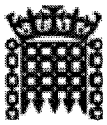

House of Lords

Session 1998-99
Publications on the Internet
Judgments

Judgment - In Re Pinochet

HOUSE OF LORDS
Lord Browne-Wilkinson Lord Goff of Chieveley
Lord Nolan Lord Hope of Craighead Lord Hutton
OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE
IN RE PINOCHET

Oral Judgment: **17 December 1998**
Reasons: **15 January 1999**

LORD BROWNE-WILKINSON

My Lords,

Introduction

This petition has been brought by Senator Pinochet to set aside an order made by your Lordships on 25 November 1998. It is said that the links between one of the members of the Appellate Committee who heard the appeal, Lord Hoffmann, and Amnesty International ("AI") were such as to give the appearance that he might have been biased against Senator Pinochet. On 17 December 1998 your Lordships set aside the order of 25 November 1998 for reasons to be given later. These are the reasons that led me to that conclusion.

Background facts

Senator Pinochet was the Head of State of Chile from 11 September 1973 until 11 March 1990. It is alleged that during that period there took place in Chile various crimes against humanity (torture, hostage taking and murder) for which he was knowingly responsible.

In October 1998 Senator Pinochet was in this country receiving medical treatment. In October and November 1998 the judicial authorities in Spain issued international warrants for his arrest to enable his extradition to Spain to face trial for those alleged offences. The Spanish Supreme Court has held that the courts of Spain have jurisdiction to try him. Pursuant to those international warrants, on 16 and 23 October 1998 Metropolitan Stipendiary Magistrates issued two provisional warrants for his arrest under section 8(1)(*b*) of the Extradition Act 1989. Senator Pinochet was arrested. He immediately applied to

the Queen's Bench Divisional Court to quash the warrants. The warrant of 16 October was quashed and nothing further turns on that warrant. The second warrant of 23 October 1998 was quashed by an order of the Divisional Court of the Queen's Bench Division (Lord Bingham of Cornhill C.J., Collins and Richards JJ.) However, the quashing of the second warrant was stayed to enable an appeal to be taken to your Lordships' House on the question certified by the Divisional Court as to "the proper interpretation and scope of the immunity enjoyed by a former Head of State from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was Head of State."

As that question indicates, the principle point at issue in the main proceedings in both the Divisional Court and this House was as to the immunity, if any, enjoyed by Senator Pinochet as a *past* Head of State in respect of the crimes against humanity for which his extradition was sought. The Crown Prosecution Service (which is conducting the proceedings on behalf of the Spanish Government) while accepting that a foreign Head of State would, during his tenure of office, be immune from arrest or trial in respect of the matters alleged, contends that once he ceased to be Head of State his immunity for crimes against humanity also ceased and he can be arrested and prosecuted for such crimes committed during the period he was Head of State. On the other side, Senator Pinochet contends that his immunity in respect of acts done whilst he was Head of State persists even after he has ceased to be Head of State. The position therefore is that if the view of the CPS (on behalf of the Spanish Government) prevails, it was lawful to arrest Senator Pinochet in October and (subject to any other valid objections and the completion of the extradition process) it will be lawful for the Secretary of State in his discretion to extradite Senator Pinochet to Spain to stand trial for the alleged crimes. If, on the other hand, the contentions of Senator Pinochet are correct, he has at all times been and still is immune from arrest in this country for the alleged crimes. He could never be extradited for those crimes to Spain or any other country. He would have to be immediately released and allowed to return to Chile as he wishes to do.

The court proceedings.

The Divisional Court having unanimously quashed the provisional warrant of 23 October on the ground that Senator Pinochet was entitled to immunity, he was thereupon free to return to Chile subject only to the stay to permit the appeal to your Lordships' House. The matter proceeded to your Lordships' House with great speed. It was heard on 4, 5 and 9-12 November 1998 by a committee consisting of Lord Slynn of Hadley, Lord Lloyd of Berwick, Lord Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann. However, before the main hearing of the appeal, there was an interlocutory decision of the greatest importance for the purposes of the present application. Amnesty International ("AI"), two other human rights bodies and three individuals petitioned for leave to intervene in the appeal. Such leave was granted by a committee consisting of Lord Slynn, Lord Nicholls and Lord Steyn subject to any protest being made by other parties at the

start of the main hearing. No such protest having been made AI accordingly became an intervener in the appeal. At the hearing of the appeal AI not only put in written submissions but was also represented by counsel, Professor Brownlie Q.C., Michael Fordham, Owen Davies and Frances Webber. Professor Brownlie addressed the committee on behalf of AI supporting the appeal.

The hearing of this case, both before the Divisional Court and in your Lordships' House, produced an unprecedent degree of public interest not only in this country but worldwide. The case raises fundamental issues of public international law and their interaction with the domestic law of this country. The conduct of Senator Pinochet and his regime have been highly contentious and emotive matters. There are many Chileans and supporters of human rights who have no doubt as to his guilt and are anxious to bring him to trial somewhere in the world. There are many others who are his supporters and believe that he was the saviour of Chile. Yet a third group believe that, whatever the truth of the matter, it is a matter for Chile to sort out internally and not for third parties to interfere in the delicate balance of contemporary Chilean politics by seeking to try him outside Chile.

This wide public interest was reflected in the very large number attending the hearings before the Appellate Committee including representatives of the world press. The Palace of Westminster was picketed throughout. The announcement of the final result gave rise to worldwide reactions. In the eyes of very many people the issue was not a mere legal issue but whether or not Senator Pinochet was to stand trial and therefore, so it was thought, the cause of human rights triumph. Although the members of the Appellate Committee were in no doubt as to their function, the issue for many people was one of moral, not legal, right or wrong.

The decision and afterwards.

Judgment in your Lordships' House was given on 25 November 1998. The appeal was allowed by a majority of three to two and your Lordships' House restored the second warrant of 23 October 1998. Of the majority, Lord Nicholls and Lord Steyn each delivered speeches holding that Senator Pinochet was not entitled to immunity: Lord Hoffmann agreed with their speeches but did not give separate reasons for allowing the appeal. Lord Slynn and Lord Lloyd each gave separate speeches setting out the reasons for their dissent.

As a result of this decision, Senator Pinochet was required to remain in this country to await the decision of the Home Secretary whether to authorise the continuation of the proceedings for his extradition under section 7(1) of the Extradition Act 1989. The Home Secretary had until the 11 December 1998 to make that decision, but he required anyone wishing to make representations on the point to do so by the 30 November 1998.

The link between Lord Hoffmann and AI

It appears that neither Senator Pinochet nor (save to a very limited extent) his legal advisers were aware of any connection between Lord Hoffmann and AI until after the judgment was given on 25 November. Two members of the legal team recalled that they had heard rumours that Lord Hoffmann's wife was connected with AI in some way. During the Newsnight programme on television on 25 November, an allegation to that effect was made by a speaker in Chile. On that limited information the representations made on Senator Pinochet's behalf to the Home Secretary on 30 November drew attention to Lady Hoffmann's position and contained a detailed consideration of the relevant law of bias.

It then read:

> "It is submitted therefore that the Secretary of State should not have any regard to the decision of Lord Hoffmann. The authorities make it plain that this is the appropriate approach to a decision that is affected by bias. Since the bias was in the House of Lords, the Secretary of State represents the senator's only domestic protection. Absent domestic protection the senator will have to invoke the jurisdiction of the European Court of Human Rights."

After the representations had been made to the Home Office, Senator Pinochet's legal advisers received a letter dated 1 December 1998 from the solicitors acting for AI written in response to a request for information as to Lord Hoffmann's links. The letter of 1 December, so far as relevant, reads as follows:

> "Further to our letter of 27 November, we are informed by our clients, Amnesty International, that Lady Hoffmann has been working at their International Secretariat since 1977. She has always been employed in administrative positions, primarily in their department dealing with press and publications. She moved to her present position of Programme Assistant to the Director of the Media and Audio Visual Programme when this position was established in 1994.
>
> "Lady Hoffmann provides administrative support to the Programme, including some receptionist duties. She has not been consulted or otherwise involved in any substantive discussions or decisions by Amnesty International, including in relation to the Pinochet case."

On 7 December a man anonymously telephoned Senator Pinochet's solicitors alleging that Lord Hoffmann was a Director of the Amnesty International Charitable Trust. That allegation was repeated in a newspaper report on 8 December. Senator Pinochet's solicitors informed the Home Secretary of these allegations. On 8 December they received a letter from the solicitors acting for AI dated 7 December which reads, so far as relevant, as follows:

"On further consideration, our client, Amnesty International have instructed us that after contacting Lord Hoffmann over the weekend both he and they believe that the following information about his connection with Amnesty International's charitable work should be provided to you.

"Lord Hoffmann is a Director and Chairperson of Amnesty International Charity Limited (AICL), a registered charity incorporated on 7 April 1986 to undertake those aspects of the work of Amnesty International Limited (AIL) which are charitable under UK law. AICL files reports with Companies' House and the Charity Commissioners as required by UK law. AICL funds a proportion of the charitable activities undertaken independently by AIL. AIL's board is composed of Amnesty International's Secretary General and two Deputy Secretaries General.

"Since 1990 Lord Hoffmann and Peter Duffy Q.C. have been the two Directors of AICL. They are neither employed nor remunerated by either AICL or AIL. They have not been consulted and have not had any other role in Amnesty International's interventions in the case of Pinochet. Lord Hoffmann is not a member of Amnesty International.

"In addition, in 1997 Lord Hoffmann helped in the organisation of a fund raising appeal for a new building for Amnesty International UK. He helped organise this appeal together with other senior legal figures, including the Lord Chief Justice, Lord Bingham. In February your firm contributed £1,000 to this appeal. You should also note that in 1982 Lord Hoffmann, when practising at the Bar, appeared in the Chancery Division for Amnesty International UK."

Further information relating to AICL and its relationship with Lord Hoffmann and AI is given below. Mr. Alun Jones Q.C. for the CPS does not contend that either Senator Pinochet or his legal advisors had any knowledge of Lord Hoffmann's position as a Director of AICL until receipt of that letter.

Senator Pinochet's solicitors informed the Home Secretary of the contents of the letter dated 7 December. The Home Secretary signed the Authority to Proceed on 9 December 1998. He also gave reasons for his decision, attaching no weight to the allegations of bias or apparent bias made by Senator Pinochet.

On 10 December 1998, Senator Pinochet lodged the present petition asking that the order of 25 November 1998 should either be set aside completely or the opinion of Lord Hoffmann should be declared to be of no effect. The sole ground relied upon was that Lord Hoffmann's links with AI were such as to give the appearance of possible bias. It is important to stress that Senator Pinochet makes no allegation of *actual bias* against Lord Hoffmann; his claim is based on the requirement that justice should be seen to be done as well as actually being done. There is no allegation that any other member of the Committee has fallen short in the performance of his judicial duties.

Amnesty International and its constituent parts

Before considering the arguments advanced before your Lordships, it is necessary to give some detail of the organisation of AI and its subsidiary and constituent bodies. Most of the information which follows is derived from the Directors' Reports and Notes to the Accounts of AICL which have been put in evidence.

AI itself is an unincorporated, non profit making organisation founded in 1961 with the object of securing throughout the world the observance of the provisions of the Universal Declaration of Human Rights in regard to prisoners of conscience. It is regulated by a document known as the Statute of Amnesty International. AI consists of sections in different countries throughout the world and its International Headquarters in London. Delegates of the Sections meet periodically at the International Council Meetings to co-ordinate their activities and to elect an International Executive Committee to implement the Council's decisions. The International Headquarters in London is responsible to the International Executive Committee. It is funded principally by the Sections for the purpose of furthering the work of AI on a worldwide basis and to assist the work of Sections in specific countries as necessary. The work of the International Headquarters is undertaken through two United Kingdom registered companies Amnesty International Limited ("AIL") and Amnesty International Charity Limited ("AICL").

AIL is an English limited company incorporated to assist in furthering the objectives of AI and to carry out the aspects of the work of the International Headquarters which are not charitable.

AICL is a company limited by guarantee and also a registered charity. In *McGovern v. Attorney-General* [1982] Ch. 321, Slade J. held that a trust established by AI to promote certain of its objects was not charitable because it was established for political purposes; however the judge indicated that a trust for research into the observance of human rights and the dissemination of the results of such research could be charitable. It appears that AICL was incorporated on 7 April 1986 to carry out such of the purposes of AI as were charitable. Clause 3 of the Memorandum of Association of AICL provides:

> "Having regard to the Statute for the time being of Amnesty International, the objects for which the Company is established are:
>
> (a) To promote research into the maintenance and observance of human rights and to publish the results of such research.
>
> (b) To provide relief to needy victims of breaches of human rights by appropriate charitable (and in particular medical, rehabilitational or

financial) assistance.

(c) To procure the abolition of torture, extra judicial execution and disappearance. . . ."

Under Article 3(a) of AICL the members of the Company are all the elected members for the time being of the International Executive Committee of Amnesty International and nobody else. The Directors are appointed by and removable by the members in general meetings. Since 8 December 1990 Lord Hoffmann and Mr. Duffy Q.C. have been the sole Directors, Lord Hoffmann at some stage becoming the Chairperson.

There are complicated arrangements between the International Headquarters of AI, AICL and AIL as to the discharge of their respective functions. From the reports of the Directors and the notes to the annual accounts, it appears that, although the system has changed slightly from time to time, the current system is as follows. The International Headquarters of AI are in London and the premises are, at least in part, shared with AICL and AIL. The conduct of AI's International Headquarters is (subject to the direction of the International Executive Committee) in the hands of AIL. AICL commissions AIL to undertake charitable activities of the kind which fall within the objects of AI. The Directors of AICL then resolve to expend the sums that they have received from AI Sections or elsewhere in funding such charitable work as AIL performs. AIL then reports retrospectively to AICL as to the monies expended and AICL votes sums to AIL for such part of AIL's work as can properly be regarded as charitable. It was confirmed in the course of argument that certain work done by AIL would therefore be treated as in part done by AIL on its own behalf and in part on behalf of AICL.

I can give one example of the close interaction between the functions of AICL and AI. The report of the Directors of AICL for the year ended 31 December 1993 records that AICL commissioned AIL to carry out charitable activities on its behalf and records as being included in the work of AICL certain research publications. One such publication related to Chile and referred to a report issued as an AI report in 1993. Such 1993 reports covers not only the occurrence and nature of breaches of human rights within Chile, but also the progress of cases being brought against those alleged to have infringed human rights by torture and otherwise in the courts of Chile. It records that "no one was convicted during the year for past human rights violations. The military courts continued to claim jurisdiction over human rights cases in civilian courts and to close cases covered by the 1978 Amnesty law." It also records "Amnesty International continued to call for full investigation into human rights violations and for those responsible to be brought to justice. The organisation also continued to call for the abolition of the death penalty." Again, the report stated that "Amnesty International included references to its concerns about past human rights violations against indigenous peoples in Chile and the lack of

accountability of those responsible." Therefore AICL was involved in the reports of AI urging the punishment of those guilty in Chile for past breaches of human rights and also referring to such work as being part of the work that it supported.

The Directors of AICL do not receive any remuneration. Nor do they take any part in the policy-making activities of AI. Lord Hoffmann is not a member of AI or of any other body connected with AI.

In addition to the AI related bodies that I have mentioned, there are other organisations which are not directly relevant to the present case. However, I should mention another charitable company connected with AI and mentioned in the papers, namely, "Amnesty International U.K. Section Charitable Trust" registered as a company under number 3139939 and as a charity under 1051681. That was a company incorporated in 1995 and, so far as I can see, has nothing directly to do with the present case.

The parties' submissions

Miss Montgomery Q.C. in her very persuasive submissions on behalf of Senator Pinochet contended:

1. That, although there was no exact precedent, your Lordships' House must have jurisdiction to set aside its own orders where they have been improperly made, since there is no other court which could correct such impropriety.

2. That (applying the test in *Reg. v. Gough* [1993] A.C. 646) the links between Lord Hoffmann and AI were such that there was a real danger that Lord Hoffmann was biased in favour of AI or alternatively (applying the test in *Webb v. The Queen* (1994) 181 C.L.R. 41) that such links give rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that Lord Hoffmann might have been so biased.

On the other side, Mr. Alun Jones Q.C. accepted that your Lordships had power to revoke an earlier order of this House but contended that there was no case for such revocation here. The applicable test of bias, he submitted, was that recently laid down by your Lordships in *Reg. v. Gough* and it was impossible to say that there was a real danger that Lord Hoffmann had been biased against Senator Pinochet. He further submitted that, by relying on the allegations of bias in making submissions to the Home Secretary, Senator Pinochet had elected to adopt the Home Secretary as the correct tribunal to adjudicate on the issue of apparent bias. He had thereby waived his right to complain before your Lordships of such bias. Expressed in other words, he was submitting that the petition was an abuse of process by Senator Pinochet. Mr. Duffy Q.C. for AI (but not for AICL) supported the case put forward by Mr. Alun Jones.

Conclusions

1. *Jurisdiction*

As I have said, the respondents to the petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment, that concession was rightly made both in principle and on authority.

In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Cassell & Co. Ltd. v. Broome (No. 2)* [1972] A.C. 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.

However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.

2. *Apparent bias*

As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias.

The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

In my judgment, this case falls within the first category of case, viz where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see Shetreet, *Judges on Trial*, (1976), p. 303; *De Smith, Woolf & Jowel, Judicial Review of Administrative Action*, 5th ed. (1995), p. 525. I will call this "automatic disqualification."

In *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L. Cas. 759, the then Lord Chancellor, Lord Cottenham, owned a substantial shareholding in the defendant canal which was an incorporated body. In the action the Lord Chancellor sat on appeal from the Vice-Chancellor, whose judgment in favour of the company he affirmed. There was an appeal to your Lordships' House on the grounds that the Lord Chancellor was disqualified. Their Lordships consulted the judges who advised that Lord Cottenham was disqualified from sitting as a judge in the cause because he had an interest in the suit: at p. 786. This advice was unanimously accepted by their Lordships. There was no inquiry by the court as to whether a reasonable man would consider Lord Cottenham to be biased and no inquiry as to the circumstances which led to Lord Cottenham sitting. Lord Campbell said, at p. 793:

> "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause *in which he is a party*, but applies to a cause in which he has an interest." (Emphasis added)

On occasion, this proposition is elided so as to omit all references to the disqualification of a judge who is a party to the suit: see, for example, *Reg. v. Rand* (1866) L.R. 1 Q.B. 230; *Reg. v. Gough* at p. 661. This does not mean that a judge who is a party to a suit is not disqualified just because the suit does not involve a financial interest. The authorities cited in the *Dimes* case show how the principle developed. The starting-point was the case in which a judge was indeed purporting to decide a case in which he was a party. This was held to be absolutely prohibited. That absolute prohibition was then extended to cases where, although not nominally a party, the judge had an interest in the outcome.

The importance of this point in the present case is this. Neither AI, nor AICL, have any financial interest in the outcome of this litigation. We are here confronted, as was Lord Hoffmann, with a novel situation where the outcome of the litigation did not lead to financial benefit to anyone. The interest of AI in the litigation was not financial; it was its interest in achieving the trial and possible

conviction of Senator Pinochet for crimes against humanity.

By seeking to intervene in this appeal and being allowed so to intervene, in practice AI became a party to the appeal. Therefore if, in the circumstances, it is right to treat Lord Hoffmann as being the alter ego of AI and therefore a judge in his own cause, then he must have been automatically disqualified on the grounds that he was a party to the appeal. Alternatively, even if it be not right to say that Lord Hoffmann was a party to the appeal as such, the question then arises whether, in non financial litigation, anything other than a financial or proprietary interest in the outcome is sufficient automatically to disqualify a man from sitting as judge in the cause.

Are the facts such as to require Lord Hoffmann to be treated as being himself a party to this appeal? The facts are striking and unusual. One of the parties to the appeal is an unincorporated association, AI. One of the constituent parts of that unincorporated association is AICL. AICL was established, for tax purposes, to carry out part of the functions of AI--those parts which were charitable--which had previously been carried on either by AI itself or by AIL. Lord Hoffmann is a Director and chairman of AICL which is wholly controlled by AI, since its members, (who ultimately control it) are all the members of the International Executive Committee of AI. A large part of the work of AI is, as a matter of strict law, carried on by AICL which instructs AIL to do the work on its behalf. In reality, AI, AICL and AIL are a close-knit group carrying on the work of AI.

However, close as these links are, I do not think it would be right to identify Lord Hoffmann personally as being a party to the appeal. He is closely linked to AI but he is not in fact AI. Although this is an area in which legal technicality is particularly to be avoided, it cannot be ignored that Lord Hoffmann took no part in running AI. Lord Hoffmann, AICL and the Executive Committee of AI are in law separate people.

Then is this a case in which it can be said that Lord Hoffmann had an "interest" which must lead to his automatic disqualification? Hitherto only pecuniary and proprietary interests have led to automatic disqualification. But, as I have indicated, this litigation is most unusual. It is not civil litigation but criminal litigation. Most unusually, by allowing AI to intervene, there is a party to a criminal cause or matter who is neither prosecutor nor accused. That party, AI, shares with the Government of Spain and the CPS, not a financial interest but an interest to establish that there is no immunity for ex-Heads of State in relation to crimes against humanity. The interest of these parties is to procure Senator Pinochet's extradition and trial--a non-pecuniary interest. So far as AICL is concerned, clause 3(c) of its Memorandum provides that one of its objects is "to procure the abolition of torture, extra-judicial execution and disappearance". AI has, amongst other objects, the same objects. Although AICL, as a charity, cannot campaign to change the law, it is concerned by other means to procure the abolition of these crimes against humanity. In my opinion, therefore, AICL

plainly had a non-pecuniary interest, to establish that Senator Pinochet was not immune.

That being the case, the question is whether in the very unusual circumstances of this case a non-pecuniary interest to achieve a particular result is sufficient to give rise to automatic disqualification and, if so, whether the fact that AICL had such an interest necessarily leads to the conclusion that Lord Hoffmann, as a Director of AICL, was automatically disqualified from sitting on the appeal? My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. Thus in my opinion if Lord Hoffmann had been a member of AI he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity. Indeed, so much I understood to have been conceded by Mr. Duffy.

Can it make any difference that, instead of being a direct member of AI, Lord Hoffmann is a Director of AICL, that is of a company which is wholly controlled by AI and is carrying on much of its work? Surely not. The substance of the matter is that AI, AIL and AICL are all various parts of an entity or movement working in different fields towards the same goals. If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart's famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." (see *Rex v. Sussex Justices, Ex parte McCarthy* [1924] K.B. 256, 259)

Since, in my judgment, the relationship between AI, AICL and Lord Hoffmann leads to the automatic disqualification of Lord Hoffmann to sit on the hearing of the appeal, it is unnecessary to consider the other factors which were relied on by Miss Montgomery, viz. the position of Lady Hoffmann as an employee of AI and the fact that Lord Hoffmann was involved in the recent appeal for funds for Amnesty. Those factors might have been relevant if Senator Pinochet had been required to show a real danger or reasonable suspicion of bias. But since the disqualification is automatic and does not depend in any way on an implication of bias, it is unnecessary to consider these factors. I do, however, wish to make

it clear (if I have not already done so) that my decision is not that Lord Hoffmann has been guilty of bias of any kind: he was disqualified as a matter of law automatically by reason of his Directorship of AICL, a company controlled by a party, AI.

For the same reason, it is unnecessary to determine whether the test of apparent bias laid down in *Reg. v. Gough* ("is there in the view of the Court a real danger that the judge was biased?") needs to be reviewed in the light of subsequent decisions. Decisions in Canada, Australia and New Zealand have either refused to apply the test in *Reg. v. Gough*, or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge was not impartial: see, for example, the High Court of Australia in *Webb v. The Queen*. It has also been suggested that the test in *Reg. v. Gough* in some way impinges on the requirement of Lord Hewart's dictum that justice should appear to be done: see *Reg. v. Inner West London Coroner, Ex Parte Dallaglio* [1994] 4 All E.R. 139 at page 152 A to B. Since such a review is unnecessary for the determination of the present case, I prefer to express no view on it.

It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25 November 1998 would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that AI was a party to the appeal; (2) that AI was joined in order to argue for a particular result; (3) the judge was a Director of a charity closely allied to AI and sharing, in this respect, AI's objects. Only in cases where a judge is taking an active role as trustee or Director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest.

Finally on this aspect of the case, we were asked to state in giving judgment what had been said and done within the Appellate Committee in relation to Amnesty International during the hearing leading to the Order of 25 November. As is apparent from what I have said, such matters are irrelevant to what we have to decide: in the absence of any disclosure to the parties of Lord Hoffmann's involvement with AI, such involvement either did or did not in law disqualify him regardless of what happened within the Appellate Committee. We therefore did not investigate those matters and make no findings as to them.

Election, Waiver, Abuse of Process

Mr. Alun Jones submitted that by raising with the Home Secretary the possible bias of Lord Hoffmann as a ground for not authorising the extradition to proceed, Senator Pinochet had elected to choose the Home Secretary rather than your Lordships' House as the arbiter as to whether such bias did or did not exist. Consequently, he submitted, Senator Pinochet had waived his right to petition your Lordships and, by doing so immediately after the Home Secretary had rejected the submission, was committing an abuse of the process of the House.

This submission is bound to fail on a number of different grounds, of which I need mention only two. First, Senator Pinochet would only be put to his election as between two alternative courses to adopt. I cannot see that there are two such courses in the present case, since the Home Secretary had no power in the matter. He could not set aside the order of 25 November and as long as such order stood, the Home Secretary was bound to accept it as stating the law. Secondly, all three concepts--election, waiver and abuse of process--require that the person said to have elected etc. has acted freely and in full knowledge of the facts. Not until 8 December 1998 did Senator Pinochet's solicitors know anything of Lord Hoffmann's position as a Director and Chairman of AICL. Even then they did not know anything about AICL and its constitution. To say that by hurriedly notifying the Home Secretary of the contents of the letter from AI's solicitors, Senator Pinochet had elected to pursue the point solely before the Home Secretary is unrealistic. Senator Pinochet had not yet had time to find out anything about the circumstances beyond the bare facts disclosed in the letter.

Result

It was for these reasons and the reasons given by my noble and learned friend Lord Goff of Chieveley that I reluctantly felt bound to set aside the order of 25 November 1998. It was appropriate to direct a re-hearing of the appeal before a differently constituted Committee, so that on the re-hearing the parties were not faced with a Committee four of whom had already expressed their conclusion on the points at issue.