UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

The appeal is refused.

The decision of the tribunal given at Glasgow on 10 April 2017 is upheld.

Representation:
For the Appellant: Himself
For the Respondent: Mr. Richard Pugh, Advocate, instructed by Ms K. Kelman, Solicitor.

REASONS FOR DECISION

Background

1. This is the appellant's appeal to the Upper Tribunal against the decision of the First-tier Tribunal (FTT) dated 10 April 2017.

2. The case concerns preliminary issues raised by the appellant that he was denied his right to a fair hearing before the FTT because of bias. At the outset of the hearing, the appellant invited me to recuse myself on the basis of conflict of interest and bias. He claimed infringement of his rights under articles 3 and 6 of the European Convention of Human Rights (ECHR). The appellant argued that he had identified a devolution issue in terms of the Scotland Act 1998 and that the case should therefore be referred to the Inner House of the Court of Session. He sought a reference to the Court of Justice of the European Union (CJEU) on the question of the compatibility of section 3 of the Children (S) Act 1995 with EU law.

3. On 27 November 2015, the appellant made a claim for Personal Independence Payment (PIP) in terms of the Social Security (Personal Independence Payment) Regulations 2013 (the "PIP" Regulations). On 17 June 2016 he attended a PIP consultation with a Health Professional (a nurse). On 6 July 2016, the decision maker awarded the appellant 6 points for the daily living component of PIP and 4 for the mobility component. These scores were insufficient for either component of PIP. The decision was reconsidered but not changed.

4. The appellant appealed the decision to the FTT (Notice of Appeal, pages 2-7) on the grounds that no assessment had been done and that his written explanation of how his Type 1 Diabetes affected him was not considered. Subsequently, on 22 December 2016, he submitted further appeal grounds (pages 75-217) asserting a number of human rights issues he wished considered as preliminary matters before the merits of his PIP appeal were considered. The appellant stated in those further grounds of appeal that he was an unmarried father (page 78); a matter not previously mentioned within the papers.

5. A hearing date was fixed for 23 December 2016. It is noted in the record of proceedings for that date that the FTT convened but the appellant refused to enter the tribunal room. Instead, he went to the waiting room. The tribunal members went to see him there but, by that time, he had left. The appeal was adjourned to allow the Secretary of State an opportunity to respond to the further submissions lodged by the appellant the day before (page 219).

6. Later, on 23 December 2016, the appellant provided a written submission that there were coded locked doors on the hearing rooms at the Glasgow Tribunal Centre and that doors were locked during hearings. He submitted that this meant that the hearing was not public.

7. On 16 January 2017, the appellant made a request for directions that, among other things; (i) the FTT should not comprise the members previously allocated on 23 December 2016; (ii) the Secretary of State for Justice, the Scottish Ministers and the Secretary of State for Scotland be informed of the case and invited to join the appeal; and, (iii) to declare that rooms with coded locked doors cannot be used as tribunal rooms, and to direct that all decisions made after hearings in these rooms be set aside. Directions dated 2 February 2017 ordered (i) an oral hearing on the preliminary issues only; and, (ii) in a room without a coded lock door (pages 222-225).

8. A hearing was fixed for 29 March 2017. On 16 March 2017, the appellant provided further submissions and lists of authorities (pages 227- 244).

The decision of the FTT

9. The appellant appeared at the tribunal hearing and argued a number of issues including, (i) the question of locked doors; and, (ii) that there was a societal bias against unmarried fathers as a result of which it was impossible for an unmarried father to receive a fair hearing as all judges were subconsciously biased against them.

10. The FTT found that in terms of article 6 of the ECHR litigants have a right to a public hearing (page 247, paragraph 23).

11. The appellant argued before the FTT that for a hearing to be held in open court and therefore in public there must be no physical or psychological barrier preventing a member of the public or press from dropping in to see how the court or tribunal operates. He requested that the tribunal make a declaration that rooms with pushbutton coded locked doors on them cannot be used as tribunal rooms and that all tribunal decisions made after hearings in these rooms are to be set aside. (Page 247, paragraph 24.) In support, the appellant made reference to and relied on the cases of Storer v. British Gas plc [2000] 1WLR 1237 and McPherson v. McPherson [1936] AC 177 (a decision of the Privy Council). In those cases hearings had taken place in rooms not usually used as hearing rooms; the rooms were outwith areas of public access; and, they were behind doors marked “private”. In both cases it was held on appeal that the circumstances of the hearings rendered them private and not public hearings.

12. The FTT found that Wellington House (the Glasgow Tribunal Centre) was a publicly recognised tribunal hearing centre. Access to tribunal rooms was from a public area directly; hearings were not conducted in private and the public could gain access to any tribunal hearing. There were no signs indicating that hearing rooms were “private”. It was within judicial knowledge that members of the public could and did attend hearings. (Page 247, paragraphs 26 and 27.)

13. The FTT found that the arrangements at Wellington House were distinguishable from the cases of Storer and McPherson.

14. Given that the appellant’s hearing was apparently held in a tribunal room without a locked door, it is questionable whether the FTT needed to consider this argument at all as it was entirely hypothetical.

15. The appellant argued that there was a societal bias against unmarried fathers and that it was impossible for an unmarried father to receive a fair hearing as all tribunal judges were subconsciously biased against them. In his written submissions (page 239) he stated that the source of this bias was section 3 of the Children (S) Act 1995 (the 1995 Act).

16. Section 3 of the 1995 Act provides that the mother of a child has parental rights and responsibilities in relation to that child whether or not she is or has been married to the father.

A married father also has such rights. An unmarried father does not have such rights or responsibilities unless he completes certain steps to acquire such rights and responsibilities. (There are similar provisions applicable to England and Wales in the Children Act 1989.)

17. The appellant argued that this denial of a right had made society biased against unmarried fathers (page 239). As a result, all judges, he argued, were subconsciously biased against unmarried fathers and no matter how much a judge tries to be fair, his or her decision will subconsciously be affected by bias. This, he argued, interfered with his rights under Article 6 of the ECHR to a fair trial before an independent and impartial tribunal.

18. The FTT considered the decision of the House of Lords in Attorney General's Reference (No. 2 of 2001) [2004] 2 AC 72 a case in which the House of Lords considered what was a "reasonable time" requirement under Article 6 for bringing criminal proceedings and the appropriate remedy when that had been violated. The FTT cited with approval Lord Hobhouse's dictum:- *"… a basic principle of human rights law is the principle of proportionality. The appellant's argument flies in the face of this principle. This is essentially a mechanical approach."* (Paragraph 120). The appellant's argument that all judges were biased against unmarried fathers, the FTT held, was to adopt a mechanical approach. What was important in terms of human rights protection was to achieve a result which was, and was seen, to be fair (page 248, paragraphs 35 and 37).

19. Under reference to the decision of Judge Markus QC in DF v. SSWP CSE 470/2015, the FTT looked at the test for apparent bias as stated by Lord Hope in Porter v. Magill [2002] AC 377, *"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."* (Paragraphs 102-103.) Applying that test the FTT concluded that it could not be stated on a reasonable basis that all judges were subconsciously biased against unmarried fathers.

20. On 10 April 2017, the FTT refused the appellant's application for directions and ordered an oral hearing on the merits. It is against that decision that the appellant now appeals.

Permission to appeal

21. Permission to appeal to the Upper Tribunal was granted by a Judge of the First-Tier Tribunal on 8 August 2017 in the following terms:-

> *I am granting leave to appeal as this appeal involves a matter of public policy and in particular the issue of push button coded door locks on tribunal room doors. I was referred to various authorities by the appellant both Scottish and English and it may be helpful for this matter to be considered further by the Upper Tribunal. Had this request been made on the basis of the submission made by the appellant as regards the question of societal bias against unmarried fathers alone I would not have granted leave.*

Proceedings before the Upper Tribunal

22. The appellant's grounds of appeal are at pages 284-290. The Secretary of State does not support the appeal. The Secretary of State's submissions are at pages 296-298.

23. Both parties submitted further submissions and authorities prior to the Upper Tribunal hearing. The appellant's submissions are at pages 613-621. The Secretary of State's further submissions are at pages 301-304.

24. Prior to the hearing the appellant made a written application for an oral hearing on the single question of whether a devolution issue he contended he had identified should be referred to the Inner House of the Court of Session, presumably under paragraph 2 of Schedule 6 of the Scotland Act 1998. It was his contention that the Children (S) Act 1995 Act was outside the legislative competence of the Scottish Parliament.

25. On 29 November 2017, I decided that on the basis of the written submissions before me a devolution issue had not been made out and I refused an oral hearing on that point alone. However, I directed that the appellant would still be able to argue this point along with his other grounds of appeal at the oral hearing on all of the grounds of appeal. (Pages 293-295.)

Public hearing

26. The appellant's first application was that the Upper Tribunal was not a public hearing. He stated that he had not been allowed into the building and had been refused entry. He said the building was not suitable for public hearings and, as a result, this was a secret hearing. He said that as he had been refused entry to the building this was an attempt to grossly humiliate him and contrary to his rights under article 3 of the ECHR.

27. I asked him how he had gained entry to the building and to tribunal room. He refused to answer this as he stated I was attempting to humiliate him. My questioning of him was, he said, contrary to his article 3 rights.

28. Upper Tribunal hearings take place in George House. George House contains hearing rooms, meeting rooms and offices. Anyone entering the building may be attending a hearing or meeting someone in one of the meeting rooms or offices. When a party, witness or member of the public wishes to attend a hearing a receptionist makes a general offer to help them. If they are attending a hearing, they are asked which court or hearing room they are looking for. They are then directed to the floor where the hearing rooms are located. Hearing rooms for other tribunals and courts are located on the same floor. There are no locked doors or "private" signs between reception and the level of the hearing rooms. Each hearing room is directly accessible from the public area. There are no locked doors to hearing rooms and they are not marked "private". It is within judicial knowledge that members of the public can and do attend hearings in George House.

29. As with the circumstances of Wellington House, the arrangements at George House are distinguishable from the cases of Storer and McPherson. I therefore reject the appellant's argument that he was not afforded a public hearing and find that the appellant's hearing in George House was a "public hearing".

Article 3 EHCR

30. Article 3 provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Treatment is not in violation of the article 3 rights merely because someone asserts that it is. In *Re* A (A Child) (Family Proceedings: Disclosure) [2013] 2 AC 66 Baroness Hale stated:-

> *32. However, when considering what treatment is sufficiently severe to reach the high threshold required for a violation of article 3, the European Court of Human Rights has consistently said that this "depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim": see, for example, Kudla v Poland (2000) 35 EHRR 198 , para 91.*

> *The court has also stressed that it must go beyond "that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment": para 92. Thus the legitimate objective of the state in subjecting a person to a particular form of treatment is relevant.*

31. The appellant did not inform me exactly what the treatment was which he claimed had violated his article 3 rights on attempting to enter George House and so I am unable to

determine whether or not it met the threshold test. Assuming, it was no more than his being asked his name and which hearing room he required, I would not have found that that such treatment met the threshold test. Such arrangements have been in place in most tribunal and court buildings in recent years for the legitimate purposes of security and efficient organisation.

32. The appellant claimed that my questioning of him as to what had happened as he entered the building breached his article 3 rights. Again, I am unable to find that this meets the threshold test.

Recusal

33. The appellant made an application for me to recuse myself on the grounds that I was biased. Firstly, I had already made a decision on the devolution issue he wished to raise and, secondly, I had a number of conflicts of interest.

34. The appellant submitted that as I had already made a decision on the question of the devolution issue I was subconsciously biased. He made reference to the decision in Davidson v. The Scottish Ministers (No 2) 2005 1 SC (HL) 7. The question in that case was whether the decisions of an Extra Division of the Inner House of the Court of Session were vitiated by apparent bias and want of impartiality on the part of one member of the three-judge court. One of the judges, Lord Hardie, had previously been Lord Advocate and, in that role, when promoting the Scotland Bill had given certain assurances to Parliament on the effect of the Bill on the legislation which was under consideration in the case before the Extra Division. In the course of the reclaiming motion before the Extra Division, Lord Hardie did not disclose his previous role or the views he had expressed. The House of Lords held that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that Lord Hardie, sitting judicially, would subconsciously strive to avoid reaching a conclusion which would undermine the very clear assurances he had given to Parliament.

35. The appellant also made reference to the test for subconscious bias in the case of Porter which was approved and applied by the House of Lords in Davidson.

36. The appellant submitted that I, too, would strive subconsciously to stick to my original decision and so I was subconsciously biased, and that that is what a fair-minded and informed observer would think.

37. At the outset of the hearing, I informed the appellant that I, and counsel for the respondent, Mr. Pugh, were members of the same stable (chambers) at the Scottish Bar. The appellant stated that as I was a friend of Mr. Pugh, I should recuse myself. I informed him that we were not friends but professional colleagues. He submitted that I should recuse myself on the grounds that we were members of the same stable and on other grounds of conflict of interest which I had not declared and which would result in my being biased.

38. The matters which he contended I ought to have declared, but had not, and which meant I had a conflict of interest and/or I was subconsciously biased were as follows:-

a. He claimed I was a friend of Lady Wolffe who is married to the Lord Advocate. He assumed that I was a friend of Lady Wolffe because, he said, we had been *ad hoc* Advocates Deputes at the same time. She was also an Upper Tribunal judge, he said.

b. He said I was a friend of the Lord Advocate because it was possible I could be asked to act as an *ad hoc* Advocate Depute. As it happens, I am no longer an *ad hoc* Advocate Depute.

c. He said, I had worked for the Scottish Executive in the following capacities:- legal member of the Police Appeals Tribunal; President of the Pensions Appeal Tribunals; legal chair of the Pensions Appeal Tribunals; Special Counsel; legal member of two NHS Panels which respectively hear disputes

relating to contracts and removal of GPs from the performers list; and, Upper Tribunal Judge

d. I had worked for the UK government when I was previously standing junior counsel to the Accountant of Court and the Accountant in Bankruptcy.

e. I had not disclosed that I was aware of a consultation response by the Sheriff's Association in 2000 on the provisions of the 1995 Act. I informed him that I had not been aware of this consultation response. He responded that as an advocate I would have known about this.

f. I had not disclosed a number of positions I had held as a member of the Faculty of Advocates on Faculty Committees. He did not elaborate on how these committee memberships caused me a conflict of interest.

g. I had made a direction that in this appeal, the Secretary of State should be represented by counsel. He said, there was therefore a financial interest involved, because, I assume, Mr. Pugh and I were members of the same stable. The appellant sought a full day's hearing on this issue before three judges of the Upper Tribunal.

h. I had not previously disclosed that I was a part time judge. No part-time judge was independent; I did not have security of tenure.

i. I had not disclosed that I lived and worked in the same area as that in which the Upper Tribunal was held, namely, Edinburgh. I should not have been allocated to hear a case in which I lived and worked. I assume this objection was on the basis that I might have to hear cases in which persons I knew were either parties or representatives.

39. Regarding friendships and colleagues, he said if I had attended more than one social occasion or worked on more than one occasion with any of these people, then they were my friends and that disqualified me. (As a point of information, neither the Lord Advocate nor Lady Wolffe are friends although I know them professionally.) The appellant submitted that this was important as, in this case, he was calling for the Lord Advocate to join the process. Further, he was asking me to refer the matter to the Inner House and Lady Wolffe might end up hearing the case in which the Lord Advocate would then be a party.

40. The previous and current appointments held by me meant that I had worked for the Scottish Government, the UK Government and the SSWP, who was a party to this case. A conflict arose because he was seeking an order to have the Secretary of State and the Scottish Ministers notified and invited to join the case. I assume he was implying that I would try to avoid this due to an interest in keeping on the right side of these bodies. He referred to the Guide to Judicial Conduct and to the Statement of Principles of Judicial Ethics which provide guidance on what should be disclosed and when.

41. The application was opposed by the Secretary of State. Mr. Pugh submitted that the test was as set out in Porter. Whether there might be a real possibility of bias depended on the facts and circumstances of any particular case. He referred to paragraph 25 of Locabail v. Bayfield Properties Ltd. [2000] QB:

> *It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member*

> *of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (see* K.F.T.C.I.C. v. Icori Estero S.p.A. *(Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6, 8/91)).*

42. Mr. Pugh submitted that all that had been listed by the appellant fell into the category listed in Locabail and did not amount to anything that should cause the Upper Tribunal Judge to recuse herself.

43. Having heard the parties' submissions, I determined the recusal application at the hearing and informed the parties that I would provide written reasons in due course. The parties' were in agreement that the test for apparent bias was as set out in Porter, as noted at paragraph 19 above.

44. Judges often have a previous involvement in on going cases. The issue of recusal depends on the facts and circumstances of the particular case and the nature of the issue to be decided. As was stated at paragraph 25 of Locabail,

> *The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or a witness to be unreliable, would not without more found a sustainable objection.*

45. It has been held that, in some circumstances, it is possible for the same person to decide the same issue on more than one occasion, without there being bias. In AMEC Capital Projects Ltd. v. Whitefriars City Estates Ltd [2005] 1 All ER 723 an arbitrator decided an issue when, in fact, he had no jurisdiction. He then decided the issue the same way when he did have jurisdiction. The Court of Appeal held that there was no possibility of bias. Dyson LJ stated:

> *In my judgment, the mere fact that the tribunal has previously decided the issue is not of itself sufficient to justify a conclusion of apparent bias. Something more is required. Judges are assumed to be trustworthy and to understand that they should approach every case with an open mind. The same applies to adjudicators, who are almost always professional persons. That is not to say that, if it is asked to redetermine an issue and the evidence and arguments are merely a repeat of what went before, the tribunal will not be likely to reach the same conclusion as before. It would be unrealistic, indeed absurd, to expect the tribunal in such circumstances to ignore its earlier decision and not to be inclined to come to the same conclusion as before, particularly if the previous decision was carefully reasoned. The vice which the law must guard against is that the tribunal may approach the rehearing with a closed mind. If a judge has considered an issue carefully before reaching a decision on the first occasion, it cannot sensibly be said that he has a closed mind if, the evidence and arguments being the same as before, he does not give as careful a consideration on the second occasion as on the first. He will, however, be expected to give such reconsideration of the matter as is reasonably necessary for him to be satisfied that his first decision was correct.*

46. I considered whether or not the appellant had identified a devolution issue for determining whether an oral hearing should be granted on that point alone on the basis of written submissions. At that stage, I decided he had not identified a devolution issue and refused to order an oral hearing on that point alone. However, I made it clear he could argue

this point again at the oral hearing on all of the preliminary issues. The situation is quite different and distinguishable from the circumstances in Davidson where Lord Hardie, in his political capacity as a Scottish Minister and legislator, had given assurances about the effect of the Scotland Bill on the legislation on which he had to adjudicate in Davidson. Applying the objective test in Porter, I do not consider that a fair-minded and informed observer, having considered the facts and circumstances in the present case, would conclude that there was a real possibility of bias on those grounds.

47. Regarding my professional background and associations, these are fairly typical of most advocates and many judges. I agree with Mr. Pugh's submissions that the matters listed by the appellant fell within the category discussed in Locabail as factors unlikely to give rise to a real possibility of bias. In any event, the public appointments to which he referred, were not made by the Scottish Ministers.

48. With regard to my direction that the Secretary of State instruct counsel for this appeal, who the Secretary of State instructs in any particular case is a matter for the Secretary of State and may be any one of a number of counsel.

49. As regards my position as a part-time judge, Upper Tribunal judges are appointed under the Tribunals Courts and Enforcement Act 2007 either to full-time or part-time working (deputy judge). Appointment is made by the Lord Chancellor who has a statutory duty to defend the independence of the judiciary under section 3 of the Constitutional Reform Act 2005. Deputy judges have security of tenure during the period of their appointment and can only be removed from office on narrow and well-defined grounds by the Lord Chancellor.

50. An argument that temporary judges of the Court of Session were not independent and impartial was rejected by an Extra Division of the Court of Session in Clancy v. Caird 2000 SC 441. The court held that temporary judges constituted an independent and impartial tribunal within the meaning of article 6(1) of the ECHR and their employment in the Court of Session as part of the normal judicial structure, subject to appeal on points of fact and law, and to the common law rules on declinature of jurisdiction, when taken with their judicial oath, was adequately guaranteed against any perception of lack of independence or impartiality. The circumstances of appointment of temporary judges of the Court of Session were similar to that of a deputy judge of the Upper Tribunal.

51. Applying the test in Porter, there is no real possibility of bias on the grounds that I am a part-time judge.

52. For all of the above reasons, I refused to recuse myself on the grounds advanced by the appellant.

Other Preliminary Issues

Appellant's submissions

53. The appellant argued that section 3 of the 1995 Act was contrary to article 6 ECHR rights because it created a societal bias against unmarried fathers. As section 3 conflicted with article 6 it was beyond the legislative competence of the Scottish Parliament and thus raised a devolution issue. That issue should therefore, he argued, be referred to the Inner House of the Court of Session. He submitted that the case should be referred to the Court of Justice of the EU under article 267 of the Treaty on the Functioning of the European Union for clarification on issues of EU law.

54. He argued as follows:- Although section 3 of the 1995 Act had been passed before Devolution, Section 28(1) of the Scotland Act 1998 states: '(1) Subject to s 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament'(ASP). He contended that section 28(1) defined all devolved legislation to be ASPs. In addition to this being Parliament's

intention, this interpretation also makes the most sense. The Scottish Parliament controls all devolved legislation and therefore these devolved Acts became ASPs on their transfer at Devolution. The contrary view would leave a gap in the legislation as to how to challenge devolved Acts on a human rights basis. A further complication, he argued, arises when a devolved Act is then modified by the Scottish Parliament. Interpreting section 28(1) of the Scotland Act to include all devolved Acts does not strain the wording to any great extent. It is obvious that this is what was intended and so obvious that it did not need to be explicitly put in the legislation. He pointed out that the Scottish Parliament had made amendments to the 1995 Act since devolution but had not changed the fundamental bias against unmarried fathers contained in section 3.

55. He argued that, as he had raised a devolution issue in terms of the Scotland Act the matter must be intimated to the Lord Advocate and Advocate General for Scotland. The Scottish Ministers should also be notified as they were responsible for the 1995 Act. The same bias was contained in the Children Act 1989 which applied in England and Wales, the Minister responsible for that Act should also receive intimation and be invited to take part in the case.

56. As background, the appellant pointed out that not only were unmarried fathers affected by section 3 of the 1995 Act but also their children. This, he argued, amounted to child abuse.

57. The problem caused by section 3 of the 1995 Act, the appellant argued, was that it caused a societal bias against unmarried fathers. Unmarried fathers had been deprived of rights and responsibilities that were granted to mothers and married fathers. Parliament believed that unmarried fathers represent a danger to their partners and their children. No study has ever shown that marital status is any barometer for the likelihood of a person creating a danger to another, he argued. But, the legislation has been passed, Judges know that unmarried fathers have been denied rights given to other parents. They know that Parliament perceives them to be a danger to women and children. This is a factor in all cases involving an unmarried father that will subconsciously affect the judge.

58. He argued that the extent of this subconscious bias could not be measured. That is why the test is one of a 'real possibility'. Real means that the factor alleged to be present must be present. Possibility means that there is a possibility of it affecting a judge. There is no need to point to a specific instance of bias. The test is one of possibility. He asked, is bias possible? In this case, the answer is clearly, "yes".

59. He stated that a provision that was incompatible with any Convention rights or with EU Law was outside the competence of the Scottish Parliament. It was his contention that section 3 of the 1995 Act was incompatible with EU law and so it was outside the legislative competence of the Scottish Parliament. He invited the Upper Tribunal to refer the question of the compatibility of section 3 of the 1995 Act to the CJEU under article 267 of the Treaty on the Functioning of the European Union. The appellant expanded on his written submission (paragraphs 39-52) explaining why a reference should be made.

Submissions for the Respondent

60. Mr. Pugh submitted that it was important that we remind ourselves what this case was about. It was an application for PIP. No decision has been made on the substance of the application by the FTT. Permission to appeal was granted principally on the issue of the coded locked doors. The appellant has not pursued that argument. The FTT made it clear permission would not have been granted on the issue of societal bias alone, yet that is all the appellant has argued.

61. The appellant objects to any decision because he cannot obtain a fair hearing because all judges in the UK are biased against unmarried fathers. He makes an exception should his case go to the Supreme Court; that shows the fallacy of his argument. It is not clear where the appellant wants this to go. Mr. Pugh asked, is it that no judge can decide the merits of his appeal until section 3 of the 1995 Act is struck down?

62. The appellant is not alleging actual bias but apparent. The test is well understood, see Porter. The fair-minded and informed observer is "neither complacent nor unduly sensitive or suspicious" (Johnson v Johnson (2000) 201 CLR 488 at para 53). Further assistance is found, he said, in Helow v. Secretary of State for the Home Department 2009 SC (HL) 1, which provides guidance on the fair-minded and informed observer. Lord Mance, at paragraph 39, stated:-

> *The basic legal test applicable is not in issue. The question is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there existed a real possibility that the judge was biased, by reason in this case of her membership of the (International Association of Jewish Lawyers and Jurists):* Porter v Magill [2001] UKHL 67; [2002] 2 AC 357*. The question is one of law, to be answered in the light of the relevant facts, which may include a statement from the judge as to what he or she knew at the time, although the court is not necessarily bound to accept any such statement at face value, there can be no question of cross- examining the judge on it, and no attention will be paid to any statement by the judge as to the impact of any knowledge on his or her mind:* Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 *para 19 per Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-C. The fair minded and informed observer is "neither complacent nor unduly sensitive or suspicious", to adopt Kirby J's neat phrase in Johnson v Johnson (2000) 201 CLR 488 , para 53, which was approved by my noble and learned friends Lord Hope of Craighead and Baroness Hale of Richmond in* Gillies v Secretary of State for Work and Pensions [2006] UKHL 2; 2006 SC (HL) 71.

63. In the same case, Lord Hope stated:-

> *1 …… the fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair- minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word "he"), she has attributes which many of us might struggle to attain to.*
>
> *2 The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.*
>
> *3 Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or*

geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

64. Accordingly, Mr. Pugh submitted, it was not merely a matter of applying the Porter test, but doing so knowing what the fair-minded person would think were one looking at it objectively and considering reasons why the judge might be biased.

65. Further, he argued, normally one would be considering apparent bias because a judge was a member of an association (Helow) or had expressed a particular view (Davidson); it is not normally the case that it would be an attribute that would apply to an entire section of a profession.

66. He submitted that the test this tribunal should apply is whether the fair-minded observer would conclude, based only on the fact that the appellant is an unmarried father, that there is a real possibility of bias. The test in not a "possibility" but a "real possibility"; that implies a measure of detachment, as Lord Hope said in Helow. The test is not to be applied on the way one party sees the world, he submitted. It is for the judge to weigh all the factors placed before her which have a bearing on the suggestion the judge was biased and whether this gives rise to a reasonable apprehension of bias, bearing in mind the judicial oath and the training of the judge. See Locabail, page 479, paragraph 20.

67. In the circumstances of the present case, he submitted that the test could not be satisfied.

68. The appellant, Mr. Pugh submitted, is arguing that he cannot be judged by any judge or jury, that he cannot enforce any right and no right can be enforced against him. That is extreme. It is not clear why in any proceedings not affecting children his status as an unmarried father is relevant or that the tribunal would even be aware of it, unless advised by the appellant himself.

69. There is no objective basis on which it can be said such a bias exists. The appellant contends it is because Parliament views unmarried fathers as a danger, there is no justification for such an assumption on the face of the legislation itself. The appellant's reasoning lacks logic.

70. The subject matter of the present case is PIP; the appellant's status as an unmarried father is not relevant. It is inconceivable that in a personal injury case heard by Lady Cosgrove the issue of her membership of a Jewish association would found the same argument as was made in Helow.

71. He submitted that taking all the other circumstances of this case into account and bearing in mind that the matter in issue is PIP, it could not be said that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

72. Moving on to the appellant's argument that he had raised a devolution issue. Firstly, section 3 of the 1995 Act was not relevant to his application for PIP, except that the appellant alleged that it caused bias. If the Upper Tribunal agreed with his submission that there was no bias, section 3 was not relevant to this case.

73. In any event, the 1995 Act, he submitted was not an Act of the Scottish Parliament. Further, that question of whether it was a devolution issue was not essential to his argument that it caused bias.

74. The 1995 Act was not an Act of the Scottish Parliament. Section 29 of the Scotland Act provides that the Scottish Parliament cannot pass Acts beyond its legislative competence. In other words, he submitted, what is envisaged is the situation where the Scottish Parliament has acted to legislate. It does not cover the situation where the Scottish Parliament has failed to amend a previous Act of the UK Parliament.

75. Regarding the appellant's request for a reference to the CJEU, there is no European law on the merits of PIP, therefore it is not engaged.

76. Article 267 provides for the situation where a Scottish court does not know what the European law is and seeks clarification to enable it to give judgment. If the Upper Tribunal finds that there is no devolution issue then no reference is required.

Discussion and decision on the other preliminary issues

Bias

77. The test for apparent or subconscious bias is to be found in Porter together with the helpful guidance in Locabail and in Helow. The judge, in the shoes of the fair-minded and informed observer, must ascertain all the circumstances that would have a bearing on the suggestion that the judge was biased and, without being unduly sensitive or suspicious, then ask whether those circumstances lead to a real possibility of bias. That involves a measure of detachment and an exercise of judgment. The judge being considered is the particular judge in the case. There is not a real possibility of bias merely because a party asserts that there is. I do not accept the appellant's submission that a mere possibility of bias is enough. I agree with the submissions for the Respondent which I have summarised above.

78. The circumstances in this particular case are that the appellant has made an application for PIP and that was the subject matter of the appeal to the FTT. A legal member of the FTT made the decision on the application for directions. The appellant's status as an unmarried father was not relevant to the FTT's consideration of his appeal. Indeed, it seems not to have been a matter contained within the papers until the appellant informed the FTT (p. 78). The FTT considered that the appellant's submission that, as a result of section 3 of the 1995 Act, all judges were biased, was to adopt a "mechanical" approach. The FTT considered the issue of subconscious bias and, in doing so, had in mind the test in Locabail and Porter. The FTT concluded that it could not be stated on a reasonable basis that all judges (and that would include him) were biased against unmarried fathers. I agree with that conclusion for the reasons stated by the FTT.

79. Having considered the test and the FTT's decision, I am satisfied that the FTT was aware of the correct legal test for bias and properly applied it. I can detect nothing in the decision that would give rise to a real possibility that the FTT judge was biased. I can find no error of law in the reasoning of the FTT on this issue.

80. For the same reasons, I do not accept the appellant's submission that it is inevitable that as a member of society, I am biased against unmarried fathers. I agree with the submissions for the respondent that the test is not met in this case either.

81. In any event, as is pointed out in Jacobs' Tribunal Procedure and Practice at paragraph 3.328, "*If the whole judiciary is affected, practicality overrides principle and someone has to decide the case."* He cited as an illustration Panton v. Minister of Finance [2001] UKPC 33 at paragraph 16:-

> *It has also to be recognised that the purity of principle may require to give way to the exigencies and realities of life. In extreme cases the doctrine of necessity may require*

> *a judge to determine an issue even although he would otherwise be disqualified. An example can be found in* The Judges v The Attorney-General for the Province of Saskatchewan (1937) 53 TLR 464 *where this Board held that the court in Saskatchewan was acting properly in deciding whether the salaries of judges were liable to income tax. Such cases where resort has to be had to the doctrine of necessity are of course rare and special.*

82. The only reason section 3 of the 1995 Act featured in this case was the appellant's assertion that he was an unmarried father and that section 3 created a bias against unmarried fathers. I have decided that there was no bias in the handling of the appellant's PIP appeal at either the FTT or Upper Tribunal level as a result of the existence of section 3 of the 1995 Act. Section 3 was not otherwise relevant to the appellant's PIP appeal. It is therefore not necessary for me to consider whether section 3 is incompatible with ECHR or EU law and not necessary or appropriate to make a reference to the CJEU. I refuse the appellant's application for such a reference.

Is there a devolution issue?

83. The appellant argued that the 1995 Act was beyond the legislative competence of the Scottish Parliament and, as such, raises a devolution issue under the Scotland Act. Paragraph 1 of Schedule 6 of the 1998 Act provides:-

> *In this Schedule "devolution issue" means -*
>
> *(a) a question whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is within the legislative competence of the Parliament,*

84. A devolution issue does not arise simply because a party says so. He has to show that there are arguable grounds for so contending. I note that paragraph 2 of Schedule 6 to the 1998 Act provides:-

> *A devolution issue shall not be taken to arise in any proceedings merely because of any contention of a party to the proceedings which appears to the court or tribunal before which the proceedings take place to be frivolous or vexatious.*

85. The 1995 Act, including section 3, was passed in 1995 by the UK Parliament before the 1998 Act was enacted. It is not an Act of the Scottish Parliament. While amendments have been made to section 3 since 1998, these do not affect the main provisions that an unmarried father does not automatically have parental rights. I am unable to accept the appellant's argument that as a result of the 1998 Act any pre-existing enactments on what became devolved matters rendered those Acts passed prior to the 1998 Act, Acts of the Scottish Parliament. If Parliament had intended such a far-reaching effect it would have clearly stated that. In the absence of such a clear statement, I agree with the submissions for the respondent that what paragraph 1 of Schedule 6 contemplates is an exercise of the legislative power of the Scottish Parliament that is beyond its competence rather than a failure to amend pre-Devolution statutes. Accordingly, I reject the appellant's contention that he has identified a devolution issue. It is therefore not necessary for me to consider the appellant's application that intimation should be made to the Lord Advocate, the Advocate General for Scotland, the Scottish Ministers, the Secretary of State for the Home Department, the Secretary of State for Justice and the Secretary of State for Work and Pensions.

86. In any event, the question of whether or not section 3 raises a devolution issue was not essential to the appellant's argument that all tribunal judges are biased against unmarried fathers. The fact is that section 3 of the 1995 Act exists and so he can make, and has made,

his argument without the necessity of a declaration that section 3 of the 1995 Act was beyond the legislative competence of the Scottish Parliament.

87. At the hearing I did not deal with the appellant's application for a full day's hearing before three judges on the question of whether I had a financial interest in the case. I rejected his arguments of bias and/or conflict of interest on this ground. The application for a hearing on this ground is refused.

88. For the foregoing reasons the appeal is refused. The case is remitted to the FTT to proceed in terms of the directions of 10 April 2017.

89. The final observation I should make is that, if the FTT intended to grant permission to appeal only on the issue of door locks then that should have been clearly stated. The appellant did not argue that ground but the permission to appeal gave him the opportunity to argue a ground based on bias. If that had been the only ground of appeal the FTT would not have given permission.

(Signed)
MARION CALDWELL QC
Judge of the Upper Tribunal
Date: 20 September 2018