview. Although I did not know it then, it later transpired from the examination of documents provided by the commission during a complaints process that that suggestion was incorrect. My respectful submission to you is that it could and should have decided. All the factual matters relied on in this document and anything else that I say will be taken from documents disclosed to me by the commission during the first complaints process. I should point out that virtually no documents — I am not entirely sure that I could say "no documents" — were disclosed to me after the first complaints process, despite repeated attempts by my lawyers to obtain some of them.

I am not going to ask you to look at many of the tabs in the course of these remarks because I want to keep them concise. However, I recently passed on to the Clerk of the Committee a document like this: it is the actual marking table, which you should have among your papers. It is probably at the back of tab 3. I will not ask you to do the math; I hope that you can take it from me that I have done my maths correctly. It appears that I scored a total of 344 marks out of 400 as against 339·5 marks for the only other eligible candidate.

I see that one or two of you do not have the document.

Mr Elliott: I think that we have a different pack.

His Honour Judge Marrinan: The document is clearly an arithmetical table. It is of considerable importance in the overall context of the points that I wish to make to you. Shall I wait until you get it?

Mr McCartney: Is it in tab 3?

His Honour Judge Marrinan: I asked for it to be included in tab 3. Whether it was or not, I do not know. I can make it available again for copy if there is a problem.

The Chairperson: My apologies.

His Honour Judge Marrinan: It is all right; these things happen.

As I said, if you take my word for the maths, I scored 344 marks out of 400, against 339·5 marks for the only other eligible candidate, other candidates having been sifted out of the competition before the final stage. In percentage terms, I scored 86%, as against 84·9% for the other candidate. To be absolutely accurate, that was eventually moderated down, as you can see from the bottom of the page. It is a bit hard to follow, but, if you look at the bottom of the page, you will see 85·5% with a little 3 beside it at the very bottom of the right-hand column. That was my final moderated score. Arithmetically, it was 86%, but it was moderated down slightly to 85·5%. In percentage terms, I scored 86%, but let us say that it was 85·5% against 84·9% for the other candidate. Three of the four selection committee members had me substantially ahead. That is another important point. Again, without doing the math, if the marks that panel members one, three and four had scored me had been relied on alone, I would have won by seven or eight points or 6% or 7%. However, the other panel member, as he is perfectly entitled to do, marked me down consistently against the other candidate. His marks were quite out of kilter with the other candidate; nevertheless, there they are. Both sets of scores — this is the important point — were significantly in excess of the benchmark score of 79%, so the other candidate and I scored well ahead of the very high benchmark of 79%.

The selection committee deliberately refused to complete the marking process in breach of its own protocols and its clear public duty to do so. Contradictory reasons were given by the members of the selection committee for that failure. I will not weary you by reading it out, but, if you are interested, after this session you can look at the very lengthy letter, which is the first entry in tab 3. I eventually had to instruct solicitors because I could not deal with all of it on my own. In fact, I think that I dealt with the first complaint entirely on my own, without solicitors, but the letter of 9 December is a letter from me to Mr Gorringe, the then chief executive of the commission. I will not weary you by taking you through it, but it contains an analysis by me of the correspondence.

A complaints committee was set up by the commission when I complained for the first time after the second interview. There should not have been a second interview, in my view, but I will come back to that. The complaints committee wrote letters through Mr Gorringe to each of the four panel members individually and insisted on getting individual answers from the four of them. Curiously enough, although perhaps not entirely surprisingly, a number of those answers were contradictory. In other words, different panel members gave different reasons for not having completed the marking process. I rely on that substantially in the letter to demonstrate. You will see towards the end of the letter, at the bottom of page 159, that the crux of the point is made in that letter of 9 December. These numbers are taken from a different file. I respectfully suggest that the whole letter deserves to be read to you, but the particular member of the committee who gave two entirely contradictory answers in my submission to you is dealt with there.

The original letters are also appended in tab 3. They are to a Professor Morrison, who was one of the four-man panel. I will come back to that when I finish my opening remarks, but it is my contention that his answers were completely contradictory. What do I mean by that? In one of the answers, he said that it was not until the second interview that he was prepared to change his mark of 15 out of 20 for the other candidate under the rubric of leadership. There were a number of competences to be tested. You will see in the tabular document under "Leadership" — I know that this is hard to follow — that for candidate A, who was the other candidate, on the first line, under the moderated, finally completed marks, no mark is recorded. That is in their official documents. That is because they refused to complete the marking, because, I say, they would have had to declare me the winner, and they chose not to do that for reasons that were not proper.

This point is slightly different. Professor Morrison was panel member number 4, and, under "Leadership", he gave the other candidate only 15 marks out of 20. The other candidate could never have equalled my mark. In other words, he was always going to be at least one mark behind me, unless, crucially, Professor Morrison could have been persuaded to increase his mark from 15 to 17, which is quite a jump. The two letters from him enclosed in tab 3 are responses, one when an individual letter was written to him; the second is after my letter of 9 December. In the first, he says categorically that he was not prepared to move the mark for leadership from 15 to 17, which was vital if the competition was to be called a draw, until after the second interview when he saw elements in the other candidate's answers that allowed him to do that. Curiously enough, in answer to the complaints committee's query on that when I raised the query on 9 December, he came back with a different answer, which was that he was prepared to acquiesce in a mark of 17. Those two answers cannot stand, and I suggested that the members of the selection panel be interviewed by the

complaints committee, preferably with counsel present to advise them. I said that those two answers in particular could not stand and were totally contradictory. However, that was ignored, and they proceeded to accept the change of tack from him. There are many other points in relation to that, but I will not weary you with them at this stage.

The letter continues:

> *"The Selection Committee deliberately refused to complete the marking process in breach of its clear duty to do so"*

Contradictory reasons were given by the members of the selection committee for that failure. At one point, for example, it was said by some of them that no agreement could be reached; they just could not reach agreement. At another point, it was said that agreement could be reached but the committee was not prepared to award the competition to me on the basis of one mark. In other words, the chairman of the committee, Lord Justice Coghlin, said in more than one letter to the Lord Chief Justice, the chairman of the complaints committee, that they were not prepared to award the competition on the basis of one mark. To my mind, that is irrational and unfair, especially at the final stage of a competition, where one would expect the difference between the two candidates to be a mark or so. In one of my letters to the chairman of the committee I unsuccessfully used the following analogy: if Rory McIlroy won the Open next year by one shot, no one is going to say to the runner-up, Tiger Woods, "I'm sorry, but you are going to have to play off over nine holes because he won by only one shot after four rounds, and his total score is 270 shots against your 271". That is exactly how I felt, although not quite as cheerful. I felt that there was no proper reason for them to refuse to give me the competition on the basis of one mark. Yet they are on record as saying that they would not do that. That is crucial because, had it done its duty, there is irrefutable documentary evidence, some of which I have just explained, that I should have been declared the winner of the competition. The nature of that evidence is set out in a letter from me to the chief executive, which was the letter of 9 December 2009 that I just referred to.

As so often in life, the devil is in the detail. It is easy to make sweeping statements about fairness, justice and transparency, and you may or may not hear those remarks later in this process. However, it is only when you examine the detail of what happened that you can come to a proper, fair and reasonable view of the fairness or justice of what is done to anyone.

The ombudsman has, as you know from your hearings in 2012, examined only a very few cases. Indeed, there is a question mark over whether his role is value for money. I think that I hold the record with about 60% of his caseload. That means that I am either a serial complainer or I have something serious to talk about. Unfortunately, the ombudsman cannot find his way to declaring maladministration, which is, as I am sure you know, an extremely difficult concept to prove. However, in his first report, of 2 March 2010, the ombudsman upheld my complaint that the selection committee was at fault in refusing to complete the moderation process. Among other remarks, he said:

> *"I considered that the Selection Committee should have continued with its deliberations and completed moderation."*

That is set out in the guidance. He continued:

> *"Completing the moderation process would have ensured a completed audit trail for this part of the recruitment process and the Guidance is explicit that this falls within the responsibilities identified for the Selection Committee."*

Although I have many issues with the complaints committee in the first process, it also came to the conclusion that the selection panel had failed in its duty.

The signal failure by the selection committee to discharge its clear public duty deprived me at once of a competition that I had won fairly and led to a chain of events in which the commission's unfairness towards me persisted and worsened over a period of years. This mindset was illustrated again as early as 18 January 2010. The ombudsman, at that point, was considering his investigation. It took him another four to five weeks to complete that investigation, which is part of the statutory process set up by Parliament when it established the Judicial Appointments Commission. In the midst of the investigation, what did the commission do? It completely ignored the investigation and went ahead with making its recommendation of the other candidate to the Lord Chancellor as if that investigation was completely irrelevant — this from an organisation that claims to treat candidates equally through

fair and open competition. The comparison between this approach and the consideration and latitude shown to the other candidate is, I suggest, stark.

In his first report of 2 March 2010, the ombudsman upheld the complaint on perception of bias — I will pause at that: "the perception of bias" — in a public organisation tasked with public functions. In his second report dealing with this incident, he noted of the decision to proceed with the recommendation as if the investigation was not even taking place that:

> *"such decisions taken in the midst of a complaint process can give rise to the perception on the part of complainants and others that the complaint is viewed as being of little value or there are closed minds with regard to the outcome... confidence in the integrity of the selection process can only be a casualty of such perceptions."*

Those are his words, not mine.

The Lord Chancellor took the hitherto unprecedented step — I think it was unique in legal history — of declining to act on the commission's recommendation. I have never been told the reasons for that, although I have strong suspicions of what they were. So, after inviting the Lord Chancellor to hold off from acting on its recommendation in March 2010, the commission took the most unusual step of seeking to withdraw its original recommendation in light of matters that it said had come to its attention in relation to the other candidate. Again, that has never happened either here or, as far as I am aware, in England, Wales or Scotland.

Obviously, issues of confidentiality arose in relation to that, and I do not press that point. Nevertheless, something serious or irregular had come to or was brought to the commission's attention between the competition ending in October 2009 and its formal request to the Lord Chancellor to withdraw its original recommendation. Permission to withdraw the recommendation was then given by the Lord Chancellor.

The commission then took it upon itself to put the competition into cold storage for almost a full year. This is an organisation tasked with filling a High Court post that had fallen vacant in the summer of 2009. It had the other candidate and it had me, and the two candidates were clearly far in excess of the requirements for the post. Something had arisen in relation to the other candidate, and, to facilitate the other candidate, it decided, effectively, to freeze the competition for a year. Again, I suggest that is a most irregular way of behaving.

Although very little information was disclosed by the commission in relation to this unprecedented period of delay, it appears certain that this was to facilitate the other candidate. He had been a director and chairman of the Presbyterian Mutual Society (PMS), and it appears that the Department of Enterprise, Trade and Investment (DETI) was considering bringing disqualification proceedings against the other candidate and other directors of the PMS. The Financial Services Authority (FSA) issued a report in the summer of 2009 that stated that the PMS had engaged in investments that were not regulated or authorised. That, as you know, sadly led to the collapse of the organisation and a huge loss of money to its investors, happily made up, as I understand, mostly by loans from the Government or the Assembly; I do not know the exact details.

The Department of Enterprise, Trade and Investment was considering bringing disqualification proceedings against the other candidate and other directors of the PMS, and the commission was prepared to freeze its decision on the recommendation of a candidate until that matter was fully resolved. In the event, DETI decided to bring such proceedings against certain directors only of the PMS and not to take action against the other candidate. Once that was clear, almost a year later, the commission resubmitted its recommendation of the other candidate on 2 March 2011. That was made to the new Lord Chancellor, Kenneth Clarke MP, the previous Lord Chancellor having been Jack Straw MP. Yet again, a different Lord Chancellor refused to endorse the commission's recommendation, and it appears that, on 1 June 2011, he wrote to the commission, asking it to review its recommendation.

The recommended candidate gave an interview to the press about the matter that was reported in the 'Belfast News Letter' on 29 June 2011. In that interview, he said that he had been informed, presumably by the commission, that the Lord Chancellor had written to the commission to inform it that, in his view, the recommended candidate was not considered fit to be a High Court judge and to ask the commission to reconsider its selection because of that candidate's involvement as a director of the PMS. On 28 June 2011, the commission sent my solicitors a very short letter informing them that, at a meeting on 27 June 2011, the commission had decided:

"to exclude one of the candidates."

The letter continued:

"The Commission has decided that it should re-commence the competition".

Before finishing that sentence, I draw your attention to the word "re-commence". As a lawyer and former lecturer in constitutional and administrative law, I am not familiar with that word, and I have never met anyone who is familiar with it. It is parliamentary language for saying that they are going to abandon the competition. That is what it really meant. Indeed, the ombudsman, in his third report, finally extracted the concession from the commission that abandoning the competition and starting again is exactly what that meant. However, it chose not to use words like that. It chose to use a word that sounds a lot softer. I will continue the quotation:

"Any previous applicants in the competition and any new applicants wishing to apply will be able to do so."

That letter is set out for you in tab 4. In effect, the commission simply abandoned the ongoing competition — the ombudsman has now confirmed that that is what it did — but, bizarrely, made it clear that the person whom it had just excluded could apply again immediately in the new, so-called recommenced competition. Again, I have never heard of a procedure relating to a person who is excluded in a competition for whatever reason. One can only imagine that the reason that was eventually accepted by the commission as being sufficiently serious to exclude him was serious. Therefore, why, one asks rhetorically, would one immediately permit the person who had just been excluded to reapply in what was, effectively, the same competition with another name?

It should be noted that, under the relevant applicable legislation — the Justice (Northern Ireland) Act 2002, as amended — the relevant sections of which I have included for you at tab 5, if the commission is required by the Lord Chancellor to reconsider its decision, it must, after reconsidering its decision:

"re-affirm its selection or select a different person to be appointed, or recommended for appointment, to the office".

If it had chosen to reaffirm its chosen candidate, the Lord Chancellor would have been powerless. He would have been obliged to accept the commission's decision to recommend him for appointment. You will see that, if you look at the copy of the Act that I have given to you.

At the time, there was a lot of press speculation, particularly in the 'News Letter' article that I referred to, that this was something imposed on the commission by an English politician. That, in fact, was inaccurate. It may be that the editor of the paper did not realise what the law was. The law is very clear. The Northern Ireland Judicial Appointments Commission was not hamstrung. It was the other way round: the Lord Chancellor was hamstrung. Of course, I have never seen the letter, nor would I expect to see it, but, if the commission had considered the points and disagreed with him again, it could have reproposed the same candidate, and the Lord Chancellor could have done nothing to stop it. If it had chosen to reaffirm its chosen candidate, the Lord Chancellor would have been obliged to accept the commission's decision to recommend him for appointment.

With full knowledge of that provision of law, the commission decided to exclude the other candidate from the process, presumably accepting the Lord Chancellor's reasoning. I do not know, but I presume that. The rational, fair and reasonable next step, I argue, was to recommend me as the sole remaining and clearly appointable candidate. Following its now established pattern of unfairness, the commission refused to endorse me and chose instead to abandon the competition in a peremptory fashion without consultation or explanation of any kind.

Again, lady and gentlemen, I wish to point out that, in June 2011, as you can imagine, the legal rumour mills were working overtime. My solicitors wrote to the commission on several occasions in that month to ask it what was going on. The rumour had been that the Lord Chancellor had written, but no one knew precisely what had been said. Our letters were either ignored or palmed off with responses that stated they had heard from the Lord Chancellor, they were going to consider the matter and they would be in touch.

The first that we heard of any detail was the short, four-line letter of 28 June, which simply and bluntly informed me that they had excluded a candidate — that was, obviously, the other candidate, not me — and were going to recommence the competition and anybody could apply. It is striking that, at no stage, did the commission officially inform me that the Lord Chancellor had declined to accept its recommendation of the other candidate, notwithstanding the fact that that information was expressly requested in solicitors' letters from me on 20 June. This caused us to write to the Lord Chancellor, asking for information, because the legal vacation was rapidly coming up and everyone would be going on holiday at the end of June.

The commission wrote to us on 22 June simply saying that the Lord Chancellor had been in contact and it would consider his correspondence at its meeting of 27 June. No information whatsoever was provided on what the Lord Chancellor had determined to do, why he had taken whatever decision he had, when the commission was likely to take any further step, what options were open to it and what factors it would consider in reaching any further decisions. Put simply, the commission's letter of 28 June came as a bolt from the blue to me. I had no idea that it was coming, and I was deeply shocked. I should also point out that that was two days before the end of the legal term. I was given no information that suggested why this highly unusual step might even be on the cards. As the only remaining candidate in the competition, which the commission had described to me in correspondence a year earlier as a "live" competition — I will come to that in a moment — I was given no opportunity to make any representations to the commission on what should happen next or the propriety of any course that it proposed to adopt.

I go on to say in these opening remarks that the quality of the commission's decisions had taken heavy blows in that, first, one Lord Chancellor had declined to act on its recommendation and, secondly, the press interview is the only information that I was given. The press interview of the other candidate gave me more information than the commission was ever willing to give me. In passing, I would like point out something to you. I have reason to believe that meetings were held on 7 June, 14 June and 27 June. If you go to NIJAC's website today and look at June 2011, as I did, you will see that there is nothing on the website about a meeting on 7 June or 27 June, despite the fact that it tells me that there was a meeting on 27 June. The meeting on 14 June says nothing about this competition. It records blandly that there was to be a new competition process in September 2011. Although I can understand that minutes occasionally have to be redacted for confidentiality reasons, it is extraordinary that the most important meeting on 27 June, during which this fateful decision was taken, is not even recorded on the website, even in a redacted form and nor is any other meeting, apart from some meeting that occurred on 14 June, about which we knew nothing either.

After deliberation, the commission chose not to challenge the reasoning of the Lord Chancellor. As I have pointed out to you, it could have ignored what he said and the reasons that he gave, whatever those reasons may have been. It took the very serious and unprecedented formal step of excluding its own twice-preferred candidate, presumably accepting the incorrectness of its previous decisions. One asks rhetorically, if it did not accept the correctness of the Lord Chancellor's reasoning and felt annoyed or outraged at his interference — I am sure that it would use more parliamentary language than that — why exclude the other candidate, whom it had supported twice? One is tempted to see its next decision, namely to abandon the competition and immediately permit the excluded candidate to reapply in the so-called recommenced competition, as nothing more than pique, combined with a rigid determination to have its own way, whatever the human cost.

Despite all that had gone before in this sorry process, this final act of unfairness is breathtaking, I suggest to you, in its mean-spiritedness. It is so obviously unfair, irrational and unreasonable that it confirms the appearance of bias again against me. You may find it instructive in this regard to compare and contrast the commission's treatment of the two candidates — myself and the other candidate — in what was claimed to be a fair competition. At every turn, the other candidate was given a convenience. For example, when Jack Straw appeared to refuse to endorse his candidature, he was called to a private meeting with the Lord Chief Justice. I do not know what took place in that meeting. That was queried by the ombudsman, and the Lord Chief Justice explained that he had a role to play as the head of the judiciary and that part of that role is to interview candidates who are selected for recommendation, to check with them that there are no issues and so on and so forth. That may well be correct. I am sure that that is a procedure that occurs, but remember that, at the same time as he did that and had that chat with the other candidate, he was chairman of the commission and was running a competition. Also, his principal private secretary took it upon himself, apparently acting on behalf of the commission, to contact DETI during its investigation of whether or not the other candidate should be subject to disqualification proceedings. The ombudsman had plenty to say about that. He thought it quite inappropriate for the principal private secretary of the Lord Chief Justice to act in that way. He was not an official of the commission. Again, it points up the difficulty,

which I will come to later on under issues of possible reform of the process, of the Lord Chief Justice, particularly in a very small jurisdiction, also being the chairman, ex officio, of NIJAC.

In paragraph 22, I state:

> *"There is unequivocal documentary evidence that I was regarded as an excellent candidate who was clearly and indisputably appointable."*

I refer members briefly to tab 6 in the papers. This is a letter from the chairman of the selection panel, Lord Justice Coghlin, who is writing to the Lord Chief Justice as chairman of the complaints committee and describing how the process went. This is one of the early letters, after I made my first complaint. I will read one small passage. It is always quite embarrassing to read about yourself; well, maybe not so embarrassing if it is flattering. However, I am acutely aware that it is always very difficult to talk about oneself, but these are his words, not mine:

> *"At the conclusion of the initial assessment process on 16 October 2009 the Selection Panel had to consider two excellent candidates, whose careers at the Bar of Northern Ireland had followed very different courses".*

I will not go on to say what those careers were. However, that is a very important point because, when my solicitors challenged in a letter the decision of NIJAC to abandon the competition, the commission changed its tack about me. Suddenly, I was not an excellent candidate. Suddenly, according to a letter that I will come to shortly, the other candidate was eventually "clearly qualitatively superior". I remember those words; they have stuck in my memory ever since. I feel insulted by them and I will explain why. They are not correct, accurate or truthful. The other candidate was not "clearly qualitatively superior" to me. Again, it is very difficult to talk about oneself. It sounds almost pompous, but we are dealing here with facts. At a stroke, the commission decided, when it was challenged about its decision to abandon the competition, to start rewriting history, if you like. Suddenly, I was no longer an excellent candidate and, according to them, the other candidate was "clearly qualitatively superior" to me. That is not true.

The letter that I have just referred to described both remaining candidates as "excellent candidates". I point out again to you that my recorded scores, whether 85·5% or 84·5%, were clearly well above the enhanced levels for appointment to the bench. The bar had been set high at 79%, but both I and the other candidate exceeded that bar comfortably. By the way, I will just point out in passing that the commission spent a year to facilitate the other candidate and his potential problems with DETI, but it also, remember, proceeded to make the recommendation, during my day in the sun, if you like. That was my first complaint to the ombudsman. It went ahead and made the recommendation, so anxious was it, apparently, to complete the process. Yet its anxiety to complete the process changed to lassitude and a delay of a year when it came to facilitating the other candidate.

If I sound a little bitter, sometimes, about some of these things, I apologise. I do not want to appear before you, either in truth or in fact, as someone who is complaining for the sake of it or who is a bad loser — my children might disagree and say that, in Christmas games of Risk and Monopoly, I am a pretty bad loser — but I can assure you that I am not, although it is a matter for you to judge for yourselves. Had I lost the competition fairly and squarely, I would not be sitting in front of you today and I would not have made three complaints to the ombudsman. I probably would not have ended up suffering a serious illness, which I did in the summer of 2012, as a direct result of all this disgraceful behaviour. That is the only word I can use.

In paragraph 23, I state:

> *"Moreover, at all times during the process and during the lengthy delays created by the Commission in order to facilitate the other candidate, the Commission had made it clear to me that the on-going process remained, as they called it, a 'live competition' in which there remained but two eligible and appointable candidates."*

At tab 7, you will see the only letter that is relevant to that: a letter from NIJAC to my solicitors. My solicitors were writing to NIJAC after this long delay — this deep-freeze of a year — occurred in the competition. On page 2 of that letter, you will see a letter from Mr Horgan, who was the acting chief executive, having taken soundings from the chairman of the commission. Presumably, during the summer, the whole commission was not available, but the chairman of the commission was. This was at a time when the commission was trying to reassure me that the competition remained live, that I

need not be concerned about the delay and that I would hear from it eventually. At paragraph 3 on the second page, Mr Horgan says, on the direction of the chairman of the commission:

> *"What is important from your client's point of view, in the context of what remains a live competition, is the information which was provided".*

That is not very relevant, but it becomes important later. When the commission was eventually required to respond to a threat of legal proceedings, it wrote a letter before action. In that formal letter, apart from suggesting, wrongly, that the other candidate was clearly better than me, it suggested that no reserve list had been created and that I, therefore, had no reason to expect that I would be appointed. It also suggested that time had passed and, therefore, it was necessary to have a new competition. It made one particularly fatuous suggestion, namely that the highly qualified members of the selection committee felt that by June 2011 it was so long since they had looked at the papers and decided the matter — October 2009 — that they could not back and look at them again. That suggestion is risible in its logic.

In making my point about the reference to it being a live competition, I ask this rhetorical question: what would you do if you, as the one remaining fully qualified candidate in the competition, were told, "Look. The competition is over. We have selected one person. That is our recommended choice. You are no longer involved in this process. Just get used to that, and go away"? That might have been one scenario. I may or may not have gone away. I certainly would have taken it that the competition was over and I did not have any chance of being appointed. However, the commission assured me more than once that it was a live competition.

I ask this, again rhetorically: why did a live competition need to die in June 2011? Why did it need to be abandoned simply because the candidate that the commission wanted to appoint could not be appointed? If, in place of that candidate, there is another highly qualified candidate who is willing and able and waiting patiently for its say-so, having been told that it is a live competition, why does the competition need to be abandoned? That is a question to which I have never had an answer. I hope that you will be able to get answer to that question some time. We never could.

I also suggest to you that I was given a legitimate expectation that I continued to be engaged as one of only two remaining candidates in the competition. However, in the commission's letter, which I will come to, it ignores that and seems to suggest that no reserve list was created and that, arguably, it was never going to appoint me. If so, why continue to give me the expectation that I was in the competition with a legitimate chance of success?

Litigation was threatened as a consequence. Letters before action were sent to the commission on 7 July, 18 July and 27 July. The commission replied in a letter of 3 August. I should say to you that, in my haste to get the papers to you, I numbered some of the tabs incorrectly. If you would not mind, under paragraph 24, change the copied letters from 8, 9 and 10, to 9, 10 and 11. Similarly, the letter referred to at paragraph 25 is not letter 11, but letter 12. For the sake of completeness, the document referred to in my response at paragraph 26 is not letter 12, but letter 13.

Those letters are important, but I do not want to weary you by going through them in any great detail. I will, however, draw attention to the commission's letter. This is its considered response to my solicitor's letters before action. Before you take judicial review proceedings, which is what I was hoping to be able to do — I will come to why I did not in a moment — you are obliged to write a letter before action that then has to be answered. Those are the formal documents that, as it were, pre-empt the application for leave for judicial review.

If you look at tab 12, you will see a letter of 3 August. It is this letter that causes me particular offence to me. In that letter, at sub-paragraph 5(d), the commission sets out the factors for not appointing me and recommencing the competition. You will see that the first of those factors is:

> *"The candidate selected by it on merit whose application ultimately was viewed as clearly qualitatively superior to that of others was no longer available for appointment".*

The only other candidate was me. I will force myself not to weary you by answering that in detail. I have given you some hint of my view on that. That point is answered in detail in paragraph 3(v) on the second page of my solicitor's response of 12 August 2011, and I will not trouble you by going through the detail. However, I ask that, in the fullness of time, you look carefully at those answers. They robustly repudiate any suggestion that the other candidate was "clearly qualitatively superior".

There was a larger difference in the second competition and interview, but that should never have occurred, and it occurred only because the commission refused to grant me the competition after the first process. From the scoring sheet, you can see that the other candidate recorded a score of 88, so his marks went up dramatically from 84·5 to 88. Mine dropped fractionally from 85·5 to 84·5. A difference of 3·5 marks out of 100 in a competition in which two people had exceeded the benchmark by several percentage points is not "clearly qualitatively superior". You also need to take into account the other matters, and I will give you a hint of what I am saying. A value judgement was made that the other candidate was "clearly qualitatively superior", and that has made it very awkward for me to be able to talk to him. In some ways, I feel sorry for him because of what happened. If you are going to make a value judgement that someone is "clearly qualitatively superior" to another candidate, you have to justify that.

In a nutshell, my solicitor's letter of 12 August shows that the commission refused to take into account any downgrading of his marks, which, for example, would have occurred as a result of whatever was known by the commission since March 2010. You can rest assured that they had that information by March 2010, a full year before Kenneth Clarke refused to accept the other candidate, and when, according to the other candidate in the 'News Letter', Mr Clarke said that he was not fit to be a High Court judge. Those are not my words. I would be very slow to say that of any colleague at the Bar, and I still regard him as a valued colleague. That was the opinion of the Lord Chancellor. I do not know what information they had before them, but clearly the commission had the same information before it for a full year. Therefore, it particularly galls me to know that, whatever that information was, which was clearly sufficient to exclude the other candidate from a competition — a process unheard of in Northern Ireland legal history — it does not appear to have affected it in its description of him as "clearly qualitatively superior" to my candidature. I do not get that, and I think that it is offensive to me.

The letter from the Crown Solicitor's Office goes on to state:

> *"at no stage had the Respondent established a 'reserve'".*

In some competitions, that may be a fair point. However, I would answer that by asking rhetorically why it called the competition "live" in August 2010. Why did it lead me to believe that I was still a candidate in a competition for two years and still there, if you like, as a "reserve"? Suddenly, out of the blue, the commission forgot the words "live competition" and made these pedantic legal points that it had not created a reserve.

The third point is that:

> *"over two years had passed since the advertisement of the competition".*

I should apologise to you because some copies of the documents that I have given you have some handwriting on them. They may have been my notes, and I am glad to say that there is nothing irreverent in those comments. Above the remark:

> *"over two years had passed since the advertisement of the competition"*

I wrote "So?" I wrote that at the time, and I hope you will forgive me for it. I have checked them carefully and there is nothing slanderous of anyone in any of my asides; I hope that you will forgive me for that. I meant to give you clean copies, but I think that I forgot.

The next point was:

> *"of the candidates who originally applied only the proposed [candidate], who had not been viewed ... as the best candidate on merit remained in the competition. The limited pool now available for the appointment ... was viewed as unsatisfactory".*

Well, if it was viewed as unsatisfactory in August 2011 when the members of the commission were thinking of defending themselves against legal proceedings, why was I not told that in August 2010, when the chairman of the commission gave specific instructions to Mr Horgan to write to pacify me by telling me that it was a live competition? Surely they knew a year previously that there were only two people left in the competition. If it is true that, as it said, the limited pool now available was regarded as unsatisfactory, why was that point not made in August 2010?Those are makeweight points. They were made on the hoof to pad or fill out a decision that should never have been made.

The next point was:

> *"it was not unreasonable to suppose that by 27 June 2011 a broader field of candidates could now be obtained"*

in the competition. Of course that is true if you delay a competition for a year or two years, as they did. I did not delay the competition by one minute, expect in making my complaints to the ombudsman. They chose to delay the competition for two years. Does it lie in their mouth to say, "Oh, we have delayed the competition for two years. We have told you that it is a live competition. We know your marks are excellent and well above the criteria, but, do you know what, we are going to start again, because there might be one or two people out there now who are better than you"?

I should say in passing that, in the meantime, because time moves on, they also knew that, through retirement, two further vacancies in the High Court had occurred, and they were going to run a competition in September 2011 for those two further vacancies anyway. So, that last point could properly be met: a broader, and maybe better, field of candidates — I do not know; I am sure that there are better people than me who could have applied for this post, but they did not apply, and that is my point — could have been catered for and the public interest satisfied by the appointment of those two judges. In fact, two excellent judges were appointed after September 2011.

I will not go through all the points, except the one that struck me as almost blackly humorous. On the next page, in paragraph (x), they came out with this:

> *"members of the original selection committee were of the view that it would be difficult, if not impossible, to re-open a process they had completed nearly two years previously and, given the small applicant pool, ensure that the statutory duties of diversity and appointment in merit would be upheld."*

The members of the original selection committee were the four people who formed the panel that refused to moderate the marks, as I told you. All I can say about that is that, first of all, no reasons are given for such an assertion. All the notes, the marking schedules etc have been retained by the committee. All the information deemed sufficient to exclude the other candidate was available to them from March 2010, yet they chose not to revisit the matter until June 2011. All that they were required to do was look at their notes again and complete the selection process by the simple procedure of selecting the candidate who was clearly appointable.

I will move on to paragraph 27. I am sorry that I am taking a long time, Mr Chairman. Can I complete these remarks?

The Chairperson: Yes, if you can get through them. Some members need to leave, and we want to get to questions.

His Honour Judge Marrinan: I am so sorry. I will not read every single word of it. I do suggest, however, that any fair-minded observer of these events would be left, as I was, with the clear and inescapable conclusion that the commission simply did not want me appointed. I will pass over some of the other remarks.

The Chairperson: I am happy for you to read through your remaining remarks if you can contain them to what is before us, and then we will get into questions.

His Honour Judge Marrinan: All right. I do apologise.

The Chairperson: You are OK. Take your time.

His Honour Judge Marrinan: One potential reason for commission's stance — as you can imagine, I have naturally been thinking about why it did this — is that I had made complaints about the way in which this deeply flawed process was conducted. In ordinary discrimination law, that would constitute victimisation. As I say, in the bruising political world of early 20th century US politics, it used to be said, "You can't beat city hall".

The commission must have smarted at the criticisms upheld by the ombudsman that it had failed in its public duty to finalise the scoring of the competition and, the even more damning criticism, that it had

ignored the appeals procedure by making its recommendation before the ombudsman had even finished his investigation, as well as the scathing reference on his part to the perception of closed minds. It must have smarted even further at the refusal of successive Lord Chancellors to endorse its recommended candidate.

It is my respectful submission to you that the commission's behaviour throughout the competition was so obviously flawed, unfair and biased towards me that it has shown itself to be unfit for purpose and that significant changes are necessary to make it fit for purpose. The commission's determined and persistent unfair treatment of me has deprived me of a public competition that I won fairly, blocked my right to be a High Court judge, with obvious major damage to my career, and caused me directly to suffer a serious illness, with significant damage to my health, resulting in great distress and suffering to my family.

It is almost beyond belief to me that a group of people chosen from respected positions in our community could act collectively in that way. I suspect, although I do not know, that some members of the commission may well have voiced their unhappiness, particularly at the final decision to abandon the competition. It is noted that the commission did not act on the Lord Chancellor's letter of 1 June for almost four weeks. It is known that there was a meeting of the commission on 7 June 2011, but I was refused any information about how the process developed during June 2011.

It is open to this Committee to call for and examine all relevant documents and call members of the commission to give evidence on this and other important issues. It would be instructive, for example, to hear from members of the selection committee their various contradictory accounts of why they chose not to complete the scoring when it was obvious that I was winning. It would be of particular interest to hear an explanation from members of the commission about why they ever thought it proper to ignore the ombudsman's investigation, which was a statutory process, and proceed to make a recommendation for the other candidate in the midst of that investigation. Furthermore, the commission could be asked why a competition that it chose to describe as "live" for almost two years was required to be abandoned only at the point when it felt obliged to exclude the other remaining candidate. In the same vein, it would be of considerable interest to learn why members of the commission considered it appropriate to take the serious formal step of excluding a candidate, doubtless on grounds that it considered compelling, and, in the same breath, recommencing the competition and making it clear that that excluded candidate could reapply.

Sadly, throughout this complaints process, the ombudsman took an unduly restrictive view of his remit and refused all attempts to disclose relevant documents. In his final report of 30 April 2012, however, he makes it clear that, in his draft report, he was resolved to find maladministration proved against the commission. He sent his draft report, which found maladministration, to the Lord Chief Justice, as chairman of the commission, for any comment before producing his final report. That is a statutory requirement. He was persuaded by the Lord Chief Justice to change his mind on that key finding, and I refer to a copy of the letter from the Lord Chief Justice to the ombudsman at tab 14 in the papers. There was no statutory or other impediment to the ombudsman seeking my response to that exchange, yet I was not permitted to become involved in that crucial correspondence. Curiously, as shown at tab 14, the chairman of NIJAC chose to write, in that very formal and public procedure, to the ombudsman on first-name terms. That one-sided correspondence is obviously a denial of natural justice to any complainant. One could just imagine how justifiably aggrieved a party to litigation would feel if a judge had a draft judgement in favour of that party but then entered into correspondence on first-name terms with the opposing party and changed his decision without any opportunity being given to the excluded party to participate in the process. Such a process would be very easily struck down on appeal.

A public competition for a senior judicial post that should have taken, at worst, a few months took almost four years until the judge finally selected in the so-called recommenced competition was sworn in. In fact, due to other commitments, he will not take up his functions fully until approximately January 2014. The gross failure to complete the competition in a timely fashion would be worthy of censure on grounds of incompetence alone. However, the matter becomes much more serious and concerning when you take account of the history of the matter, marked as it was throughout by conspicuous unfairness, irrationality and the frequent appearance of bias.

When I entered the competition, I was prepared for two outcomes: one, that I would be successful; or, two, that a better candidate would emerge. The one scenario that I could never have anticipated was that I would win the competition but be denied the result because of the determination of the commission to deny me and, in doing so, breach every fair rule of competition. It has been, I can assure you, a harrowing experience that has cost me much. Many in the legal profession know that

what happened was very wrong and have contacted me to express their sympathy and distaste for the commission's behaviour. Several senior judges, including High Court judges, are included in that group.

It might be said — no doubt, it will be said — that I could have instigated litigation in relation to that deeply flawed and unfair process, and, indeed, I was advised by two senior counsel that I had more than sufficient grounds for doing so. However, I could repose no confidence, sadly, in the system to deliver justice on the affair. Any such litigation would have involved a challenge to the action of senior judges and the Lord Chief Justice. In a small jurisdiction like Northern Ireland, it is entirely invidious, I argue, to ask a High Court judge to adjudicate on the actions of his more senior colleagues, particularly when dealing with allegations such as unfairness, irrationality and bias. It is for this reason that the procedure for dealing with a complaint made against the Lord Chief Justice, for example, or a Lord Justice can only be dealt with by a Supreme Court judge. In the face of the commission's tenacious resolve to ensure that I was not appointed, I saw no point whatsoever in putting myself and my family through such a doomed process, whatever the merits of the arguments. Doubtless, I would have been penalised with punitive costs. The commission, as a publicly funded body, faced no cost risk, but I, as an individual, would have been faced with ruinous costs.

The decision to place these matters before you was not an easy one, I can assure you of the truth of that. I value my privacy and that of my family. Frankly, I would prefer to forget all about the commission and its works, as one would seek to banish the memory of a bad dream. The truth is, sadly, that an unrepentant and unreformed commission will continue to cast its baleful shadow over my remaining career hopes, such as they are, and the aspirations of many others who seek judicial appointment. I cannot ask this Committee for justice for myself; that is not within your gift. My appearance before you today will have been worthwhile, however, if it leads to a rigorous reappraisal of the commission's working and a reformed appointments process that is truly fair, transparent and just.

Finally, the process of appointment for a High Court judge is clearly a matter of considerable public importance. In the light of the material that I have placed before the Committee, I respectfully suggest that you might consider inviting a Supreme Court judge who is unconnected to Northern Ireland to review the papers in this matter. You may, of course, feel that you do not need such assistance, but I would respectfully suggest that such a proposal may be of the greatest assistance to you, providing an impartial overview of the highest quality, integrity and authority.

During the third and final complaints process, I made an identical proposal to the commission, which was rejected. One would hope that it would not object now, particularly if it was the wish of this Committee. I have some ideas for reform, but I will leave that to you. I apologise for taking up so much of your time with that opening statement.

The Chairperson: Judge Marrinan, thank you very much. Certainly, the issues that you have brought to our attention are most serious indeed, and it is right that we give careful consideration to this. We expect and, indeed, demand that the judiciary in Northern Ireland operates impartially and fairly at all times. I have no doubt that that is how you carry out your duty as a judge. That standard needs to be applied, not least when it comes to appointing judges. As an organisation, NIJAC needs to be whiter than white. This issue goes to the heart of confidence in the administration of justice, and it is right that we give proper consideration to it.

I know that members will have a number of questions that they want to ask. I want to go through some of those questions, and I will bring members in. Hopefully, we can keep the exchanges brief. I will ask brief questions and, likewise, I ask that the responses are brief.

Let us go back to the very first competition. You made valid comments about the scoring system that was used. For my benefit and for the record, can you explain the method of moderation that was being used in that process?

His Honour Judge Marrinan: That is an interesting one. The commission has always denied that it was arithmetical. As somebody who lectured at Queen's for six years and was an external examiner at the institute, I am used to moderation of marks, and I know what happens.

If you have four different examiners and a series of different marks, they will come together around a table and compare the marks that they gave to a candidate, for example, for competence of leadership. If one examiner awarded 17 marks and another awarded 15 marks, they would debate amongst themselves whether that was appropriate. It is a bit like a jury: they can persuade each

other to change the marks. They would not change them a lot; there would not be a sea change in the marks. In other words, the crudest way of moderating or averaging marks between four different examiners is to arithmetically divide them by four to get a figure.

The interesting thing about this competition is that, although the commission has robustly denied that that was the way it operated, if you look at the marks and compare the final marks, you see that every single mark except the marks for leadership were done either as a coincidence or else it happened to be arithmetical. All the marks reflect an average. I made that point in the letter of 9 December, which I referred you to. A close analysis of them will show that it was either a coincidence or, more likely, truthful that they were moderated arithmetically, which is of course the simplest way to do it.

Essentially, moderation means that one examiner can persuade another examiner as to whether they should increase or decrease their mark. That is what moderation means, and that is what the commission did for nine out of the 10 sets of marks. However, it did not do that, and I say that it refused to do that for the last set of marks for the other candidate.

The Chairperson: In your letter, you quote Lord Justice Coghlin, who was the chairman of the selection committee, is that right?

His Honour Judge Marrinan: He was.

The Chairperson: It relates to the point about moderation. In your letter, you say:

> *"Curiously, Lord Justice Coghlin continues in his letter in the 7th December 2009 '... that the suggested moderation for leadership for'"*

the other candidate

> *'"at 17 would have resulted in total moderated scores of 85.5 for both candidates ..."'*

You say:

> *"If that is right he is seriously suggesting that the Panel, whilst noting that I scored 66 marks under that heading as against"*

the other candidate's

> *"65.5 marks, would act so perversely so as to moderate my mark down to 16 and that"*

of the other candidate

> *"who achieved a lower total mark should be moderated up to 17. I suggest one only has to look at the inconsistent way all other competences were moderated ... to see how perverse and unreasonable not to mention irresponsible and unfair such a conclusion would be."*

His Honour Judge Marrinan: Just one correction:

> *"I suggest one only has to look at the consistent way ..."*

I think you accidentally said, "inconsistent".

The Chairperson: "At the consistent way", yes. That is a very important correction.

His Honour Judge Marrinan: That is a point that I hold to.

The Chairperson: What I have quoted encapsulates the fact that, for the entire process when it came to you, there was a consistent approach taken.

His Honour Judge Marrinan: Except, oddly enough, for leadership, on which they marked me down —

The Chairperson: For the last category.

His Honour Judge Marrinan: — from 16·5 to 16 for the first and only time. For him to get level with me, he would have had to be marked up substantially to 17. That is the point I made about the good professor. I will just take you to that now. It is in the same tab 3, where you will see an e-mail from him to Mr Gorringe. It is the very last entry in the document. It is the document that mentions Professor Morison. He was asked individually, as they all were, what he would have done. You will see that the second paragraph of that answer states:

> *"With regard to the particular query addressed to me, I can say that in common with the others on the selection committee I was concerned mainly in the second interview with Knowledge and Analysis but willing to revisit other competencies if and only if additional material relevant to the other competencies came to light."*

He also says regarding the other candidate in the second interview:

> *"I was provided with evidence ... which persuaded me to move my leadership mark from the first interview to 17 (which coincided with the majority view)".*

Therefore, he is making the point quite clearly that he was not prepared to move from 15 to 17, which was crucial, after moderation in the first process, but in a later e-mail after the point is made, he appears to change his mind about that. He is quite clear there that he was not prepared to do so until he saw evidence of leadership from the other candidate in a second interview.

The Chairperson: You apply that argument, conversely, to Mr Justice Weatherup, who, you point out, regularly marked you lower than the other three candidates.

His Honour Judge Marrinan: Yes, as he is entitled to do.

The Chairperson: Again, I will quote from what you said:

> *"One might argue that if that is the way a decision on moderation could be made then why not for example in my case exclude the marks of Mr Justice Weatherup whose marks for me were regularly lower and inconsistent with the marks of the other 3 members ... It is difficult to see how the requirements of fairness can be reconciled by Professor Morrison being asked to acquiescence in agreeing a mark of 17 for"*

the other candidate

> *"when ... Mr Justice Weatherup is not asked to acquiesce in agreeing a mark of 17 for me."*

That brings me to the point that I want to —

His Honour Judge Marrinan: Sorry to interrupt you. The word "acquiesce" is one of those interesting words. What does it really mean? You will note that, right beside the one line that is not marked is the 15, sitting there clearly as Professor Morison's mark. Are they really saying to him, "We will just ignore you for that particular mark and we will agree a 17"? They did not do that. I say that is because he made it very clear in the first interview that he was not prepared to shift on his 15. Sorry for interrupting you.

The Chairperson: You are OK. The point that I wanted to make was that Professor Morison seems to have been put under a fair degree of pressure, but Mr Justice Weatherup certainly was not in the approach that was taken.

His Honour Judge Marrinan: So it would appear.

The Chairperson: It draws me to the point that has been made before —

His Honour Judge Marrinan: Of course, if one excluded Mr Justice Weatherup's scores entirely, I would have won by several points. We would not have been sitting having this conversation. Remember this when they talk about the other candidate being clearly qualitatively superior: three of

the four judges who judged me on the panel marked me ahead, two substantially and one, Lord Justice Coghlin, marginally. Three of the four had me ahead. The only one who was out of kilter was Mr Justice Weatherup.

The Chairperson: The point I wanted to make was that the pressure that seems to have been placed on the professor was not applied to Mr Justice Weatherup. Previously, the comment has been made that, within NIJAC, there are lay members, but it is still senior judges appointing who they want, and lay members do not necessarily have the voice that they should have. Is that something that you feel has happened in your case?

His Honour Judge Marrinan: Sadly, yes, to put it bluntly. Later, when you ask me about possible reforms, I will give you a little more information about that. I have no doubt — nor did the Attorney General for Northern Ireland, when he gave evidence to you in 2012 — that, sadly, the process is dominated, perhaps not numerically, but in spirit and reality, by the senior judiciary.

The Chairperson: The change that was then made still had you winning by one mark.

His Honour Judge Marrinan: Which change?

The Chairperson: Once the gap was narrowed, you won the first competition but you were not awarded it because it was not —

His Honour Judge Marrinan: They refused to complete the marking, so there was no final mark given for the other candidate. That is the whole point. I feel that was wrong, and the ombudsman felt that it was wrong. It should have been —

The Chairperson: Yes, because he upheld that element of the complaint. I wanted to make that point when I was —

His Honour Judge Marrinan: I am sure that the ombudsman was trying to do his very best. The strange thing was that he found in my favour so many times but refused to take the leap of faith to say that that cost me so much. I could never understand why he felt that. Quite apart from finding maladministration to be proven against the commission in the third process, then being dissuaded from that view on the strength of a couple of letters from the Lord Chief Justice that began, "Dear Karamjit".

The Chairperson: The final point in the note of the meeting that Lord Justice Coghlin chaired was to do with the audit trail and states:

> *"The Chairman emphasised the importance of the audit trail and ensuring that all documents are fully completed and signed."*

That is the very point on which the ombudsman then upheld your complaint —

His Honour Judge Marrinan: Yes, exactly.

The Chairperson: — that the failure to complete the moderation did not comply with specific guidance that the commission has to complete.

His Honour Judge Marrinan: And, to be fair, the first complaints process, which was chaired by the Lord Chief Justice, was immaculate in its information-gathering. It adopted all the right ways. It went to each of the selection panel individually and asked for their individual answers, until, of course, it came to the very last decision, and that was what had happened to Professor Morison. Then, for the one and only time, the members of the selection panel were allowed a further week to give an answer. They met collectively for the first time and came up with Lord Justice Coghlin's letter, which I analyse in my 9 December letter, a copy of which is at tab 3 in your papers. However, you are absolutely right, there it is in black and white that they were required to fully complete all documents and sign them off. Yet, they refused to do that.

The Chairperson: And, had they done so —

His Honour Judge Marrinan: I would have won.

The Chairperson: — you were the winner of the competition.

His Honour Judge Marrinan: Yes, I would have won.

The Chairperson: That seems pretty fundamental.

His Honour Judge Marrinan: I have been saying that for three years. Although the ombudsman found in my favour, he would not make the next step and say, "Ergo, this candidate was unfavourably treated and it was maladministration".

The Chairperson: I think that you say that "a well-informed observer" would recognise that that would have been the outcome. I would not describe myself as such; I am a layman on these things, and I think that a layman rather than a well-informed individual can see what the outcome should have been, had the moderation process been completed.

On a side point, as I read though the papers, I noticed that a meeting was held in Dr Rooney's private residence.

His Honour Judge Marrinan: Yes.

The Chairperson: Would that be normal?

His Honour Judge Marrinan: That, of itself, would not bother me. If you are on a selection panel and you are trying to meet urgently to answer a letter from the complaints committee, I do not think, with respect, that where you meet is either here nor there.

The Chairperson: OK. It just struck me as strange, but I will leave it at that.

His Honour Judge Marrinan: Maybe she made better coffee than the others.

The Chairperson: In his first report, the ombudsman upheld your complaint around bias. I think that he called it, "perception of unfairness".

His Honour Judge Marrinan: Yes.

The Chairperson: And he indicated in his response that this would have had a detrimental impact on your confidence in the process. What was the impact on you?

His Honour Judge Marrinan: The impact from when?

The Chairperson: From that finding about the perception of unfairness and that the failures of the commission led to an impact on your confidence in the process.

His Honour Judge Marrinan: Interestingly enough, between the first and second interviews — because there was a second interview that I have not spent much time on, except to point out that the other candidate won that more clearly by 88 marks against 84·5 — I actually complained, and I have not dealt with this in my letter to you. I did not know all this other stuff about what had gone on in the process, because I only got that during the course of my first complaint. Ironically, I got it almost accidentally, and I had to amend my first complaint to include all these more substantive points.

My first complaint was about a very different matter. It was because, in the competition process, the information given to candidates stated in black and white that no written material shall be provided. You were to be examined, more or less, on what you were able to tell them on five different competences. However, after they had wrongly claimed to me that they could not agree in their first interview, Mr Gorringe told me on that first night that the committee had decided to ask me for three written judgements that I had done that it was going to compare with three written opinions from the other candidate. Now, the other candidate, as is well known, was a top QC specialising in commercial law. I am, I hope, a hard-working County Court judge. It is very much at the coalface in terms of dealing mostly with criminal law, which is what I spend most of my time doing, or family law. I

immediately wrote back to them complaining that that was not comparing apples with apples but apples with oranges, because a QC, in writing an opinion, can take many months to do so. He will charge, no doubt, a substantial fee, he may have the assistance of junior counsel, and he may have the assistance of solicitor and research facilities. I am sometimes faced with writing a decision — a judgement — over a weekend, and sometimes overnight, and I do not have the luxury of spending months and months drafting it. Therefore, I said that it was not fair to ask now. The rules of the competition say in black and white that no written work should be submitted, presumably for the same reason that I have just given you, and yet the committee insisted in the second interview that it was going to have written work. When I complained about that, it very reluctantly withdrew that, but they managed to get it in, because the very last question that they asked was this: "Tell us about your three most interesting judgements." I do not know, but I could guess that they may have asked the other candidate to tell them about their three most interesting opinions.

I am sorry if I am going off point slightly, but I was extremely discouraged when I went for the second interview, so much so that I had asked them to recuse themselves and to set up a fresh selection panel. I felt that, because I would have to complain to them about the written work material, that it would be better if it were a new panel. They refused me that request. So, I went into that second interview. Probably the reason why I scored not so well — still well enough — was because I was then dealing with people whom I now did not have a good relationship with, and I was dealing with people whom I was beginning to sense were being unfair to me. I suspect that that is part of the reason why I did not do so well.

The Chairperson: With regard to the aspect of the report that upholds your complaint around the unfairness, I will quote exactly from the ombudsman, who said:

> *"There was communication in part, but the lack of any reference to the recusal issue contributed to the perception of apparent unfairness",*

which you had and subsequent complaints. So, you obviously asked them to recuse themselves —

His Honour Judge Marrinan: I did.

The Chairperson: — as part of one of the areas to look into, but you never got a response to that.

His Honour Judge Marrinan: No, I did not, but, in essence, I think that I might have got a phone call the day before the second interview, but I cannot remember; do not hold me to that. I certainly know that when I turned up, the same four people were there. It was sad because, at a human level — we are talking about very dusty things here — when I came out of the first interview, I was elated. I met my wife for coffee, and she said, "How did it go?" I said, "You know, all exams are tough, but I really did well and engaged well with them, and I was able to deal with the issues they were bringing up." I felt happy, and I said, win or lose, I had come out of that competition feeling great. Little did I know, of course.

I went into the second interview in a totally different frame of mind. My eye contact with them was nowhere near as good. I was unhappy with the way they treated me. However, little did I know that, when I made my complaint about the recusal issue and the documents issue, I was going to be given, for the one and only time, all the documentation that shows that far worse things were happening than my simple concern about written work as opposed to oral work. I then, for the first time, found out what had really happened, and I then had to seek leave to amend my grounds of complaint substantially.

The Chairperson: To go back to the point where, obviously, they change the process on the back of not completing the moderation that they should have completed and that complaint is upheld, and we go through the next stages and then the other candidate is put forward and declined, and you went through the history of the previous Lord Chancellors who declined that request. Then, a year later, you get that letter, which struck me when I read it — I think it was four sentences long — telling you that the individual has been excluded, the competition is recommencing and it is open to you and others to apply again.

His Honour Judge Marrinan: Including the excluded candidate to apply.

The Chairperson: Just go over that again. When you opened that letter and read that, what was your initial response to it? Elaborate on why you think they used the word "recommence".

His Honour Judge Marrinan: Without being melodramatic, it was like a bolt from the blue. I was completely shocked and so were my legal advisers. I had two of Northern Ireland's top QCs advising me, Nick Hanna and David Scoffield, and my solicitor Colin Gowdy, who is a very well-known Belfast solicitor and deputy judge. All of them were shocked. All of them expected that I would be appointed and that, even at this stage, the commission would have the guts to do the right thing and make it right for me, as it were, even though it was two years down the line. I could not have been more shocked if I had been hit by a thunderbolt. I was devastated for a number of days, and it took several days to get my thoughts in gear so that I could go back to my solicitors and engage in the process, yet again, of challenging them on their reasons for doing so.

Sorry, what was the second part of your question?

The Chairperson: Why did they use the word "recommence"?

His Honour Judge Marrinan: You would have to ask the draftsman of that letter. I suspect that the reason was that the word "recommence" sounds so much softer than, "the Commission have decided to abandon the competition, which we told you was a live competition" — in other words, to kill it off. "Recommence" sounds softer and therefore more defensible than any other word, but the ombudsman pinned them on that, and eventually the chairman of the commission had to concede. It is in the ombudsman's third report that it was effectively an abandonment of the competition. That is the word that they should have used from day one.

The Chairperson: That is, in effect, what the ombudsman said.

His Honour Judge Marrinan: It is exactly what the ombudsman said.

The Chairperson: The Lord Chief Justice conceded that, in effect, they had abandoned the competition and that this was a new competition.

His Honour Judge Marrinan: He did. He had to concede that.

The Chairperson: The Lord Chief Justice met with the other candidate. The principal private secretary was then deployed to contact DETI. The ombudsman upholds the complaint that an inappropriate —

His Honour Judge Marrinan: There was inappropriate contact between people not concerned with the commission and others. That was at a vital time, because DETI was considering the very serious step of taking disqualification proceedings. I am delighted for the other candidates' sake that it did not. Nevertheless, should a public body be approached by anybody, whether it is the Lord Chief Justice or even NIJAC, to ask how things are going?

This is maybe not an entirely fair example, but if the police were investigating me, for example, as a candidate and considering whether to bring proceedings, would it be right if I was in a competition, for the people running that competition, particularly people in high office or their secretary, to be contacting the very organisation that is independently considering whether it should take proceedings? I do not know what was said. It may have been entirely innocuous. I am sure that it was, but the perception is that it is not right. It does not sound right, and the ombudsman found that it was not right and that it should not have happened.

The Chairperson: The ombudsman says:

> *"It is important to ensure that a clear distinction is continually made between the roles of senior officials at the commission and those in the Office of the Lord Chief Justice. In this instance, it was the case, and whatever the pragmatic reasons for this, that there was involvement of an official outside the commission in the competition in the sense that it was the principal private secretary to the Lord Chief Justice rather than the commission officials who made contact with DETI. If the commission wish to obtain information on the likely timescale for the decision, it could and should have made the request through its own officials."*

Why do you think it is important to have a clear distinction between the work of the commission and the work of the Office of the Lord Chief Justice?

His Honour Judge Marrinan: That goes to the very heart of whether the Lord Chief Justice should be involved in NIJAC at all. I take a very robust view on that, quite apart from this matter. I take a view, which others share — I will tell you about that if you wish, because I have written some comments about it — that the Lord Chief Justice should have nothing to do with the Northern Ireland Judicial Appointments Commission.

The Lord Chief Justice of England and Wales has nothing to do with the Judicial Appointments Commission (JAC) in England. The chairman of the Judicial Appointments Commission in England must, by law, be a layperson and must enter open competition before he is allowed to become the chairman. Pre-appointment, he must also appear before the House of Commons equivalent of this Committee, the Justice Committee, to satisfy its members of his complete independence.

The number of judges on the 15-man JAC in England is five, whereas in Northern Ireland, we have six out of 13, which is almost 50%. The Lord Chief Justice of Northern Ireland has the right not only to sit ex officio as the chairman but the right, which he exercises, to nominate five members of the judiciary at different levels from Lord Justice to High Court judge to County Court judge and so on down the hierarchy. In England that does not happen; the Lord Chief Justice has nothing to do with the process. The three judges from different tiers are nominated by the Judges' Council or the Tribunals' Council, which are bodies that have nothing to do with the Lord Chief Justice. The other two judges have to enter a competition and satisfy an entirely independent body of their right to sit. All other members of the commission enter a public competition. So, therefore, in England, 12 out of the 15 members of the commission enter a competition, and, as I said, the chairman must be a layperson. That is much healthier, in my view.

Let me deal with the question of reform. In his evidence to the House of Lords Select Committee on the Constitution's review of the judicial appointments process — I have given you this in my discussion on thoughts for reform — Lord Justice Toulson, then vice-chairman of the Judicial Appointments Commission of England and Wales noted that, prior to the commission's being set up by the Constitutional Reform Act 2005:

> *"there was widespread public concern that judges were being appointed through cronyism and secret soundings. Nothing, really, could disabuse the public of that."*

The establishment of the JAC in England and Wales and NIJAC was intended to put an end to such concerns. I say to you that it is clear that such concerns persist. I draw attention to the fact that, before this Committee in evidence, the Attorney General of Northern Ireland clearly expressed the opinion, which I share, that the higher judiciary is the dominating element in the appointments process. He said that, even though this group:

> *"does not form a majority, there is no doubt that, de facto, it is the dominating element in NIJAC."*

As I said, nothing that I have seen suggests the contrary.

I would not always recommend something because it comes from England, but I am simply saying that, on this occasion, they have got it right. My respectful submission, with great respect to you, is that we have it wrong and that our law needs to be reformed along the English model.

The Chairperson: I just want you to touch on why, ultimately, you did not go through with the judicial review option. Reading between the lines, I can infer why you did not think it appropriate, but I would rather hear it from you.

His Honour Judge Marrinan: It is very hard for me, as a practising judge, to say that I did not have faith in the justice system. That does not sound like the sort of thing that you expect a judge to say, and I say it with measured words. Picture the scene. In England, they have hundreds of High Court judges — a couple of hundred at least. Some of them do not know each other. They live in different parts of England and work in different areas. There is the northern circuit and the southern circuit, etc. In Northern Ireland, we have a very small country and a very small bench. There are very few High Court judges. I say to you that there is no doubt that it is invidious to expect any High Court judge to sit in judgement on his superior — the Lord Chief Justice — on a Lord Justice, which is what Lord Justice Coghlin was, and on one of the most senior puisne judges, Mr Justice Weatherup. It is

invidious to ask him to do that, especially when the allegations are such as those that I was making of unfairness, lack of impartiality and bias.

I was sitting round a table with my lawyers, who are two top QCs, and asking them, "Do I have a good case, or am I whistling in the wind?" They answered that, "In any other walk of life, should it be the Housing Executive or some other public appointment; these people would not defend this case. However, they know that you are going to have to bring the case before a High Court judge, and they know that you are going to be making complaints essentially against those leading the commission. The chairman of the commission is the Lord Chief Justice. It is a matter for you to assess your chances, but you need to be careful." They also then pointed out to me the cost implication. It will come as a shock to some of you, although perhaps not to Mr Maginness, to know that, if I had taken the matter all the way to the Supreme Court, which I might have had to do, it may have cost me a quarter of a million pounds. I would have had to sell my house, and I could have been ruined by it. Ironically, a bankrupt cannot be a County Court judge, so I might have lost everything.

Those were the kinds of practical considerations that I had to take account of. Indeed, I suggest to you that that system itself should be reformed. It is wrong to force me, or anybody else like me, from whatever walk of life they come, to go before a court that is composed of people with whom they work day and daily. You are forced to criticise them. There is nothing personal in this. 'The Irish News' wrongly suggested yesterday that I was coming here today to criticise the Lord Chief Justice. Nothing could be further from the truth. I have respect for him and for his high office, and I am truly sorry that he sought fit to preside over this procedure in the way that he did. This is not a personal attack: it is not an attack at all. If anything, I am reflecting to you more in sorrow than in anger. I know that I have lost my chance. I know the judge who took my place, and I have written to congratulate him. He is an excellent judge, and he is someone I taught at Queen's University, so I am proud of him. So, this is not an exercise in revenge. It is, on my part, an exercise in trying to get some measure of justice. Someone will listen in an impartial and unbiased way to what I have to say and will hopefully make reforms that will help other people in the future.

The Chairperson: I have a final question, and then I will bring in other members. You talked about the implications for your health as a result of this. Some will ask why you are revisiting something that clearly had a very detrimental impact on you personally.

His Honour Judge Marrinan: My wife asked that, for a start, a few weeks ago. To be serious, that is a very good question. The answer is this: I suffered a depression from this. I was treated for over two and a half months. I managed to go back to work in December 2012. I hope that I have done a reasonable job since then; I have not heard of any appeals so far, but we will see whether any are in the pipeline.

Why did I do this? It would have been easy for me, in a sense, to walk away from all this. I just felt that it was not right to leave it the way that it was. Of course, all the proceedings up to now have been entirely confidential. I do not think that the ombudsman did me justice. He kept finding in my favour. The final straw was to find in my favour and then to change his mind in his one-sided correspondence with the chairman of the commission. If I had been well and if I had had the money to do so, I would have made this public a year ago by taking judicial review. I do not have that luxury, and it is too late now to go for judicial review. The only other avenue that is open to me, as to any citizen, whether he is a judge or a layperson, is to take the matter to their elected representatives. Without being mealy-mouthed about it, I felt that there are, of course, risks, and I accept those risks. I feel more sorry that this will attract publicity and will therefore draw attention to me and to my family, in particular. I have discussed it carefully with my wife, and she supports me in doing this. I am taking a risk, but I think that it is a justifiable risk. These issues have a general importance that is far beyond my importance. That is why I have done it.

The Chairperson: Thank you very much. I am going to bring in Mr Humphrey, because he has indicated to me that he needs to leave shortly.

His Honour Judge Marrinan: Certainly.

The Chairperson: I will bring in members now for questions.

Mr Humphrey: The last question that the Chair asked you was the first question that I was going to ask. Why do you think that the Lord Chancellor refused to act on the commission's recommendation in March 2010?

His Honour Judge Marrinan: That is a very good question. I am not trying to be evasive, but I do not know. We asked the commission that question. We even said to it, "Look, tell us, because we'll keep it confidential." I have kept my end of the bargain until now. Throughout the competition, confidentiality was fully respected. This can only be a suspicion, but I strongly suspect that what happened is that, in his application, the other candidate omitted to mention that he had potential problems with the PMS. I suspect that the Lord Chancellor was told about that and that it led to him taking a certain view about the other candidate on two grounds. The first was his connection to the PMS in the first place as a senior director and then chairman, although he was chairman for only a short time before the collapse. Secondly, and perhaps just as importantly, if — I emphasise "if", because I do not know this to be true; I am sure that the chairman of the commission could tell you if you asked him — he did not disclose that the FSA, having said two months before the competition, stated that the PMS, through its directors, had made irregular and unauthorised investments, which would have been a serious matter and one that could have influenced his candidature. I do not know whether that is true, but that is the best answer that I can give you.

Mr Humphrey: For how long have the procedures for the appointment of High Court judges in Northern Ireland been in place?

His Honour Judge Marrinan: The actual procedures?

Mr Humphrey: Yes.

His Honour Judge Marrinan: It depends on what you mean by the "procedures". Do you mean under NIJAC?

Mr Humphrey: Yes.

His Honour Judge Marrinan: Presumably since it began, which was in 2005?

Mr Humphrey: Is what you discussed today and your position the first of its kind? Is there any other precedent?

His Honour Judge Marrinan: Precedent for?

Mr Humphrey: The treatment that, you feel, you were delivered.

His Honour Judge Marrinan: I hope not. I rather suspect that there is not.

Mr Humphrey: Are you not aware of any?

His Honour Judge Marrinan: Bearing in mind that I have 66·67% of the ombudsman's caseload, I strongly suspect that you are right, Mr Humphrey, that there has never been a case such as mine. I sincerely hope that there will never be one again and that this is very much a one-off.

Mr Humphrey: You spoke in your evidence about the ombudsman not taking a "leap of faith".

His Honour Judge Marrinan: Perhaps that was slightly colourful language, but I meant that, when you come to the conclusion that someone has been unfairly treated, there should be a remedy for that. He kept saying from time to time in his various reports, "I could not possibly go into the merits of the candidates. I could not possibly consider legal issues." I may be wrong in this view, but he seems to have taken an unnecessarily narrow view of his remit. In other words, to prove maladministration for him, I am not quite sure what you would have to prove. I thought that I had proved enough.

Remember this: he was prepared to find it. If there had not been that odd procedure whereby, under statute, the ombudsman was required to send his draft report to the Lord Chancellor and to the Lord Chief Justice as chairman of NIJAC, maladministration would have been found. He did find it and then changed his mind in that strange way with his one-sided correspondence that I was not allowed to take part in. If I had been allowed to take part in that, I would have had quite a lot to say.

Mr Humphrey: Did I pick up correctly from your evidence that the Lord Chief Justice had a private meeting with the other candidate?

His Honour Judge Marrinan: Yes, he did. The ombudsman was told that.

Mr Humphrey: What do you think that was about? Did that concern you?

His Honour Judge Marrinan: The Lord Chief Justice answered that. He said that, in his role as Lord Chief Justice, and I am sure that this is correct, it is traditional for the Lord Chief Justice to meet the successful candidate to consider any possible impediments to appointment and other practical features, I am sure. The timing of it was slightly unusual, I thought, because it happened after Mr Straw apparently had not endorsed the recommendation. Nevertheless, the Lord Chief Justice said that was why he met him, and I am sure that that is correct and why he did meet him.

Mr Humphrey: I hope that you do not think that this question is improper or in any way aims to try to cause you embarrassment, but can I ask you this directly: do you think that your failure to be appointed was personal?

His Honour Judge Marrinan: It feels very personal to me. I think that the commission behaved as though there were an us-and-them situation. After I started to complain, they did not treat me as an equal candidate to be treated fairly and conscientiously. I think that they saw me as trouble and as someone who had accused them. In that letter of 9 December, I pointed out that the answer of one member of the selection panel could not be reconciled. Perhaps unwisely, I said that perhaps counsel should be appointed to question them about that. That was a direct suggestion that they were being economical with the truth.

Once I said that, I think that there was a sea change in their attitude to me. From then on, I was not treated in the way that a candidate should be treated. It often crossed my mind that it became very personal. By June 2011, they were determined that I was not going to be appointed, even though I was the only remaining appointable candidate. So, yes, I do think that it was personal in that sense. However, I do not mean that there was some background issue or some personal vendetta from private life. I do not mean that at all.

Mr Humphrey: Do you think that the decision not to appoint you and the fact that you have been involved in a legal case against NIJAC affected your role or your relationships with other judges in Northern Ireland?

His Honour Judge Marrinan: It has affected my relationships in the sense that I do not see other judges very often. Being a judge is quite a singular world where you spend most of your time dealing with counsel in court. I do not attend as many meetings as I used to, if I can put it that way. I do not feel welcome at the Royal Courts of Justice, I am sad to say.

Mr McCartney: Thank you very much for your presentation. We appreciate you coming here. It is difficult, and you outlined that. To your credit, where you felt that you were treated unfairly or unjustly, in my opinion, you took the appropriate steps.

You presented your case to us today, if that is the right word for it, and there are issues that we need to address. In many ways, and I suppose this will become the subject of conversation after you leave, we are not certain what to do next, because we are not sure whether the ombudsman will be in a position to answer some of the obvious questions. He may feel that he does not have to and that perhaps it would be the same with NIJAC. We are limited until we hear differently.

I know that the Chair touched on this, but from my limited experience of having sat on a number of interview panels for people being selected for positions in paid employment, although perhaps not for as high an office as that of a High Court judge, it strikes me in a broad sense that, if it was ruled that procedures were not properly followed, I would have expected someone to ask why that was not done. I would like to ask the ombudsman that. You described his not taking a "leap of faith" to go to obvious conclusion and to at least say that the procedure was null and void. Some of the things that he said involved perceived bias. If another candidate in another situation was able to prove that there was perceived bias, I am sure that the employer would want to rerun the competition and gauge interest.

I have a couple of factual questions to ask. When you were first told that you had been a point ahead but that NIJAC did not think that that was an appropriate score, did you seek any legal advice?

His Honour Judge Marrinan: I was not told that I had won the competition. I was told the exact opposite. I was told that they could not agree. Mr Gorringe rang me that night and said, "I am sorry to say that they could not agree". It was only much later that I found out, when I got the documents and had to amend my grounds of complaint to reflect that that was not accurate. It is not that they could not agree; they would not agree. They refused to mark off the scoring sheet, despite their own procedures.

I am sorry, I missed the rest of your question.

Mr McCartney: Was there anything that you could have done, apart from making the complaint? Could you have sought a meeting with NIJAC at that time about the procedure?

His Honour Judge Marrinan: No. A candidate normally would not seek a meeting with the very people who are going to decide the matter. One of my complaints was that the other candidate had a meeting with the Lord Chief Justice when the issue came from Jack Straw that he was not going to endorse him. The Lord Chief Justice's response was that that was not putting on his hat as chairman of NIJAC; it was putting on his hat — or his wig — as Lord Chief Justice. The ombudsman accepted that, although he expressed some reservations about it. However, it would not have been appropriate for me to ask to meet NIJAC as one of two candidates left in the competition. It would not have been fair to the other candidate, even though in the circumstances, as you said, all that I could do was start off the complaints procedure, which is what I did.

Mr McCartney: What process was involved in your contact with the Judicial Appointments Ombudsman? Was it always on paper? Was it a paper exercise?

His Honour Judge Marrinan: No.

Mr McCartney: Was there an interview?

His Honour Judge Marrinan: Yes. What happened was that he wrote to me setting out everything formally, and I wrote formally back to him. We exchanged some correspondence. I am sorry to say that he felt that at no point was he required to give me disclosure of any documents. He consistently refused me documents throughout the three processes. Those were very pointed documents; we were not asking for a blanket disclosure. My lawyers advised me — I had two top QCs working with me — about what documents were relevant. He always found reasons not to give them to me. However, at the end of the day, I then had short meetings with him and gave oral evidence to him before he made his decision.

Mr McCartney: Were his findings in written form only, or was there a meeting?

His Honour Judge Marrinan: No, they were in written form. I did not see the draft findings, of course. They were only ever sent, as I pointed out, but finally I got them in writing.

Mr McCartney: Did you seek a meeting with him?

His Honour Judge Marrinan: Do you mean a meeting to question his findings?

Mr McCartney: Yes, to ask him about it. He said in his report:

> *"I also explicitly excluded any consideration of whether or not DM should have been declared as the person who should have been appointed."*

That seems strange to me. Why would he not want to find on that or explain to you that that was the reason why he did not feel that that part of your complaint should be considered?

His Honour Judge Marrinan: I was guided by my legal advisers, who said that I did not have a right and that the only way that I could challenge it was through a judicial review. Of course, we are back to square one with the cost of that and the likelihood of its succeeding. I do not think that I had the right, and nor would it have occurred to me, to ask him to second-guess himself once he produced his final report. I did not have the luxury of asking him to second-guess himself, unlike the commission, which did.

Mr McCartney: Did he not offer you a meeting?

His Honour Judge Marrinan: No, it was done purely through a letter that was sent through the post with the report attached.

Mr McCartney: So, was there no dialogue?

His Honour Judge Marrinan: There was no dialogue once he decided to make up his mind on the final report.

Mr McCartney: I am not sure how he will respond to that, and I do not want to prejudge the conversation that we are going to have.

In terms of the — *[Inaudible due to mobile phone interference.]*

The Chairperson: Raymond, I think that that is your phone.

Mr McCartney: I think it is. I hope it is not. No, it is off.

The Chairperson: Someone's phone is too near the mic.

Mr McCartney: I lost my thread there. It is not procedure for the ombudsman. So, once he made his final conclusions, your only means was to make the second and third complaints.

His Honour Judge Marrinan: That is right. There is no other way. He would not permit me to approach him in any other way. Once he had completed his final report, his function was over. I had no right to approach him, put it that way. There is nothing in statute that entitles me to approach him.

Mr McCartney: I ask this question in ignorance: is there any route in employment law? I was personally involved in a successful judicial review, but the final bill, if I had to pay it, would have been £224,000. So, I have sympathy on that level. Does employment law not offer an option?

His Honour Judge Marrinan: I would have had to take it to tribunal. I could not have alleged religious discrimination, even in Northern Ireland, because the commission was divided equally between people of religion, no religion and both branches of Christianity. I could not have alleged ageism, I do not think, although I am beginning to wonder whether that might have played some part in it. I was 60 when I entered the competition, and I am now drawing my pension at 65. It has taken so long. In fact, one other irony and sadness of the process is that, by delaying me so long, I have to retire when I am 70, and, therefore, even with a fair wind, I will be much less employable now than I would have been in October 2009 when I was slightly more bright-eyed and younger.

Mr McCartney: Apart from the process, the questioning and the relationship on the decisions that were made, it seems strange to me that words such as "external interference" and "perceived bias" can be used and that the selection panel did not follow its own guidelines. That is there in black and white. It does not seem to have been challenged by anyone, including NIJAC. Secondly, it seems a bit strange to me that, given that circumstance, the selection panel comprised the same people who were on the first one, which is what I assume from your evidence today.

His Honour Judge Marrinan: The complaints committee was a different group. There were 13 members of NIJAC: four were on the selection panel, and a different four were on the first complaints committee. In fact, they ran out of commissioners. For the second and third complaints process, they had to look outside NIJAC for someone to form a complaints committee, because I made the obvious point that you cannot keep appointing people from inside the commission. By now, I was complaining about the complaints committee as well, because it had not done its job properly either.

Mr McCartney: Was the competition panel the same?

His Honour Judge Marrinan: The panel was the same in the second interview, yes, even though I had asked them to recuse themselves.

Mr McCartney: That is what I am saying. However, given the findings, which NIJAC do not object to, of perceived bias and not following its own procedures, you would think that would have been one of the more straightforward steps to take.

His Honour Judge Marrinan: The second interview took place before I made my complaint. It was within two weeks of the first interview. So, my complaint had not even really got off the ground. Not knowing about all that other material, I made a mini-complaint to them after they told me the rules for the second interview, but I did not formally make my first complaint until after the second interview.

The Chairperson: I want to pick up on one of the points that Mr McCartney covered. Mrs Anderson, who was one of the secretariat staff — you refer to this in a letter — gave evidence to the complaint committee and said that, when she entered the selection panel's deliberation, she was told at a very late stage that a majority probably favoured the other candidate. Can you elaborate on why Mrs Anderson would have been told that? I will put it in your words:

> *"If that is what she was told then this was plainly incorrect — it is clear that a majority favoured me."*

Why would she have given different information?

His Honour Judge Marrinan: I do not want to be trite in my answer, but you would have to ask her and ask the chairman of the commission that, because that does not stack up with the marks that were put around the table. How could a majority favour the other candidate when three out of four of them had clearly voted in my favour? That does not make sense. At the end of the day, even Lord Justice Coghlin acknowledged that they were not prepared. One of the many answers that were given about why they did not complete the marking process was, specifically, that they would not grant the competition to me on the basis of one mark or more. Therefore, how could it logically ever be the position that the other candidate was ever ahead of me? That just is not accurate. She may have just formed the wrong impression. Sometimes, a civil servant coming into a high-powered meeting can do so. The meeting went on for several hours and late into the evening, so I was told later. I got my phone call from Mr Gorringe at about 10.00 pm, and I had been interviewed at 2.00 pm. therefore, I suspect that they went on for quite a long time. All that I can say is that Mrs Anderson's impression is wrong, and I do not know how she got that impression.

The Chairperson: How important is her evidence to the complaints committee, in your opinion?

His Honour Judge Marrinan: I do not think that it was that important, to be honest with you. I would not lay too much stress on that.

Mr A Maginness: Thank you very much, Judge Marrinan, for attending today. I know that it is difficult for you. Can we park, as it were, the evaluation of the original interview and the second interview, and the merits or demerits of that process, and fast-forward to June 2011? At that point, the second Lord Chancellor who looked at this case decided, for whatever reason, to ask the commission to reconsider its decision on the candidate that it put forward for appointment. Are you saying that the net meaning of section 5(6) in Part 1 of the Justice (Northern Ireland) Act 2002 is that the Lord Chancellor asks the commission to reconsider, that the commission has no option but to reconsider and that, after that reconsideration, it either goes back to the Lord Chancellor and says that it is sticking with the original candidate or is appointing another candidate? Is that what you are saying the law demands?

His Honour Judge Marrinan: It is 100% certain that that is what I am saying. That is what the plain words of the statute say. The commission is required to reconsider its decision, so it must meet to reconsider. It must, to quote the words of subsection (6)(a):

> *"after doing so, either re-affirm its selection or select a different person to be appointed, or recommended for appointment".*

As the commission sat there in early June 2011, it could have said that it had listened to what Mr Clarke had had to say and that it did not agree with him and that it stuck by its candidate. It could have said that it knew the problems about the PMS a year ago and that it put it forward on that basis, once it was clear that he was not going to be disqualified. It would have been disagreeing with the Lord Chancellor from London and would have decided to write back to him politely saying that it had decided to reaffirm its selection of the other candidate. It could have done that, but it chose not to do

that and instead chose, presumably, to take whatever reasons that he gave as correct and formally excluded the other candidate. That is a very unusual step to take.

Mr A Maginness: In other words, the Lord Chancellor had no power of veto.

His Honour Judge Marrinan: His power was only a power to ask the commission to reconsider. He had no power of veto.

Mr A Maginness: The commission must have said that it would reconsider. It did reconsider, and, for whatever reason, it decided not to proceed with that candidate.

His Honour Judge Marrinan: That is right, and to exclude him.

Mr A Maginness: It decided to exclude that candidate. At that point, you were the only person left to be appointed.

His Honour Judge Marrinan: In what they call the live competition. Yes, I was the only person. I understand that there was recently a competition in the public sphere for the head of the water service or something like that. I do not know anything about it, except that they did not appoint anyone and have restarted the competition. If, for example, the pool of candidates had been of inferior quality in October 2009, and the commission had said, "We don't think any of those candidates comes up to the benchmark of 79%", for example, which is a very high mark, I would have perfectly well understood — I might have been a bit unflattered — if they had recommenced the competition, to use their word, or abandoned the competition, to use my word, and started all over again. However, they did not do that. They said that they had two excellent candidates, and they told me consistently, and pacified me by saying, "This is a live competition; you are still in the game". Then when they excluded the only other candidate, for whatever reason best known to themselves, I fully expected that they would turn to me — perhaps reluctantly, after what had happened — and say, "You are the only other candidate standing; therefore, you get the job". I could never understand why the ombudsman did not find that to be maladministration. He was prepared to do so but changed his mind.

Mr A Maginness: The point that I am making is that, at 5(6)(a), it states:

> *"after doing so, either re-affirm its selection or select a different person to be appointed, or recommended for appointment, to the office".*

That would mean that they had to select you in such circumstances.

His Honour Judge Marrinan: Well, yes, because, unless they were going to start another competition, I was the only "different person" left. You are right.

Mr A Maginness: It states that "it must", not that "it may". In other words, it had to do that.

His Honour Judge Marrinan: On that strange issue, I have been asked a couple of times about the word "recommencement". May I make a very simple point? Nowhere in any of the literature that the commission produces — I have read the literature of the commission from front to back — is it provided for or permitted to have a recommencement of a public competition. It is a clear departure from the procedures that candidates are entitled to expect the commission to employ. In my view, it was a simple device to prevent me being appointed. I was asked by Mr Humphrey whether it was personal. Yes, it was personal. They took it upon themselves to deprive me of something that I had won fairly and squarely.

Mr A Maginness: We are not going to decide this issue.

His Honour Judge Marrinan: No, of course not. I only wish that you could.

Mr A Maginness: We are not a court or a tribunal of any sort. The only thing that we can determine here, on hearing your evidence, and, of course, the evidence from the commission, and perhaps even that of the ombudsman, is whether there is a problem with the procedures and the architecture of the commission — its make-up — and how it operates. You have usefully made some suggestions there,

but, if our conclusion were to reform the commission, in what way could we do that in order to prevent something like this happening?

His Honour Judge Marrinan: I suppose that there is no way in human affairs that you can ever prevent something happening — we are all fragile creatures in the world — but you can certainly take robust steps to make it much more difficult for something like this to happen again. I commend to you the English model, which is designed to get around the problem that Lord Justice Toulson identified, which is the public perception of cronyism. It is designed to make sure that members of the senior judiciary cannot get their own will come what may.

The Attorney General for Northern Ireland, who should know a thing or two about the legal system in Northern Ireland, gave you clear evidence last year that, in his view, the commission was dominated by the senior judiciary. The English model prevents the senior judiciary doing that. Of a 15-man panel, only five are judges. Only three of those are nominated, not by the Lord Chief Justice but by the Judges' Council and the Administrative Justice and Tribunals Council. The other two must be elected after open competition. I do not know whether the five lay members of NIJAC subject themselves to open competition. I rather think not, but if they do, so be it. You probably know that better than I do, but in England 12 of the 15 people, including the chairman, must be elected by open competition, and the chairman must be a layperson. Those types of procedures, it seems to me, enable the English system to work in a much more transparent way than our system.

The Chairperson: I want to follow up on Mr Maginness's point around the unsuccessful candidate and the fact that the appointment was rejected by the Lord Chancellor, who asked the commission to reconsider. Mr Maginness outlined that it says in statute that the commission must move on to select someone else. As you said, you were the only candidate left standing. In some of your papers, you state your belief that, by recommencing the competition, the commission acted ultra vires. In your opinion, did the commission break the law by failing to appoint you?

His Honour Judge Marrinan: Yes, in my view, it did. It was an illegal act, in my view. It may have been difficult to argue that it was entirely ultra vires, because that means "outside their powers completely". I, personally, would argue that it was ultra vires. I can see that lawyers could take different views. However, even if the commission acted technically within its power, it was so irrational and so unfair that, had I felt confident about going for judicial review and not fearful that I might end up bankrupt by doing so, I would have been very hopeful, given a fair wind, that a judge would have found the decision to be irrational and have the appearance of bias against me. I would have rather hoped that that would be the decision. Unfortunately, I just did not have the confidence, given the factors that I have just mentioned and the fact that a judge would then be put in the very difficult position of having to make such findings against the highest judicial figures in the land. I just did not feel confident that I would succeed, nor did my skilled QCs.

The Chairperson: You appreciate that this is more than just you seeking the ombudsman to find maladministration. If I may say so, I look at you as someone who has an incredible record and CV, which you outlined earlier in the meeting. Given who the chairman of the commission is, it is a very profound statement for you to say that the commission acted illegally.

His Honour Judge Marrinan: That is one of the reasons that I find it so difficult to be here today. It is something that I do with great diffidence. I am not here to make trouble. I am here to seek some measure of comfort. I thought carefully about whether or not I should come here. I have to be perfectly honest and say that my wife was not keen on my coming here. Perhaps she was right, and I will look back and regret coming. However, I must say that you have treated me very fairly. I just did not feel like I wanted to slip quietly into retirement with this matter unresolved and without the public and the Assembly knowing what happened. That is what drives me forward.

There is very little chance that I will ever achieve judicial office after what happened to me then and after my evidence today. I am not doing this because I think that it will lead to promotion. It is not exactly a great career move to be sitting here today. On the other hand, those people who are members of and lead organisations such as NIJAC should be called to account in a public way. After all, as I pointed put, the chairman of England's equivalent of NIJAC, apart from having to be a layperson, must go before the House of Commons Select Committee on Justice to be appointed in the first place. I listened to the evidence that was given to you in 2012 when you made your first report. There were suggestions, for example, that there was no domination of laypeople by the judiciary. All that I have to say about that is that I tend more to the view taken by the Attorney General.

Mr McCartney: I want to go back to a previous point around the use of the word "maladministration". You are saying that, in the ombudsman's first draft report, that word was used, and then it was —

His Honour Judge Marrinan: He says himself that he was prepared to find maladministration. Now, that was not the case on every issue. The issue that he was concentrating on was the complete lack of information that the commission gave to me before it made its mind up. In other words, the commission told me nothing about what it was thinking of doing. It gave me no opportunity to make any representations. On that ground, the ombudsman was prepared to find that the commission had acted with maladministration, which is a very serious finding. However, he did not allow himself to maintain that view when the chairman wrote to him.

Mr McCartney: Is that referenced here?

His Honour Judge Marrinan: Yes, it is.

Mr McCartney: I just do not see the reference at the minute.

His Honour Judge Marrinan: I have left with the Chairman the full reports of the ombudsman. Obviously, that is a lot of paper, and I did not want to copy all of it. It is there for you to look at if you like, Mr McCartney.

Ms McCorley: Go raibh maith agat. All the questions and points have been gone over, so I am not going to rehearse the same points. I just want to say that I appreciate how difficult it was for you to come here, and I admire the fact that you were able to come and lay it all out like that. I just want to say to you that I probably understand, because you met injustice at so many turns. There comes a point at which you just cannot sleep at night and just have to confront it. There is no financial gain or gain for your career, but you feel better in yourself for having done it, and I commend that.

His Honour Judge Marrinan: You have taken the words right out of my mouth. I have not slept. When I saw the doctors, they said that I must not ruminate on it. Although I feel a lot better now, I have to confess that there are many times when I wake up in the middle of the night feeling so bad about it.

I can lose a competition. I am really not a bad loser. I have a sense of humour, and I am glad to say that I have retained that. However, it hurt, it still hurts and it will always hurt me. Particularly now, in the last few years of my career, I do not feel comfortable about going to meetings of the higher judiciary. I was offered the chance to be a bencher and turned it down because I do not really want to meet those people. I feel that they have behaved so badly to me and have not given me any kind of acknowledgement. They have not given me respect. Anyone deserves respect. Whether you are a cleaner or the Lord Chief Justice, you deserve to be treated with respect, but I have been treated with utter disrespect. To say that of the other candidate, after what they must know about him. I make no comment about him. He lost his wife and mother during this process. I feel very sorry for him, and I like him. He is a decent man. However, to say of him that he is "clearly qualitatively superior" to me is just not true. As you say, I just felt that I had to get it out of my system. Perhaps I will get some closure from being able to tell you about what happened. I hope that you will make your own enquiries.

Mr Elliott: Thank you, Judge, for your presentation. We all learn a wee bit every day, and you said how nervous you were coming as a witness to the meeting, as opposed to being the chairman or the judge. I am sure that, when you said the economic consequences of having to go to the Supreme Court would be too much for you, you also recognise the difficulties of some people out there in the community having to face judicial reviews.

His Honour Judge Marrinan: Of course.

Mr Elliott: I thank you for your appreciation.

I have a couple of issues. Mr Humphrey asked you whether the decision not to appoint you was a personal one. You went into some detail. I want to tease that out a wee bit more, because you have been very forthright, I have to say. You appeared to indicate that you believed that you were not going to be appointed anyway. I wonder what the specific reason for that was. You indicated that, as time went on and you made your complaints, it got more personal, although you did not indicate perhaps

individual personal aspects of anything having happened. How did it all start? There seems to be an implication in your words that you were not going to be appointed anyway. Why was that?

His Honour Judge Marrinan: With all due respect, Mr Elliott, that would be paranoia on my part. I am certainly not making that case. I am old enough and have suffered enough of life's problems not to be paranoid. It is a risk for anyone who complains.

I suspect that, when the chairman of NIJAC comes before you, if he does, and I suspect that he will want to after today, he will probably say you very politely that I cannot take the defeats that I have suffered. In other words, three times the ombudsman has looked at my case and three times, although finding in my favour in many examples, he has refused to declare a maladministration. I did not go to court, and it will be said of me that I am perhaps becoming too obsessed with this.

No, I do not believe that they were all against me, as it were, from day one. The facts that I had such a good interview that I came out really happy and that three out of four selection panel members found me substantially ahead, with only one out of kilter, suggests to me that they marked the matter fairly. However, somewhere along the line, perhaps in those long hours of discussion when they were trying to decide what to do, someone come up with the bright idea, "Let us not give it to him on the basis of one mark. Let us have another round of interviews". All I am saying is that they are not entitled to do that. This is not a gift in their —

Mr Elliott: If you do not mind me stopping you, may I ask why they would do that? Why would they decide to do that even if it was only one mark, as you accept? When two very professional people are in that position, there will be only "a mark or so" — I think that you used those words earlier — between them. I am trying to get a feeling of why you believe that they did that, because I cannot get it through to myself.

His Honour Judge Marrinan: I do not want to be smart in my answer, but you would really have to ask them that. The truth is that, if you are given a public responsibility to run a competition, you should not allow thoughts such as, "Well, he is winning only by one mark, but we will not let him win by one mark." They have said that; those are not my words. Lord Justice Coghlin, in his letter to the Lord Chief Justice, said that they were not prepared to award the competition on the strength of one mark or one and a half marks — whatever it was. I do not know why they came to such a conclusion. I hope that it was not personal at that stage, and I have no reason to believe that it was, but it was a wrong decision. It was an improper decision for them to take, as, indeed, the ombudsman found. When I say that it became personal, I think that it became personal when I became a complainant and pointed out the discrepancies and difficulties.

Mr Elliott: I understand that. You remarked on the Lord Chief Justice's role in the judicial appointments process. It almost sounded to me as though you were indicating that, had it not been for his role, you may now be a High Court judge.

His Honour Judge Marrinan: I do not know that. All I know is that he was the chairman of the commission. He, therefore, presided over all of these decisions. Presumably, he takes responsibility for all of these decisions and fully agrees with all of those matters. The reason that I draw attention briefly to him is not as the 'Irish News' suggested; I have nothing personal against him, and this is not an attack on him as an individual. If it is an attack at all — I suppose that it must be regarded as an attack — it is on the commission. All I can say is that, if one can imagine sitting round the commission table, and the chairman is the Lord Chief Justice, it would be a brave person, whether he or she is a judge or layperson, who would second-guess his views on the matter. He is bound, because of his high office, to carry significant weight in any commission discussion.

I drew attention to the events of June 2011. I know nothing about those events. It will be open to you to call for the minutes and find out. I strongly suspect that some members of the commission were not happy about what was done to me in June 2011 and that there was a second or third meeting so that those doubts could be resolved, and I would be surprised if the Lord Chief Justice was one of the people who expressed those concerns.

Mr Elliott: What you have said has been a scathing criticism of the judicial appointments system —

His Honour Judge Marrinan: Yes.

Mr Elliott: — and a scathing criticism, as I see it, of our legal process, system and judiciary.

His Honour Judge Marrinan: No, I would not go that far. I would not be a judge for one minute if I thought that our justice system or legal system was not fair, equal and even-handed. I am proud to be a judge. I would not be a judge for one moment if I thought that the system itself was wrong. I am talking about the appointment of judges; I am not talking about how justice is administered day and daily from the Magistrates' Court all the way up to the Court of Appeal. I am not saying that.

Mr Elliott: You said that you would feel uncomfortable and did not have the confidence to take your case to judicial review. The Chairman also questioned you about that.

His Honour Judge Marrinan: That is true.

Mr Elliott: Obviously, it is a failure, as you would see it, of the justice system that you felt that you did not have the confidence to go that far. I am saying that it is because of the process. Whether the process is right or wrong, it is still a significant criticism of the judicial system.

His Honour Judge Marrinan: It is a significant criticism of the way in which NIJAC is administered and those by whom it is governed. In England, this could not happen. Let us leave aside the cost issue, which, of course, is a big issue, as Mr McCartney pointed out. If somebody was unlucky enough to be in my position in England, although I suspect strongly that I am a unique case — I hope that I am — and was thinking of taking a judicial review, he or she would not have to look over their shoulder and say, for example, "The judge who will hear my case may be picked by the Lord Chief Justice, who is the very person about whom I am complaining." The person hearing that case would be one of hundreds of judges in England. Therefore, there is a great distance between the higher judiciary in England. They do not feature, in the sense that the Lord Chief Justice plays no part in the Judicial Appointments Commission in England. A senior Lord Justice is usually one of the members, but only one of 15. There are so many judges in England that there is not this perception that it is an attack on the Lord Chief Justice or the Lord Justice. I think that, if a person like me were trying to decide whether to go forward to judicial review in England, they would be much, much more confident. My lawyers and I felt that it would be invidious to ask a High Court judge to rule that those with whom he works so closely, in such a small community at the highest level, could be accused, not individually but as part of a commission, of being unfair.

Mr Elliott: You eloquently pointed out the failures, as you see them, in the Northern Ireland system. You highlighted the differences in England and how it would have, at least, been an easier process for you there. As you see it, there are failures in the judicial review process, given the position that you found yourself in with those who were deciding whether to appoint you. So this goes further than the appointments process; it goes to the heart of the judicial system.

His Honour Judge Marrinan: You are pressing me on this. Let me put it this way: I had a perception that I was disadvantaged considerably by the kind of criticisms that I was going to have to make and the people who were leading the organisation that I was criticising. The very judges who were going to hear the judicial review proceedings, either at first instance or on appeal, were close colleagues of the very people whom I was criticising. All I am saying is that that is a failure of the statute. It, surprisingly, sets the system up to fail because it institutionalises the role of the Lord Chief Justice as chairman of the commission and gives him the sole right to nominate six of 13 other judges. If you are going to maintain that system, I think that you should take a root-and-branch look at how someone can challenge that by judicial review, and I have a suggestion to make in that regard. I personally feel that the system should be changed to that in England. If it is left the way it is, the only way in which you could give confidence to someone like me would be to say, for example, that, given the nature of Northern Ireland, any legal appeal on the matter should be taken to a judge of the Supreme Court, unconnected to Northern Ireland. As one of the most skilled lawyers in the country, that judge would have the right to deal with it, and then no one could say that there was any perceived connection to Northern Ireland or the Northern Ireland legal process.

Mr Elliott: I certainly do not want to put words in your mouth, but there is an indication, from what you said, that we need to change the appointments process or change the appeal system, or the opportunity to challenge that system.

His Honour Judge Marrinan: Exactly. One or the other.

Mr Elliott: So, one way or the other, there is still a failure, as you see it, in the judicial system in Northern Ireland. You said — I am just looking for the comment — that you do not feel welcome in the Royal Courts of Justice. That is a pretty scathing suggestion about your colleagues.

His Honour Judge Marrinan: One does not want to personalise this, and I try not to. I do not feel comfortable. Whether or not I am welcome is another matter. I am sure that, if I went down there and attended meetings, as I do from time to time, I would be "welcomed", but I no longer feel comfortable dealing with many of my colleagues.

Mr Anderson: Thank you, Judge Marrinan, for your evidence today. A number of the points that I wished to raise have been answered, so I will be brief. From listening to your evidence, this has taken its toll on your health, and I suppose that that is understandable. The length of time and the duration —

His Honour Judge Marrinan: I hope that I have not exaggerated that so that someone tries to make me resign on medical grounds.

Mr Anderson: Certainly not, but I picked up that you have reached retirement age.

His Honour Judge Marrinan: I have, yes.

Mr Anderson: No matter what job or position one goes for, it is an experience. What has happened to you has obviously had an effect. You said that your wife was not that keen for you even to come to the Committee to make your points. It is perhaps ironic that you, as a judge, are here with us trying to get justice for the way in which you have been treated over this whole episode.

His Honour Judge Marrinan: I know, as a matter of fact, that the job has gone. It has gone to a very good man, and I have congratulated him. There is nothing between him and me. He deserves high office; he just did not deserve my job. Sorry, what was the rest of your question?

Mr Anderson: I was just saying that it is ironic that you have to come to the Justice Committee to put forward these points. As a judge, you are having to go outside the judicial process.

His Honour Judge Marrinan: I seek a measure of justice. I will feel happier if you ask those responsible for this some pointed questions. I will be happier but not in any vindictive sense because I do not feel vindictive towards anyone, but it shocks me that, at this time in my life, this has happened to me, and it still feels like a nightmare . If you, at the end of the day, feel that reforms are necessary, I will feel that some justice has been done, not only for me but for the system. That sounds a little pompous, I know, but I do not mean it like that.

Mr Anderson: The point that you are bringing to us today is that you wish to see some change because of what has happened to you. You are 65 and the opportunity may have passed for you, but things could be put right for people in the future.

His Honour Judge Marrinan: The Select Committee on the Constitution in the House of Lords recommended that the age of retirement for Appeal Court judges be raised to 75. It said that ordinary judges should still retire at 70. I do not agree with them, as you might expect, but it is true that it looks as though I am on the road down towards the end of my career.

Mr Anderson: You mentioned a number of times that there should not have been a second competition.

His Honour Judge Marrinan: No, there should not have been.

Mr Anderson: I am trying to get my head around the non-marking of one of the judges. If that mark had been put in, you would have won the competition. Is that what you are saying?

His Honour Judge Marrinan: In a nutshell, yes.

Mr Anderson: Did not putting the mark in give the panel a reason for saying, "We will go to a second competition"?

His Honour Judge Marrinan: It was the only device that they could come up with to prevent my winning. You can see that there is a blank where there should be a mark. My contention is that, had they finished the marking, they could have done nothing else but appoint me.

Mr Anderson: Are you suggesting that that was deliberate?

His Honour Judge Marrinan: Yes. It did not happen by accident.

Mr Anderson: That leads me to my next point. In your submission, you state:

> *"There is clear and unequivocal documentary evidence that the Selection Committee are on record as describing me as an 'excellent' candidate and someone who was regarded by the Commission as clearly appointable and entirely suitable for this post."*

Mr Maginness and Mr Elliott referred to the meeting held in June 2011, at which the committee was asked to look at the process again. There was very quick movement to put another selection panel in place. It moved with undue haste. It was within two months, was it?

His Honour Judge Marrinan: It was over the summer. Bear in mind that lawyers, at least those who can afford to, tend to go away for most of the summer. So, over the summer, usually nothing gets done. Remarkably, however, once I had been pushed aside, they managed to run the competition and have a recommendation ready for the Lord Chancellor by September 2011. If you compare that with the length of time it took for the first competition, it is extraordinary. A competition should normally take three to four months or slightly longer, but not much longer. The committee certainly moved very quickly. It had its candidate in place and ready to go.

Mr Anderson: So you are suggesting, on the back of your other point, that this was also deliberate.

His Honour Judge Marrinan: No, I am suggesting that the committee moved with proper expedition on the final competition — the so-called recommenced competition. That is the way that things should happen: expeditiously. I ask you to compare that with the lack of urgency that occurred in the first competition, a lack of urgency designed only to assist the other candidate and create difficulty for me.

Mr Anderson: You said that the other candidate was not even in a position to take up the post immediately. I read somewhere that, due to commitments, he was unable to take up the post until some time in 2013.

His Honour Judge Marrinan: He is conducting an important public inquiry. I am sure that when they approached him and asked him to take up appointment, he would have told them that he would not be able to take up the post for a year. Yet the committee was willing to allow him that facility. It never showed that leniency to me.

Mr Anderson: You said that there were a number of meetings in June 2011.

His Honour Judge Marrinan: I believe that there were a number of meetings. However, I cannot prove that because they would not tell us about them.

Mr Anderson: Did you try to get that information?

His Honour Judge Marrinan: Only one meeting is mentioned on the commission's website. That was on 14 June, and I did not even know about it. Of the meetings that I do know about, the meeting of 27 June does not appear in the minutes section of its website.

Mr Anderson: Do you think that we should find out about that?

His Honour Judge Marrinan: I also think that there was another meeting on 7 June. Again, we have never been given any information about that. The commission refused to give us that information. However, it cannot refuse you if you ask for it.

Mr Anderson: Is that an area that we should be looking at?

His Honour Judge Marrinan: With due respect, indeed it is.

Mr Lynch: Thank you. I just want to make a comment. I think that you made a compelling argument. If it was within our remit, we would find in your favour, but it is not. One would imagine that it is not often that a judge feels an injustice.

His Honour Judge Marrinan: It is somewhat ironic.

Mr Lynch: I want to ask you a personal question. Do you feel that this whole episode will affect the rest of your career?

His Honour Judge Marrinan: Do you mean do I think that I will ever be appointed as a High Court judge?

Mr Lynch: No. You answered that.

His Honour Judge Marrinan: In my ordinary life as an assigned judge in Antrim, I do not see any way in which anyone could affect my career, and I do not think that anyone would.

The Chairperson: You have given us the paper that includes your thoughts. I assure you that that will be included in the record.

His Honour Judge Marrinan: On the possible reform issues?

The Chairperson: Yes. You elaborated on some of those issues throughout the meeting, but we will certainly include that paper.

As you said earlier, everyone should be given respect, irrespective of their position. I assure you that, irrespective of anybody's position, the Committee will hold them to account. It does not matter who you are and what office you hold. Even if you hold the highest office in the land, you will be subject to the scrutiny and accountability of the Committee.

His Honour Judge Marrinan: Thank you.

The Chairperson: What you have done is very brave. I give you an assurance. It is incumbent on the Committee to take forward a piece of work that will interrogate all the evidence that you have provided and hold people responsible for their actions and the way in which you have been treated. If that leads to a requirement for fundamental reform to the process, once we have gathered up all the evidence and the information that we need to deliberate on the issues, I do not think that you will find the Committee wanting in its desire to step up to the challenge.

Once again, thank you very much for coming to the Committee. Your time is very much appreciated.

His Honour Judge Marrinan: Thank you, Mr Chairman and members of the Committee. You have been very gracious. I feel a lot more at ease in my mind as a witness and a person after listening to your very fair questioning of me. Thank you very much for your help.

Mr McCartney: We are not a bad jury. *[Laughter.]*

His Honour Judge Marrinan: Can I borrow you for the next couple of months? *[Laughter.]*