Barriers to High Court Appointments in Northern Ireland


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BARRIERS TO HIGH COURT APPOINTMENTS IN NORTHERN IRELAND: A REPORT FOR THE NORTHERN IRELAND JUDICIAL APPOINTMENTS COMMISSION

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Foreword

This report continues the longstanding interest which scholars in the School of Law at Queen’s University have maintained in the operation of the legal system in Northern Ireland and the cooperation which has been enjoyed with the Northern Ireland Judicial Appointments Commission. The research was carried out by Professors John Morison and Brice Dickson (both of whom have been involved in earlier work, with Professor Morison also serving as a Commissioner with NIJAC from June 2005 to June 2012). Ms Leah Trainor, a PhD researcher in the School of Law, provided valuable research assistance and Ms Julie McEvoy and Mr Alistair Charles helped with format and layout.

The project team is indebted to NIJAC not only for the opportunity to carry out this research but also for the support, encouragement and assistance of the NIJAC Steering Committee appointed to oversee the project, and, particularly, Ms Adeline Frew who worked tirelessly to ensure that we were able to make the necessary connections with all parts of the judiciary and legal profession to assist our work. Of course our greatest debt is to those judges and practitioners who gave their time and offered their valuable opinions. What follows is not a direct report of these sometimes differing views. It is rather an account of the challenges around ensuring that the appointment process to the High Court in Northern Ireland continues to produce outstanding candidates for this most important role. Much of what we have discovered follows the pattern in England and Wales as shown by research there. There are however significant local differences in the Northern Ireland context, and a series of additional challenges arising from the small size of the jurisdiction, the nature of the applicant pool and a variety of other circumstances. The Report seeks to outline these additional obstacles, while emphasising also the positive factors which continue to make appointment to the High Court the pinnacle of a career in law for many of the most talented lawyers in the jurisdiction. The Executive Summary at the beginning of the Report outlines the structure of the Report while the Compendium of Recommendations to be found at the end provides a digest of some of the points for further consideration that our work has prompted. The views expressed are those of the authors rather than representing the position taken by NIJAC. We urge readers to consider the Report as a whole, and to engage in the further discussion about the future recruitment to the High Court that we hope such reading will encourage.

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Executive Summary

The research for this report was commissioned by the Northern Ireland Judicial Appointments Commission (NIJAC) in December 2018 and the report was finalised by the researchers in May 2019. The Commission was prompted by the fact that in recent competitions for High Court appointments NIJAC had been disappointed that more applicants did not apply and that not all of the advertised posts could be filled. We were tasked with looking for and providing evidence relating to the real and perceived barriers to potential and actual applicants.

The report builds on research previously conducted for NIJAC by ourselves and others on why people were or were not applying for judicial office in Northern Ireland (2008) and on the meaning of ‘merit’ in competitions for judicial appointments in Northern Ireland (2013). It also takes account of research conducted on the attractiveness of judicial appointments in the United Kingdom more generally, such as by Genn (2008) and Turenne and Bell (2018).

Chapter 1 sets out briefly the reasons for carrying out the research at this time and the methodology we used in doing so. Apart from considering the literature on the subject to date, we interviewed 25 lawyers face-to-face, including 15 serving or retired judges. We also conducted group consultative meetings with the Presiders of a range of tribunals, solicitors and lawyers in public services. In all we heard the views of 50 lawyers. A reasonable balance in terms of gender and professional background was achieved, although nearly all of those consulted were relatively senior, being either judges or falling within the applicant pool for the High Court. The chapter then explains what the functions of the High Court are in Northern Ireland and summarises the results of competitions for appointment to the High Court since NIJAC was established in 2005. Since then, across seven competitions, there have been a total of 55 applications. These were reduced to 20 at the shortlisting stage: 17 were from barristers, 2 were from solicitors and 1 was from a County Court judge. Of the 10 applicants who were offered a post, 9 were barristers and 1 was a solicitor.

Chapter 2 summarises the relevant research already conducted relating to the subject-matter of this report. It looks in turn at perceptions of applicants in the pool for High Court posts, at the impact of the rules on pay and pensions for High Court judges, at the nature of a High Court judge’s job today, and at the application and selection process. The research seems to indicate that the type of applicant most likely to succeed in a competition for a High Court post is a Queen’s Counsel of many years standing, that the relatively low salary attached to a High Court post and the recent changes to the pension arrangements for High Court judges are strong disincentives to potential applicants, that the nature of a High Court judge’s job has changed significantly in recent years to the point where to some it is no longer deemed to be worth the sacrifices or the intangible benefits which accompany appointment to the role, and that for many potential applicants the application and selection process is very daunting.
Chapters 3 to 7 then consider in more detail the five types of barrier to High Court appointments which we think are most relevant in Northern Ireland today. At the end of each of these chapters there is a series of short recommendations for NIJAC to consider.

Chapter 3 shows that in Northern Ireland the pay and pension issues are probably just as discouraging to many potential applicants (especially senior barristers and solicitors) as they are in the rest of the United Kingdom.

Chapter 4 indicates that many senior practitioners no longer wish to apply to become a High Court judge because they are put off by the nature of the job. It is perceived to be a role which has become more demanding than ever in terms of workload, responsibilities and publicity. Some of the public service expectations that may have been transmitted when the appointment process involved a personal approach (the ‘tap on the shoulder’) are less easily suggested when the applicant is required to make an application on his or her own initiative. Chapter 4 also reinforces the view found in the wider literature that the nature of legal practice and the role of the judge have both changed. Private practice now allows for more flexibility than in the past, affording greater control over the work-life balance, and this is valued highly by well-established barristers and solicitors. In contrast there are elements of the judicial role, such as the level of work-load, the nature of cases, the number of personal litigants and the obligation to do whatever work is allocated to you, that are less appealing. The absence of opportunities to work part-time on the bench, as well as increased public criticism and relatively limited support in terms of judicial assistants are also explored here.

Chapter 5 takes a detailed look at all elements of the recruitment process for High Court posts in Northern Ireland. It identifies some features of the process which might be altered in order to make it less intimidating and, perhaps, more likely to attract a wide range of applicants.

Chapter 6 examines some of the traditions and assumptions which may perhaps operate, consciously or otherwise, to dissuade certain categories of applicants from applying, especially solicitors and judges who are already serving in lower courts. The lack of opportunities for part-time working may again be a factor, especially for those with caring responsibilities or those potential applicants who place a high premium on maintaining a healthy work-life balance. We draw attention to the benefits of NIJAC appointing temporary High Court judges, as it is empowered by statute to do.

Chapter 7 addresses head-on the startling fact that no County Court judge has been successful in a High Court competition since NIJAC was created in 2005. We found a lot of dissatisfaction amongst the County Court judiciary because of this perceived barrier to promotion. We studied carefully the relative merits and demerits of a hypothetically excellent County Court judge and a hypothetically excellent senior barrister or solicitor and could see no obvious reason why the former’s candidacy for the High Court should be so much less likely to succeed than the latter’s. We suggest that there might be unconscious bias at work, either on the part of potential County Court judge applicants who are failing to apply or on the part of members of NIJAC’s Selection Committees when they are assessing a County Court judge’s abilities,
qualities and skills. We can see advantages in a future where talented lawyers who join the judiciary at lower levels are as likely to be as successful in a competition for a High Court appointment as a talented legal practitioner might be.

Chapter 8 reiterates the sets of recommendations laid out at the end of Chapters 3 to 7, but without any further comment.
1. Why the research was commissioned.

We were commissioned by NIJAC in December 2018 to undertake research into the real and perceived barriers that may be influencing those at relatively senior levels in the legal professions – widely defined – and at the County Court when they are making decisions about whether to apply for a position as a High Court judge. It had become apparent that such positions were not as attractive to potential applicants as in previous years. In its submission to the Review Body on Senior Salaries in 2018 the High Court Judges’ Association Northern Ireland expressed the view that the unsuccessful recruitment round for High Court appointments conducted in 2016 was evidence that the role was not sufficiently rewarding to make legal practitioners want to give up their much higher incomes derived from private practice. The Association described the failure to fill three posts out of the statutory complement of ten as ‘little short of disastrous’. Happily, two of the three vacancies were filled in 2018, but one vacancy still remains. A competition for that vacancy, and for a reserve list valid for 12 months from the date of the first appointment, was launched while this research was underway.

We have interpreted the terms of reference for this research more broadly than as a request to investigate pay differentials between experienced legal practitioners and High Court judges. We have taken the opportunity to inquire more generally into why it is proving difficult to fill High Court posts. In doing so we have taken account of existing literature in the field, especially in relation to High Court appointments in England and Wales, where there have been more serious recruitment difficulties than in Northern Ireland. We are most grateful for the assistance with that task which we received from Ms Leah Treanor, a doctoral student in the School of Law at Queen’s University. We have also conducted interviews with a wide range of interested parties: barristers, solicitors, lawyers working in the public sector, currently serving County Court and High Court judges, and retired County Court and High Court judges. A total of 50 lawyers – male and female - engaged with our fieldwork, 25 through one-to-one interviews and 25 through participation in group discussions. They comprised 18 serving or retired judges (including seven serving puisne judges), 12 solicitors, eight barristers (all QCs), six judges working in tribunals and six lawyers employed in government legal services. We guaranteed anonymity to all of those people but each of them granted us permission to use our discretion in quoting what they said. In line with the policy of Queen’s University Belfast, the recordings of interviews will be held confidentially by the authors and will be destroyed five years after the final version of the report has been submitted to NIJAC.¹

The High Court of Northern Ireland

As in England and Wales the High Court of Northern Ireland constitutes the highest level of court for first instance hearings in the jurisdiction. Its jurisdiction and miscellaneous powers are set out in sections 16 to 33A of the Judicature (NI) Act 1978, as amended. Since 2004 the currently permitted number of High Court judges is ten,

¹ https://www.qub.ac.uk/home/media/Media,600198,en.pdf, at para. 3.10.1.
not including the Lord Chief Justice or the three Lords Justices of Appeal.\(^2\) The vast bulk of their workload is in the area of civil law, although they do occasionally sit in the Crown Court to hear serious criminal cases and in the High Court they hear judicial review applications relating to criminal matters. Occasionally High Court judges will also sit in the Court of Appeal of Northern Ireland. Between them they are called upon to perform more than 60 other tasks at the Lord Chief Justice’s request, ranging from being a Judge-in-Residence at Ulster University or Queen’s University Belfast (positions which carry relatively light duties) to chairing bodies such as the Council of Legal Education or the Boundary Commission for Northern Ireland (which can be onerous tasks at certain times). As of March 2019 the annual salary for a High Court judge was £185,197, the same as in England and Wales. They are recommended for appointment by NIJAC after responding to an advertisement and undergoing a rigorous selection process.

NIJAC was established in 2005 under the Justice (NI) Act 2002, amended by the Justice (NI) Act 2004. In the years since 2008 it has organised seven competitions for High Court appointments. In total there were 55 applicants for the posts, of whom 20 were shortlisted, and 10 were eventually offered a post. Of these 10, 9 were Queen’s Counsel and 1 was a senior solicitor. No County Court judge has been appointed to the High Court since NIJAC was established, even though, as NIJAC’s internal reports reveal, there have been 11 applications from County Court judges. In this context it is worth bearing in mind the words of the Lord Chief Justice of England and Wales, Lord Burnett, in his Treasurer’s Lecture on 18 February 2019: ‘if the judiciary is not appointed from every corner of the legal professions, talented people will be missed and the overall quality of the judiciary will suffer’.\(^3\)

The High Court is the second highest court in the judicial system of Northern Ireland. Table 1, below, containing data made available to us by NIJAC, sets out the number of judges serving in every tier of the system as of 18 April 2019 and specifies how many of them are in pensionable posts and how many are remunerated on a fee-only basis. It can be seen that there are only 80 pensionable judges currently in office and that there are more than seven times as many fee-paid members of the judiciary as there are pensionable members. More than half of the fee-paid judicial office holders are persons with no legal qualifications who sit as lay magistrates or as members of e.g. appeal tribunals (who deal mainly with disputes over welfare entitlements). At present there are also numerous vacancies within many of the tiers. In addition, we have been informed through NIJAC that, as of June 2018, 13.2% of solicitors working in Northern Ireland were classified as employed by the government or elsewhere in the public sector.

\(^2\) Section 2(1) of the Judicature (NI) Act 1978, as amended by article 2 of the Maximum Number of Judges (NI) Order 2004 (SI 1985), provides: ‘The High Court shall consist of the Lord Chief Justice of Northern Ireland (in this Act referred to as “the Lord Chief Justice”) and not more than ten puisne judges who shall be styled “Judges of the High Court”.

Table 1: The Serving Judiciary in Northern Ireland

<table>
<thead>
<tr>
<th></th>
<th>Pensionable posts</th>
<th>Fee paid posts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lord Chief Justice</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Lord Justice of Appeal</td>
<td>3</td>
<td>-</td>
</tr>
<tr>
<td>High Court judge</td>
<td>9</td>
<td>-</td>
</tr>
<tr>
<td>County Court judge</td>
<td>18</td>
<td>16</td>
</tr>
<tr>
<td>District Judge (Magistrates’ Court)</td>
<td>20</td>
<td>23</td>
</tr>
<tr>
<td>District Judge</td>
<td>4</td>
<td>-</td>
</tr>
<tr>
<td>Coroner</td>
<td>3</td>
<td>11⁵</td>
</tr>
<tr>
<td>Master</td>
<td>7</td>
<td>-</td>
</tr>
<tr>
<td>Deputy Statutory Officer</td>
<td>-</td>
<td>8</td>
</tr>
<tr>
<td>Lay Magistrates</td>
<td>-</td>
<td>128</td>
</tr>
<tr>
<td>Appeal Tribunals</td>
<td>2</td>
<td>240</td>
</tr>
<tr>
<td>Care Tribunal</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>Charity Tribunal</td>
<td>-</td>
<td>6</td>
</tr>
<tr>
<td>Criminal Injuries Compensation Appeals Panel</td>
<td>-</td>
<td>20</td>
</tr>
<tr>
<td>Health and Safety Appeals Tribunal</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>Industrial Tribunal and Fair Employment Tribunal</td>
<td>8</td>
<td>13</td>
</tr>
<tr>
<td>Lands Tribunal</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Mental Health Review Tribunal</td>
<td>-</td>
<td>24</td>
</tr>
<tr>
<td>National Security Certificates Appeal Tribunal</td>
<td>-</td>
<td>5</td>
</tr>
<tr>
<td>Northern Ireland Traffic Penalty Tribunal</td>
<td>-</td>
<td>4</td>
</tr>
<tr>
<td>Northern Ireland Valuation Tribunal</td>
<td>-</td>
<td>26</td>
</tr>
<tr>
<td>Pensions Appeals Tribunal</td>
<td>-</td>
<td>20</td>
</tr>
<tr>
<td>Reserve Forces Reinstatement Committee</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>Social Security and Child Support Commissioners</td>
<td>4</td>
<td>10</td>
</tr>
<tr>
<td>Special Educational Needs and Disability Tribunal</td>
<td>-</td>
<td>10</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>80</strong></td>
<td><strong>571</strong></td>
</tr>
</tbody>
</table>

⁴ For the names of judges currently in post see https://judiciaryni.uk/about-judiciary/judicial-members.

⁵ These are dual appointments held by pensionable County Court and High Court judges.
2. The findings of research already conducted

The supposed ‘recruitment crisis’ presently facing the judiciary generally has attracted some recent attention. We already know quite a lot about its nature and possible causes. In the United Kingdom work on the theme began in 1998 and the most recent study was completed in 2018 by Turenne and Bell. This builds upon findings in annual Judicial Attitudes Surveys from 2014 and 2016, continuing interest from the Review Body on Senior Salaries and work done by the House of Lords Select Committee on the Constitution.

In Northern Ireland the general position on judicial appointments has been fairly well-researched. Although this is the first study looking particularly at the issue of appointment to the High Court in Northern Ireland, there is some information that can be read across from the work carried out for the UK as a whole, as well as a number of internal reports that can be read alongside NIJAC’s internal reports.

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7 Hazel Genn, The Attractiveness of Senior Judicial Appointment to Highly Qualified Practitioners (Judicial Executive Board, 2008).


This research and comment reveals a number of themes which were explored further in the context of Northern Ireland during our fieldwork for this report.

*Perceptions about the applicant pool: a focus on the senior Bar*

While recruitment to the High Court is of course open to sufficiently experienced and qualified barristers and solicitors alike (as well as to serving judges who have the required qualifications), the senior Bar is widely seen as the traditional route to the senior bench in the UK generally. In Northern Ireland earlier research showed not only that ‘merit’ was frequently viewed within the professions to be QC-focused, with undue emphasis on advocacy experience, but also male. In addition it was seen to be related to a carefully calibrated ‘pecking order’ of seniority, where appointment to the High Court is seen as ‘the final phase of a career at the Bar’ involving a very particular, high-end practice. Solicitors and those in public service simultaneously acknowledge this as a reality but repudiate strongly its relevance, as do some barristers to a lesser extent. The absence of a formal (or indeed informal) career pathway from the lower courts is a very significant issue, particularly in Northern Ireland. For instance, while there have been very occasional promotions of Chairs of Tribunals to the position of County Court judge, no District Judge (Magistrates Courts) has been promoted to the County Court since NIJAC was first set up.

As far as we know, no-one who is primarily a legal academic has ever applied for, or been encouraged to apply for, an appointment as a High Court judge in Northern Ireland. This is at least partly because since the mid-1980s, when official research assessment processes were introduced for all Law Schools in UK universities and legal academics were therefore required to spend more time undertaking and publishing the results of legal research, it has become very uncommon for legal academics to engage in legal practice or even to obtain a practitioner qualification in the first place. There are therefore few legal academics who would be able to fulfil the requirement that applicants for High Court appointments must have at least 10 years’ standing as a member of the Bar of Northern Ireland or as a solicitor in Northern Ireland. Moreover, those legal academics who do practise usually confine that practical work to relatively specialised areas of the law and would be unlikely to have the breadth of practical experience expected of someone sitting as a High Court judge. For these reasons we did not interview any legal academics for the purposes of this research and have not further considered whether more could be done to make their eligibility for High Court appointment more feasible.

*Pay and Pensions: a significant disincentive*

The research is generally very clear about the effect that the issue of pay and pensions is having on recruitment to the senior bench. Indeed this is the starting point for much

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15 Queen’s University Belfast (2013), n. 12, at p. 44 et seq.
16 Ibid.
17 Queen’s University Belfast (2013), n. 12, at p. 59.
of the work carried out for the whole of the UK. The issue is of course closely tied to perceptions about the nature of the applicant pool and the likely fall in earnings that appointment to the bench would entail. In Turenne and Bell’s 2018 study, 67% of those interviewed ‘commented at length that there was a substantial loss of income… and only 15% saw the salary level as an attraction of the Bench. 29% of the whole sample… saw salary as a disincentive’.18 That there is likely to be a reduction in earnings for many applicants is clear. However, the NatCen 2017 survey of newly appointed judges offers a more nuanced insight into the scale of the earnings gap at different tiers of the judiciary. By way of example, the median pre-appointment earned income Group 4c judges (i.e. High Court) was £554,822, as compared with a judicial salary of £181,566.19 This translates to a 67% decrease on appointment. At Circuit Court level (England and Wales) the median pre-appointment earned income of Circuit Court Judges was £182,425, as compared with a judicial salary of £134,841. This represents a 26% decrease in earnings on joining the judiciary.20

The pension situation has been seen universally as having a negative influence.21 In the 2016 Judicial Attitudes Survey, 78% of salaried judges reported a loss of net earnings over the last 2 years, 62% said change in pension has affected them personally and 74% felt pay and pension entitlement did not adequately reflect the work they have done and will do before retirement.22 The detrimental effect applies to many newly appointed judges, who had expected their pension arrangements to be governed by the 1993 pension scheme but then found themselves siphoned off into the less valuable 2015 scheme without their agreement.23 For others, changes to the structure of the judicial pension scheme itself, coupled with changes to the taxation of pensions, have resulted in the pension effectively becoming redundant for those practitioners who have made sufficient provision for their retirement at an earlier stage in their career.24 Indeed, the willingness of judges to engage in litigation with the government on this issue is demonstrative of the gravity of the matter.25

The nature of the job

The survey literature suggests that there is increasing dissatisfaction with the job of being a judge, although the research findings are UK-wide and it is difficult to extrapolate from them the views of judges in Northern Ireland. In the 2016 Judicial Attitudes Survey, 45% expressed job dissatisfaction; this compares with 38% in 2014.26 In 2016, 42% of those interviewed indicated they would leave the judiciary if it was a viable option; this figure has almost doubled since 2014 (23%).27 It is noteworthy

18 Turenne and Bell (n. 8) at p. 11.
19 NatCen (n. 10) at p. 2.
20 NatCen (n. 10) at p. 2.
21 For more information regarding the changes, see Government Actuary’s Department, Judicial Pension Scheme. Report on Membership Data as at 31 March 2012 (2014), Appendix B2.
22 UCL Judicial Institute, 2016 Judicial Attitudes Survey (2017), n. 9, at p.36.
23 See further Constitution Committee (n. 11) at p. 10.
24 Turenne and Bell (n. 8) at p. 13.
25 See n. 63 below.
26 UCL (n. 9) at p. 63.
27 Ibid, at p. 50.
that 43% of judges said they would not encourage suitable people to apply for their job. In addition to pension issues and salary reductions, the reasons given relate to constant policy changes (57%), lack of administrative support (52%) and the feeling of being an employee or civil servant (51%).

Significantly perhaps, High Court judges were the least likely to say that they would encourage people to apply. (81%).

The surveys suggest that these findings on poor morale are linked to concerns about staff reductions, fiscal constraints, stressful working conditions, the perceived difficulties attracting the best people into the judiciary, and an increase in litigants in person. The research confirms the view that traditionally the bench was attractive, as it was considered to involve a reduction in workload and pressure compared with private practice; it also meant an increase in social status, as well as the chance to satisfy a sense of public duty (in addition to pension security). However, it also corroborates the view that over the last 20 years, there has been a significant change with regard to the perceptions about working conditions of the post and their capacity to compensate for a reduced income.

A ‘lack of flexibility in working practices on the Bench’ was the most commonly cited barrier to judicial appointment in Turenne and Bell’s recent study. Perhaps unsurprisingly, the majority of women respondents raised this as an issue (65% as compared with 24% of men). Judicial working patterns are perceived to be inflexible in terms not only of working hours but, also, geographical deployment and specialism (though the geographical aspect is less likely to be an issue in Northern Ireland, given the smallness of the jurisdiction). The literature reveals concerns, particularly among women, that they might be assigned to areas of work where they had no particular expertise and might feel out of their depth. While legal practice is thought to offer a significant degree of flexibility, particularly for those at partner level in solicitors’ firms or at the senior Bar, this is not believed to be the case on the bench. Autonomy over one’s work is valued by practitioners, particularly women. Indeed, in a third of cases across the jurisdictions, the loss of autonomy enjoyed by self-employed barristers or partners in solicitors’ firms was cited as a reason for not pursuing a judicial career. Furthermore there appears to be a view that ‘a part-time approach to judicial appointments’ does not align with what is ‘required for a judicial post (i.e. a full commitment to the role)’.

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28 Ibid, at p. 5.
29 Ibid, at p. 90.
30 Ibid.
31 Turenne and Bell (n. 8) at p. 9.
32 Ibid, at p. 15.
33 Ibid.
34 Ibid, at p. 18.
36 Turenne and Bell (n. 8), at p. 16.
37 Turenne and Bell (n. 8), at p. 20.
38 Queen’s University Belfast, 2013 (n. 11), at p. 6. This would seem to remain the case notwithstanding the Advisory Panel on Judicial Diversity recommendation that ‘it should be assumed that all posts are capable of being delivered through some form of flexible working arrangements, with
Workload on the bench is perceived to be as high as, or higher than, in practice, further reducing what was once seen as an incentive for application.\(^39\) Turenne and Bell found a widespread belief that the workload and stress associated with a judicial career has increased,\(^40\) while the NatCen survey reports that 48% of judges said that the workload made them more inclined to leave the judiciary earlier.\(^41\) An increase in litigants in person is also reported as a factor increasing the workload of the judges.\(^42\)

There is in addition an increased focus on quantitative targets which, it has been reported, has led to many judges feeling like civil servants.\(^43\) The House of Lords Select Committee on the Constitution expressed its concern about ‘the working conditions of the judiciary and the detrimental effect they may be having on retaining and recruiting judges. The dilapidated state of some courts coupled with administrative burdens, under-resourcing of staff and IT shortcomings all need to be addressed.’\(^44\) The absence of a system of judicial assistants (outside the Supreme Court), such as exists in many other jurisdictions, whereby research tasks and judgment writing can be delegated to non-judge staff,\(^45\) is also noted as an issue.

The research indicates, moreover, that there is a view that ‘social respect for judges has declined markedly in recent years’ and that this makes the job unattractive.\(^46\) This is in part because the judiciary is now not accorded as much deference as it once was, but also in part because of Brexit-related critiques in the press, combined with the then Lord Chancellor’s failure to intervene in order to defend judges from such public attack.\(^47\) Notwithstanding the (same) Lord Chancellor’s comments regretting poor judicial morale effecting recruitment and retention,\(^48\) it is noteworthy that just 2% of

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\(^39\) Genn (n. 7). This perception appears to be vindicated when one considers that 51% of judges responding to the 2016 JAS said that the number of hours required to do their job was affecting them. This represents a significant increase from the 2014 JAS, when only 29% felt the same way (UCL, n. 9, at p. 47).

\(^40\) Turenne and Bell (n. 8), at p. 20.

\(^41\) NatCen (n. 10) at p. 3.

\(^42\) See Litigants in Person: the rise of the self-represented litigant in civil and family cases in England and Wales, House of Commons Brief Papers SN07113, (2016) Section 2.3. It is estimated that litigants in person (LIPs) now form a steady 20% of the litigant population in Northern Ireland (G. McKeever, et al Litigants in Person in Northern Ireland: Barriers to Legal Participation (University of Ulster, 2018). Indeed, in the list of changes to the judiciary which concerned judges most, LIPs moved from fifth to third place between the 2014 and 2016 surveys undertaken by UCL (n. 9 above).

\(^43\) Turenne and Bell (n. 8) at p. 24.

\(^44\) Constitution Committee (n. 11) at p. 14.


\(^46\) Turenne and Bell (n. 7) at p. 30. See also the Queen’s University Belfast study (2013), n. 12 at p. 65.

\(^47\) Constitution Committee (n. 8) at paras. 46-57.

\(^48\) Annual oral evidence taken on 22 March 2017 (Session 2016-17) Q4 (Lord Thomas of Cwmgiedd).
respondents to the 2016 Judicial Attitudes Survey felt valued by the government.\textsuperscript{49} At the same time there is potentially a chill factor from the wider ‘culture’ within the system. This affects women, and some minority groups to a greater extent.\textsuperscript{50} In Northern Ireland, the perceived ‘ethos’ of the ‘back corridor’ had been identified (before the appointment of two female High Court judges in 2015) as having the potential to be particularly isolating, especially for women.\textsuperscript{51} Security remains an issue across all jurisdictions,\textsuperscript{52} and has particular implications in Northern Ireland.\textsuperscript{53}

All of these points are compounded by the irreversibility of a judicial appointment, although this is ameliorated to some degree by the opportunity to try out the role as is possible in England and Wales and, to a lesser extent in Northern Ireland through deputy positions.\textsuperscript{54}

\textit{The application and selection process}

The move towards a merit-based commission system is reported in the literature as being viewed as largely positive. However, some concerns remain. Many of those in private practice, particularly those at the Bar, appear to be uncomfortable with the requirement for the completion of application forms and interviews. Indeed, the window for the submission of applications (even though it is typically 5–6 weeks in Northern Ireland) is reported as being difficult to manage for those with busy practices.\textsuperscript{55} Breaches of confidentiality, and the detrimental consequences for a career in being known to be an applicant, are consistently seen as significant.\textsuperscript{56}

With this understanding of what the background literature reveals, the views of potential applicants, applicants, existing judges and a range of practitioners in Northern Ireland will now be considered.

\section*{3. Pay and pensions as barriers}

Amongst the commonest barriers to senior judicial appointments mentioned to us by our interviewees were (a) the relatively low salary attached to the position of High Court judge in comparison with the higher salaries earned by successful QCs and senior partners in firms of solicitors and (b) the changes applied to the judicial pension scheme in 2015.

\textsuperscript{49} UCL (n. 9) at p. 9. Turenne and Bell report that among the judiciary, the prevailing attitude of those in government is perceived to be that ‘far from being a coordinate branch of government, judges are seen as an obstacle’ (n. 8 at p. 33).
\textsuperscript{50} For example, Gay women/lesbians and BAME respondents are the two subgroups most likely to report judicial establishment and culture as unappealing. More LGBT solicitors (50\%) than barristers (29\%) indicate that it is unappealing. See further L. Moran, ‘Sexual Diversity in the Judiciary in England and Wales; Research on Barriers to Judicial Careers’ (2013) 2 Laws 512 at 521.
\textsuperscript{51} Queen’s University Belfast, 2008 and 2013 (n. 12) at pp. 59 and 44.
\textsuperscript{52} 51\% of judges have expressed concern for their safety whilst in court, 37\% when outside court and 15\% with regard to social media, with women judges more likely to report concern for their personal safety, both in and out of court, than their male colleagues. (Turenne and Bell (n. 8) at pp. 22-3.
\textsuperscript{53} Queen’s University Belfast, 2008 (n. 12) at p. 44 and Turenne and Bell (n. 8) at p. 10.
\textsuperscript{54} Turenne and Bell (n. 8) at p. 33.
\textsuperscript{55} Ibid, at pp.26-27.
\textsuperscript{56} Ibid, at p. 25; Queen’s University Belfast, 2013 (n.12) at p. 60.
Pay

In the financial year 2018-19 the salary of a puisne High Court judge in Northern Ireland (as in England and Wales) was £185,197. The Senior Salaries Review Board confirmed in 2018 that judicial salaries had been allowed to fall far below the levels they should have been at and it therefore recommended that the salary of a High Court judge should be raised by 32% to £240,000, backdated to April 2018. But on 26 October 2018 the Lord Chancellor announced that judicial pay for 2018-19 would rise by just 2% – the biggest rise in 10 years.

Although the average earnings of QCs in Northern Ireland during that or any other year is not known, it is an accepted fact that many QCs regularly earn much more than that amount each year. As long ago as 2012 it was disclosed in an answer to a question put to the Minister for Justice in the Northern Ireland Executive by Jim Allister MLA that in the five previous financial years 21 Queen’s Counsel had each earned more than £1,000,000 in legal aid payments alone and £55,000,000 was awarded to 70 QCs in all. Although legal aid payments have been reduced since 2012, considerable rewards are still available to barristers and solicitors through non-publicly funded work. As far as solicitors are concerned, the head of the Belfast branch of an international firm asked us rhetorically why he or she would want to take a 50% pay cut in order to become a High Court judge.

It is interesting that the application form for High Court appointments asks (but does not oblige) applicants to complete a section indicating their personal gross income from practice or employment in each of the last three accounting years (to the nearest of £1,000). The form states that the information is not made available to the Selection Committee and plays no role in the decision-making process. It is gathered purely for monitoring purposes by the Senior Salaries Review Board. We have not been able to access such information for the purposes of this report.

It seems clear, certainly, that in Northern Ireland there is a cadre of high-earning lawyers who, at present, are not likely to be interested in applying to become a High Court judge because they would be significantly better off financially if they stayed in their current job. As discussed in Chapter 4 of this report, they may be individuals who find their current work much more enjoyable than the work they anticipate having to do as a High Court Judge. We know from Turenne and Bell’s Report that the same situation obtains in England and Wales, although those authors also noted that for solicitors in Northern Ireland the judicial salary is ‘often close enough to what would


58 Turenne and Bell (n. 8) at paras. 32–38.
be received in private practice’. They said the same about solicitors in Scotland but at the same time cited a survey by the Law Society of Scotland which indicated that, in 2017, at least 25% of all solicitors, regardless of the size of the firm where they were working, earned more than £200,000 per year. There are other factors at play here too. Turenne and Bell’s work confirmed the view in Genn’s 2008 study which reported that generally people were having children at a later age with many practitioners over fifty have young children, and that this was making the job less financially attractive to this group. Certainly several of our respondents mentioned candidates who would be suitable but cited family responsibilities as the explanation for why they would not apply.

It is equally clear that pay, in and of itself, is not a barrier to High Court appointment as far as serving County Court judges in Northern Ireland are concerned. In 2018-19 the salary of a County Court judge was £148,527 (with the Recorder of Belfast receiving an 8% uplift), meaning that for applicants from that pool promotion to the High Court would entail a pay rise of almost 25%. Lawyers working in the public sector – for example in the Public Prosecution Service or the Crown Solicitors Office – would be in a similar position to that of County Court judges. In fact for them the pay rise would be significantly greater.

_Pensions_

The pension arrangements for all judges in Northern Ireland, as in the rest of the United Kingdom, were radically altered by the Judicial Pension Regulations 2015. This was described by one judge as the ‘biggest obstacle for the traditional applicants ... for both silks and partners in large successful commercial practices’. Prior to the entry into force of those Regulations the key benefits under the judicial pension scheme then in place were as follows:

- an annual pension of an amount equal to 1/40th of the judge’s pensionable pay in his or her final year of service, multiplied by his or her total length of service as a judge up to a maximum of twenty years;
- a lump sum of 2.25 times the judge’s annual pension;
- entitlement to the pension at the age of 65;
- a surviving spouse’s or civil partner’s pension, paid at half the rate of the judge’s pension, and provision for a pension in respect of dependent children;
- a contribution by judges of 3.2% of their pensionable pay, plus a contribution of 1.8% in respect of survivors’ benefits;
- judges’ contributions and their lump sum did not attract any favourable tax treatment because the judicial pension scheme was not a registered scheme, but in practice this disadvantage was off-set by the fact that benefits accrued under the

61 Turenne and Bell (n. 8) and Genn (n. 7).
62 This pay is slightly higher than that earned by Circuit judges in England and Wales because of the fact that County Court judges in Northern Ireland may be required to preside in serious criminal cases without the assistance of a jury (in terrorism-related cases).
judicial pension scheme were not subject to the annual or lifetime allowance charges imposed on registered schemes by the Finance Act 2004.

Under the 2015 Regulations the benefits provided by the new judicial pension scheme were changed to these:

- an annual pension of an amount equal to 1/43rd of the judge’s pensionable pay on a judicial career average basis;
- no lump sum in addition to the annual pension; a lump sum is available only by commuting part of the annual pension entitlement;
- the age from which the pension can be taken is either 65 or the judge’s personal state pension age if that is higher;
- a surviving spouse’s, civil partner’s or nominated partner’s pension is paid at 3/8ths the rate of the judge’s pension.
- the judge’s contribution rate is between 4.6% and 8.05% of their pensionable pay, depending on the annualised rate of their pensionable earnings;
- as the new judicial pension scheme is a registered scheme it is subject to the restrictions on the accrual of benefits imposed by the Finance Act 2004 through the rules on annual and lifetime allowances; this means that there has been a substantial increase in the tax payable on a judge’s pension and on any lump sum payments he or she may receive.

The 2015 Regulations affected judges in three different ways depending on their length of service and their date of birth:

1. those who were members of the judicial pension scheme before 1 April 2012 and were born before 2 April 1957 retained full protection;
2. those who were members of the scheme before 1 April 2012 and were born between the 2 April 1957 and 1 September 1960 were entitled to tapering protection until a date between 31 May 2015 and 31 January 2022, whereupon they are to be excluded from the scheme and become entitled to join the new scheme (they also acquired the option to transfer to the new scheme on 1 April 2015);
3. those who were members of the scheme before 1 April 2012 but were born after 1 September 1960 were not entitled to any protection and were excluded from membership of the scheme after 1 April 2015, on which date they were able to join the new scheme.

It follows that judges who fell within the third category were treated less favourably than those who fell within the first and second categories and those who fell within the second category were treated less favourably than those who fell within the first category. The factor determining which category a judge fell into was their date of birth.

In December 2018 the Court of Appeal of England and Wales confirmed the decision of the Employment Appeal Tribunal (and of the employment tribunal below that) that the changes to the pension scheme discriminated against certain judges on the ground of their age and that the Lord Chancellor and Ministry of Justice had failed to show that such discriminatory treatment was a proportionate means of achieving a legitimate
The Court of Appeal’s decision may be appealed to the Supreme Court. If it is not, or if any such appeal is unsuccessful, the UK government will be required to compensate those judges who have been unfairly discriminated against on age grounds, but judges who were not members of the judicial pension scheme before 1 April 2012 will apparently not qualify for any such compensation. We were told that complaints about age discrimination in the implementation of the new judicial pension scheme had also been made by various judges in Northern Ireland and that the determination of those complaints had been put on hold until the final outcome of the litigation in England and Wales was known.

We heard from several current judges in Northern Ireland that the changes to the pension arrangements had hit them very hard financially. One of them confided to us that the loss involved amounted to approximately £30,000. Applicants for High Court appointments are made aware of the pension arrangements attached to the post through a ‘Pensions Factsheet’ available on the website of NIJAC. This includes an example of the tax implications of the new judicial pension scheme, showing that a High Court judge can expect to have to pay more than £25,000 per year in tax on their accrued pension. This has an influence on potential candidates’ career planning with one QC telling us, ‘you really need to go onto the bench now at about 50 or 55 at the latest … to get the fifteen years needed’.

It is clear that some High Court judges, particularly the younger ones, now have pension arrangements which are not as generous as those previously in place. But in that respect those judges are no different from many other categories of workers in the public sector whose final-salary pension schemes have recently been abolished or radically altered and whose predecessors in their jobs were treated more favourably. Moreover we heard from several interviewees that successful barristers, like other self-employed individuals, usually build up their own private pension pot over a number of years through savings and investments. If they become senior judges they will still enjoy the benefits of that pension pot in addition to the pension which they will receive under the new judicial pension scheme when they retire from the bench. Senior solicitors who become judges should be in a similar situation. In addition, the pension problem is a transient one because as time goes on applicants for senior judicial appointments will no longer feel aggrieved that the previous very generous pension scheme is no longer available to new appointees. The new pension scheme is still a relatively attractive one and there is no unfairness in retired judges being bound by the same annual allowance and lifetime allowance rules which all other workers have to accept.

In short, while recognising that the change in pension arrangements has affected some serving judges quite adversely, it is a phenomenon which affects all tiers of the judiciary and as time goes on is unlikely to be a discernible barrier to lawyers who are considering whether to apply for a senior judicial post.

63 The Lord Chancellor v McCloud [2018] EWCA Civ 2844 (20 December 2018). The details of the schemes mentioned above are taken directly from paras. 12 to 24 of the Court of Appeal’s judgment.
Recommendations

We do not see the need for NIJAC to make any changes to the information it supplies to potential applicants for High Court posts about what their pay and pension arrangements will be, since the information already provided is clear and extensive. We do however caution against the risk of the development of any assumptions, especially within NIJAC and its Selection Committees, that the highest earning applicants are likely to make the most competent High Court judges, since the skill-sets required for successful High Court work may be quite different from those required for the charging of high legal fees. NIJAC may want to continue to lobby the UK government (since judicial pay is a reserved matter) for further increases to be made to judicial pay to reflect the importance and difficulty of the work involved.

4. The nature of the job as a barrier

The NatCen Survey of Newly Appointed Judges research suggests that those who join the judiciary are motivated by the idea of undertaking a challenging job, providing a valuable public service, and taking what may be seen as a natural career step, and that these expectations are generally fulfilled. Turenne and Bell list the main incentives for applying for appointment as involving a reduction of workload and pressure compared to private practice, a secure salary (albeit often smaller), a good pension, respected social status and a wish to put something back into the legal system. Our interviews confirmed this to a degree but also detected a number of changes to the way in which practitioners (barristers and solicitors) work and to the work of judges, which together have an impact on the attractiveness of a judicial role.

Changes to the job of legal practitioners

First, the role of the practitioner has changed in recent decades. We were told, for example, that twenty or so years ago there was both more work available and considerably more pressure to take what was on offer. In this context, despite the reduced salary, a judicial appointment had a particular appeal. As one current judge told us, ‘in the past the bench was seen as an escape from the unrelenting pressure of work, one case after another…’. Nowadays, the nature of practice is said to have changed. The same judge pointed out that that ‘now the vast majority [of barristers] have a much better work / life balance … [for me] there was no question of taking time off to go skiing… [but] now you can organise your cases … there is less work available… [but] you can still have a decent life’.

Both barristers and solicitors told us that now even very successful practitioners have considerably more control over their work. Indeed a senior partner in a solicitors’ firm contrasted what she regarded as the old fashioned working practices on the bench with modern working conditions in practice, and wondered why she would be willing to take a considerable pay cut to work not only as intensively as at present but in conditions that are less attractive. This solicitor referred to the hierarchy and formality of the ‘back corridor’ comparing unfavourably to a collaborative and teamwork

64 Above n. 10.
approach in the modern solicitors’ firm where diversity and flexibility in working patterns are valued for business reasons. Similarly, as a senior barrister put it, ‘I am going to have to come in every day of the week. I am going to have a boss… who will tell me where I have to go and what cases I have to hear … and my holidays are going to be cut back … and all this for a cut in pay’. To be fair, we heard contrasting views as well. One judge with experience of the back corridor thought it was ‘very collegiate’ and several such judges told us they could easily informally consult one of their colleagues on a legal point if they felt the need to do so. Another judge appreciated the variety and challenges which High Court work presented.

This perhaps suggests that some modernisation of the working conditions of judges might be worth consideration. In particular, as one QC put it, ‘if there was the option of having part-time hours that would make it much more attractive’. While this is problematic in terms of the statutory provisions setting out the establishment of the judiciary, it is an important element to consider. One judge told us, however, that it would not make sense to appoint a part-time judge unless he or she could commit to being available for a two- or three-month period at a time, so that the person would be able to take on long cases. Similarly, there was some support for the idea of targeting recruitment at senior practitioners, perhaps in their sixties, on either a full-time or part-time basis, and perhaps with an extension to their retirement age. We return to the issue of part-time and flexible working below.

Changes to the job of High Court judges

At the same time the work of a High Court judge has intensified. It involves an increased volume of work compared to what might have been expected 20 years ago. Most judges accept this. As one said, ‘there are a lot of good things about being on the bench and most people broadly enjoy it… [W]hen I applied I did expect that I would have to work pretty hard… At times you would feel a little stressed but no more than at the Bar… we shouldn’t be too defensive’. Indeed all of the serving and retired High Court judges we interviewed told us that the experience of serving as a High Court judge was enjoyable, and none expressed any regrets at having taken up the role. However legacy cases and historic sex abuse work were seen as particularly difficult and unattractive. One judge spoke eloquently about the difficulties he has had as an older person who has lived through this period of going back into the past to revisit former times to try to apply modern standards to old cases. We were also told that current political situation in Northern Ireland, where the Executive is not meeting or providing direction for government, has put additional pressure on judges who are finding that issues around inquiries and inquests are being passed on to the judiciary in the absence of alternatives.

Concerns were expressed also about the variety of specialisms that might be involved in the High Court, and that some of these might be far from one’s expertise in the increasingly specialist world of legal practice. We were told, ‘by the time you got to the

65 See further comments made by Lady Hale to the House of Lords Constitution Committee, reported in The Times, 28 March 2019 at https://www.thetimes.co.uk/article/let-judges-stay-on-unti-72-urges-hale-k8txk3mts.
66 See p. 42 below.
stage in your career where you were ready to apply to a High Court job... you will be a specialist and then you then have to go back to being a generalist'. As one QC put it, ‘You may find that you’re pitched in somewhere... like the Family Division where you never had any experience or interest and you can do very little about it'. This might be an argument for increased training of new judges or, alternatively, for ensuring that judges are appointed more directly to particular specialisms rather than rotating across areas of law. This might also assist in widening those attracted to making an application. We were told, ‘I believe that would encourage solicitors in particular who have a speciality... I am a criminal lawyer, what do I know about Chancery cases?’ Another said, ‘by the time you are thinking of applying you are specialist in an area... you enjoy it... and why would you move out of the zone where you are very comfortable, probably for the next fifteen years?’ At the same time a serving judge commented that one of the attractions of the post was ‘the new challenge... you are being asked to do things that are difficult... and moving into a different area of law’.

Judges also talked about the greater access of the profession to the judiciary and the ‘increasing number of emails... directly from solicitors which can interrupt your work... It is not uncommon for me to field inquiries about the list the next day... like a civil servant’. The effects of austerity too are being felt, reinforcing views found in the wider literature about working conditions. One outworking of this is an increase in the number of litigants in person, who are identified as a particular difficulty. While we did not find the same complaints about facilities in the High Court in Northern Ireland as others have reported in Great Britain, there is a sense in which the funding environment has sapped morale. As one judge put it, ‘austerity has been a factor .... ideas which could help judges be more efficient are not viewed favourably at this time... there is a lot of scope here... someone to do research and work with and provide a critical perspective’. Indeed the idea of judicial assistants was popular both with serving judges and with some potential applicants. As one judge observed, confirming the considerable support for an enhanced system of judicial assistants, ‘it would really help to have someone... setting out the background, explaining, for example, the contractual framework in a complex case... or doing a bit of research on the caselaw’. Another linked this to the increase in personal litigants, remarking that ‘I get nothing from them [in terms of legal argument] ... and end up having to go and do my own research’.

This is an area which could be developed to considerable effect. We understand that a small research unit exits in the Royal Courts of Justice but that in practice it is available for use only by judges who are sitting in the Court of Appeal. While there is a system of tipstaffs who attend judges, they are not much involved in legal work. One judge told us that his tipstaff was very helpful but would not be someone who was adept at legal research. The potential for a proper support staff for judges is a very important element which has considerable appeal in terms of making the job more attractive.

67 See Turenne and Bell (n. 8) at p. 19.
The ‘back corridor culture’

We did uncover some negative attitudes among potential applicants about the working conditions and the so-called ‘back corridor culture’. One senior barrister said, ‘the atmosphere has been poisonous at times… but if anyone really wants to be a judge they would apply’. It should be added that the High Court judges we interviewed described good relations among each other, reporting that judges lunched together and that newly appointed judges in particular felt able to seek advice. Recent newcomers to the corridor, we understand, have been made to feel at home and are able to go to colleagues for support and advice. However, notwithstanding the recent appointment of a judge with a solicitor background to the High Court (which has attracted considerable interest and general approval) some solicitors were concerned that they might feel isolated in the High Court. As one solicitor put it, ‘anyone who comes from our ranks to the High Court will still have that baggage and that sense of difference… There would need to be a sea change in attitudes there’. There were differing views about whether the culture continues to have a gender dimension: one senior solicitor commented that ‘the perception I have is that it is still viewed very much as a boys’ network at the higher end, you can tell that walking into the court’. However another focus group strongly took the view that, with the appointment of two women to the High Court, this was no longer an issue and a further appointment of a woman ‘wouldn’t raise an eyebrow’. The same may be true following the appointment of a solicitor to the High Court.

Exposure to public criticism and demystification of the role

Another feature from the wider literature relates to the perception of the judiciary in wider society. As one judge told us, ‘in very recent years people on the bench are exposed to all sorts of criticism… you get ill-informed people in the Assembly, local politicians engaging in criticisms of judicial decisions… also the “Enemies of the People” thing in the Daily Mail… and the Lord Chancellor did absolutely nothing about it’. This combines with the impact on personal life which was described as now being less about security issues of the sort familiar from the recent past and more about intrusion on family life and a sense of isolation from former colleagues. It seems that this is not fully compensated for by the status of the post. As one senior barrister put it, ‘more and more people aren’t attracted by the knighthood or see the kudos that there maybe once was… Instead of it being a mark of distinction at the end of your career… you ask yourself, “is this a good job that I would want to do for fifteen years?”’ Indeed, reflecting on the change since the advent of NIJAC one interviewee told us how the ‘tap on the shoulder’ recruitment scheme perhaps carried with it ‘a sense that it was your duty to do it… to put something back into the profession… and that seems to have gone… it is a job now’. There is a sense in which the High Court role has now been successfully demystified and the process of appointment made more transparent. One, perhaps unintended, effect of this is that some of the drivers which led to people accepting appointment, maybe from a sense of duty or a feeling that it is the culmination of a successful career, no longer pertain. As one QC put it, ‘I don’t see any barriers as such… I just wouldn’t be interested in the job’.
Recommendations

While the role of High Court judge remains attractive to some as a challenge and a way of contributing public service, changes in working methods in practice and an increase in workload have reduced its appeal when it is viewed as a job. There is some scope in terms of changing and improving the working conditions of the High Court which could make the role more attractive. As highlighted below, flexibility in working conditions, along with the possibility of part-time working, especially towards the end of a career in practice, may make the post more attractive to some good candidates. The possibility of appointing judges to particular specialities might be considered. Provision of increased support in the form of judicial research assistants, as well as enhanced administrative support, would relieve workload pressure considerably.

5. The recruitment process as a barrier

General impressions

Several interviewees told us that there were things wrong with the recruitment process. Mostly these comments seemed to derive from a sense of frustration over the fact that no County Court judge has yet been selected by NIJAC to serve as a permanent High Court judge. One person said ‘the application process is not terribly effective’, adding that ‘proof of [judicial] experience should count as proof of ability’; another said ‘The system itself is irredeemably flawed… because there is a panel of four, two of whom are lay people’; the same interviewee said ‘the process is not efficient’. Another judge observed that ‘the current selection system is incredibly mathematical and moderated marks cause problems too’ and ‘obviously the process of appointment is putting off people’. Despite all these comments most interviewees were positive about the role of NIJAC and only one or two of the people we spoke to intimated that they were surprised that A or B had been appointed to the High Court over the heads of X or Y, who were known to have competed for the same posts.

The advertisement

Few of our interviewees saw any barrier in the way High Court posts are advertised, but one or two (not from the Bar) did suggest that stronger welcoming statements could be inserted to try to encourage a more diverse pool of applicants. We note that care would need to be taken to ensure that any such statements do not violate anti-discrimination laws. For the High Court competition which began while this research was being conducted NIJAC sent out a message on its website which included the statement that ‘We recognise that in a small jurisdiction such as Northern Ireland, it can be difficult for applicants to come forward to be considered for senior judicial office. Consequently, we want to encourage a diverse pool of the right applicants of the highest calibre to come forward for consideration’.68

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68 See https://www.nijac.gov.uk/sites/nijac/files/media-files/Message%20from%20the%20High%20Court%20Selection%20Committee%202019_1.pdf, at para. 5.
Some interviewees also thought that more reassurance could be given in the advertisement concerning the training that would be provided for applicants if they were successful in their application. This would help dispel the notion that persons should apply only if they are able to undertake all the work required of a High Court judge as from their first day in office. Reference could also be made to mentoring and/or ‘buddy’ schemes, in so far as they exist, and to the existence of the Research Unit within the High Court (although we understand that at present this is reserved almost entirely for the use of judges who are sitting in the Court of Appeal).

One solicitor interviewee lamented the absence of something like a day-release course in Northern Ireland to allow prospective applicants for a variety of judicial appointments to receive training and coaching in such matters as the managing of disputatious lawyers, the intricacies of the rules of evidence and the art of judgment-writing. As noted below, seminars, programmes and schemes are now provided in England and Wales for people who are thinking of applying for judicial appointments, including deputy High Court appointments.\(^{69}\) If it is not feasible to replicate such events in a small jurisdiction such as Northern Ireland, perhaps potential applicants for High Court appointments there should be eligible to attend the events in England and Wales.

**The application form**

The amount of work required to be undertaken by those applying for a High Court appointment was referred to by several interviewees as ‘off-putting’ and ‘laborious’. Just finding the time to prepare all the paperwork was described by one interviewee, a busy practitioner, as so difficult as to make applying almost impossible. Frankly, we found such claims disingenuous. It would be naïve to assume that applying for a post as important as that of a High Court judge would be anything other than a demanding process. Given the effort which senior lawyers need to put into important matters they deal with on an almost daily basis, it is hard to believe that any of them could be so daunted by the judicial application process as to make them not want to undertake it at all. Anyone who is put off from applying because of the work involved in doing so is, we would submit, unlikely to make a conscientious judge in any event.

There is however a separate issue around the levelness of the playing field. We were told that ‘those who can fill in the forms properly… show the abilities, qualities and skills… pay the three or four thousand pounds to get the HR consultants to fill in the forms can get on further than those who know they are actually able to do the job’. There is probably no way in which this use of outside consultants can be policed, let alone totally avoided. It may perhaps lead to some applicants being shortlisted who without such help would not have deserved to be, but there is a lot more to the selection process than consideration of the application form and any deficiencies in the applicant’s abilities will almost certainly be revealed during those later stages of the selection process. If there is a doubt about the accuracy of some information supplied in the application form there should be room in the selection process – at both the interview and final assessment stage – for that alleged inaccuracy to be

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\(^{69}\) See p. 46-7 below.
clarified with the applicant and, if necessary, for additional evidence in support of the information given in the application form to be made available.

It is reassuring that on the application form itself applicants are told that the Selection Committee will not consider ‘CVs, letters, additional information or any other supplementary material in place of, or in addition to, completed Application Forms (unless specifically requested)’. It is also to be welcomed that NIJAC makes available to applicants an ‘Applicant Information Booklet’ and a document entitled ‘Guidance to Applicants on Judicial Assessment and Selection’. These two publications are very informative and certainly help to minimise any barriers that might otherwise exist for an aspiring applicant.

Applicants who are not aware of what kind of thing they are expected to say on their application form are also assisted by two documents on NIJAC’s website entitled ‘Job Description’ and ‘Nature of the Role’. The former makes it clear, for instance, that High Court judges may be required to sit on committees to facilitate the management and efficient disposal of court business and to contribute to administrative reform. They are also expected to serve on a variety of bodies such as the Judicial Studies Board. The Lord Chief Justice made us aware of the full range of these roles and it is obvious that some of them can add considerably to a judge’s workload. The Lord Chief Justice may also ask a judge to attend a function or make a speech on his behalf. However, while the need for these roles to be filled may point to the need for the creation of additional High Court posts, we do not see them as constituting a barrier to applicants for existing High Court positions. The additional roles are not onerous enough to carry much weight in the mind of someone who is weighing up the pros and cons of applying for the core job.

The ‘Nature of the Role’ document sets out in some detail the kinds of judicial work which a High Court judge is required to undertake, drawing attention to the need for jury trials to be handled very carefully, to the growing intricacies of the criminal law, to the importance of being able to work as a member of a small team and to the expectation that in their professional and personal lives judges will conduct themselves in accordance with the highest standards. The document also stresses, appropriately, the great significance of communication skills, including ‘the careful and tactful selection of words on all occasions’.

The application form for High Court appointments refers to the ‘Personal Profile’ for the position in question. This is set out in the Applicant Information Booklet and its content is also partly reflected in the Job Description and Nature of the Role documents referred to above. It explicitly states that ‘it is essential that applicants not only have the highest levels of intellectual capacity, knowledge and leadership ability but are able, as public servants, to demonstrate a real understanding of human nature and the society that they serve’. Potential applicants are also told in the Application Information Booklet that if they wish to discuss the role and nature of the work of a High Court judge NIJAC can arrange a conversation between the potential applicant and a named serving High Court judge. This ‘Point of Contact’ plays no part in the subsequent assessment process and the Selection Committee is not made aware of

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any contact applicants have had with the Point of Contact. In addition, and perhaps less defensibly, NIJAC ‘strongly encourage[s] potential applicants to the High Court scheme to contact any High Court judge to gain an enhanced understanding of the challenges and expectations of the role, either directly where they know that judge personally, or through the Point of Contact’. We have some doubts about the desirability of this practice given that it may give an unfair advantage to applicants – especially barrister applicants – who are more likely to know High Court judges personally.’

As an aside, we note that, confusingly, NIJAC’s website contains a section headed ‘Judicial Profiles’ where, in an attempt to raise awareness of the many different career opportunities for which applicants may be eligible, information is provided about ‘the day-to-day realities of many judicial offices’. Thirteen such profiles are provided, but unfortunately there is none for the post of High Court judge. No interviewee cited this omission to us as a barrier to application, but the fact remains that the publication of a High Court judge profile could assist in making the position in question appear more interesting to some potential applicants than it otherwise might be. It cannot be presumed that even senior barristers know in detail what the working life of a High Court judge actually entails and curious potential applicants from all appropriate areas should not have to track down an Applicant Information Booklet in order to obtain such information.

Demonstrating abilities, qualities and skills

It was frequently suggested to us that barristers were disincentivised by the fact that they had to complete a form in which they were expected to provide evidence for how they had acquired certain abilities, qualities and skills: being self-employed, many barristers will rarely if ever have had to complete such a form in the past. This was considered to be in contrast to lawyers working in the public sector who will routinely apply for higher grade posts. However, when junior barristers are applying to become Queen’s Counsel they also have to complete a form on which they must provide at least seven statements, each of up to 400 words, indicating that they possess a variety of competencies. Such applicants also go through an interviewing process. It may be true that competency-based forms have only recently been adopted in this sphere (which is what we were told) but, given the intellectual ability of senior barristers and other senior lawyers, it is difficult to take seriously a statement that they genuinely find it difficult to complete a competency-based (or similar) form when applying for the High Court, particularly as the form itself and the other information provided by NIJAC to applicants, gives clear instructions as to what is expected from applicants. Applicants who misconstrue those instructions or who wilfully ignore them are, we would suggest, unlikely to be the appropriate people to merit appointment to the High Court.

It was pointed out to us that there has not been a call for applications for Queen’s Counsel positions in Northern Ireland since 2014. The responsibility for arranging such competitions rests with the Department of Justice and it was expected that a new competition would be run in 2017, after the customary three-year gap (in England and Wales competitions are run annually), but because of the collapse of the Northern
Ireland Executive and Assembly in that year the competition did not take place. This has meant that in the last two or three years there have been fewer Queen’s Counsel available to apply for High Court appointments, but as it is unlikely (given previous practice) that a barrister would be appointed to the High Court after just a few years’ experience as a Queen’s Counsel the absence of a competition since 2014 cannot realistically be said to currently constitute an additional barrier to applications from the Bar for a High Court position. As time goes on it could become a barrier, but we understand that, with the cooperation of the Advocate General of Northern Ireland (Geoffrey Cox QC), a new call for applications to be appointed Queen’s Counsel in Northern Ireland was launched in May 2019.

According to the Applicant Information Booklet, applicants for High Court appointments are assessed against the following five categories of abilities, qualities and skills.

(1) Intellectual Capacity, Knowledge and Expertise:

- legal expertise and the ability to deal with complex problems
- an ability to quickly absorb and analyse information and extract relevant facts in accordance with the applicable rules of evidence and procedure
- knowledge of the law and its underlying principles and the ability, where appropriate, to master unfamiliar areas of law.

(2) Personal Qualities:

- integrity and independence of mind
- sound judgment and decisiveness
- objectivity
- an ability and willingness to learn and develop professionally.

(3) Understanding and Fairness:

- a commitment to justice and fair treatment
- an awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs
- an ability to adapt and deal effectively with a wide range of people including personal litigants.

(4) Communication Skills:

- an ability to express and succinctly explain matters of procedure and judgment and to listen with patience and courtesy to a wide range of people, including personal litigants
- an ability to engage constructively and effectively with judicial colleagues and others, as part of a team, including through the use of IT
- an ability to produce timely, clear and reasoned written and oral decisions.

(5) Leadership and Management Skills:

- an ability to form strategic objectives and to provide leadership to implement and manage change effectively
- an ability to organise own and others’ time and manage available resources for the effective disposal of business
- an ability to inspire respect and confidence and to maintain authority when challenged.

We can see nothing in this list of abilities, qualities and skills which seems out of place, and it is appropriate that in relation to each of the five abilities, qualities and skills, applicants are required to provide evidence demonstrating, through the use of examples from their own experience, how they meet ‘the requirements’ – these being, presumably, the characteristics set out in the three or four bullet points under each of the five headings.

We note that the requirements listed under ‘Intellectual Capacity, Knowledge and Expertise’ do not ask for evidence and examples of ‘expertise in judging’. At one level this is surprising, given that the post in question is one where a very high level of such skills is required. But we accept that it is arguable that the skills involved in judging are catered for elsewhere in the list of abilities, qualities and skills, such as the requirement of ‘sound judgment’ under the heading of ‘Personal Qualities’ and all the requirements under the heading of ‘Communication Skills’, especially ‘an ability to produce timely, clear and reasoned written and oral decisions’.

The Applicant Information Booklet informs applicants that the Personal Profile in the Booklet does not include every ability, quality or skill required for the office under recruitment but that it does show what abilities, qualities and skills the Selection Committee has determined are the most important and therefore those upon which the selection decision will be based. The Booklet helpfully explains that the distribution of marks in the assessment is as follows: 40% for intellectual capacity, knowledge and expertise; 15% for personal qualities; 15% for understanding and fairness; 15% for communication skills; and 15% for leadership and management skills. This seems to us to be a reasonable allocation of marks but we suggest that it might be worthwhile further disaggregating the 40% allocated to intellectual capacity, knowledge and expertise into smaller amounts, such as 10% for intellectual capacity (always very difficult to assess), 15% for knowledge and 15% for relevant expertise. Amongst other benefits, this might allow previous judicial experience to be given some explicit weight in the selection process.

Having examined the application form which an applicant for a High Court position needs to complete (it is available on NIJAC’s website), we can see that it asks for up to 500 words to be submitted in relation to each of the five abilities, qualities and skills set out above. We suspect that this word limit may be too low, especially as applicants are expected to provide evidence demonstrating how they meet each of the requirements through the use of examples drawn from their own experience. A limit of 750 words may be wiser.

Role-based exercises

Applicants for High Court appointments are warned that they may also be assessed on the basis of their performance in a role-based exercise (normally a ‘situational judgment exercise’) and an interview. We understand applicants for a High Court post
are always asked to undertake a role-based exercise, and that NIJAC works hard to ensure that the exercise chosen is unlikely to be one which has already been undertaken by any of the applicants. If role-play were introduced and were to take the form of the applicant pretending to take on the role of a judicial office holder, this may work to the benefit of applicants who have already served as judges. Conversely, it may not be welcomed by applicants who have no judicial experience. We understand, however, that the practice to date has been not to use role-plays in the selection processes for High Court positions. They are, apparently, very popular with Selection Committees which make appointments to County Court positions or to the position of chair of an industrial tribunal. We wonder why they are deemed appropriate in those contexts but not in the context of High Court appointments.

As discussed above there is also an issue around specialism. We heard from a solicitor interviewee that by the time a senior solicitor might think of applying for the High Court he or she is likely to have been embedded in a specialised area of the law for some time and may not therefore feel adequately equipped to succeed in unusual types of role-based exercises. We understand that prior to any shortlisting of applicants careful consideration is given to the nature of role-based exercises which the Selection Committee deems to be suitable for all those who may be asked to undertake it. That presumably goes a long way to removing any barrier to appointment which such exercises might otherwise constitute.

Interviews

NIJAC’s ‘Guidance to Applicants’ document states that at the interview stage questions will focus on the assessment of some or all of the criteria set out in the ‘Personal Profile’ and adds that some questions may combine one or more areas of the Personal Profile. All applicants are interviewed on the basis of their application form and the purpose of the interview is to shortlist applicants for the next stage of the selection process, which includes a role-based exercise and further interview.

We were told that it was not uncommon for barrister applicants to seek help with the interview stage by attending courses or obtaining online assistance. Indeed we were told that it is now routine for applicants to seek interview training. Of itself this is not an objectionable practice, so long as NIJAC’s Selection Committees are sufficiently probing of statements made at interviews to be fully confident that they are accurate and genuine. Some respondents believed that interview-training is particularly useful for applicants, such as solicitors and lawyers working in the public sector, who are not otherwise accustomed to speaking in front of judges. It was suggested that perhaps NIJAC itself should offer interview training, rather than former NIJAC Commissioners or the host of private sector providers. This might ensure that the idiosyncrasies of Northern Ireland’s legal system could be accommodated fully in the training.

As we do not know what questions are customarily asked at interviews for High Court appointments we are unable to say whether they are all focused on the abilities, qualities and skills which are seen as particularly relevant to the position in question or whether questions about key skills required for the position are sometimes omitted.
Interviews are not currently recorded, whether for sound or vision, so panel members are presumably taking copious notes when listening to the answers given by interviewees. To enable members of the Selection Committee to validate their assessments of how applicants have answered questions in the interview it may be worth ensuring that interviews are at least audio-recorded so that the answers given can later be played back to the Committee if this is requested by one or more of its members. Interviews are notoriously unreliable mechanisms for choosing the best candidate for a job, and it is difficult to take extensive notes while listening intently to everything an interviewee is saying, but these problems can often be overcome if a recording is taken and made available to the assessors in instances where their memory of what was said needs to be assisted.

NIJAC has also made it clear, in relation to High Court appointments, that ‘[i]t is essential that applicants not only have the highest levels of intellectual capacity, knowledge and leadership ability but are able, as public servants, to demonstrate a real understanding of human nature and the society that they serve’. It was not immediately clear to us how the requisite understanding of human nature and society is tested during the interview process or elsewhere in the selection process, but we have been informed by NIJAC that this occurs through questions or tests designed to assess the applicants’ ‘Understanding and Fairness’, which are taken to embrace (a) a commitment to justice and fair treatment, (b) an awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs, and (c) an ability to adapt and deal effectively with a wide range of people including personal litigants. We accept that these are reasonable ways of interpreting the phrase ‘understanding of human nature and the society that [judges] serve’.

The submission of written work

Applicants are also required to submit three pieces of ‘written work of substance’. NIJAC’s website contains a cover page for whatever is submitted. This page makes it clear that the three pieces should demonstrate the applicant’s ‘abilities, qualities and skills…and how these could potentially transfer to [the work] expected of a High Court judge’. It adds that the Selection Committee ‘will have regard to the written work presented, your role in it, the degree of challenge and how you dealt with it’ and it explains that the Committee ‘will draw a distinction between “run of the mill” work which may present limited legal or other professional challenge from work which presents unusual, novel or unforeseen complexities or has far reaching consequences’. The cover page goes on to point out that the pieces of written work could be, for example, ‘advice given to clients in a contentious, non-contentious or transactional matter which may take the form of emails, letters, memos, opinions or notes, written submissions, public lectures, published material or other written legal argument; reports, judgments, stated cases, decisions given in a judicial, tribunal or similar capacity; written advice given internally in a firm or other institutional environment; or any other written explanation of the law, and how that applies in the circumstances of a particular case.

See the message from the High Court Selection Committee relating to the competition currently being run for a High Court appointment: https://www.nijac.gov.uk/sites/nijac/files/media-files/Message%20from%20the%20High%20Court%20Selection%20Committee%202019_1.pdf, at para. 4.
or other factual situation’. Applicants are also asked to provide a brief synopsis of no more than 200 words on why they have selected each piece of written work and how it demonstrates the applicant’s knowledge of the law and his or her skills and competence in the interpretation and application of the law. Applicants who submit lengthy pieces of written work are told to highlight which paragraphs contain the analysis and application of the law that they wish the Selection Committee to consider.

The written work that must be submitted by applicants as evidence of their writing ability was seen as problematic by some of our interviewees. There was a feeling that NIJAC’s Selection Committees were more impressed by examples of senior counsel’s opinions than by, say, a judgment issued by a County Court judge or academic material (even in book form) submitted by a lawyer in public service. We were told by one interviewee that a County Court judge who applied for a High Court post did not have any written judgment available to submit and that another such applicant submitted a judgment that was flawed. One County Court judge was emphatic that the nature of their work was not suitable for producing polished judgements that might impress a selection panel. That judge told us that ‘the barrister’s opinion is very much part of their day to day job in the way that it is not for us’, and that while County Court judges could of course write up a “vanity judgment” with a view to advancing themselves the pressure of day-to-day working life was such that they would need to make a special effort to focus on doing so as part of an application process.

Several of our solicitor interviewees felt that may have the evidence of high-quality written work but complained that that they may have ‘a chip on our shoulders…. [W]e don’t recognise the evidence that exists…. [H]ow can you compare a commercial lease… with maybe a very good use of precedent… a “must” instead of a “shall”… against an opinion setting out the salient points…?’ The work of the solicitor, they maintained, was different from that of a QC but no less demanding or relevant. As one said, ‘in any day any solicitor will have seen four or five different people in the morning with different problems… [maybe] without advance notice of what is coming in… fielded multiple telephone calls, all the paperwork… and back office stuff associated with it… That should transfer across’.

Interviewees employed as government lawyers told us that it was difficult for them to submit written material which met the stated criteria because the documents they have written are not theirs to share – they are owned by the parties to the cases in question. In any event, many documents they generate are ‘joint efforts’ and it can be almost impossible for an applicant from that sector to identify specific parts of the documents which were written exclusively by them.

Generally speaking, concerns were expressed by several interviewees over the fairness of this element of the selection process, especially as the Applicant Information Booklet and the cover page, despite being quite wordy on the matter, do not specify precisely what qualities are being looked for in the written submissions. Nor is there any word limit to what can be submitted and on occasions the assessment of submissions must be akin to comparing apples and oranges. As one interviewee remarked, ‘What is the purpose behind asking for this? Is this something that could be properly, fairly and more consistently approached as part of the actual assessment
process? You could [instead] be asked to read something and write up a brief summary judgement’.

We were left with the distinct impression that more could be done to reduce applicants’ understandable anxieties relating to this element of the selection process and that more could be tested at this stage. We discussed with interviewees whether in this context ‘merit’ might mean more than straightforward intellectual ability and encompass an ability to run a court decisively and efficiently. This might provide an opportunity for all applicants to come away with an equal sense of the fairness of the process. While it was felt that it may be difficult to produce metrics to demonstrate such aspects, the general opinion was that there are important abilities, qualities and skills that are not presently assessed.

The scoring scheme

As mentioned above, the scoring scheme used by Selection Committees for High Court posts is made known to applicants in advance. It is not clear from the documentation available whether information supplied in the application forms is taken into account when marks are allocated in accordance with the scoring scheme. In our view they should be, because at the shortlisting and final assessment stage (and in any role-based exercise as well as in written submissions) the applicant may not get the opportunity to repeat pertinent information supplied in the application form. From what we have been led to believe it is the interview which constitutes by far the most important aspect of the selection process and yet human resource consultants consistently claim that an excessive focus on interviews reduces the chances that the most suitable applicant will be chosen for a job. Against that context it is curious that appointments to High Court positions do not involve any psychometric testing. Such testing is common in competitions for senior positions in other parts of the public sector, such as policing.

Consultees and referees

It was noted by several of our interlocutors that NIJAC’s abandonment of ‘consultees’ during recruitment competitions was a good thing. It means that applicants who are close to existing judges cannot capitalise upon that coincidence in order to boost their application. But one High Court judge was of the very definite view that it was a mistake not to make use of consultees, saying ‘I know who is High Court material and who is not’. Another High Court judge suggested that all existing High Court judges should be asked for their views on the candidates being considered by NIJAC (as was the practice in the past), and another said that the removal of this practice represented a diminution of their status. Our own view is that such consultations should not take place: provided that NIJAC’s selection process is rigorous in obtaining as much information as possible about the knowledge and competencies of the applicants (together with honest references), a level-playing field is maintained and the risk of discriminatory treatment or unconscious bias around the nature of what constitutes ‘merit’ is reduced.

Reliance on references, particularly if the referee is asked to comment specifically on key abilities, qualities and skills in which good applicants are expected to excel, helps
to produce a more level playing field. But it was pointed out to us by one senior counsel that non-advocate applicants for the High Court (and for the County Court) may have difficulty in finding a serving judge who knows their work well enough to provide an impressive reference. Of course there is no requirement to have a serving judge act as a referee, but doubtless a positive reference from such a person would carry considerable weight. The same source said that the fact that so few solicitors are appointed to the bench was ironic because on the whole solicitors are better than barristers at managing cases. But we acknowledge that senior solicitors who apply for a position in the High Court are very likely to know other senior people not just in the law but in other walks of life and therefore should have little difficulty in calling upon them to act as referees. The key point here is that Selection Committees should not attribute undue weight to a reference just because it emanates from a senior judge. In any event, references should serve not as a vehicle for allowing an applicant to attain a higher score in a selection process but merely as a means of reassuring a panel which is already minded to select a certain applicant as the winner of the competition that other people have acquired the same high opinion of that person’s abilities, qualities and skills as the panel has done.

**Personal knowledge of applicants**

The interviewees we spoke to differed greatly as regards the appropriateness of members of Selection Committees taking into account their own personal knowledge of applicants when assessing them. One very experienced judge said it was ‘ludicrous’ not to allow such personal knowledge to be taken into account, although that judge did not go so far as to suggest that the panel member could fill in the blanks of an acquaintance’s poorly completed application form. The same judge thought that Selection Committees should consist only of people who have themselves had judicial experience. But nearly every other interviewee who was asked about the selection process was of the view that lay people should be involved at all stages, and that the chairperson did not have to be a judge.

Barrister interviewees tended to accept that an applicant could be at a distinct advantage if the judges on the Selection Committee happened to be very familiar with his or her work (while acknowledging that this could be a double-edged sword).72 One senior counsel felt strongly that the selectors of judges did need to know the people they were appointing but, when pressed, the lawyer in question could not provide a justification for that view. Another QC said the main point that he or she would like to get across in their interview was that the selection system for High Court judges should be more subjective than at present: the current system was described as too much like a box-ticking exercise. We were surprised that during our interviews with some judges the names of particular barristers were occasionally mentioned as people who either should have already applied for High Court posts or should be thinking of doing so in the near future. It seems that certain barristers are ‘identified’ as potential future High Court judges in a way which does not apply to applicants from other pools, such as solicitors, lawyers in public service or even existing County Court judges, all of

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72 This notion of ‘visibility’ was also flagged up in the 2013 study from Queen’s University Belfast on the concept of ‘merit’: see n. 12 above.
whom are not so often within the gaze of High Court judges in the courts. Specific barristers are often strongly encouraged to apply by senior serving judges, which of course is a dangerous course of action because it may lead to unreasonable expectations on the part of such barristers who do apply. Just as canvassing for particular jobs is sometimes stated to be a justification for disqualifying the canvasser from consideration for the job, so those who are selecting people for particular jobs should not be suggesting in any way that a person would be a worthy candidate for the post. Pre-judging a potential applicant in this way is potentially discriminatory against other applicants.

In a small jurisdiction such as Northern Ireland it is unrealistic to expect people on Selection Committees not to be personally acquainted with some of the applicants for judicial posts, but good practice would dictate not only that such acquaintanceships are notified to the whole Committee in advance of any deliberations taking place but also that the member who knows an applicant does not make any comments about that applicant to other members of the Committee which are not based on something stated by the applicant in his or her application form or during the course of his or her participation in a role-playing exercise or interview.

We were told that NIJAC’s conflict of interest policy is based on guidance issued by the Northern Ireland Audit Office, and this seems appropriate. What is equally important, however, is that the guidance is strictly adhered to. It should be remembered that, according to the NIAO’s guidance, ‘[a] perception of a conflict of interest can be just as significant as an actual conflict of interest. The key issue is whether there is a risk that a fair-minded outside observer, acting reasonably, would conclude that there is a real possibility of bias’. The document goes on to point out that amongst the questions people should ask themselves when determining if they have an actual, perceived or potential conflict of interest are the following: ‘Do I have a current or previous personal… [or] professional… relationship or association of any significance with an interested party?’ and ‘Do I hold any personal or professional views or biases that may lead others to reasonably conclude that I am not an appropriate person to deal with the matter?’.75

Confidentiality

Most applicants for senior judicial appointments understandably expect that a high degree of confidentiality will characterise the process. Many of our interviewees said that they used to have concerns about the breaches in confidentiality that accompanied High Court competitions in Northern Ireland, while admitting that some of the breaches may have been a result of what applicants themselves had disclosed to other people. But no interviewee expressed concerns of this nature in relation to the most recent competitions, even though some rumours concerning who had applied had been circulating. There seems to be a high degree of confidence that any

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74 Ibid, at para. 2.4.
75 Ibid, at p. 8.
continuing leaks concerning the identity of applicants do not derive from NIJAC. Nevertheless, perhaps as a consequence of the smallness of the legal world in Northern Ireland, the pecking order which was identified by earlier research combines with issues about candidates being known to produce a situation which may be off-putting to some candidates, particularly women. For example, we were told that ‘if you have a talented woman who is thinking of applying... and she hears that a very capable male is applying, she will say “I just won’t bother”... There is a pecking order.’ This suggests that more still needs to be done to encourage able women to apply for High Court appointments.

The fear of failure

We detected amongst several of our interviewees a distinct feeling that what would most discourage them from applying for the High Court is the fear of being unsuccessful. It appears that applicants from all sectors – the Bar, solicitors, lawyers in the public sector and serving judges – are of the view that failing in an application would seriously damage their self-esteem but, more importantly, severely undermine their credibility in the eyes of their peers if their failure became public knowledge. We have already addressed the importance of confidentiality in the recruitment process; it is clearly important that unless the applicant himself or herself wishes to make their candidature known to people beyond the Selection Committee, no-one else should do so. On the other hand, more could be done to ensure that applicants know that failure in a competition for the High Court is not at all something to feel ashamed of.

Applicants who are not appointed should be given honest and helpful feedback, and it should be made more widely known that in the past applicants have been appointed to the High Court bench after one or more previously unsuccessful applications. It is also a fact of life that the very best of applicants can unexpectedly under-perform on the day of their interview or in the other exercises they need to go through as part of the selection process. Failure to succeed in competitions for jobs is a very common phenomenon throughout the public sector. NIJAC’s own figures show that the success rate for applicants is not high. Of the 55 applicants who applied for a High Court appointment between 2008 and today, the success rate was just over 18% (10 appointments were made). Making applicants aware of this reality in advance might help to soften the blow if they are unsuccessful.

Delays

The delays in the process of appointment were viewed as particularly problematic. While they may be unavoidable, as security checks and appeals against complaints must be allowed to run their course, we did hear that the delays can be very disruptive of private practice and therefore potentially quite costly to the appointee(s).

Recommendations

More could be done by NIJAC to ensure that competitions for High Court appointments are attractive to a wider range of applicants. Advertisements should be more transparent about the possibilities (or not) of part-time working and flexi-working.

76 N. 12 above.
NIJAC’s collection of Judicial Profiles should contain at least one from a serving or recently retired High Court judge. NIJAC should think again about the fairness of telling potential applicants that they can contact serving High Court judges (other than the named Point of Contact) to discuss their interest in applying for appointment.

The list of competencies looked for in applicants for High Court posts should be expanded to include ‘judging skills’, defined more widely than intellectual ability as demonstrated in opinions or judgments. The treatment of solicitors by High Court judges should be changed so that solicitors no longer feel that they are less important or capable than barristers. The word limit for statements on the application form about the applicant’s abilities, qualities and skills should be increased from 500 to 750 words. NIJAC should take steps to provide access to pre-application training to potential applicants for High Court appointments, following the practice in England and Wales. Greater clarity could be provided as to how the requisite understanding of human nature and society is tested during the interview process or anywhere else in the selection process and as to the qualities expected from the written work which applicants are asked to submit. The scoring system used during the selection process should disaggregate the marks available for intellectual capacity, knowledge and expertise. Consideration could be given to the introduction of psychometric testing for applicants for High Court appointments.

NIJAC should continue to refuse to engage in consultation with anyone other than named referees concerning an applicant’s qualities. Selection Committees should not attribute undue weight to a reference just because it emanates from a senior judge and should seek to eliminate as much as possible the influence of any personal knowledge which members of the Committee might possess about particular applicants. NIJAC should continue to stress – including to applicants themselves – that it is very important that all aspects of the selection process should be kept confidential. It should also do more to convey to applicants in advance that failure in a High Court competition is no disgrace and that unsuccessful applicants will be given detailed feedback on why their performance in the selection process was scored as it was.

6 Traditions and assumptions as barriers

The assumed superior suitability of senior counsel

Reference has already been made to the expectation that the prime candidates for appointment to the High Court bench in Northern Ireland will be very successful barristers – usually high-earning Queen’s Counsel. As mentioned above, between 2008 and 2018 NIJAC organised seven competitions for High Court appointments, sometimes for more than one vacancy. There were 55 applicants, some of whom may have been repeat-players after failing to get appointed in an earlier competition, but they were all drawn from just three pools of lawyers: 31 were barristers (56%), 11 were solicitors (20%) and 13 were already serving judges in lower courts (24%). Of the 55 applicants, 20 were shortlisted: 17 of these were barristers (85%), 2 were solicitors (10%) and one was already a judge (5%). Of the 10 who were finally offered a post on

77 See too Queen’s University Belfast, Rewarding Merit in Judicial Appointments? (2013), n. 12 above, and other commentary on ‘merit’ referred to in n. 12.
the High Court, 9 were barristers (90%), 1 was a solicitor (10%) and none was already a judge.

As regards the last seven barristers appointed to the High Court, the average number of years they had spent as a practising barrister was 28, including an average of eight years as a Queen’s Counsel. The statutory minimum number of years’ standing required of appointees to the High Court is just ten, but in reality the experience possessed by successful applicants is closer to three times that figure. Thus, the commonest applicants for High Court appointments during the last decade have been barristers, by far the commonest applicants shortlisted for appointment have been barristers, and the overwhelming majority of those actually appointed have been Queen’s Counsel of several years’ experience at that level.

Several of our interviewees, including current High Court judges, seemed to take it for granted that senior counsel would be the most likely category of person to merit appointment to the High Court. In particular, Senior Crown Counsel were thought to be particularly eligible with one informant saying ‘anyone who was Senior Crown Counsel normally felt that they had to go on to the bench… some have enjoyed it… one or two of them maybe should not [have made the move]’. When pressed, however, interviewees were not able to provide hard evidence as to why Crown Counsel status or success at the Bar, which tends to be measured in terms of years of experience and perceived income levels, should necessarily mean that those individuals would be better equipped than other applicants to serve as High Court judges. More commonly we received the impression from judicial interviewees that serving judges who themselves had been successful as senior barristers tended to assume that the competencies displayed in that latter role by the subsequent generation of senior barristers inevitably meant that those individuals too would be likely to be able to perform the work of a High Court judge with aplomb.

When we spoke to solicitors, to lawyers in government service and to serving or retired County Court judges, we were frequently told that the myth that senior barristers must be better equipped for a High Court appointment was just that – a myth. One solicitor told us ‘the skillset for the High Court puts an emphasis on advocacy… court room experience… when in truth the ability to analyse, identify the issues, be methodical and logical and to communicate well and to manage… all those things solicitors do bloody well … but the job is described in the context of being on your feet, in court’.

Solicitors and County Court judges were of the view that applicants from their own professions were often as likely to have the same or better skill-sets compared with those of senior barristers; they reminded us that such individuals in their professions will have had to take many important decisions in the course of their careers, that solicitors are likely to be better than barristers at interacting with clients and that County Court judges will by definition be more knowledgeable about and practised in the art of ‘court craft’ or ‘judge craft’, that is, the skills required to keep cases running efficiently through the court while ensuring that all points needing to be addressed in each case are dealt with in appropriate detail both during the trial and in any resulting judgment.

No-one we spoke to thought it was acceptable that a County Court judge had never been successful in a competition for the High Court run by NIJAC since its establishment in 2005. One currently serving judge said it was ‘outrageous’. It was
intimated to us that there must be something amiss in the selection criteria being applied or in the processes used in the assessment of applicants against those criteria. A few interviewees were as frank as to intimate that County Court judges would be unlikely to have the intellectual capacity to serve as a High Court judge. As one QC put it, ‘most of the people who go to the County Court…. are people who don’t think they are going to get a High Court job’. Another said ‘you tend to plump for the job that you think is at your level’. Now and again it was implied that the selection process was in some respects engineered so as to give preferential treatment to candidates who were currently financially successful senior counsel. It was suggested, for example, that senior counsel’s written submissions would be more likely to ‘cut the ice’ with a Selection Committee than written submissions from other categories of applicant. Some of those with experience of writing County Court judgments were of the view that by definition such judgments would be seen as sub-optimal by the Selection Committee. One County Court judge told us that High Court judges do not appreciate the pressures County Court judges are under: they just ‘do not have the luxury of reserving a judgment for weeks’ because they would then risk falling behind with their daily caseload. In addition, it was felt that experience in running a court and/or in ensuring that the throughput of cases was efficient was downplayed by the Selection Committee when assessing applicants’ leadership and management skills, even if the experience in question was obtained over many years. In such circumstances, as one County Court informant told us, ‘you are setting yourself up to fail… such is the attitude of the Selection Committee… you are facing the embarrassment of being unsuccessful or worse still un-appointable’.

The report by Turenne and Bell78 did not specifically address the traditional preference given to senior counsel in competitions for High Court appointments. Nevertheless, many of the barriers to appointment which are discussed there apply just as much if not more so to non-traditional recruitment pools. The quantity, complexity and unremittingness of High Court work are as unlikely to be attractive to some non-traditional groups, such as senior solicitors, as they are to experienced barristers. The inflexibility of working hours and practices may be even less appealing to solicitors and lawyers in government service, who may have become used to benefiting from more sympathetic approaches to their caring responsibilities, their health needs and their work-life balance. One of our interviewees commented that he or she would be reluctant to apply for the High Court partly because he or she periodically suffers from depression and did not think that reasonable adjustments would be made to take account of this.

*Non-barristers as ‘second-class lawyers’*

We heard from solicitors and government lawyers that various customs and practices give the impression that in the eyes of existing High Court judges their role is less important than that of barristers. As small examples of this we were told that solicitors are not permitted to wear any kind of robe in court because that is the prerogative of barristers and judges, and nor can they be referred to as ‘my learned friend’ because apparently only barristers deserve that label. At present solicitors do not have rights of audience in the High Court unless they have obtained the qualification of solicitor-advocate; they are not even permitted to announce that a case has been settled. There

78 See n. 8 above.
appears to be little justification for the continuation of such customs, which only serve to make solicitors in court look like second-class lawyers. Indeed we heard frequently from solicitors and others that they felt equally or better qualified to take on the High Court role. We were told ‘the skillset that the solicitor brings to the table is perhaps better... because our interaction with the public is on a daily basis... but the personal skills aren’t recognised…’. This is of course a wider issue but our solicitor informants felt very keenly that there is an inequality between the professions that should be corrected. On the other hand, there was also a recognition that ‘solicitors are self-defeating, they run to barristers for every decision... we need a recalibration of the skills we have … and a recognition of their value’. Indeed, one of our interviewees saw the problem lying at a system level whereby ‘the Law Society have not been strong enough about promoting judicial office among solicitors … and embracing those who have taken judicial office ... the Bar would celebrate [an appointment to the Bench] … the Law Society have no culture of doing anything like this..’.

The same issues apply, perhaps even more so, to lawyers in government service. All of the six interviewees we spoke to from that sector said they would never dream of applying for a High Court post. They saw themselves as mainly working in the background and even where they might be involved in a very complex case, for example, in the Supreme Court, the view is that, as one interviewee put it, ‘the Senior counsel would be the “correct” candidate, not me’. Most of them also agreed that they were at a disadvantage when applying for judicial posts at a lower level, including salaried posts, but in fact NIJAC’s figures show that that cohort of applicant does quite well in competitions for lower level judicial posts.

*The ban on former judges returning to practice*

Applicants for High Court appointments are referred to a document on NIJAC’s website called ‘Terms and Conditions’. This makes it clear, in paragraph 2.1, that ‘The Lord Chancellor regards appointment to the Bench as being for life. Any offer of appointment is therefore made on the understanding that the appointee will not return to practice’. This prohibition on practice affects all categories of applicant equally, but it is perhaps even more off-putting for younger applicants since resigning from their judicial post after a relatively short time on the bench will entail a greater sacrifice in career terms than it would for an older person. Former judges can become Chairs of inquiries (Judges Hart and Coghlin are recent examples), arbitrators, mediators or in-house lawyers, but otherwise they could find it difficult to make a living out of their legal knowledge. This potential barrier to judicial appointment was not mentioned to us by any interviewee, perhaps because it affects persons who are thinking of applying to lower tier judicial appointments more than it does prospective applicants to the High Court. However Turenne and Bell observe that a number of the people who responded to their question on the issue thought that the prohibition on future practice was ‘an unnecessary limitation’. They also note that the House of Lords Select Committee on the Constitution had received representations from both the Bar and solicitors to the effect that the ban on returning to practice was a disincentive to potential applicants for judicial posts.

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79 Above, n. 8, at para. 101.
This context provides a further justification for the appointment by NIJAC of temporary High Court judges. As we shall see in Chapter 7 below, several County Court judges have recently been invited to serve as deputy High Court judges under the power conferred on the Lord Chief Justice by section 7 of the Judicature (NI) Act 1978. We discussed with several interviewees whether they thought it would be feasible for a practising barrister or solicitor to try out the role of High Court judge while still maintaining their practice. The consensus (but not the unanimous view) was that it would not be feasible, due not only to the likely clash of diary commitments but also to the potential conflict of interests that might arise. But one QC did serve as a deputy High Court judge in the 1990s while still maintaining his practice, and some barristers and solicitors do still serve as deputy County Court judges, so if such ‘double-jobbing’ is possible at that level it may be worth considering its introduction at the High Court level too. Deputy High Court judges are common in England and Wales, but we gather that it is easier in that larger jurisdiction for practising lawyers to undertake specialised High Court work on a trial basis without this making it very difficult for them to carry on their own private practice.

While this report was nearing its final draft we learned that NIJAC has approved a method to recruit temporary High Court judges, but awaits the go-ahead to run such a scheme. This is a development which we warmly welcome. Such positions may be attractive to practitioners who are nearing the end of their career in practice and who wish to experience one new challenge before retirement. Such appointments would help to reduce the workload falling on permanent High Court judges, thereby in due course making their job more attractive to future applicants.

**Part-time or flexible working**

It is not currently possible for an advertisement for a permanent High Court post in Northern Ireland to guarantee that the person appointed will be able to work on a part-time or flexitime basis. Legislation stipulates a maximum number of puisne High Court judges (10), not a maximum number of full-time equivalent High Court posts.\(^80\) Likewise, while all employees have the right to request flexible working hours they have no right to demand them. The Lord Chief Justice, as noted above, does have the power to ask persons who are otherwise qualified to serve as High Court judges to do so on a deputy basis, and indeed NIJAC also has the power to appoint temporary High Court judges.\(^81\) Further use of these powers may be a way of allowing some prospective future applicants for permanent High Court posts to acquire short-term

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\(^81\) Sections 7(1) to 7(3) of the Judicature (NI) Act 1978, in their current version, read as follows: (1) A person who not being a judge of the High Court or the Court of Appeal (a) holds or has held the office of a judge of the Supreme Court and before his appointment to that office was a member of the Bar of Northern Ireland, or a solicitor of the Court of Judicature of at least ten years’ standing or (b) has held the office of a judge of the High Court or the Court of Appeal, may at any time at the request of the Lord Chief Justice sit and act as a judge of the High Court or the Court of Appeal at any time on or before the day on which he attains the age of seventy-five. (2) A county court judge shall, if requested to do so by the Lord Chief Justice, sit and act as a judge of the High Court. (3) The Northern Ireland Judicial Appointments Commission may appoint a person qualified for appointment as a judge of the High Court to sit and act as a judge of the High Court as a temporary measure in order to facilitate the disposal of business in the High Court or the Crown Court.
experience of working in the role, but unless the temporary appointments are
themselves the result of an advertised competition it may be difficult to defend the
preferential treatment of these temporary appointees against claims that the
preferment is discriminatory in the eyes of other qualified people who were not given
the advantage of such appointments.

The ‘Terms and Conditions’ notified to High Court applicants in Northern Ireland
specify that High Court judges are expected to sit throughout the legal terms, i.e. for
189 days each year. If they sit in vacation, they are normally allowed time off in lieu,
but newly appointed High Court judges are expected to do vacation duty for a total of
six weeks before they qualify for time off in lieu. The document makes clear that High
Court judges are expected to work ‘outside hours’ and during vacations as well as
term times. This may be the place at which to indicate to applicants that there is some
flexibility as to when they will be able take their leave days (we understand that the
current Lord Chief Justice has shown himself to be very accommodating in that
regard). If there is any possibility of permitting more regular flexitime arrangements for
individual judges, this should be mentioned in the Terms and Conditions too.

Recommendations

More should be done to ensure that Selection Committees do not too readily assume
that the best applicant for a High Court appointment is likely to come from the pool of
senior counsel applicants. The members of the Selection Committee should be made
aware of the fact that many very competent lawyers perform other very valuable roles
in the legal system and may very well be extremely expert not just in the law but in
administering systems, managing people and communicating messages. NIJAC
should also consider asking the Lord Chancellor to relax the convention whereby
former judges will not be permitted to return to private practice. Further opportunities
to permit High Court judges to work on a part-time basis or to take advantage of
flexitime should be explored, to ensure that in that respect High Court judges are no
worse off than they would be if working at a lower level of the judiciary.

7 Judging as a career

The perceived problem

As one of our judicial informants told us, ‘there has never been a defined judicial career
path here ... at best judicial experience is seen as a neutral rather than an advantage’.
One of the clearest messages we received during the course of our research for this
report was that it was remarkable that no County Court judge had made it to the High
Court in Northern Ireland since the new NIJAC-run selection system was put in place
in 2005. One County Court judge told us this was ‘outrageous’ while someone else
with County Court experience described it as ‘a serious injustice’. Another experienced
judge said: ‘There is no doubt in my mind that even now a large number of High Court
judges and practitioners think that the mere fact that you're a County Court judge
means you're not fit [to be a High Court judge]’. The same interviewee added ‘It’s a
fair judgment to say that County Court judges are under-valued’ and another said
‘proven experience of County Court judges is simply not being recognised’.
We know from NIJAC’s internal reports that, of the 55 applicants for High Court posts competed for in Northern Ireland between 2008 and 2018, 13 (24%) were already serving judges in lower courts. But of the 20 applicants who were shortlisted for further selection exercises after their application forms had been scrutinised, only 1 (5%) was already a judge and that person was not ultimately successful in being appointed to a High Court post. We gather that the chances of the equivalent level of judges (Circuit judges) being appointed to the High Court in England and Wales are equally low, but that of itself is hardly a justification for the phenomenon in Northern Ireland. Meanwhile it is perhaps significant that in the Republic of Ireland new developments suggest that serving judges in the superior courts will not have to apply through the Judicial Appointments Commission for promotion to the High Court, Court of Appeal or Supreme Court, following a significant concession by the Government to opponents of the Judicial Appointments Commission Bill that is currently passing through the Oireachtas.

To the informed outsider – someone who is not familiar with the prevailing culture within the various branches of the legal professions – the fact that ‘junior’ judges do not regularly get appointed as ‘senior’ judges must seem bizarre. Most people would assume that the persons most likely to make good High Court judges would be those who have already demonstrated their judging abilities in a lower court. As one County Court judge told us, ‘the Bar should never be seen as the sole pool or even necessarily the best pool for higher judicial office… the skills don’t necessarily transfer over’. We accept, however, that while it is important that judge-applicants have a proper opportunity to reveal to the Selection Committee the skills they have already acquired while serving as judges, the competition for High Court appointments should not be skewed in favour of judge-applicants. Rather, the skills in question need to be ones which lawyers who have not yet served as judges could still demonstrate based on their legal experience to date. We suggest that these skills could be (a) an ability to manage a number of cases that need to be processed more or less at the same time, (b) an ability to manage particular cases effectively and efficiently, including an ability to interact successfully with legal practitioners involved in the same case, (c) an ability to make decisions and (d) an ability to explain their decision-making in writing.

The suitability of County Court judge applicants

Major advantages associated with encouraging applications to the High Court from the County Court bench are that a reduction in salary would be unlikely to play any part in the decision to apply for the job. The applicants would already be familiar with the trappings of judicial office (including the security implications) and aware of the responsibilities and ‘sacrifices’ connected to holding such office. Many of them would be accustomed to the practice of writing court judgments and to the risk of adverse publicity arising out of their handling of a case, and if they have been appointed to the County Court bench since the establishment of NIJAC in 2005, they would have undergone at least one previous application process and not be as daunted by it as

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82 We know that in this context ‘serving judge’ could include applicants who were legal members of a Tribunal. It is curious that these figures are not included in NIJAC’s Annual Reports We would have thought that in the interests of transparency they should be made publicly available.

83 Irish Times, 9 May 2019.
some senior counsel who have only subjected themselves to something similar when applying for silk. In addition, some County Court judges were previously solicitors, not barristers, so their appointment to the High Court would help to embed diversity there.

There is a prevalent view amongst some serving High Court judges that, to be blunt about it, County Court judges would not be intellectually up to the task of serving in the High Court. That is certainly not the official line, as is evidenced by the fact that during the last year or so the Lord Chief Justice has invited a number of County Court judges to spend some time within the Royal Courts of Justice acting as deputy High Court judges. It seems that a prime motivation for this initiative may have been to meet business needs, particularly given the vacancy in the High Court that has existed for some time. However it has provided a cadre of County Court judges with the experience of undertaking High Court work (even if while serving in that Court they were not paid at the same rate as High Court judges).

Given the shortness of their time in the High Court (just a few weeks) it has not always been possible, we were told, to expose the deputy High Court judges to ‘big’ (i.e. complex or high profile) cases. This suggests that perhaps this practice is not fulfilling its potential to develop an applicant pool among County Court judges. As one High Court judge put it, in order to be useful ‘they should be given some of the more heavyweight work to demonstrate that they have the wherewithal to do it... [I]t would be helpful for the system to give them cases... where they can demonstrate their ability’. Nevertheless, those who have undertaken the role do seem to have welcomed the opportunity to do so and have seen it as a way of testing whether the role is attractive. Of course, if the current experiment were to be developed more systematically as a recruitment initiative, rather than as a way of managing business, it would be important that the system offered opportunities on an equal basis. Whether this should involve a role for NIJAC is open to debate.

Notwithstanding this recent experiment, there appears to be a widespread view that County Court judges would be unlikely to be able to cope with the pressures of High Court work. It was suggested to us by several interviewees (including one High Court judge) that if County Court judges were appointed to the High Court they may not be adroit enough at handling fleet-footed senior counsel or at disaggregating the separate legal issues entwined in complex litigation. One senior counsel told us that even a County Court judge with 25 years’ experience would not be adequately equipped to deal with what goes on in the High Court. The same person said that to appoint as a High Court judge someone who had previously worked as a lawyer in a government legal office would be ‘fundamentally flawed’ because that person would lack independence – in reality as well as in people’s perception. On the other hand, one County Court judge described as ‘absolute tripe’ the suggestion that senior counsel would inevitably be better than County Court judges at dealing with knotty legal issues.

Such views were expressed despite the fact that several County Court judges have many years’ experience in running Crown Court trials (usually with a jury), including trials where the charges have included murder or serious sexual offences. We were told that summing up to a jury can be an ‘extremely difficult’ task. Criminal law now forms a small part of the workload of the High Court, so perhaps substantial experience
in that field is not given as much weight in the selection process as experience in civil or family work would be given. In addition, County Court judges hear all the extradition applications in Northern Ireland, which can raise quite complex points of law. They also regularly deal with difficult family law cases in the Family Care Centres, and in that context they may have to manage many litigants in person. Difficult points can arise in civil litigation at the County Court level too, as exemplified all too well when the ‘gay cake’ case was first litigated in that forum.\textsuperscript{84} An interviewee with many years of experience in more than one tier of the judiciary did not know why a County Court judge would be more likely to be ‘bested’ by a leading Queen’s Counsel than a High Court judge, while another suggested that the idea of a County Court judge having the ‘wool pulled over their eyes’ by an experienced silk was a nonsense.

A County Court judge was firmly of the view that because of the consistent failure of County Court judges to be appointed to the High Court in the last decade there was now a chill factor amongst serving County Court judges which enhanced their reluctance to apply to the High Court. That interviewee knew of one ‘very good’ County Court judge who applied but did not get to the final assessment stage. A senior counsel – who had already tried to be appointed to the County Court but unsuccessfully – argued strongly that several of the existing County Court judges were easily as good lawyers as some senior counsel,

In England and Wales the Lord Chief Justice has let it be known that ‘[p]roper appraisals, consistent with judicial independence, are being rolled out across the judiciary within the resources available to us’.\textsuperscript{85} We are not aware that the same is happening in Northern Ireland. If it were, then County Court judges who are led to believe from their appraisal that they are performing their role particularly well might be more incentivised to apply for a High Court position in due course. Lord Burnett also said:

\begin{quote}
Career progression within the judiciary is an important factor in increasing diversity at the higher levels. The appointments process should recognise that in the ranks of both salaried and fee-paid judges are many individuals who have not been visible in the higher ranks of the professions, often because they have chosen a career path in the judiciary which is more readily compatible with family life, but who have demonstrated judicial ability.\textsuperscript{86}
\end{quote}

As examples of the kind of steps being taken in England and Wales to encourage applications for judicial posts Lord Burnett referred to specific pre-application seminars, a Pre-Application (Online) Judicial Education Programme, a Judicial Work Shadowing Scheme, a formal judicial mentoring scheme, and a scheme enabling individuals to apply for a fixed-term appointment as a temporary High Court judge.\textsuperscript{87}

Regarding the last of these initiatives, he pointed out that by 2018 a total of 73 deputy

\begin{footnotes}
\textsuperscript{84} Lee v Ashers Baking Co Ltd [2015] NICTy 2 (heard by District Judge Brownlie while sitting as a deputy County Court judge; the case later went to the Court of Appeal ([2016] NICA 23 and 55) and then to the UK Supreme Court ([2018] UKSC 49).

\textsuperscript{85} The Treasurer’s Lecture, n. 3 above, at p. 23.

\textsuperscript{86} Ibid, at p. 26.

\textsuperscript{87} Ibid, at pp. 27–9.
\end{footnotes}
High Court judges had been appointed and that 9 of these had subsequently been appointed as permanent High Court judges.\textsuperscript{88}

\textit{Unconscious bias at the selection stage?}

Considering the relative skill-sets of experienced senior counsel and experienced County Court judges (several of whom would have been senior counsel before being appointed to the County Court), as well as the conversations we have had with several interviewees who have experience of judicial work in the County Court, it may well be that something in the selection process for High Court posts in Northern Ireland is working to the disadvantage of applicants from the County Court. We deduce that the judicial experience already gained by such applicants is perhaps not being given enough weight in the selection process. Not only is it not a ‘desirable’ criterion, it does not even seem to be the case that ‘judging skills’ or ‘court management skills’ are amongst the elements which are assessed by the Selection Committee. While it may be understandable that judges on the Selection Committee who may have come to the High Court through the traditional route (i.e. directly from the ranks of Queen’s Counsel) might be prone to unconsciously favour applicants who have a similar background to themselves, it is surprising that lay members of the Selection Committee do not set greater store by an applicant’s existing judicial experience when considering their suitability for the High Court. One of our High Court interviewees told us that more attention should be paid during the selection process to whether an applicant could display good ‘court craft’, suggesting that County Court judge applicants should be scoring more highly than Queen’s Counsel when it comes to assessing their leadership and management skills.

If in future a common route to the High Court were to consist of many years’ experience in the practice of law, in whatever capacity, coupled with several years’ experience as a judge at a lower tier in the court system, this would undoubtedly be unpopular within the Bar, especially the senior Bar, but it may well lead to better qualified applicants competing for appointments. Senior barristers have the choice – when they have already been earning high sums for some time – to attempt to divert into the lower tier of the judicial profession if they so wish. The choice is not very different from that facing longstanding junior counsel when confronted with the prospect of applying to take silk: presumably they wish to enjoy the esteem which goes with the move, but they are unsure if they will be able to make a success of the new role. Lawyers who opt to join the lower tier of the judiciary should not then have to conclude that their chances of progressing further up the judicial ladder are no better than one in ten. One of our interviewees stated that the difficulty in achieving such progression has led to a serious fall in morale amongst current County Court judges and that view was confirmed by several other interviewees who have experience of County Court work.

We were also made aware by several interviewees, especially those from government legal services (e.g. the Public Prosecution Service) and those attending a meeting of ‘Presiders’, that there seems to be little tradition in Northern Ireland of persons employed as judges in tribunals or as District Judges being promoted to a higher tier

\textsuperscript{88} Ibid, at p. 29.
of the judiciary.\textsuperscript{89} NIJAC informed us that three individuals who served as fee-paid legal members of tribunals and then as salaried Chairs of tribunals subsequently applied successfully to become County Court judges, but the Commission confirmed that to date it has never selected a District Judge (Magistrates Courts) to be promoted to the level of full-time County Court judge. The four District Judges who operate in the civil courts are, however, all also deputy County Court judges. Several solicitors made the point that they knew of colleagues who ‘had applied for various judicial roles… just to get experience with a view of moving upwards to the role they eventually wanted.’ The problem is that, unless and until there is a clear career pathway within the judiciary there will be little incentive to such ambitious lawyers to apply to join the judicial ladder in the first place.

Recommendations

More should be done by NIJAC to ensure that existing judicial experience (and perhaps judicial potential) is given due weight in competitions for High Court appointments. Such experience could perhaps be disaggregated into (a) an ability to manage a number of cases that need to be processed more or less at the same time, (b) an ability to manage particular cases effectively and efficiently, including an ability to interact successfully with legal practitioners involved in the same case, (c) an ability to make decisions and (d) an ability to explain their decision-making in writing. Applicants without direct judicial experience could offer equivalent evidence of their abilities in this regard based on their own career background to date. The practice of deputising County Court judges into the High Court should be seen as a potentially important opportunity to allow County Court judges to try out the role and afford them the chance to demonstrate their potential.

We welcome that it is anticipated that NIJAC will be asked to make use of its statutory power to recruit temporary High Court judges on a fixed-term basis, especially as this would seem to be a fairer way of ensuring equality of opportunity to all possible applicants for such a role.\textsuperscript{90} Consideration should be given to mirroring some of the proactive steps being taken in England and Wales to make potential applicants more aware of what the work of a High Court judge is like.

8 Compendium of recommendations

For ease of reference the recommendations set out at the end of each Chapter of this report are reproduced here.

Chapter 3 – Pay and pensions

We do not see the need for NIJAC to make any changes to the information it supplies to potential applicants for High Court posts about what their pay and pension arrangements will be, since the information already provided is clear and extensive.

\textsuperscript{89} In civil law countries, of course, such promotion is normal because they prefer to have a ‘career judiciary’.

\textsuperscript{90} See section 7(3) of the Judicature (NI) Act 1978, as amended by section 5(7) of the Northern Ireland Act 2009, set out above at n. 81.
We do however caution against the risk of the development of any assumptions, especially within NJAC and its Selection Committees, that the highest earning applicants are likely to make the most competent High Court judges, since the skill-sets required for successful High Court work may be quite different from those required for the charging of high legal fees. NJAC may want to continue to lobby the UK government (since judicial pay is a reserved matter) for further increases to be made to judicial pay to reflect the importance and difficulty of the work involved.

Chapter 4 – The nature of the job

While the role of High Court judge remains attractive to some as a challenge and a way of contributing public service, changes in working methods in practice and an increase in workload have reduced its appeal when it is viewed as a job. There is some scope in terms of changing and improving the working conditions of the High Court which could make the role more attractive. As highlighted below, flexibility in working conditions, along with the possibility of part-time working, especially towards the end of a career in practice, may make the post more attractive to some good candidates. The possibility of appointing judges to particular specialities might be considered. Provision of increased support in the form of judicial research assistants, as well as enhanced administrative support, would relieve workload pressure considerably.

Chapter 5 – The recruitment process

More could be done by NJAC to ensure that competitions for High Court appointments are attractive to a wider range of applicants. Advertisements should be more transparent about the possibilities (or not) of part-time working and flexi-working. NJAC’s collection of Judicial Profiles should contain at least one from a serving or recently retired High Court judge. NJAC should think again about the fairness of telling potential applicants that they can contact serving High Court judges (other than the named Point of Contact) to discuss their interest in applying for appointment.

The list of competencies looked for in applicants for High Court posts should be expanded to include ‘judging skills’, defined more widely than intellectual ability as demonstrated in opinions or judgments. The treatment of solicitors by High Court judges should be changed so that solicitors no longer feel that they are less important or capable than barristers. The word limit for statements on the application form about the applicant’s abilities, qualities and skills should be increased from 500 to 750 words. NJAC should take steps to provide access to pre-application training to potential applicants for High Court appointments, following the practice in England and Wales. Greater clarity could be provided as to how the requisite understanding of human nature and society is tested during the interview process or anywhere else in the selection process and as to the qualities expected from the written work which applicants are asked to submit. The scoring system used during the selection process should disaggregate the marks available for intellectual capacity, knowledge and expertise. Consideration should be given to the introduction of psychometric testing for applicants for High Court appointments.

NJAC should continue to refuse to engage in consultation with anyone other than named referees concerning an applicant’s qualities. Selection Committees should not
attribute undue weight to a reference just because it emanates from a senior judge and should seek to eliminate as much as possible the influence of any personal knowledge which members of the Committee might possess about particular applicants. NIJAC should continue to stress – including to applicants themselves – that it is very important that all aspects of the selection process should be kept confidential. It should also do more to convey to applicants in advance that failure in a High Court competition is no disgrace and that unsuccessful applicants will be given detailed feedback on why their performance in the selection process was scored as it was.

Chapter 6 – Traditions and assumptions

More should be done to ensure that Selection Committees do not too readily assume that the best applicant for a High Court appointment is likely to come from the pool of senior counsel applicants. The members of the Selection Committee should be made aware of the fact that many very competent lawyers perform other very valuable roles in the legal system and may very well be extremely expert not just in the law but in administering systems, managing people and communicating messages. NIJAC should also consider asking the Lord Chancellor to relax the convention whereby former judges will not be permitted to return to private practice. Further opportunities to permit High Court judges to work on a part-time basis or to take advantage of flexitime should be explored, to ensure that in that respect High Court judges are no worse off than they would be if working at a lower level of the judiciary.

Chapter 7 – Judging as a career

More should be done by NIJAC to ensure that existing judicial experience (and perhaps judicial potential) is given due weight in competitions for High Court appointments. Such experience could perhaps be disaggregated into (a) an ability to manage a number of cases that need to be processed more or less at the same time, (b) an ability to manage particular cases effectively and efficiently, including an ability to interact successfully with legal practitioners involved in the same case, (c) an ability to make decisions and (d) an ability to explain their decision-making in writing. Applicants without direct judicial experience could offer equivalent evidence of their abilities in this regard based on their own career background to date. The practice of deputising County Court judges into the High Court should be seen as a potentially important opportunity to allow County Court judges to try out the role and afford them the chance to demonstrate their potential.

We welcome that it is anticipated that NIJAC will be asked to make use of its statutory power to recruit temporary High Court judges on a fixed-term basis, especially as this would seem to be a fairer way of ensuring equality of opportunity to all possible applicants for such a role. Consideration should be given to mirroring some of the proactive steps being taken in England and Wales to make potential applicants more aware of what the work of a High Court judge is like.