When is a judge not a judge?

By *Jonathan Barnes*

In *Coppard v HM Customs &* Excise [2003] QB 1428, [2003] 3 All ER 351 the Court of Appeal has, for the second time in under a year, had to consider a challenge to the judgment of a circuit judge sitting in the Queen's Bench Division of the High Court on the basis the circuit judge in question lacked jurisdiction or authority to sit in the Queen's Bench Division. The previous case was *Fawdry & Co (a firm) v Murfitt* [2002] 3 WLR 1354, although the present case of *Coppard* now takes the debate forward.

Mr Coppard brought a High Court, Queen's Bench Division, contract claim against the Commissioners of Customs and Excise. He lost the case on all substantive points. However, he subsequently discovered that the circuit judge who had heard the action had not been authorised (or "ticketed") by the Lord Chancellor, exercising a statutory power under the Supreme Court Act 1981, to sit as a justice of the High Court. Mr Coppard duly sought to appeal, arguing the judgment was a nullity. The Court of Appeal granted him permission to appeal, although noted that the judgment itself was "legally impeccable". Permission for the appeal was granted solely because of the question of general importance that it raised.

That question was what status, if any, the "judgment" carried. The circuit judge had been ticketed to conduct business in the Technology and Construction Court ("TCC"), a limb of the High Court, but that was the limit of his High Court authority. For him to be legally authorised to sit elsewhere in the High Court, such as in Mr Coppard's case, required an additional authorisation by the Lord Chancellor that, it was accepted, had not been given. So, could the judgment be rescued? If yes, how could such a rescue be compatible with Article 6 of the European Convention on Human Rights ("ECHR"), which entitles every citizen in the determination of his civil rights to a hearing by a tribunal established by law? Article 6 in particular was thrown into stark relief since all parties accepted (the Lord Chancellor intervening) that the circuit judge had indeed "…sat and adjudicated in Mr Coppard's case without legal authority".

The Court of Appeal found that the circuit judge's common law saviour was the ancient concept of a judge in fact (formerly "*de facto*"). By this doctrine, an official or judicial act performed by a person not legally entitled to the capacity in which he has acted will nevertheless be valid if the person concerned was "reputed" to hold the office in which he purported to perform his act. The circuit judge in question had been told when he took up his appointment by the High Court judge in charge of the lists that when he had spare capacity in his TCC list he would be expected to volunteer to assist elsewhere in the High Court, either in the Queen's Bench or Chancery divisions. He therefore thought that he did have authority to sit in those divisions by virtue of his appointment as a TCC judge and that no further authorisation was required. The Court of Appeal found accordingly that the circuit judge neither knew nor ought to have known, in the sense that he was ignoring the obvious or failing to make obvious enquiries, that he was not authorised generally to sit as a judge of the High Court. Therefore, he was not a "usurper", nor lacking competence or qualification to deliver his judgment, and the *de facto* doctrine applied to protect the flaw in his appointment.

So far so good, but how can this be reconciled with Article 6? In particular, since the *de facto* doctrine serves to repair what would otherwise be a legally flawed appointment, can the *de facto* doctrine, in the language of Article 6, fairly be described as the law by which the tribunal in this case was established? The Court of Appeal's answer to this point came in two stages. First, it pointed out that Article 6 does not in its language require a tribunal that has "previously" been established by law, although the Court also emphasised that the composition and authority of a court must not be arbitrary. Secondly, the Court reminded itself that since the Convention is not a domestic statute the Court should be concerned less with a close analysis of the Convention's language than with the principles that animate it. This, coupled with a recognition that the legal system of every state that has adopted the Convention will contain ways of dealing with errors and omissions in the appointment of persons to judicial office, and a finding that a mistake had occurred that was one of form rather than substance, led the Court to conclude that the Convention did not require the disqualification of a judge purely because his authority was not formally established before he sat.

Depending upon the stamina of the appellant, Mr Coppard, this may or may not be the last word. The Court of Appeal decision can be recognised as a pragmatic and practical answer if it is correct to view the circuit judge's lack of authority as no more than an administrative error. However, if it is thought that his want of legal authority carried greater significance than that (and the Court of Appeal itself declined to treat it as a procedural error capable of remedy under the Civil Procedure Rules) then it must remain open to question whether the *de facto* doctrine matches up to the sort of prescriptive scheme to establish judicial authority and office that the draftsman of the Convention had in mind.

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