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Abimbola A. Olowofoyeku

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ABIMBOLA A. OLOWOFOYEKU*

INTRODUCTION

> "Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public …. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw."[1]

THE decision of the House of Lords in the conjoined appeals, *R.* v. *Abdroikov*, *R.* v. *Green* and *R.* v. *Wilkinson*[2] (hereafter referred to as *Abdroikov*) brings to the fore again the question of the standards of adjudication and review in cases of alleged apparent bias. The appeals raise difficult questions, not least of which is the role of the "impartial observer" in cases wherein a decision is being challenged on appeal or judicial review on grounds of apparent bias.

The appeals involved police officers and a Crown Prosecution Service (CPS) solicitor serving on juries. *Abdroikov* had been convicted by a jury whose foreman was a serving police officer – a fact unknown to the court until the jury had retired to consider its verdict. *Green* had been convicted by a jury that included a police officer serving in the same borough as the police officer who had conducted a stop and search on Green, and who had been a prosecution witness at Green's trial. The two officers had also once served in the same police station at the same time, although they did not know each other. *Williamson* had been convicted by a jury whose foreman was a solicitor working for the CPS. The trial judge had overruled the objections of defence counsel to the presence of this solicitor on the jury. The Court of Appeal dismissed Abdroikov's, Green's and Williamson's appeals against their convictions, on the ground that a fair-minded and informed observer would not conclude that there was a real possibility of bias from the two

* Professor of Law and Head of Brunel Law School. I am grateful to Professor Dawn Oliver of UCL for her comments on an earlier draft of this article.

[1] The European Court of Human Rights in *Hauschildt* v. *Denmark* (1989) 12 E.H.R.R. 266 at [48].

[2] [2007] UKHL 37; [2008] 1 All E.R. 315.

police officers and the CPS solicitor who had served on the relevant juries. In the House of Lords,[3] Abdroikov's appeal was dismissed unanimously. Green's and Williamson's appeals were allowed by a majority (Lords Rodger and Carswell dissenting).

This all looks straightforward enough. So what is the problem? Lord Mance neatly summed it up. Having had the benefit of reading drafts of the opinions of both the majority and dissenting speeches before writing his own speech, he noted that there was a division of opinion with regard to two of the appeals (*Green* and *Williamson*), and that the difference turned "largely on different perceptions of the view that would be taken by a fair-minded and informed observer, after considering the facts", of the question whether there was a reasonable possibility of bias.[4]

It will be argued in this article that this (the Lords deciding the issues based on their speculations as to the mind of a fictitious third party) is unsatisfactory. Fictional characters are created by the courts in situations wherein they wish to retain a wide measure of discretion in reaching the "right" decision in individual cases. The fictitious "reasonable man" or reasonable person that permeates the discourses in negligence cases is one such example. More pertinent to the current discussion is the "fair-minded and informed observer" that now haunts the discourses on bias. Lord Mance admitted in *Abdroikov* that this person is "in large measure the construct of the court".[5] The kind of use of fictional characters seen in *Abdroikov* and similar cases on bias often leads courts to what is effectively a case-by-case approach to complex questions. While this is understandable as a pragmatic approach, the fiction, when taken too far, does little to provide reliable guidance to stakeholders in the judicial process. It is not right for any decision of the nation's apex court (or, indeed, of any court) to be predicated, not on some point of principle (which can be unpacked), but entirely on whatever judges may imagine that some fictional characters would think.[6] The normal processes for appeal or judicial review are unsuited for this kind of inquiry. There must be another way – and, that way, it will be argued, is a partial return to Lord Goff of Chieveley's statement of principle in *R.* v. *Gough*,[7] dispense with the informed observer and restore the perspective of the reviewing court. This would be but a

[3] Lord Bingham of Cornhill, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Carswell, and Lord Mance.
[4] At [80].
[5] At [81].
[6] Two other problems arise in constructing the informed observer. First, the observer's personality and character, and, secondly, the knowledge and understanding required before the observer is deemed to be "informed".
[7] [1993] A.C. 646 at 667–670. According to Lord Goff (at 670) it is "unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man."

slight shift – but it would be one that would engage a completely different mindset and approach to the resolution of bias cases. But first, we must go to the beginning.

The rule against bias

Under Article 6 of the ECHR and under common law, litigants have the right to have their cases heard and decided by an impartial and unbiased tribunal. Although "in modern practice … no party has the right to decide by whom his case will be tried", and "it is not open to a party, by the mere making of an objection, to exclude from his case any judge whose participation is not to his liking", a judge who finds a "sound objection" to his participation in a case is under a duty "to recuse himself at once".[8] Subject to the issue of disqualification,[9] it is similarly not open to judges exclude themselves from cases that are not to their liking. This is the so-called "duty to sit".[10] With respect to the issue of disqualification, judicial officers are disqualified from sitting in cases in which they have an interest[11] or in which their impartiality is reasonably questionable. This principle, otherwise known as the "rule against bias", is one of the common law's instruments for implementing the right to a fair hearing before an independent, impartial and unbiased tribunal. The starting point is a presumption of judicial impartiality.[12] Disqualification is trigged by either actual bias, or by apprehended, apparent or objective bias. The question with respect to the latter is whether there is a "real possibility" that the "judicial officer" concerned is or will be biased.[13] In this respect, the cases have not sought to draw a distinction between judges and jurors, and the term "judicial officer" refers to both. Many of the leading cases (including *Gough*) indeed involve jurors, and in this article, I use the term "judges" and "judicial officers" to include jurors, as contextually appropriate.

[8] The Lord Justice-Clerk in *Robbie The Pict* v. *Her Majesty's Advocate* [2002] ScotHC 333, at [16].

[9] See for example, *Re JRL; Ex parte C.J.L* [1986] HCA 39; (1986) 161 C.L.R. 342 at 352; *Livesey* v. *New South Wales Bar Association* (1983) 151 C.L.R. 288 at 293.

[10] Lord Justice-Clerk in *Robbie The Pict* v. *Her Majesty's Advocate* (above). Also *Locabail (UK) Ltd* v. *Bayfield Properties Ltd* [2000] Q.B. 451 at 480; *Bienstein* v. *Bienstein* [2003] HCA 7 at [35–36] (HC, Australia), *SACCAWU* v. *Irvin & Johnson*, 2000 (3) SA 705 at [13] (Const. Ct., SA).

[11] *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L.C. 759; *Sellar v. Highland Railway Co*, 1919 SC (HL) 19; *R.* v. *Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 A.C. 119; *Meerabux* v. *AG of Belize* [2005] UKPC 12.

[12] *Hauschildt* v. *Denmark* (1989) 12 E.H.R.R. 266 at [47] (ECt.HR); *Kyprianou* v. *Cyprus* (2007) 44 E.H.R.R. 27, [2005] ECHR 873 (ECt.HR); *US* v. *Morgan*, 313 US 409 at 421 (SC, 1941); *Wewaykum Indian Band* v. *Canada* [2003] 2 SCR 259, 2003 SCC 45 at [59] (SC, Canada); *President of the Republic of South Africa and others* v. *South African Rugby Football Union and others* [1999] 7 B. Const. L.R. 725, 1999 (4) SA 147 at [40] (Const. Ct., South Africa); *Jaipal* v. *The State* (18 Feb 2005), Case CCT 12/04 at [42] (Const. Ct., South Africa).

[13] *Porter* v. *Magill* [2002] 2 A.C. 357; *In re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 W.L.R. 700; *Lawal* v. *Northern Spirit Ltd* [2003] UKHL 35; *Davidson* v. *Scottish Ministers* [2004] UKHL 34.

The principle of apparent bias is common in the Anglo-American legal traditions, and, in this article, I will be referring to cases from a number of other jurisdictions. While decisions from these jurisdictions are only persuasive in England, these cases are highly relevant because the applicable principles are similar, albeit with varying formulations. For example, in parts of the Commonwealth, the principle of apparent bias refers to a "reasonable apprehension" or "reasonable suspicion" of bias,[14] while it refers in US Federal law to cases in which a judge's impartiality might reasonably be questioned.[15] The aim in all cases is to ensure that justice is "seen" to be done.[16] This principle, "of fundamental importance", is widespread,[17] enshrined in the jurisprudence of the European Court of Human Rights,[18] and is all about appearances. According to Scalia J. of the US Supreme Court, "what matters is not the reality of bias or prejudice, but its appearance".[19] Frankfurter J. of the same court said that "justice must satisfy the appearance of justice".[20] In the UK, Lord Nolan said in the *Pinochet*[21] case that, in any case in which the impartiality of a judge is in question the appearance of the matter is just as important as the reality. With regard to the question of whose benefit the "appearances" are for, Lord Steyn in *Lawal* v. *Northern Spirit Ltd* identified this as the "public".[22] This concern about the "the objective appearance of impartiality"[23] is a "manifestation of a broader preoccupation about the image of justice".[24] And this is where the informed observer comes in.

[14] See *e.g. R.* v. *Webb* [1994] HCA 30, (1994) 181 C.L.R. 41 (HC, Australia); *Cook* v. *Patterson* [1972] N.Z.L.R. 861 (CA, New Zealand), *EH Cochrane Ltd* v. *Ministry of Transport* [1987] 1 N.Z.L.R. 146 (CA, New Zealand), *Auckland Casino Ltd.* v. *Casino Control Authority* [1995] 1 N.Z.L.R. 142 (CA, New Zealand); *Committee for Justice and Liberty* v. *National Energy Board* (1976) 68 D.L.R. (3d) 716 (SC, Canada); *R.* v. *S (RD)* (1997) 151 D.L.R. (4th) 193 (SC, Canada); *SACCAWU* v. *Irvin & Johnson* [2000] 8 B. Const. LR 886, 2000 (3) SA 705 (Const. Ct., South Africa); *President of the Republic of South Africa and others* v. *South African Rugby Football Union and others* [1999] 7 B. Const. L.R. 725, 1999 (4) SA. 147 (Const. Ct., South Africa).

[15] 28 U.S.C. § 455(a).

[16] Lord Hewart C.J. in *R.* v. *Sussex Justices, ex p McCarthy* [1924] 1 K.B. 256 at 259. See also *Millar v Dickson* [2002] SC 30 at [63] (PC).

[17] See for example, *Public Utilities Commission* v. *Pollak* 343 US 451 at 476 (SC, 1952); *In re United States* 666 F.2d. 690 at 694 (1st Cir. 1981); *Johnson* v. *Johnson* [2000] HCA 48; *Ebner* v. *Official Trustee in Bankruptcy* [1999] FCA 110, [2000] HCA 63 (HC, Australia); *Erris Promotions* v. *Inland Revenue* [2003] NZCA 163 at [24] (CA, New Zealand).

[18] See *e.g. Delcourt* v. *Belgium* (1970) 1 E.H.R.R. 355 at [31]; *De Cubber v. Belgium* (1984) 7 E.H.R.R. 236 at [26]; *Kyprianou* v. *Cyprus* (2007) 44 E.H.R.R. 27, [2005] ECHR 873.

[19] *Liteky* v. *US*, 127 L. Ed.2d. 474 at 486, *per* Scalia J. (SC, 1994). See also the ECt.HR in *Hauschildt* v. *Denmark* (1989) 12 E.H.R.R. 266 at para. 48 (referring to *De Cubber* v. *Belgium*).

[20] *Offutt* v. *United States* 99 L. Ed. 11 at 16 (SC, 1954).

[21] *R.* v. *Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [1999] 1 All E.R. 577, 592.

[22] "Public perception of the possibility of unconscious bias is the key." [2003] UKHL 35 at [14].

[23] The Lord Justice-Clerk in *Robbie The Pict* v. *Her Majesty's Advocate* [2002] ScotHC 333, [2003] S.C.C.R. 99 at [24].

[24] See the Supreme Court of Canada in *Wewaykum Indian Band* v. *Canada* [2003] 2 S.C.R. 259, 2003 SCC 45 at [66].

ENTER THE OBSERVER

In a bid to maintain visible objectivity in the inquiry into apparent bias, the inquiry is conducted from the viewpoint of an independent third party, rather than that of the judicial officer whose impartiality is being questioned. According to the Lord Justice-Clerk in *Davidson* v. *Scottish Ministers*:

> [T]his being a question of public confidence in the administration of justice, we are concerned with the appearance of things. The question has to be decided from the standpoint of the onlooker rather than that of the judge [whose impartiality is in question].[25]

In *Metropolitan Properties Ltd* v. *Lannon*[26] Lord Denning M.R. said that justice is rooted in confidence, and that confidence is destroyed when right-minded people go away thinking that the judge was biased.

The "onlooker" or "right-minded" person referred to in these statements has since crystallised into a reasonable, impartial, well-informed, fair-minded, detached, objective, observer. This is how Kennedy J. of the US Supreme Court put it in *Liteky* v. *US*:

> Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified.[27]

The situation in which a judicial officer is facing a request to recuse himself/herself is amenable to this process. Clearly, such a person is obliged to consider how his/her continuing to hear the case would look to another person. That other person may be a notional informed observer (if constructed sensibly) or an appeal/review court that may be asked to rule on the propriety of a decision to not stand down. Recourse to some sort of fictional third party is inevitable when the objection is taken during the original trial/hearing. In such cases, doubts should be resolved in favour of recusal.[28]

But this article focuses rather on the situations in which the matter is being considered on appeal or judicial review. While the judges of appeal and review courts are no doubt right-minded, informed, reasonable, etc., they are apparently not the kind of "onlooker" that is being envisaged when the informed observer is invoked at the appellate/review stage. Thus the question is "not based purely upon the assessment by some judges of the capacity or performance of their

[25] [2002] ScotCS 256 at [33] (affd. [2004] UKHL 34).
[26] [1969] 1 Q.B. 577 at 599.
[27] 127 L.Ed.2d. 474 at 497.
[28] See *Locabail (UK) Ltd* v. *Bayfield Properties Ltd* [2000] Q.B. 451 at 480; *Davidson* v. *Scottish Ministers* [2002] ScotCS 256 at [16].

colleagues".[29] Rather, the "onlooker" has been described as "other persons", "the public"[30] or, as a bystander taken as representative of the community.[31] So the fabled informed observer is a person outwith the judiciary and even the legal profession[32] – *i.e.*, an ordinary member of the public[33] – to all intents and purposes, an invisible, ever-present lay member of the review court. And herein, it will be argued, lies the problem.

This outcome of apparently sidelining reasonable, impartial, reviewing judges in favour of reasonable, impartial, ordinary lay members of the public would be fine enough if the legal construct developed to support it were realistic. However, the combined wisdom of global common law jurisprudence on the "informed observer" produces an extraordinary and wholly unrealistic creature – howbeit, one that may be deemed a logical necessity in this context, given that this invisible lay member of the reviewing panel has an absolute veto (in that his or her judgement in the matter is taken to be determinative).[34]

The discussion that follows on the attributes of the informed observer may appear laboured. However, it is necessary to examine the matter at some depth because therein lies the main source of the difficulty being addressed in this article.

The attributes of the informed observer

The informed observer is a paragon of balance, virtue and wisdom,[35] is informed of all the surrounding facts and circumstances,[36] and must be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances.[37] While he or she cannot be attributed with a detailed knowledge of the law,[38] at least, not a level of knowledge of the law and an awareness of the judicial process that ordinary experience suggests not to be the case,[39] he or she is also not "a person wholly uninformed and uninstructed about the law in general or

[29] Gleeson C.J., Gaudron, McHugh, Gummow and Hayne JJ. in *Johnson* v. *Johnson* [2000] HCA at [12].
[30] Stevens J. in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 US 847 at 863; *Livesey* v. *New South Wales Bar Association* (1983) 151 C.L.R. 288 at 293.
[31] Kirby J. in *Johnson* v. *Johnson* [2000] HCA at [42].
[32] "Such a person is not a lawyer" – Kirby J. in *Johnson* v. *Johnson* [2000] HCA at [53].
[33] Described as a "lay observer" by Brennan, Deane and Gaudron JJ. in *Vakauta* v. *Kelly* [1989] HCA 44.
[34] Kirby J. in *Johnson* v. *Johnson* [2000] HCA 48 at [48].
[35] See the general discussion and exhaustive list by Kirby J. of the High Court of Australia in *Johnson* v. *Johnson* [2000] HCA 48.
[36] Rehnquist C.J. in *Microsoft Corp* v. *US*, 147 L. Ed. 2d. at 1049.
[37] Kirby J. in *Johnson* v. *Johnson* [2000] HCA 48 at [53].
[38] *Johnson* v. *Johnson* [2000] HCA 48 at [13].
[39] Toohey J. in *Vakauta* v. *Kelly* [1989] HCA 44, at para 10 of his judgment.

the issue to be decided",[40] but rather must be taken to have a reasonable working grasp of how things are usually done.[41]

He or she cannot be attributed with highly specialised knowledge,[42] with a knowledge of all that was eventually known to the court,[43] or with knowledge of the character or ability of a particular judge.[44] This person is less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be,[45] and should not be attributed "with a conviction that judges, or adjudicators as a class have a special capacity to distinguish truth from falsehood by the appearance of witnesses or the presentation of their oral evidence".[46] Nevertheless, he or she will be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality.[47] He or she must also now be taken to have, at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted.[48] He or she would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not said or done, without necessarily disqualifying themselves from continuing to exercise their powers.[49]

The informed observer is reasonable,[50] right-minded,[51] thoughtful,[52] not necessarily a man nor necessarily of European ethnicity or other majority traits,[53] neither complacent nor unduly sensitive or suspicious,[54] not unduly compliant or naïve[55], not entitled to make snap judgments,[56] and would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to the parties or their representatives, which was taken out of context.[57] He or

[40] Kirby J. in *Johnson* v. *Johnson* [2000] HCA 48 at [53].
[41] Lord Bingham of Cornhill in *Bolkiah & Ors* v. *The State of Brunei Darussalam & Anor (Brunei Darussalam)* [2007] UKPC 62, at [16].
[42] Kirby J. in *Johnson* v. *Johnson* [2000] HCA 48 at [49].
[43] *Ibid.*
[44] *Johnson* v. *Johnson* [2000] HCA at [13].
[45] *In re Mason*, 916 F.2d. 384 at 386 (7th Cir. 1990).
[46] Kirby J. in *Johnson* v. *Johnson* [2000] HCA 48 at [57].
[47] Kirby J. in *Johnson* v. *Johnson* [2000] HCA 48 at [53].
[48] *Ibid.*
[49] *Ibid.*
[50] *Johnson* v. *Johnson* [2000] HCA 48 at [12]; Rehnquist C.J. in *Microsoft Corp* v. *US*, 147 L. Ed. 2d. at 1049; *SACCAWU* v. *Irvin & Johnson* 2000 (3) SA 705 at [15]; *President of the Republic of South Africa and others* v. *South African Rugby Football Union and Others*, 1999 (4) SA 147 at [45].
[51] Lord Denning M.R. in *Metropolitan Properties Ltd* v. *Lannon*, above; *Committee for Justice and Liberty* v. *National Energy Board* [1978] 1 SCR 369 at 394; *R.* v. *S (RD)* [1997] 3 S.C.R. 484 at 505, 507.
[52] *Jaipal* v. *State* [2004] ZASCA 45 at [12] (Supreme Court of Appeals, South Africa).
[53] Kirby J. in *Johnson* v. *Johnson* [2000] HCA 48 at [52].
[54] *Johnson* v. *Johnson*, above.
[55] Lord Mance in *Abdroikov*, at [81].
[56] *Johnson* v *Johnson* [2000] HCA 48 at [14].
[57] *Johnson* v. *Johnson* [2000] HCA 48 at [53].

she does not have a very sensitive or scrupulous conscience,[58] can be expected to be aware of the legal traditions and culture,[59] but may not be wholly uncritical of this culture,[60] and would adopt a balanced approach.[61]

If one were to attempt to describe the attributes of the Archangel Michael, one could not do much better than the above. This is just another way of saying that this informed observer can only be a spirit and cannot possibly exist in the world of human beings. However, this phantom is superimposed on the law – the relevant legal question being whether this informed observer would or might, in the light of the circumstances, reasonably question the impartiality of the judicial officer – *i.e.*, whether he or she would conclude that there was "a real possibility of bias"[62] or "a reasonable possibility of bias"[63] or whether he or she "might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide".[64] These formulations all mean the same thing, reflecting the principle applicable across the Commonwealth, and in the jurisprudence of the European Court of Human Rights.[65]

The apprehensions of bias on the part of the informed observer must of course be reasonable,[66] a matter to be considered in the context of ordinary judicial practice,[67] apparently, by the court itself.[68] The reasonableness requirement means, among other things, that any such apprehension must not be fantastic or fanciful.[69] Finally, any

[58] Kirby J. in *Johnson* v. *Johnson* [2000] HCA 48 at [53]; De Grandpré J. of the Supreme Court of Canada (dissenting) in *Committee for Justice and Liberty* v. *National Energy Board* [1978] 1 S.C.R. 369 at 395 (approved in *Valente* v. *The Queen* [1985] 2 S.C.R. 673, and *Wewaykum Indian Band* v. *Canada* [2003] 2 S.C.R. 259, 2003 SCC 45).

[59] Lord Woolf C.J. in *Taylor* v. *Lawrence* [2002] EWCA Civ 90 at [61].

[60] Lord Steyn in *Lawal* v. *Northern Spirit Ltd* [2003] UKHL 35 at [22].

[61] See Lord Steyn in *Lawal* v. *Northern Spirit Ltd*, at [14]; Lord Mance in *Abdroikov*, at [81].

[62] See Lord Bingham in *Abdroikov* at [1]; Baroness Hale at [45].

[63] See Lord Mance in *Abdroikov* at [80].

[64] See Gleeson C.J., Gaudron, McHugh, Gummow and Hayne JJ. in *Johnson* v. *Johnson* [2000] HCA at [11]; See also *Livesey* v. *New South Wales Bar Association* (1983) 151 C.L.R. 288 at 293–294; *Ebner* v. *Official Trustee* [2000] HCA 63 at [6]; *Hot Holdings Pty Ltd* v. *Creasy* [2002] HCA 51 at [68]; *R.* v. *Mr Justice R.S. Watson, a Judge of the Family Court of Australia, Ex parte Armstrong* (1976) 9 A.L.R. 551 at 564–565; *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28 at [28]; *Johnson* v. *Johnson* [2000] HCA at [11]; *Bienstein* v. *Bienstein* [2003] HCA 7 at [31]; *Hauschildt* v. *Denmark* (1989) 12 E.H.R.R. 266 at [48]; *Liljeberg v. Health Services Acquisition Corp.*, Stevens J. (at 860); Rehnquist C.J. (dissenting) (at 871); the New Zealand Court of Appeal in *Erris Promotions & Anor* v. *Inland Revenue* ([2003] NZCA 163 at [32]); the Supreme Court of Ireland in *Orange Ltd* v. *Director of Telecoms (No. 2)* [2004] 4 I.R. 159 at 186.

[65] Lord Steyn in *Lawal* v. *Northern Spirit Ltd* at [14].

[66] *R.* v. *Webb*, above; *Johnson* v. *Johnson*, at [11–13]; *SACCAWU* v. *Irvin & Johnson* 2000 (3) SA 705, para 15, referring to *President of the Republic of South Africa and others* v. *South African Rugby Football Union and Others*, 1999 (4) SA 147, para. 45. This was described by the Court in *State* v. *Basson* as "the reasonable apprehension of the reasonable person" (2004), CCT 30/03, para. 53.

[67] *Johnson* v. *Johnson* [2000] HCA at [13].

[68] See for example, *Johnson* v. *Johnson* [2000] HCA at [16] and [18].

[69] *Idoport Pty Limited & Anor* v. *National Australia Bank Limited & 8 Ors* [2004] NSWSC 270 at [18] (SC, NSW).

apprehension of bias must have an objective basis[70] – or, put slightly differently, it must be "objectively justified".[71] This means that there must be some demonstrable and rational basis for what the informed observer suspects.[72]

Apart from these statements, there is little guidance on what is "reasonable", or on why it should be supposed that there is any possibility that the fantastic creature described above could ever have an apprehension or suspicion that is not reasonable. This in itself indicates that the fiction, although long standing, is not well thought through, and that the courts are struggling for a convincing way to bring the matter onto an objective (from the perspective of their own decision-making processes) basis.

In the end, despite the pitch on objectivity and the view that the apprehensions of bias must have an objective basis, it is the opinion of the reviewing court on this issue that matters. While lawyers and judges might pretend to know what "reasonable" means objectively, it is, in fact, a value-laden term, and, in many cases, judges appear to make it up as they go along. It is trite that the profession's (that is to say, lawyers' and judges') perceptions of what is reasonable are not necessarily consistent with those of the ordinary members of the public. The judicial construct of the informed observer no longer provides a reliable guide to decision-making on the issue of apparent bias. No wonder their Lordships found themselves in some difficulty in *Abdroikov*. We will now return to this case.

Back to *Abdroikov*

I will not say much about whether I consider the decision of the House of Lords in *Abdroikov* to be the "right" one on the merits. Suffice it to say here that I consider the approaches and decisions of the Court of Appeal and the dissents of Lords Rodgers and Carswell to be more supportable, and the majority's approaches in the two appeals that were allowed to be unfortunate. It follows that I also consider the subsequent approach of the Court of Appeal to similar issues in *R.* v. *Bakish Alla Khan*[73] to be eminently sensible.

But the point of this article is not to analyse the merits of the actual decisions in *Abdroikov*. It is rather to spotlight the role of the impartial

[70] The Lord Justice-General in *Transco Plc* v. *HM Advocate* [2005] ScotHC HCJAC1 at [22]; Lord Hope of Craighead said in *Davidson* v. *Scottish Ministers* [2004] UKHL 34 at [47].
[71] *Hauschildt* v. *Denmark* (1989) 12 E.H.R.R. 266, 279, at [48]; *Kyprianou* v. *Cyprus* (2007) 44 E.H.R.R. 27, [2005] ECHR 873 at [118].
[72] Lord Bingham in *Abdroikov* at [16].
[73] [2008] EWCA Crim 531 – Lord Philips of Worth Matravers C.J., Sir Igor Judge P, and Silber J.

observer. It is clear that courts often face difficulties when they introduce fictional characters into the law. While such constructs can be helpful in the quest for a broad, organising principle, they can, if taken too far, create problems. The facts of the three appeals in *Abdroikov* were straightforward, and the applicable legal principles were supposedly clear. The judges did not disagree as to the facts, and they did not disagree as to the law. Yet, in applying accepted facts to accepted principles of apparent bias, the outcome was an almost even split (3/5 overall) between senior judges (Court of Appeal and House of Lords). The arguments supporting these different decisions are all reasonable, and, sometimes, compelling, as one would expect of the rationalisations of senior judges. Such splits would be understandable, and, indeed, almost inevitable, if the issue were novel, the facts disputed, or the law unclear. But this was not the case here. The decision has resulted in at least one attempt to seek amendments to the Criminal Justice Act 2003, which, pursuant to the Auld Report, removed the old disqualifications against, *inter alia*, the classes of juror under scrutiny in these cases.[74]

That some of the major gains achieved by the Auld Report and the Criminal Justice Act 2003 by opening up jury service to all classes of people, including prosecutors and judges, could so easily and quickly be questioned is unfortunate. Worse still, the *Abdroikov* decision is not particularly helpful to the lower courts. In *R.* v. *Bakish Alla Khan*[75], Lord Phillips of Worth Matravers C.J., for the Court of Appeal (Criminal Division), admitted that the Court had "not found it easy to deduce on the part of the majority of the Committee [in *Abdroikov*] clear principles that apply where a juror is a police officer." He provided examples of the lack of clarity, one of which was that:

> Of the three who found apparent bias on the facts of the first appeal, Lord Bingham did so on the basis that the police juror would appear partial to the police witness, whose evidence involved a 'crucial dispute' with that of the appellant. The apparent likelihood that he would prefer the evidence of a 'brother officer' would be seen as 'a real and possible source of unfairness', so that the jury was not a tribunal which was and appeared to be impartial … It is not entirely clear that Lord Bingham concluded that the police juror had the appearance of being partial to the prosecution, as opposed to simply being biased in respect of the relevant conflict of evidence and, indeed, it is probably not

[74] Douglas Hogg, Early Day Motion 160 (8 November 2007), "That this House notes the decision of the House of Lords in the cases of R. v Abdroikov, R. v Green and R. v Williamson; and believes that the law should be amended so as to exclude police officers and prosecutors employed by the Crown Prosecution Service from serving on a jury."

[75] [2008] EWCA Crim 531 at [24].

> possible to draw a clear line between the two on the facts of the case.[76]

This is a poor reflection on the state of the law. The culprit is partly the informed observer – or, more correctly, the courts' preoccupation with the informed observer.

Part of the aftermath of *Abdroikov* was the Court of Appeal feeling compelled in *R.* v. *Bakish Alla Khan* to do something about the situation. *Khan* involved a number of appeals on the grounds of jury bias, where the relevant jurors were either police officers, prison officers, or CPS employees. Lord Phillips C.J. felt it undesirable that apprehensions of jury bias should lead to the kinds of appeals that the Court was facing in that case.[77] He thought it "particularly undesirable" for such appeals to result in the quashing of convictions requiring retrials. Thus, it was important that any risk of jury bias, or of unfairness as a result of partiality to witnesses should be identified before the trial begins, and, if such a risk may arise, then the juror should be stood down.[78] His last statements in the judgment are instructive:

> We considered attempting to give guidance in this judgment as to the steps that should be taken to ensure that the risk of jury bias does not occur. However, it seems to us that these will involve instructions to be given by the police, prosecuting and prison authorities to their employees coupled with guidance to court officials. It would be ambitious to attempt to formulate all of this in a judgment without discussion with those involved. There is one matter, however, that should receive attention without any delay. It is essential that the trial judge should be aware at the stage of jury selection if any juror in waiting is or has been, a police officer or a member of the prosecuting authority, or is a serving prison officer. Those called for jury service should be required to record on the appropriate form whether they fall into any of these categories, so that this information can be conveyed to the judge. We invite all of these authorities and Her Majesty's Court Service to consider the implications of this judgment and to issue such directions as they consider appropriate.[79]

THE INFORMED OBSERVER REVISITED

As mentioned earlier, Lord Mance noted in *Abdroikov* that the division of opinion with regard to two of the appeals in that case turned largely on "different perceptions of the view that would be taken by a fair-minded and informed observer, after considering the facts", of the

[76] At [25] and [26].
[77] At [131].
[78] *Ibid.*
[79] At [132].

question whether there was a reasonable possibility of bias.[80] I will now return to this point.

Lord Goff of Chieveley had dealt with the issue of whose viewpoint should be considered in *R.* v. *Gough*.[81] After a review of the existing case law, Lord Goff compared the approaches of Devlin L.J. in *R.* v. *Barnsley Licensing Justices Ex p Barnsley and District Licensed Victuallers Association*,[82] and Lord Denning M.R. in *Metropolitan Properties Ltd* v. *Lannon*.[83] According to Lord Goff, both considered that proof of actual bias was not necessary, that the court had to proceed "upon an impression derived from the circumstances"; and that the question is "whether such an impression reveals a real likelihood of bias".[84] He found that the point where Lord Denning M.R. and Devlin L.J. differed was that, while Devlin L.J. was concerned with the impression that the court gets from the circumstances, Lord Denning M.R. "looked at the circumstances from the point of view of a reasonable man." Lord Goff was able to reconcile the apparent differences, saying:

> Since however the court investigates the actual circumstances, knowledge of such circumstances as are found by the court must be imputed to the reasonable man; and in the result it is difficult to see what difference there is between the impression derived by a reasonable man to whom such knowledge has been imputed, and the impression derived by the court, here personifying the reasonable man.[85]

Lord Goff returned to this theme shortly afterwards, in these terms:

> … I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.[86]

Lord Goff was simply being frank about what really goes on in this kind of case – i.e., that the court is making its own evaluation of the factual circumstances in arriving at a decision. But the courts have since sought to distance themselves from Lord Goff, a matter discussed in more detail below. And so, we have a plethora of cases involving judges expressing opinions on what a fair-minded and impartial

[80] At [80].
[81] [1993] A.C. 646 at 667–670.
[82] [1967] 2 Q.B. 167.
[83] [1969] 1 Q.B. 577.
[84] [1993] A.C. 646, at 667.
[85] At 667–668.
[86] At 670.

observer would (or would not) think or conclude.[87] This would be perfectly fine, had the impartial observer being referred to (and there is nothing that renders this approach incompatible with Strasbourg jurisprudence) been the reviewing court itself. But this is not the case,[88] and, unfortunately, this approach unravelled in *Abdroikov* wherein so many senior judges came to different and incompatible views of what the informed observer would think.

Abdroikov demonstrates that some of the developments following *R. v Gough* have not advanced the situation very much (if at all) and that the attempted departures from Lord Goff's statements in *R. v Gough* have been futile, and, in retrospect, possibly misguided.

The High Court of Australia has rightly warned that the interposition of the fictional informed observer should not be taken too far,[89] and that "it is important to reserve to the appellate court a capacity to review the facts and the complaints having regard to the 'serious and sensitive issues' raised by an allegation of prejudgment". The Court of Appeal of Northern Ireland similarly warned in *Re Purcell's application*:

> These anthropomorphic creations of the common law lend a humanising and homely touch to the law, personalising what are, in effect, objective tests of fairness and rationality. The metaphors should not distract from a proper understanding of the objective nature of the question which has to be addressed in individual cases. The critical issue in the present case is whether it would be fair and reasonable in the circumstances to conclude that there is a real possibility that the relevant decision makers, the members of the disciplinary panel, would not evaluate objectively and impartially the evidence and material which they had to consider in carrying out the task assigned to them …[90]

Richards J. (as he then was) has remarked that the test must be approached "with appropriate caution"[91] – a warning that was used to great effect by Jackson J. to reconcile two apparently conflicting lines of authority in *R. (on the Application of Lewis)* v. *Redcar and Cleveland*

[87] For examples of recent relevant decisions of the higher courts, see *R.* v. *Wilson* [2008] EWCA Crim 134; *R.* v. *S* [2008] EWCA Crim 138; *R.* v. *Pintori* [2007] EWCA Crim 1700; *Gillies* v. *Secretary of State for Work and Pensions*, [2006] UKHL 2, 2006 S.C. 71 (H.L.); *R.* v. *Karl Eldin, Bakri Siraj-Eldin* [2006] EWCA Crim 1904; *Helow* v. *Advocate General*, 2007 S.C. 303; *R.* v. *Marquez-Arnedo (Nicholas)* [2006] EWCA Crim 1988; *R.* v. *Campbell* [2005] EWCA Crim 248; *Man O'War Station Ltd* v. *Auckland City Council (No.1)* [2002] UKPC 28.

[88] As Lord Steyn for the Privy Council pointed out in *Man O'War Station Ltd* v. *Auckland City Council (No.1)* [2002] UKPC 28 at [10] the adjusted test in *Porter* v. *Magill* emphasises the perspective of the fair-minded observer rather than the view of the court.

[89] Kirby J. in *Johnson* v. *Johnson* [2000] HCA 48 at [48].

[90] [2008] NICA 11 at [26] – per Girvan L.J.

[91] *Georgiou* v. *Enfield London Borough Council* [2004] EWHC 779 (Admin) at [31].

Borough Council.[92] It has also been said that the question must be approached "realistically".[93]

These are pertinent points – already alluded to by Lord Mance in *Abdroikov* itself. He noted[94] that the decisions of *In re Medicaments and Related Classes of Goods (No. 2)*[95] and *Porter* v. *Magill*[96] replaced the court, whose view had previously been taken as the relevant test in *R.* v. *Gough*, with "the fair-minded and informed observer – a reasonable member of the public …" He also noted the difficulties inherent in this shift – something that he was well placed to observe, having already seen drafts of all the other speeches before writing his own:

> But the fair-minded and informed observer is him or herself in large measure the construct of the court. Individual members of the public, all of whom might claim this description, have widely differing characteristics, experience, attitudes and beliefs which could shape their answers on issues such as those before the court, without their being easily cast as unreasonable. The differences of view in the present case illustrate the difficulties of attributing to the fair-minded and informed observer the appropriate balance between on the one hand complacency and naivety and on the other cynicism and suspicion.[97]

What does the informed observer know?

The "difficulties" referred to by Lord Mance in *Abdroikov* are inherent in any endeavour to construct a fictional character, since the attributes to be assigned to the character inevitably become controversial. We have already seen above the unrealistic attributes that the informed observer is supposed to possess. Unfortunately, the problem of assigning the "right" personality attributes is just one side of the coin. The other side of the coin is the problem of how to ensure that, this person, having been assigned the "right" personality, is also appropriately "informed". This, as one might expect, has also presented the courts with difficulties – which are well illustrated in *Re Purcell's application*.[98] Kerr L.C.J. said, in response to counsel's argument that "if the observer is endowed with a surfeit of information, his or her detached status would be compromised and the essential component of public confidence would be imperilled":

> One can understand that it is necessary that the objectivity of the notional observer should not be compromised by being drawn too

[92] [2007] EWHC 3166 (Admin).
[93] Scott Baker L.J. in *R.* v. *K* [2007] EWCA Crim 1620, at [24].
[94] At [80]–[81].
[95] [2001] 1 W.L.R. 700.
[96] [2001] UKHL 67; [2002] 2 A.C. 357.
[97] At [81].
[98] [2008] NICA 11.

> deeply into a familiarity with the procedures, if that would make him or her too ready to overlook an appearance of bias, but we do not consider that either Lord Hope or Baroness Hale [in *Gillies* v. *Secretary of State for Work and Pensions* ([2006] UKHL 2)] was suggesting that the amount of information available to the observer should necessarily be restricted to that which was instantly available to a member of the public. The phrase 'capable of being known' from Lord Hope's formulation holds the key, in our opinion. This does not signify a need to restrict the material to that which is immediately in the public domain but includes such information as may be necessary for an informed member of the public without any particular, specialised knowledge or experience to make a dispassionate judgment.[99]

He concluded that "it would be necessary for the informed observer to be aware of the general structure of the system of disciplinary panels, to be conscious that this is a procedure internal to the police force and that the Chief Constable is statutorily authorised to appoint members of panels while retaining an interest in the outcome of disciplinary hearings."[100] Similarly, in *Re Young's application*,[101] Kerr L.C.J. said, in the circumstances of that case, that it was "relevant for the informed observer … to take into account the administrative arrangements that underlie the decision and the statutory requirements, if any, as to how it should be reached". In *Sengupta & Anor* v. *Holmes & Ors*,[102] Laws L.J. said that the observer "would know of the central place accorded to oral argument in our common law adversarial system." In *Feld* v. *London Borough of Barnet*,[103] Ward L.J. said:

> [I]n judging whether that is a real as opposed to a fanciful risk the informed observer will bear in mind that this is an administrative decision which by the will of Parliament is placed in the hands of a senior officer of the local housing authority who has been trained to the task and brings expert knowledge and experience of the local housing authority's work to bear on the decision making process.[104]

Other things which the informed observer would bear in mind, according to Ward L.J., are, that judges do sit on matters which they have dealt with on previous occasions, that deference must be given to the will of Parliament,[105] and the practical realities of decision making in the local housing authority's department.[106] In *Re Bothwell's application*

[99] At [20].
[100] At [21].
[101] [2007] NICA 32, at [8].
[102] [2002] EWCA Civ 1104 at [38].
[103] [2004] EWCA Civ 1307.
[104] At [44].
[105] *Ibid.*
[106] At [45].

(No 2),[107] Weatherup J. felt that the informed observer would note "the specialist nature" of the Tuberculosis and Brucellosis Valuation Appeals Panel and the appointment of a specialist from the Department of Agriculture and Regional Development (DARD) "to reflect the need for such expertise to contribute to decision making, the separation of powers within the Department so that the DARD member is appointed from a different stream to those engaged in processing claims and the non involvement of the DARD member with any aspect of the matters giving rise to the claim, which matters would of themselves not indicate any real possibility of bias or legitimate doubt." In *Bolkiah & Ors* v. *The State of Brunei Darussalam & Anor (Brunei Darussalam)* Lord Bingham attributed the following knowledge to the informed observer:

> [The observer must] be taken to understand that the Chief Justice [of Brunei] was a judge of unblemished reputation, nearing the end of a long and distinguished judicial career in more than one jurisdiction, sworn to do right to all manner of people without fear or favour, affection or ill-will and already enjoying what he described as "reasonably adequate" pension provision. Such an observer would dismiss as fanciful the notion that such a judge would break his judicial oath and jeopardise his reputation in order to curry favour with the Sultan and secure a relatively brief extension of his contract, or to avoid a reduction of his salary which has never (so far as the Board is aware) been made in the case of any Brunei judge at any time. The Chief Justice must be seen as a man for whom all ambition was spent, save that of retiring with the highest judicial reputation.[108]

In *El-Farargy* v. *El Farargy & Ors*[109] Ward L.J. thought that a fair-minded observer would know that judges are trained to have an open mind and that judges frequently do change their minds during the course of any hearing.[110] And, according to the Lord Justice-Clerk (Gill) in *Robertson* v. *HM Advocate*[111], the observer would also "be aware of the traditions of judicial integrity and of the judicial oath", and "would give it great weight".[112] He or she would "recognise the desirability of a judge's keeping in touch with the world beyond the courts, and that his or her personal interests and experience may lead to membership of or involvement with external organisations."[113] The observer must also be taken to be aware of the statutory functions of the clerk of a district court, and of the relationship between the clerk

[107] [2007] NIQB 25 at [19].
[108] [2007] UKPC 62 at [21].
[109] [2007] EWCA Civ 1149 at [26].
[110] Compare Laws L.J. in *Sengupta & Anor* v. *Holmes & Ors* [2002] EWCA Civ 1104 at [38].
[111] [2007] HC.J.AC 63; 2007 SLT 1153 at [63].
[112] *Per* Lord Nimmo Smith in *Helow* v. *Advocate General* [2007] SC 303 at [35].
[113] Lord Nimmo Smith, *ibid.*

and the court.[114] Finally, in *R. (on the Application of Lewis)* v. *Redcar and Cleveland Borough Council* Jackson J. said:

> In the context of decisions reached by a council committee, the notional observer is a person cognisant of the practicalities of local government. He does not take it amiss that councillors have previously expressed views on matters which arise for decision. In the ordinary run of events, he trusts councillors, whatever their pre-existing views, to approach decision making with an open mind. If, however, there are additional and unusual circumstances which suggest that councillors may have closed their minds before embarking upon a decision, then he will conclude that there is a real possibility of bias or predetermination.[115]

It is possible to cite more examples, but the point is hopefully already obvious. The clear trend in the cases has been that, as the complexities of the factual situations or the "grey areas" increase, the informed observer is imbued with increased knowledge and understanding in order for the courts to be able to arrive at the right outcome. This is inconsistent with the rationales for interposing a lay person, for, in the end, the courts will attribute to the informed observer all the knowledge which they consider necessary in order for them to reach the right decision. In fact, if one were to attempt to articulate the knowledge and experience of judges, one could do no better than what we have just seen being attributed to the impartial observer. As such, this impartial observer might as well be a judge.

WHAT IS WRONG WITH *GOUGH*?

Lord Goff posited in *R.* v. *Gough*[116] that the reviewing court could personify the reasonable man. This has proved controversial, as the courts have been concerned to ensure that they are not seen to be holding a mirror onto themselves.[117] Ostensibly, this shyness on the part of the courts is to promote public confidence in the administration of justice. For example, according to Baroness Hale of Richmond in *Gillies* v. *Secretary of State for Work and Pensions*:

> The 'fair-minded and informed observer' is probably not an insider (i.e. another member of the same tribunal system). Otherwise she would run the risk of having the insider's blindness to the faults that outsiders can so easily see.[118]

[114] Lord Nimmo Smith in *Robbie the Pict* v. *Wylie* [2007] HCJAC 10 at [21].
[115] [2007] EWHC 3166 (Admin) at [76].
[116] [1993] A.C. 646.
[117] See for example Sedley J. in *R.* v. *Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd* [1996] 3 All E.R. 304 at 316.
[118] [2006] UKHL 2 at [39].

Kerr L.C.J., referring to this passage in Re *Purcell's application*,[119] said that "[o]ne needs to be alert to the danger of transforming the observer from his or her essential condition of disinterested yet informed neutrality to that of someone who, by dint of his or her engagement in the system that has generated the challenge, has acquired something of an insider's status."

The principle of "real danger" of bias propounded in *R.* v. *Gough*[120] was abandoned following some critical comments on it. In *R.* v. *Inner West London Coroner, ex parte Dallaglio*[121] Sir Thomas Bingham M.R. took the view that the preference in *Gough* for the real danger of bias test, as opposed to a test whether a reasonable and fair-minded person sitting in court and having all the necessary information would have a reasonable suspicion of bias indicated that Lord Hewart C.J.'s dictum in the *Sussex Justices* case that justice should be seen to be done may no longer be good law, except "where the appearance of bias is such as to show a real danger of bias".[122]

In *R.* v. *Webb*,[123] Mason C.J. and McHugh J. also criticised the *Gough* test. In their judgment they noted the fact "that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice"[124] and that the parties and the general public must be satisfied that justice has not only been done but that it has been seen to be done. In their view, "the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality", while the tests of reasonable likelihood or real danger of bias tend to emphasise the court's view of the facts, leading to a situation wherein "the trial judge's acceptance of explanations becomes of primary importance". In their view, these two tests "tend to place inadequate emphasis on the public perception of the irregular incident".[125] Continuing with their criticism, they said:

> In *Gough*, the House of Lords rejected the need to take account of the public perception of an incident which raises an issue of bias except in the case of a pecuniary interest. Behind this reasoning is the assumption that public confidence in the administration of justice will be maintained because the public will accept the conclusions of the judge. But the premise on which the decisions in this Court are based is that public confidence in the administration of justice is more likely to be maintained if the Court adopts a

[119] [2008] NICA 11 at [19].
[120] [1993] A.C. 646.
[121] [1994] 4 All E.R. 139.
[122] At 162.
[123] [1994] HCA 30; (1994) 181 C.L.R. 41.
[124] At [9].
[125] *Ibid.*

> test that reflects the reaction of the ordinary reasonable member of the public to the irregularity in question.[126]

They then referred to a number of Australian authorities, which, in their view, "indicate that it is the court's view of the public's view, not the court's own view, which is determinative." They concluded that, "if public confidence in the administration of justice is to be maintained, the approach that is taken by fair-minded and informed members of the public cannot be ignored."

While this is a fair point, the courts are arguably not very good at doing this kind of task,[127] and "the court's view of the public's view" is inevitably the judges' own views of the matter. The foregoing analysis has, it is submitted, revealed that much. Hiding it behind the cloak of their "view of the public's view" has not been very convincing, and attributing every kind of knowledge to the fictional creature that is meant to represent "the public" is even less convincing.

Sir Thomas Bingham M.R. was referring in his statement concerning *Gough* in *R.* v. *Inner West London Coroner, ex parte Dallaglio* more to the substance of the *Gough* test (*i.e.*, "real danger", as opposed to "reasonable suspicion") than to the question whether the reviewing court should be making an assessment of the possibilities of bias from its own perspective, or from the perspective of a fictitious bystander distinct from the court. As long as the matter is about appearances from the perspective of an *independent third party*, and the court is to make the final judgement on the matter, it makes no difference whether or not a fiction is employed.

Choosing the perspective of a lay person rather than that of the reviewing court might look attractive from the points of view of the avoidance of excessive legalism and of engendering public confidence on a matter in which the public may be suspicious – judges judging judges. However, having seen the kinds of knowledge routinely attributed to the fictitious lay person, it is obvious that the courts are quite unable to resolve convincingly the question of how this matter would appear to a lay person. The best way to ensure that such a fiction becomes reality is to empanel lay juries in bias cases, hence leaving the question of how the matter would appear to a lay person to real lay persons. Unless that is done, then the courts might as well assume the position of the impartial observer. This would not require any

[126] At [10].

[127] See generally, J.A.G. Griffith, *The Politics of the Judiciary*, 5th edn. (London 1997). Compare S. Atrill, "Who is the 'Fair-Minded and Informed Observer'? Bias after *Magill* ", [2003] C.L.J. 279 at 281, suggesting that the difficulties faced by the courts in these cases "may reflect a concern that the judiciary, belonging to a relatively homogeneous social group, is not best placed to develop an accurate picture of a hypothetical person."

significant change to the current principle. It would only involve dispensing with a fictional and theoretical "middle-man".

Conclusion: Away with the Lay Informed Observer

Perhaps the time has come for the "informed observer", to the extent that this is meant to be an ordinary lay member of the public, to be retired. The persona given to this phantom ensures that it will always remain elusive. Its capacity to increase in wisdom, knowledge and understanding, as any particular case may require, is not credible. It is clear that no human being could live up to its reputation, and that, judges, being mere mortals, do not have any chance of deciphering (or agreeing on) what this creature would or could think. This construct no longer serves any useful purpose.

The reasons for wanting to replace the evaluations of judges with the perspective of an ordinary lay member of the public are laudable. However, the task assigned to the observer, when all its parameters are fully engaged, is beyond the ken of an ordinary lay member of the public. The task was expressed succinctly by Kerr L.C.J. in *Re Purcell's application*:

> The concept of apparent bias does not rest on impression based on an incomplete picture but on a fair and reasoned judgment formed as a result of composed and considered appraisal of the relevant facts.[128]

This is a straightforward description of what judges do on a day-to-day basis. The task is, in essence, a normal judicial function. This is the reason why the courts have been at pains (incrementally) to attach increasingly unrealistic and unachievable attributes to the unfortunate lay person to whom they have endeavoured, for all the noblest reasons, to hive off the task. The difficulties experienced by the courts in constructing the informed lay observer require that this construct either be thought through in order to provide a realistic basis for decision-making on the issue of apparent bias, or be killed off and buried.

There are a number of possible responses to the resolution of these difficulties. One is to call for a more flexible approach to the application of the informed observer principle.[129] Another is to dispense with the need for the informed observer to be "informed", which then means that the courts can avoid expending energy on the kinds of knowledge that he or she should have in order to be "informed". A third is to empanel lay juries in all cases of apparent bias, so that the courts can secure the actual views of the ordinary members of the public, as it

[128] [2008] NICA 11 at [22].
[129] See S. Atrill, "Who is the 'Fair-Minded and Informed Observer'?" [2003] C.L.J. 279.

were, from the horse's mouth. A fourth is to dispense with the whole notion of an observer outwith the courts and to use the perspective of the reviewing court.

The first two responses retain the construct and seek to modify the courts' approach thereto. The problem is that, whatever their intrinsic strengths and weaknesses, they might just be plastering over the cracks of a flawed construct. My point is that the construct itself is the problem. The third response is the only convincing approach to implementing the principle that the observer must be an ordinary member of the public. It would suffer from the difficulties of practicability, affordability, and the obvious fact that ordinary members of the public are a very diverse group whose views in any random selection are unpredictable.

As already indicated, my view is that the problem is with the construct itself. At the end of the day, human judges are going to have to make a decision about this construct's state of mind. Judges are experienced and well trained to evaluate facts and to draw inferences from those facts. There is no need to hide such activities behind an artificial construct. The goal at all times is to ensure that justice *is done*, and *is seen to be done*. Judges are as capable as anyone else to secure this outcome, and are far better placed to do so than any ordinary lay member of the public. As Mummery L.J. rightly said in *AWG Group Ltd* v. *Morrison*,[130] "an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances." He then went on to say that the appellate court "must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias." The next logical step is what he did not say – that the appellate court, consisting of fair-minded and informed observers with knowledge of the relevant circumstances, must draw its conclusions, not by reference to what another fictitious fair-minded and informed observer with knowledge of the relevant circumstances would conclude, but by reference to what itself as an embodiment of fair-mindedness and relevant knowledge had concluded.

This, it is submitted, would advance matters significantly and would simplify the process of deciding cases of apparent bias. Thus, instead of counsel expending much time and energy arguing about what an informed observer "would" take into account,[131] they would simply present their submissions to the court. And instead of judges embarking on the dubious journey of probing into the mind of a fictitious lay person, they would simply indicate which submissions they found more

[130] [2006] EWCA Civ 6 at [20]. Applied in *Howell* v. *Lees Millais* [2007] EWCA Civ 720.
[131] See for example, *Re Purcell's application* [2008] NICA 11, at [16]; *R. (On the Application of Abdi)* v. *Lambeth LBC* [2007] EWHC 1565 (Admin) at [34].

convincing, and why. The reviewing court would need to be mindful of the need to be alert to the possibility of being blind to the defects in the judicial process. And I think judges are well able, with the assistance of counsel, to identify and evaluate all that needs to be taken into account.

All this is just another way of saying that matters ought to be returned to what was stated by Lord Goff in *R.* v. *Gough*:

> I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence …[132]

What this means in bias cases is accepting that judicial evaluations of the circumstances will often come down eventually to the value judgments of individual judges. This is already the fact, no matter the theory – something that *Abdroikov* has again exposed. Such an approach is not likely to lead to significant differences in outcomes[133] – but it would avoid much time and effort being wasted in fruitless debates about what a fictitious lay person would think. Matters would return to the simplicity of judges expressing their conclusions based on their own assessment of the facts – a refreshing position exemplified by this approach of Nelson J. in *R.* v. *Alan I*:

> In these circumstances, we have no doubt that there was here a real possibility of bias arising from the presence on the jury of a police officer who knew the police witnesses. The possibility that he might be likely to accept the words of his colleagues, irrespective of the dispute between the parties is one which can only be described as real. We know no more than that and there is no suggestion the police officer was actually biased. None at all. Justice must not only be done but must be seen to be done. We fear that on the facts of this case that did not occur.[134]

Echoing Girvan L.J. in *Re Purcell's application*,[135] the "critical issue" for the reviewing judges would be "whether it would be fair and reasonable in the circumstances to conclude that there is a real possibility that the relevant decision makers … would not evaluate objectively and impartially the evidence and material which they had to consider in carrying out the task assigned to them".

[132] [1993] A.C. 646 at 670.
[133] Indeed, Lord Steyn said in *Man O'War Station Ltd* v. *Auckland City Council (No.1)* [2002] UKPC 28 at [10] that "In any event, the distinction [between the court and the lay observer] is a fine one, notably since even on the *Gough* test the court undoubtedly had to take account of public perception and confidence."
[134] [2007] EWCA Crim 2999 at [33].
[135] [2008] NICA 11 at [26].