HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Gillies (AP) (Appellant) *v.* Secretary of State for Work and Pensions (Respondent) (Scotland)

[2006] UKHL 2

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Hope of Craighead, Lord Rodger of Earlsferry and Baroness Hale of Richmond. I agree with them and for the reasons they give I would dismiss this appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

2. In this case it is alleged that there was a reasonable apprehension that the medical member of a disability appeal tribunal was biased. The First Division of the Court of Session (the Lord President (Cullen) and Lords Kirkwood and Weir) on 28 November 2003 allowed an appeal from a decision of a tribunal of the Social Security Commissioners (W M Walker QC, D J May QC and J N Wright QC) dated 15 June 2001 in which that argument was upheld: 2004 SLT 14. Holding that the facts were not such as to raise such an apprehension, the First Division restored the decision of the disability appeal tribunal of 15 July 1999 refusing the appellant's appeal against the decision of an adjudication officer that he was not entitled to a disability living allowance.

3. As the Lord President noted at p 18, paras 21 and 22, the common law test by which issues of this kind are determined has been

simplified since the case was before the tribunal of the Social Security Commissioners. The possibility of a conflict between the English test as set out in *R v Gough* [1993] AC 646, 670 by Lord Goff of Chieveley and the Scottish test as set out in *Bradford v McLeod*, 1986 SLT 244,247 by Lord Justice-Clerk Ross and in *Hoekstra v H M Advocate (No 2)*, 2000 JC 391, 399 by Lord Justice General Rodger has been removed. The test which this House approved in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, is set out at p 494, para 103, where I said that the question 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. The issue for determination in this case therefore is whether, on the facts of the case, this test has been satisfied.

Is there a question of law?

4. I am conscious that a consequence of putting the issue in this way is to invite the question whether this is a question of law or a question of fact. Section 14(1) of the Social Security Act 1998 provides that an appeal lies to a commissioner from any decision of an appeal tribunal under sections 12 and 13 of the Act on the ground that the decision of the tribunal was erroneous in point of law. That was the route by which this case reached the tribunal of commissioners, as a direction was given under section 16(7) that it be heard not by a commissioner sitting alone but by a tribunal of three commissioners on the ground that the appeal involved a question of law of special difficulty. Section 15(1), read with section 15(4)(b) of the Act, provides that an appeal shall lie to the Court of Session from any decision of a commissioner. At that stage, and at the stage of any further appeal to this House as well, the question is the same as that which was before the commissioner. It is whether the decision of the disability appeal tribunal was erroneous in point of law.

5. The Lord President said that the court was satisfied that the appeal raised a question of law for the court. As he put it, at p 20, para 34:

> "We are not concerned in this appeal with a question such as whether the tribunal of commissioners drew the correct inference of fact from the factual circumstances which were before them. We are concerned with whether there was a failure to provide the guarantee of impartiality on the part of the members of the disability appeal tribunal which the respondent and the public were entitled to

> expect. For that purpose we require to apply the law to the factual circumstances. We have to take the view of a reasonable and well-informed observer who, in the words of Kirby J in *Johnson v Johnson* (2000) 200 CLR 488, is 'neither complacent nor unduly sensitive or suspicious.' The argument presented by the appellant in this case goes to the root of the decision of the tribunal of commissioners by asserting that, when that standard was applied, there was no basis for any suspicion of bias."

Mr Mitchell QC for the appellant said that it was for the respondent, who had brought the case to the Court of Session on the ground that there was an error of law by the tribunal of commissioners, to identify the error of law which had occurred. But he did not suggest that the Court of Session did not have jurisdiction to examine the question, and I think that he was right not to do so.

6. The question whether the fair-minded and informed observer would conclude that there was a real possibility that the tribunal was biased cannot, of course, be answered without looking at the facts. The error of which the respondent complains is not that the tribunal of commissioners asked themselves the wrong question, but that they reached the wrong answer. But the question whether a tribunal was properly constituted or was acting in breach of the principles of natural justice is essentially a question of law. It requires a correct application of the legal test to the decided facts. As Mr Campbell QC for the respondent said, there can be only one correct answer to the question whether the tribunal was properly constituted. So to answer the question incorrectly is an error of law. If that argument is accepted, it must follow that there was an error of law which was open to correction by the appellate court.

7. This is how the matter is dealt with in practice. In *Lawal v Northern Spirit Ltd* [2003] ICR 856 objection was taken to the appearance in an appeal from an employment tribunal as counsel for the employers of a part-time recorder who in that capacity had sat as a part-time judge in the Employment Appeal Tribunal with one or both of the two lay members of the appeal tribunal panel. The question was raised whether there was a real possibility of unconscious bias on the part of the law member or lay members. This was treated throughout as a question of law for decision by the Employment Appeal Tribunal which was open to review in the Court of Appeal and in the House of Lords by the statutory appeal process. So I think that it is safe to proceed on the

basis that a question of law has been raised in this case which is open for determination by your Lordships.

The question of bias

8. The factual background to this question can be stated quite simply. The medical member of the tribunal was Dr J F Armstrong. She was first appointed on 1 October 1993 to the panel of medical practitioners constituted under section 42(3) of the Social Security Administration Act 1992 from which medical members of disability appeal tribunals were drawn under section 43(2) of that Act. Following the expiry of her first appointment she was re-appointed to the panel for one more year with effect from 1 September 1998, in anticipation of the restructuring and reorganisation of the appeal tribunals which was provided for by sections 4 to 7 of the Social Security Act 1998. It was by virtue of that appointment that she was sitting as a member of the tribunal which heard the appellant's appeal on 15 July 1999.

9. For a number of years Dr Armstrong had been providing reports for the Benefits Agency as an examining medical practitioner ("EMP"). Between 1990 and 1998 she was engaged for this purpose by the Benefits Agency Medical Services. In 1998 the Benefits Agency contracted out the provision of EMP reports in respect of a number of types of benefit to the SEMA Group, which subcontracted part of that work to another company, Nestor Healthcare Group plc and one of its subsidiaries (known collectively as "Nestor"). SEMA employed a number of doctors to act for them full time on work for the Department of Social Security. It also contracted with Nestor to engage a separate pool of doctors to act for them on a part-time, sessional fee-paid basis. It was in that part-time, fee-paid capacity that Dr Armstrong, who had previously worked directly for the Benefits Agency Medical Services, was invited in 1998 to apply for a new contract with Nestor.

10. During the period from 1990 to 2000 Dr Armstrong provided an average of four EMP reports each month in disability living allowance cases. She carried out her examination of the claimants for the purposes of these reports in the claimants' own homes. Between 1995 and 2000 she also provided EMP reports in incapacity benefit cases at an average of four sessions per week, and thereafter at an average of seven sessions per week. Some of these reports involved an "all work" test which was carried out at a Benefits Agency medical centre. Medical members who prepared reports in these cases were advised that, to avoid any risk of

embarrassment, they should not to sit on a tribunal hearing "all work" test appeals. At the time of the hearing of the appellant's appeal, Dr Armstrong was spending the majority of her working week either examining claimants and preparing reports on them for Nestor on behalf of the Benefits Agency, or sitting as a tribunal member hearing appeals relating to disability living allowance and other benefits other than those in "all work" test cases. She was sitting as a tribunal member at an average of one session per week. Medical members of appeal tribunals did not require to take a judicial oath or give any other kind of formal undertaking as to the way in which they would carry out their duties as a member of the tribunal.

11. The tribunal which heard the appellant's appeal was constituted in the usual way. There was a legally qualified chairman, and there were two panel members, one of whom was Dr Armstrong. Its decision to refuse the appeal was unanimous. In its decision notice it was stated that the tribunal found the appellant to be a difficult witness, that there was a wealth of medical evidence to say that his condition was better than he claimed, that he was supported only by a report from a consultant cardiologist who did not examine him but accepted his claim that he was unable to walk and that it accepted the view of the EMP and the appellant's general practitioner who saw him regularly. These points were made again in the formal statement of reasons for its decision, where the tribunal said that it found the appellant's evidence unreliable and that it had afforded greater weight to the opinions of the EMP and the general practitioner.

12. The tribunal of commissioners said in para 77 of their decision that, on the basis of the information available to them, they had concluded that the objective bystander would have a reasonable apprehension of bias on the part of Dr Armstrong, even though they had no reason to think that she was consciously biased. They accepted that the arrangements under which doctors such as Dr Armstrong were engaged to provide EMP reports did ensure the provision of independent expert evidence which could be relied upon as such by the Benefits Agency. But they said that it was different matter for one of those same doctors to be involved in assessing such reports prepared by other doctors and then adjudicating on conflicts of evidence between such reports and other evidence. In their view it would be reasonable for an informed member of the public to think that justice might not be done in such circumstances.

13. Elaborating on this view, the tribunal of commissioners made it clear in para 79 of their decision that they rejected the submission that doctors who were in this position were to be seen as acting on behalf of the Benefits Agency. They were satisfied that, when they were acting as expert advisers to the Agency, the doctors were obliged to work objectively to prescribed standards. They were in a position of professional independence. Their reports were presented to appeal tribunals as independent reports, and they could properly be relied upon as such.

14. But the tribunal of commissioners went on to find that doctors who held current engagements with Nestor were in a markedly different position from NHS doctors generally. In their view the bystander, considering situations where EMP reports were in competition with other evidence, would have a real apprehension or suspicion that doctors who prepared these reports would tend to lean in favour of accepting reports by other doctors in that class. They explained their decision that the test for apparent bias had been satisfied in this way in para 80:

> "We are thinking of situations where an EMP report is placed beside the appellant's oral evidence, or beside a consultant's evidence, both of which situations arose in the present case. There may of course be very good reasons to accept evidence which is objective and focussed on the correct issues in preference to that of interested claimants. There may also quite often be circumstances in which the evidence of other doctors, even consultants, can be seen to be less well focussed on the issues. However, the concern would be that a doctor in Dr A's position, because of the substantial current involvement in the same role as the reporting doctor, may start with an inclination to accept that evidence rather than objectively viewing the competing version. We may not necessarily take the same view ourselves, but if we find that our objective bystander would reasonably have that perception, we must apply the brocard 'Justice must be seen to be done.' We do so find."

15. The Court of Session did not agree. As the Lord President explained at pp 20-21, para 38, it could be assumed that the reasonable and well-informed observer would know that Dr Armstrong and the other EMPs were independent expert advisers when carrying out the work of examining and reporting to the Benefits Agency. Why then, he asked, should they not be regard as independent of each other when it

came to assessing and adjudicating between competing medical opinions when sitting on the tribunal? Having examined the facts, the court concluded that the fact that Dr Armstrong carried out examinations and provided reports for the Benefits Agency as an EMP would not be sufficient to raise an apprehension as to her impartiality as a member of a disability appeal tribunal. The mere fact that the tribunal would require to consider and assess reports by other doctors who acted as EMPs would not raise such an apprehension.

16. Mr Mitchell sought to persuade your Lordships that their Lordships of the First Division were in error and that the correct view of the facts was that which was reached by the tribunal of special commissioners. He built his argument up in this way. Dr Armstrong had been working for the Benefits Agency as an EMP for nine years, albeit as an independent adviser to the Agency. She had been providing reports in that capacity in relation to claims for disability living allowance and invalidity benefit. The issues which she was having to consider in those cases were so similar as to be indistinguishable from the issues which were before the tribunal of which she was a member. She had been doing this as a colleague of an important witness before the tribunal who contradicted the claimant's evidence. Important institutional safeguards were lacking in her case, such as the taking of a judicial oath and evidence that she had been professionally trained in the work of the tribunals. She had also failed to make a proper disclosure when sitting as tribunal member as to the circumstances that might be thought to raise a question as to her impartiality. Taking these factors together, he said, the tribunal commissioners were right to hold that the test for apparent bias was satisfied.

Discussion

17. The critical issue is whether the fair-minded and informed observer would conclude, having considered the facts, that there was a real possibility that Dr Armstrong would not evaluate reports by other doctors who acted as EMPs objectively and impartially against the other evidence. The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed, as Kirby J put it in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53, that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at.

It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant.

18. It is important to stress at the outset that the facts do not support the appellant's primary argument that Dr Armstrong was to be seen as a Benefits Agency doctor or that she was in some other way aligned with the Benefits Agency. The tribunal of commissioners and their Lordships of the First Division were in agreement on this point. Her relationship with the Benefits Agency was as an independent expert adviser. Her advice was sought and given because of the skills that she was able to bring to bear on medical issues in the exercise of her professional judgment. A fair-minded observer who had considered the facts properly would appreciate that professional detachment and the ability to exercise her own independent judgment on medical issues lay at the heart of her relationship with the Agency. He would also appreciate that she was just as capable of exercising those qualities when sitting as the medical member of a disability appeal tribunal. So there is no basis for a finding that there was a reasonable apprehension of bias on the ground that Dr Armstrong had a predisposition to favour the interests of the Benefits Agency. Nor, it must be emphasised, is there any suggestion that she did or said anything in the course of her work which might be thought to cast doubt on her impartiality or her integrity.

19. The question then is whether there were grounds for thinking that Dr Armstrong was likely to be unconsciously biased when she was examining the medical evidence because of a predisposition to prefer the EMP report as against any contrary evidence due simply to her current involvement in providing reports as an EMP. Doctors holding current engagements to provide these reports can be assumed, no doubt, to have a special interest and experience in this kind of work. The group of doctors to which they belong can also be distinguished from NHS doctors generally, as was pointed out by the tribunal of commissioners. But why should these facts be said to lead to the conclusion that there was a real possibility that she was biased in favour of the views expressed by the EMP?

20. The weakness of the argument that this was a real possibility is exposed as soon as the task that Dr Armstrong was performing as an EMP is compared with the task which she was performing on the tribunal. In each of these two roles she was being called upon to

exercise an independent professional judgment, drawing upon her medical knowledge and her experience. The fair-minded observer would understand that there is a crucial difference between approaching the issues which the tribunal had to decide with a predisposition in favour of the views of the EMP, and drawing upon her medical knowledge and experience when testing those views against the other evidence. He would appreciate, looking at the matter objectively, that her knowledge and experience could cut both ways as she would be just as well placed to spot weaknesses in these reports as to spot their strengths. He would have no reason to think, in the absence of any other facts indicating the contrary, that she would not apply her medical knowledge and experience in just the same impartial way when she was sitting as a tribunal member as she would when she was acting as an EMP.

21. In *R (PD) v West Midlands and North West Mental Health Review Tribunal* [2004] EWCA Civ 311 the Court of Appeal held that the medical member of the review tribunal to which the appellant had applied for his discharge from detention under section 3 of the Mental Health Act 1983 who was a consultant psychiatrist was not disqualified from considering the appellant's case because he was employed by the Mersey Care National Health Service Trust. Lord Phillips of Worth Matravers MR, delivering the judgment of the court, said in para 33:

> "We consider that [the reasonable and informed] observer would expect a consultant psychiatrist to apply the same concerns for the welfare of a patient, whether that patient was the consultant's own, or a patient whose liberty depended upon the objective clinical judgment of the consultant in the context of a tribunal hearing."

I would apply the same reasoning to this case. The observer would appreciate that Dr Armstrong's experience of working as an EMP would be likely to be of benefit to her, and through her to the other tribunal members, when she was evaluating the EMP report. The exercise of her independent judgment, after all, was the function that she was expected to perform as the tribunal's medical member. Her experience in the preparation of these reports was an asset which was available, through her, for the other tribunal members to draw upon when they were considering the whole of the evidence.

22. One of the strengths of the tribunal system as it has been developed in this country is the breadth of relevant experience that can be built into it by the use of lay members to sit with members who are legally qualified. In *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, para 15 Hale LJ (as she then was) paid tribute to the fact that specialist tribunals, chaired as they usually are by a lawyer, have an appropriate balance of experience and expertise amongst their members. The panel system that was provided for by section 42 of the Social Security Administration Act 1992 for the appointment of persons to act as members of disability appeal tribunals, and is now to be found in section 6 of the Social Security Act 1998 for use under the new unified system, gives effect to that principle. There were to be two panels for each area, one composed of medical practitioners and the other composed of persons experienced in dealing with the needs of disabled persons in a professional or voluntary capacity or because they themselves are disabled. It would greatly undermine the practical utility of this system if panel members were to be disabled from sitting on cases because their experience was likely to give them an advantage when examining the evidence over those who did not have the same background.

23. The fact is that the bringing of experience to bear when examining evidence and reaching a decision upon it has nothing whatever to do with bias. The purpose of disqualification on the ground of apparent bias is to preserve the administration of justice from anything that might detract from the basic rules of fairness. One guiding principle is to be found in the concept of independence. No one can be a judge in his own cause. That principle is, of course, applied much more widely today than a literal interpretation of these words might suggest. It is not confined to cases where the judge is a party to the proceedings. It applies also to cases where he has even the slightest personal or pecuniary interest in their outcome. There is no suggestion that that principle was breached in this case. The other principle is to be found in the concept of impartiality - that justice must not only be done: it must be seen to be done. This too has at its heart the need to maintain public confidence in the integrity of the administration of justice. Impartiality consists in the absence of a predisposition to favour the interests of either side in the dispute. Therein lies the integrity of the adjudication system. But its integrity is not compromised by the use of specialist knowledge or experience when the judge or tribunal member is examining the evidence.

24. Support for this approach is found in *Nwabueze v General Medical Council* [2000] 1 WLR 1760 where it was contended that there

was a real possibility that a lay member of the Professional Conduct Committee was biased because she lived in or close to the area from which a medical centre where the doctor had worked when he was a trainee drew its patients and her undisclosed period of office as chairman of a statutory body concerned with nursing and midwifery in Wales. It was also suggested that she showed bias in the manner of her questioning of the doctor when questions were being put to him at the end of his evidence by the committee. These allegations were rejected. Reviewing the evidence about her professional background, the Board said at p 1771:

> "From this summary it can be seen that Mrs Walker was and is eminently qualified to sit on the Professional Conduct Committee as one of its lay members. She brought to that membership an extensive knowledge of the health service in Wales, as a result of having worked there for many years as a nurse and midwife and her period of service as director of the South East Wales Institute. It is in the public interest that those who serve as lay members on disciplinary bodies of this kind should be well-informed and have experience of working in the area within which cases are likely to arise on which they may be called upon to adjudicate. It could not possibly be suggested that there was anything in Mrs Walker's general background that would be likely to give rise to the danger or possibility of bias on her part when she was considering a case from Wales."

25. In *Meerabux v Attorney-General of Belize* [2005] UKPC 12; [2005] 2 WLR 1307 one of the questions was whether the chairman of an advisory council to which the complaint against the judge had been referred by the Governor was disqualified on the ground of apparent bias because of his membership of the Belize Bar Association. It was held that mere membership of the Bar Association did not disqualify him on this ground. But the Board also said at p 1318, para 25, that the facts which the observer would take into account included the nature and composition of the tribunal and the qualifications that a person must possess to be appointed chairman [to its membership]. So too in this case the fair-minded observer would take into account the nature and composition of the tribunal and the qualifications that Dr Armstrong had to have to be appointed as its medical member. This is the context in which her involvement as an EMP had to be viewed. It does not lead to the conclusion that she was likely to be biased.

26. I do not overlook the fact that concern has been expressed about the composition of medical health tribunals constituted under the Mental Health (Care and Treatment) (Scotland) Act 2003 on the ground that community psychiatric nurses who have been appointed to the panel of general members are drawn from the same profession as the psychiatrists appointed to the panel of medical members: Chris Turner, *Seen to be Fair?* Journal of the Law Society of Scotland, vol 50, no 11, November 2005, p 24. But whatever force there may be in this criticism, as to which I express no opinion, it cannot be based on the allegation that there is a real possibility that those chosen for membership of these panels are biased simply because they are community psychiatric nurses or psychiatrists. They are chosen for membership of these panels because they have the experience that is thought to be relevant to the issues that these tribunals are called upon to decide.

27. In my opinion the idea that Dr Armstrong was likely to be predisposed in favour of reports by EMP practitioners simply because she had a special interest in and experience of the preparation of these reports has no objective basis in the evidence. The test for her disqualification on the ground of apparent bias has not been made out.

Conclusion

28. For these reasons, and for those given by my noble and learned friend Lord Rodger of Earlsferry, I would affirm the interlocutor of the First Division of the Court of Session and dismiss the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

29. I have had the advantage of considering the speech of my noble and learned friend, Lord Hope of Craighead, in draft. I agree with it and, for the reasons he gives, I too would dismiss the appeal. I add only one point.

30. The appellant's objection to Dr Armstrong was that she was serving as a panel member while continuing, as an independent expert adviser, to provide reports for the Benefits Agency under the subcontract arrangements described by Lord Hope. The appellant did not suggest that there would be any objection to Dr Armstrong sitting on a tribunal if she had previously provided reports but was no longer doing so – at least if sufficient time had been allowed to elapse before she sat. In my view the currency of her involvement should not be regarded as a decisive factor.

31. Dr Armstrong was originally appointed to the panel of medical practitioners under section 42(3) of the Social Security Administration Act 1992. Under section 42(4) the other panel was to comprise persons who were experienced in dealing with the needs of disabled persons (a) in a professional or voluntary capacity or (b) because they were themselves disabled. That legislation has been superseded by section 6 of the Social Security Act 1998 but the position remains the same since, in any appeal relating to disability living allowance, the panel must include a person who meets the same criteria as were prescribed by section 42(4): regulations 1 and 36(6) of, and para 5 of Schedule 3 to, the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999 No 991).

32. Clearly, the class of people with experience in dealing with the needs of disabled persons in a professional or voluntary capacity could include people who were no longer actively involved in that kind of work. But people who qualify as members of the panel because they are themselves disabled will be disabled whenever they sit on a tribunal. So, on the appellant's approach, there would be an argument for saying that, because they were themselves disabled, they should be disqualified because they would be likely to be partial to the disabled person. In particular, consciously or subconsciously, they might be more receptive to the disabled person's account of his or her condition. It is important to emphasise, however, that Parliament has not endorsed that line of thinking. On the contrary, it takes the view that disabled people who have been selected to serve as members of a tribunal can act impartially and may bring valuable experience to its work – even though they are not legally qualified and have not taken a judicial oath. That will usually be the position in practice as well as in theory. If, exceptionally, it should turn out that the judgment of a particular tribunal member was so affected by his or her disability that the member could not display the necessary impartiality in reaching decisions, this would be a good ground for objecting to that member.

33. Similarly, the fact that Dr Armstrong was currently providing reports for the Benefits Agency, as an independent expert adviser, would not, of itself, be a reason why the fair-minded and informed observer would conclude that there was a real possibility that the tribunal was biased. The position might have been different if there had been any reason to suppose that the members of the Nestor pool of doctors were a close-knit group sharing an esprit de corps. But there was nothing to suggest that and nothing to suggest that Dr Armstrong was actually predisposed, whether consciously or subconsciously, to accept the reports of her colleagues. In short, there was nothing in Dr Armstrong's outside activities or in the way that she conducted herself to show that she was unable to fulfil the duty of every tribunal member, which is to reach an independent judgment. In these circumstances, the appropriate conclusion is that the tribunal which included Dr Armstrong was properly constituted.

LORD WALKER OF GESTINGTHORPE

My Lords,

34. I have had the great advantage of reading in draft the opinions of my noble and learned friends Lord Hope of Craighead, Lord Rodger of Earlsferry and Baroness Hale of Richmond. I am in full agreement with them and for the reasons which they give I too would dismiss this appeal.

BARONESS HALE OF RICHMOND

35. My noble and learned friends, Lord Hope of Craighead and Lord Rodger of Earlsferry, have already said all that needs to be said in support of dismissing this appeal. I add a few words only because, as a former member of the Council on Tribunals, I take a particular interest in the tribunal system.

36. Tribunals were once regarded with the deepest of suspicion but they are now an essential part of our justice system. They are mostly there to secure justice between citizen and state in a wide variety of contexts, the most numerically important of which is entitlement to the

financial benefits provided by the welfare state. Since the Report of the Donoughmore Committee on Ministers' Powers (Cmd 4060, 1932), it has been recognised that tribunals can have important advantages over courts of law. These are 'cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject': see the Report of the Franks Committee on Administrative Tribunals and Enquiries (Cmnd 218, 1957, para 38). The Report of Sir Andrew Leggatt's Review of Tribunals, *Tribunals for Users, One System, One Service* (2001, paras 1.11 to 1.13) suggests three tests of whether tribunals rather than courts should decide cases. The first is participation: that users should be able to prepare and present their own cases effectively. The third is the need for expertise in the area of law involved: users should not have to explain to the tribunal what the law is. The second is the need for special expertise in the subject matter of the dispute:

> "Where the civil courts require expert opinion on the facts of the case, they generally rely on the evidence produced by the parties – increasingly jointly – or on a court-appointed assessor. Tribunals offer a different opportunity, by permitting decisions to be reached by a panel of people with a range of qualifications and expertise. … users clearly feel that the greater expertise makes for better decisions."

Expertise on the tribunal not only improves decision-making and reduces the need for outside expertise; it also thereby increases the accessibility and user-friendliness of the proceedings.

37. Ever since the Franks Report, the watchwords by which any tribunal system has been judged are its 'openness, fairness and impartiality':

> "Take … impartiality. How can the citizen be satisfied unless he feels that those who decide his case come to their decision with open minds?" (para 24)

Thus,

> " … impartiality [appears to us] to require the freedom of tribunals from the influence, real or apparent, of Departments concerned with the subject-matter of their decisions." (para 42)

This is echoed in the Council on Tribunals' *Framework of Standards for Tribunals* (November 2002, para 1(a)):

> "Tribunals should be free to reach decisions according to law without influence (actual or perceived) from the body or person whose decision is being challenged or appealed, or from anyone else."

38. Impartiality is not the same as independence, although the two are closely linked. Impartiality is the tribunal's approach to deciding the cases before it. Independence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal members but also in the perception of the public. The public are now represented by the 'fair-minded and informed observer'. The approach to be adopted was explained by Lord Phillips of Worth Matravers MR in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, para 85, at pp 726-727, and adopted (with the deletion of the words 'or a real danger') by my noble and learned friend Lord Hope of Craighead in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, para 103, p 494:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility … that the tribunal was biased."

39. The 'fair minded and informed observer' is probably not an insider (ie another member of the same tribunal system). Otherwise she would run the risk of having the insider's blindness to the faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair minded. She is, as Kirby J put it in *Johnson v Johnson* (2000) 200 CLR 488, 'neither complacent nor unduly sensitive or suspicious'.

40. The relevant facts of tribunal life include the great advantage, both to its users and to its decision-making, of being able to call upon the people with the greatest expertise in the subject matter of the claim. Given the wide variety of disabilities which come before the Disability Appeal Tribunals, it would not be practicable to have a specialist in the particular disability involved in the particular case. The greatest expertise in assessing the claimant's condition and applying the statutory criteria to it is likely to be held by those doctors who are experienced in making these assessments at the point of claim. To have such expertise available on the tribunal can only be an advantage to it.

41. Another relevant fact of tribunal life is that the benefits system exists to pay benefits to those who are entitled to them. As counsel put it to us in *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, [2005] 1 WLR 967, the system is there to ensure, so far as it can, that everyone receives what they are entitled to, neither more nor less. The role of the examining medical practitioner (EMP) is to provide an independent assessment of whether the claimant meets the criteria for the benefit in question. She has no more interest in denying the claimant a benefit to which he is entitled than she has in granting him one to which he is not. No doubt, just as some judges are more lenient or more generous than others, some EMPs are kinder to claimants than others, but that stems from the individual's character and personality, not from the nature of the role.

42. The Tribunal of Commissioners rejected the argument that Dr Armstrong was by virtue of her role as EMP a "Benefits Agency" doctor. She had very detailed obligations to work objectively to prescribed standards. Hence they concluded (para 79) that EMPs were "not … simply 'Benefits Agency doctors', but rather independent expert advisers, at that stage". Their reason for holding that the objective bystander would have a reasonable perception of bias (para 80) was "the concern … that a doctor in Dr A's position, because of the substantial current involvement in the same role as the reporting doctor, may start with an inclination to accept that evidence rather than objectively viewing the competing version".

43. But another relevant fact of tribunal life is that professional people are often called upon to adjudicate upon disputes concerning exactly the same sort of decisions that they regularly make in their own professional practice. In disciplinary tribunals they may be called upon to judge whether a fellow practitioner has met the required standards of professional practice and conduct. Doubts are sometimes expressed

about whether professional solidarity gets in the way of impartial adjudication in such cases, but the professional members of such tribunals have not so far been held to be institutionally biased. In any event, this is not a disciplinary situation. The Disability Appeal Tribunal is not holding the EMP to account. This is simply one doctor reviewing at appellate level in the same sort of decision that she is used to making on the ground.

44. The nearest parallel in the tribunal system is in Mental Health Review Tribunals. The medical member of the tribunal is a specialist in mental health, usually a consultant psychiatrist approved under section 12(2) of the Mental Health Act 1983 to make recommendations and reports for the purpose of compulsory admission to hospital. On the tribunal she is called upon to participate in a review of the clinical judgment of another consultant psychiatrist approved under section 12(2) who is in charge of the patient's treatment and further detention in hospital. Consultant psychiatrists are also a comparatively small professional group, who might also be suspected of professional solidarity. Yet it has not been suggested that, for this reason alone, one psychiatrist is likely to be biased in favour of the views of another psychiatrist. The whole system depends upon there being a psychiatrist on the tribunal who is likely to know what the other psychiatrist is talking about and be able to make an informed but dispassionate judgment upon it. The fair minded and informed observer would see no reason why the capacity of an EMP to do the same should be any different.

45. In *R (PD) v West Midlands and North West Mental Health Review Tribunal* [2004] EWCA Civ 311, the medical member of the tribunal was, at the time the case came before the tribunal, employed by the same NHS Trust which ran the hospital (in Liverpool) at which the patient was detained, but at a different hospital (in Southport). But there was nothing to suggest that the Trust had any particular interest in the outcome of the case, that it was in a position to benefit or disadvantage the doctor if it disapproved of the decision, or that he had worked with the staff who were responsible for the patient at the hospital where he was detained. The judge dismissed the application. The Court of Appeal was left wondering why the case had ever been brought. I must have seen something in it at some time, because I had given permission to appeal. But I entirely accept the reasoning of the Court of Appeal and, given that the Tribunal of Commissioners had rejected the 'Benefits Agency doctor' argument, consider that it applies equally strongly to this case. The Agency has no more interest than the Trust in the outcome of any individual case. It is not realistically in a position to influence the

doctor's decisions one way or the other. And there is no more reason in this case to suspect Dr Armstrong of professional solidarity with the views of the EMP in this case than there was of the psychiatrist in that case. It might be different, of course, if she had had prior knowledge of the facts of the case. There is a distinction between knowledge of the particular facts and knowledge of the subject matter: see *R (Al-Hasan) v Secretary of State for the Home Department* [2005] UKHL 13, [2005] 1 WLR 688.

46. It is also a fact of tribunal life that they are presided over by lawyers whose role is not only to conduct the hearing in a fair and user-friendly fashion, to understand the relevant law, and to explain it to their colleagues. It is also to assist those colleagues to address the relevant issues in a reasonable and fair-minded way and then write the reasons for their decision. It is now the responsibility of the President of the Appeals Service to arrange training, not only for tribunal chairs, but also for tribunal members. We have no evidence about the training that may or may not have been given to members of Disability Appeal Tribunals before this case. But if the detailed obligation of EMPs to work objectively to prescribed standards was enough, in the view of the Commissioners, to put the doctors in a position of professional independence at that stage, I find it difficult to understand what there could possibly be about the facts of tribunal life which would lead to a lessening of that professional independence and objectivity at the tribunal stage.

47. For those further reasons, in addition to those given by my noble and learned friends, Lord Hope of Craighead and Lord Rodger of Earlsferry, with which I agree, I too would dismiss this appeal.