

Response by The Sheriffs` Association to the Forfeiture Provisions in the Judicial Pensions Scheme 2015

- (1) Regulation 153 of the Judicial Pensions Scheme 2015 provides for forfeiture of a judge`s pension if they owe a relevant monetary obligation or have caused a relevant monetary loss. Regulation 154 provides for set off of a relevant monetary obligation against a judge`s entitlement to benefits under the pension scheme.
- (2) Forfeiture or set off can only occur when both the appropriate Minister and the relevant Head of Jurisdiction agree that it is appropriate and about the extent to which forfeiture or set off should apply.

The Ministry of Justice invites comments on

- A The interaction between judicial immunity and forfeiture and or set off of pensions
- B Forfeiture and set off of pensions and judicial independence
- C Any other matters of relevance to forfeiture and set off of judicial pensions.

[1] A relevant monetary obligation is one which is incurred to the Crown by the judge after he or she becomes an active member of the scheme and arises out of the judge`s criminal, fraudulent or negligent act or omission.

{2} A relevant monetary loss is one which is caused to the pension scheme and arises out of the judge`s criminal, fraudulent or negligent act or omission.

{3} Judges enjoy judicial immunity for anything done whilst acting as a judge, doing a judicial act, acting judicially or in the execution of the office of judge.

{4} Independence of the Judiciary refers to the necessary individual and collective or institutional independence required for impartial decisions and decision making.

Question A

{5} Since a judge is immune from suit so long as he is acting in good faith in his judicial role it is difficult to see how the set off or forfeiture provisions could apply. Negligence and therefore forfeiture cannot arise in relation to the performance of judicial functions.

{6} However the law is dynamic and fluid; the immunity of counsel, regarded as immutable at one stage now no longer holds (Arthur JS Hall v Simons [2000] UKHL38; Wright v Paton Farrell [2006] CSIH7; there can be no certainty that the current construction of judicial immunity would continue to apply. Even in the case of Sirros v Moore [1975]QB 118 which confirmed judicial immunity there was a dissent suggesting that judicial immunity might not be all encompassing.

{7} The Sheriff`s Association is of the view that the Regulations in their entirety should not be applied. Any criminal or fraudulent conduct on the part of a judge should, and could, be dealt with in the normal way. Why should a judge have his conduct scrutinised by a Head of Department who

would decide whether this was one of the “most serious of cases” to justify removal of all or part of a judicial pension?

{8} What is meant by “a duty of care” owed by the judge to the Ministry of Justice?

{9} Why can this type of case not be dealt with in the normal way with the MOJ pursuing their redress in the courts like normal employers? The fact that these Regulations apply to other classes of employees or office holders is not a justification to apply them to the judiciary. We refer to the Council of Europe Committee of Ministers Recommendation (2010) Number 12 which deals with Article 6 Rights and Judicial Independence. In the section dealing with “A Judge’s Liability and Disciplinary Proceedings” paragraph 7 provides: “Only the State may seek to establish the civil liability of a judge through court action in the event that it has to award compensation”.

{10} The examples given in the discussion paper of overstatement of sitting days or overstatement of expenses hardly justifies the description of “the most serious of cases.” These are the only examples given. They do not justify the measures proposed.

{11} In the limited and probably unprecedented set of circumstances where recovery may arise the Association is firmly of the view that the imposition of forfeiture provisions for negligence is disproportionate and unnecessary. There can be no public interest in maintaining what are otherwise undesirable provisions on the basis of such an unusual and unlikely set of circumstances.

Question B

{12} According to The Ministry of Justice forfeiture would only be considered “in the most serious of cases.” and where negligence has been the cause of the monetary loss to the Crown “only where a duty of care owed by the judge to the Ministry of Justice had been breached”

{13} The Sheriffs` Association is opposed to this proposal. It is not in the public interest that judges should pursue their judicial careers under threat that, in some unforeseen and unanticipated circumstance, a successful claim might deprive them of their pension.

{14} Negligence can be a nebulous concept and defining when a “duty of care” arises can be a difficult task. The Association is of the view that these proposals are a threat to judicial independence. They are flawed even without taking judicial independence into account.

Question C

{15} The Association has no other comment.