necessarily trump. Moreover, if taken to its logical conclusion, the dissenters' approach would produce results that plainly contradict existing international law. If it were true that peremptory norms disapplied *all* conflicting ordinary rules, then States would no longer be entitled to plead immunity from execution of judgments based on torture claims. National courts could disregard the immunity of acting foreign Heads of State or Government, or of ambassadors alleged to have committed torture. International practice shows no signs of accepting these results.

Unsatisfactory or not, the pragmatic approach seems generally to be applied by domestic courts. Thus the Court concluded that the plea of immunity was not automatically excluded in proceedings involving breaches of peremptory norms. The question remained whether international practice warranted such an exclusion. In this regard, the majority was on safer grounds in concluding that it did not. Even when focusing on recent jurisprudence, the majority of decisions still seem to uphold immunity in respect of torture claims. The crucial question under present international law is not whether States are *obliged* to withhold immunity, but rather whether they have a *right* to exclude it.

The ECHR's decision in *Al-Adsani* can thus be defended in law. Nevertheless, a feeling of disappointment remains. The decision exposes the sad state of an ambitious concept which the international community, 30 years after formally endorsing it in Article 53 of the Vienna Convention, is still not prepared to take seriously. The problem with *Al-Adsani* is not that it is wrong but that it is probably right. State enemies of mankind are still well protected under present day international law, and the concept of *ius cogens* changes precious little about that.

CHRISTIAN J. TAMS

WILFUL MISCONDUCT—THE HOUSE OF LORDS' DECISION IN *PORTER* V. *MAGILL*

THE House of Lords has now ruled in favour of the Local Government Finance auditor in the well-known "homes for votes" saga involving Dame Shirley Porter and Mr. Weeks, leader and deputy leader of the Conservative Party of Westminster City Council: *Porter* v. *Magill* [2001] UKHL 67, [2002] 2 W.L.R. 37. It will be remembered that the auditor found Dame Shirley and Mr. Weeks jointly and severally by their wilful misconduct to have caused the Council to lose approximately £31 million, for which

https://doi.org/10.1017/S0008197302241604 Published online by Cambridge University Press

they were liable under the Local Government Finance Act 1982, s. 20. His decision was upheld by the Divisional Court but reversed by the Court of Appeal (Kennedy and Schiemann L.JJ., Robert Walker L.J. dissenting): [2000] 2 W.L.R. 1420. Two sets of issues arose for decision by the House of Lords: procedural issues relating to the conduct of the auditor's enquiry (on which the leading speech was delivered by Lord Hope) and substantive issues relating to the findings of the auditor and the lower courts (dealt with by Lord Bingham). Three of these issues are of particular interest.

On the relationship between the existing law on procedural fairness and the requirements of Article 6(1) ECHR, Lord Hope held first that the procedure laid down by the 1982 Act did inevitably require the auditor to act not only as an investigator, but also as prosecutor and judge (para. [92]). However, in line with the House of Lords' decision in *Lloyd* v. *McMahon* [1987] A.C. 625, he held that this problem was recognised and dealt with by section 20(3) of the Act, which provides that any person aggrieved by the decision can appeal against it to a court, which may then "confirm, vary or quash the decision and give any certificate which the auditor could have given". This is in line with the decisions of the European Court of Human Rights in *Kingsley* v. *UK*, *The Times*, 9 January 2001, Application No. 35605/97, and *Bryan* v. *UK* (1995) 21 E.H.R.R. 342, 360–361, in which it was held that even if an adjudicatory body determining disputes over "civil rights and obligations" does not itself comply with Article 6(1), appeal from that body to a court of "full jurisdiction" prevents any breach of the Article. Dame Shirley and Mr. Weeks' Article 6(1) Convention rights were thus, his Lordship held, fully protected by the proceedings in the Divisional Court, having regard to the powers which that court was entitled to exercise (paras. [93]–[94]). Nevertheless, nothing in *Porter* v. *Magill* extends this principle to cases where only judicial review is available in the second court, rather than full jurisdiction. It should also be noted that even where the principle does apply, the appellant only receives one fair hearing, when he or she was actually entitled to two: one before the initial decision-making body and a *second* supplied by the court of full jurisdiction. As Wade and Forsyth point out, this is not just a mathematical technicality; the second hearing may in fact be more effective when it follows a first fair hearing than when it does not (Wade & Forsyth, *Administrative Law*, 8th ed., pp. 520–523).

On the closely connected impartiality issue it was argued by counsel for Dame Shirley and Mr. Weeks that the auditor's decision should be quashed for apparent bias because he had announced his provisional findings in a highly public press

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statement before the audit hearing. In rejecting this argument (while accepting that the press conference was "an error of judgment" and "an exercise in self-promotion in which he should not have indulged"), Lord Hope completed the clarification of the correct test for apparent bias, approving the Court of Appeal's decision in *In re Medicaments and related Classes of Goods (No. 2)* [2001] 1 W.L.R. 700. Significantly, however, his Lordship finally deleted the words "real danger" from the test, concluding that they no longer served a useful purpose and that the test would thus be more in line with that used in Strasbourg. So the question now is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" (para. [103]).

It will be remembered that the political interest of the case lay in the fact that Dame Shirley and Mr. Weeks were found to have formulated a policy of selling off Council properties in the belief that home owners were more likely than Council tenants to vote Conservative. Having been advised that targeting such sales at marginal wards would be unlawful, they revised the policy to include sales across the city while maintaining the target sales in marginal wards.

It is important on this third point to separate two subtly different issues: first, whether the decision to increase the designated number of sales taken by the Housing Committee in July 1987 was lawful, and second, whether the loss suffered by Westminster City Council was caused by Dame Shirley and Mr. Weeks.

On the first issue, Lord Bingham began by reaffirming the established principle that statutory power is conferred upon trust; it may be exercised for the public purpose for which the powers were conferred and not otherwise. He then held that both the decision to increase the number of designated sales and the selection of the specific properties for sale were influenced by an irrelevant consideration, the electoral advantage of the majority party (paras. [19]–[25], approving the findings of the auditor and the Divisional Court and Robert Walker L.J.'s dissent in the Court of Appeal).

The causation issue arose because the Court of Appeal had held that any wilful misconduct alleged could in any case only be found in Dame Shirley and Mr. Weeks' decision to put the policy to the Housing Committee. Robert Walker L.J. and the House of Lords rejected this argument on the basis that once the policy had been adopted by the majority party, it was bound to be approved by the Committee.

It is submitted that while Kennedy L.J. and Lord Bingham kept these two issues separate, the better approach is that of Schiemann

https://doi.org/10.1017/S0008197302241604 Published online by Cambridge University Press

and Robert Walker L.JJ. who dealt with them together. The causation point only arose because of the alleged wilful misconduct by specific individuals, but it is arguable that even if the challenge had been directly to the legality of the policy itself, causation would still be relevant. As Schiemann L.J. noted, if a councillor proposes something for an unlawful reason but the committee rejects this reason and takes the same decision for another reason, the decision will be lawful (p. 1452). The point here is that this could not happen because, as Lord Bingham pointed out, the unlawful purpose of the policy was never revealed for rejection by the Committee. Such practicalities and political realities are relevant both to a determination of personal allegations of wilful misconduct and to the substantive illegality of the decision, where the decision may have been motivated by more than one factor.

REBECCA WILLIAMS

NEGLIGENCE: CANADA REMAKES THE *ANNS* TEST

MARY Cooper was one of thousands of investors who advanced funds to Eron Mortgage Corporation, a licensed British Columbia mortgage broker specialising in large syndicated loans. When Eron went out of business it owed the investors over $180 million more than it was able to pay. Unable to recover from Eron, the investors turned their attention to Robert Hobart, the statutory official in charge of regulating mortgage brokers. The investors alleged that Eron had used their money for unauthorised purposes such as funding interest payments on non-performing mortgages. They further alleged that Hobart had been aware of these problems, all serious violations of statute, but that he had delayed in suspending Eron's licence and had failed to notify investors that he was investigating Eron. Cooper therefore sought to bring a class action on behalf of the investors against Hobart and the provincial government.

To approve the class action, the court was required to determine whether it was based on a valid cause of action. The cause of action pleaded by Cooper was negligence. Accordingly, the court was required to determine whether Hobart owed Cooper a duty of care. This issue was ultimately appealed to the Supreme Court of Canada: *Cooper* v. *Hobart* (2001) 206 D.L.R. (4th) 193 (S.C.C.). To spare readers who have spotted the similarity of these facts to those in *Yuen Kun Yeu* v. *A-G of Hong Kong* [1988] A.C. 175 further suspense, the court reached the same conclusion as the Privy

https://doi.org/10.1017/S0008197302241604 Published online by Cambridge University Press