DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Save for the cover sheet, this decision may be made public (rule 14(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698)). That sheet is not formally part of the decision.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

The decision of the First-tier Tribunal under reference MH/2018/15153, made on 4 September 2018, did not involve the making of an error of law. The appellant's appeal is dismissed.

REASONS FOR DECISION

Procedural Background

1. The appellant was detained under section 3 of the Mental Health Act 1983 at the time of the hearing before the First-tier Tribunal on 4 September 2018. The hearing proceeded before a panel consisting of a First-tier Tribunal judge, a medical member and a specialist member.

2. It is stated (in the grounds of appeal) that, at the commencement of the hearing the judge spoke to the appellant and his representative explaining that his colleagues had suggested that he inform them that he had accessed a Court of Appeal judgment[1] in respect of the appellant in a connected matter, he emphasised that this would not affect his view of risk assessment in the case and he had merely accessed the judgment to ascertain the sequence of events prior to the appellant's detention.

3. The appellant and his representative state that they felt at the time that this gave a strong indication that the judge had a biased view of the case. The explanation given by the

[1] The Court of Appeal dismissed an appeal made by the Crown against the trial judge's ruling that there was no case to answer – the appellant had been charged with an offence of murder.

judge as to why he had accessed the judgment did not, in their view, rebut the strong presumption of bias. They nevertheless decided to proceed with the hearing rather than ask the judge to recuse himself. This decision was based on an assessment that the appellant's chances of success were favourable, particularly because the Tribunal could have come to a majority view.

4. The hearing went ahead, and the Tribunal decided that it was necessary for the appellant's health and safety and for the protection of others that he remained liable to be detained, setting out its reasons in a decision dated 4 September 2018.

5. The appellant applied, on 9 September 2018, to the First-tier Tribunal for permission to appeal to the Upper Tribunal against the First-tier Tribunal's decision claiming that the judge, having accessed the Court of Appeal judgment in respect of the appellant, acted with apparent bias.

6. The First-tier Tribunal, on 12 October 2018, refused permission to appeal. The appellant renewed his application to the Upper Tribunal. I directed an oral hearing and gave directions requiring written submissions from the appellant's representative. The oral hearing of the permission to appeal application was held on 28 January 2019 and was attended by the appellant's representative, Ms K Wolton. She provided written submissions and amplified these at the hearing.

7. On 27 March 2019, having considered the appellant's arguments (as elaborated upon at the oral hearing), I granted permission to appeal. This appeal raises issues that are deserving of consideration by the Upper Tribunal. I granted permission to appeal on that basis. I gave directions inviting the parties to make written or further written submissions if so wished. I did not consider it necessary to require the respondent to make submissions given the subject matter of the appeal. I also directed the appellant to provide a copy of the Court of Appeal judgment or to make representations as to why it should not be disclosed.

8. Neither party made any further submissions. The appellant provided a copy of the Court of Appeal judgment (obtained from a barrister's chamber's website).

The grounds of appeal

9. The application for permission to appeal set out only one ground, namely that the First-tier Tribunal acted with apparent bias (it is not argued that there is actual bias). No application for permission to appeal was made on the basis of any other error of law. The apparent bias was said to arise from the judge having accessed the Court of Appeal

judgment in respect of the appellant. There was no criticism of the judge's behaviour during the hearing or the conduct of the appeal hearing. That initial ground has subsequently been elaborated upon and, although the arguments are interrelated, the grounds of appeal are:

i) It is not open for a judge to undertake his own non-legal research into a case – this is a breach of natural justice and leads, of itself, to a reasonable conclusion of apparent bias

ii) The Court of Appeal judgment contained prejudicial material leading to the conclusion that the judge could not bring an open mind to bear on the case

iii) There is a strong presumption of bias as a result of the judge's action in independently seeking out evidence

iv) The hearing was not fair as the evidence seen by the judge was not submitted to the parties and Tribunal

v) It is not appropriate to conclude that by not objecting at the time the appellant has waived his right to complain now

10. Although the appellant's case was initially advanced solely on the basis of apparent bias, as the arguments developed two aspects have emerged in respect of the rules of natural justice or procedural fairness. The two aspects of natural justice, as relevant to this case, were set out in the case of *AMEC Capital Projects Limited v Whitefriars City Estates Limited* [2004] EWCA Civ 1418 ('*AMEC*') [14] as:

> "…First, the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made. Secondly, the person affected has the right to an unbiased tribunal. These two requirements are conceptually distinct. It is quite possible to have a decision from an unbiased tribunal which is unfair because the losing party was denied an effective opportunity of making representations. Conversely, it is possible for a tribunal to allow the losing party an effective opportunity to make representations, but be biased…"

11. I will deal with the two aspects separately considering apparent bias (grounds i – iii) first and then procedural fairness (ground iv). For the reasons set out below I do not consider that it is arguable that there was a breach of the rules of natural justice. I therefore do not need to consider the waiver issue (ground v).

Apparent bias – relevant legal principles

12. The rule against bias, which is enshrined in the common law and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, ensures parties have their cases determined by impartial tribunals. The principle on which the rule is built is that judges must decide cases without fear or favour, affection or ill-will. They must consider cases with an open mind exercising independent judgment.

13. The test for apparent bias is well established. The following relevant principles can be drawn from the cases:

- The test 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' (Magill v Porter and Weeks* [2001] UKHL 67 at [103])
- The fair-minded and informed observer, '*is neither complacent nor unduly sensitive or suspicious', '[i]t is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach'* (*Lawal v Northern Spirit* [2003] UKHL 35 at [14] ('*Lawal*') and citing *Johnson v Johnson* (2000) 200 CLR 488, 509, at [53] for the first proposition) and must be taken to be to be able distinguish between what is relevant and what is irrelevant and decide what weight should be given to facts that are relevant (*Gilles v Secretary of State for Work and Pensions* [2006] UKHL 2 [17])
- The fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found evidence of a party or witness to be unreliable, would not without more found a sustainable objection (*Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Civ 3004 ('*Locabail*')) and '*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' (AMEC* [20])
- A Judge's training and professional objectivity are relevant factors, '… *in assuming the mantle of the fair-minded observer, to bear in mind that he is not a judge and therefore to take perhaps a more critical or questioning view of the degree to which the judge's training and professional objectivity would operate in the particular circumstances of the case. But the latter remain an obvious and important factor in the assessment which the lay observer will make…'Broughal v Walsh Brothers Builders Ltd & Anor* [2018] EWCA Civ 1610 [23]

- '*The informed observer of today can perhaps "be expected to be aware of the legal traditions and culture of this jurisdiction" … But he may not be wholly uncritical of this culture'. Lawal* [22]
- '*While the test is certainly less rigorous than one of probability, it is a test which is founded on reality. The test is not one of "any possibility" but of a "real" possibility of bias* (*Resolution Chemicals Ltd v H. Lundbeck A/C* [2013] EWCA Civ 1515 at [36]).
- There needs to be something of substance to lead the fair-minded and informed observer to conclude that there is a real possibility that the tribunal will not bring an open mind and objective judgment to bear (*AMEC* at [21]).
- The test is objective and the onus of establishing bias lies on the applicant, *Locabail* [21] citing with approval *President of the Republic of South Africa & Others v South African Rugby Football Union 1999* (7) BCLR (CC) 725. No attention will be paid to any statement by the judge as to the impact of any knowledge on his or her mind. 'It *is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision' Locabail* [19]
- In any case where the impartiality of a judge is in question, the appearance of the matter is just as important as the reality (*ex p Pinochet (No.2)* [1999] UKHL 52 [139]). Public perception of the possibility of unconscious bias is the key. (*Lawal* [14])

Discussion

14. Whilst each case necessarily turns on its own facts, the above authorities demonstrate that judges must be robust and are not expected to recuse themselves unless there is something of substance that would lead the fair-minded and informed observer to conclude that there is a real possibility of bias. A judge's training, professional objectivity and experience are relevant to the assessment. However, judges should not hesitate to recuse themselves if there are reasonable grounds for apprehending that they will not be impartial.

15. I am not concerned in this appeal with problems sometimes created by: a connection between the judge and a party, of the judge having made a previous adverse decision in relation to the appellant or the case or of the judge 'entering into the arena' during the course of the hearing. However, it is argued (although not in these terms) that the judge 'entered the arena' by virtue of his imputed motive (i.e. to bolster the evidence that he thought was

inadequate regarding the risk posed by the appellant) for accessing the Court of Appeal judgment. No criticism is made about the conduct of the judge during the hearing itself.

16. Ground i) was advanced as the primary argument. It was submitted that by undertaking independent non-legal research this, of itself, would lead the fair-minded impartial observer to conclude there was a real possibility of bias. There are two secondary arguments. The first of these is that the Court of Appeal judgment contained material that was potentially prejudicial to the appellant so that having seen this the fair-minded informed observer would conclude that the judge could not consider the case impartially. The second is, that the judge's motive for accessing the material leads to the conclusion he was biased.

17. The critical issue for me to decide is whether the fair-minded and informed observer would conclude, having considered the facts, that there was a real possibility that the judge was biased or was unable to bring an open mind and objective judgment to bear. The question cannot be answered without considering the facts. It is necessary to set in context the Court of Appeal judgment and the judge's access to it in order to analyse and understand the appellant's arguments and to apply, to the facts, the relevant legal principles. However, I can deal with the primary argument without doing so.

18. I pause briefly to mention the basis on which I have approached the issue of the research being non-legal. For the purpose of deciding this appeal this does not require definition as, with the exception of ground i), an analysis and application of the relevant legal principles when determining an apparent bias allegation must be undertaken on the factual basis and therefore on the actual research undertaken by the judge in this case. There may be other types of non-legal research that may require a different approach or which would lead to a different outcome.

<u>Ground i) The Primary Argument – undertaking independent non-legal research of itself leads to a conclusion of bias</u>

19. The primary argument is that if a judge undertakes research in relation to a case on non-legal matters that, of itself, is sufficient for a fair-minded and informed observer to conclude that there is a real possibility of bias. The subject matter or content of the research is not material, so no reliance was placed on any potential prejudice arising from reading the judgment (this features in relation to ground ii).

20. In support of the primary argument an analogy is drawn with the position of a juror. It is submitted that a juror in a criminal trial, who it is said to be in a materially similar (albeit

clearly different) position, is forbidden from carrying out personal research and can be jailed for doing so. I do not consider that the position of a judge is analogous to that of a juror[2]. Whilst some of the reasons to prohibit jurors from undertaking research (for example the requirement that the parties should know what evidence might influence the decision maker and be able to comment upon it[3]) apply equally to judges (and judicial decision makers), judges are professionally experienced and trained and can be assumed to be trustworthy and to understand that they should approach every case with an open mind. Judges regularly see and hear irrelevant or prejudicial material/evidence and it is their duty to put it out of their mind.

21. The effect of the primary argument, if correct, would be that it gives rise to an irrebuttable presumption of bias. It would, in effect, amount to automatic disqualification. There would be no requirement to consider the facts of the case other than that the judge undertook non-legal research into the case. Further, what the subject matter of the research is (apart from it being non-legal) would not be material. There would be no need to adopt the mantle of the fair-minded and informed observer when determining an apparent bias claim made on this basis. The authorities do not support such an approach. Whilst establishing apparent bias is an objective test (there is no requirement to find that the judge was biased (subjectively) as the appearance of bias is sufficient) the authorities have consistently held that consideration of an allegation of apparent bias must be evaluated by applying the relevant legal principles to the facts of the particular case.

22. Although not argued in this way, in my view the effect of the argument (since it does not take into account the nature of the non-legal research), if successful, would be to create a new class of automatic disqualification (presumed bias). The rationale behind automatic disqualification is that a person cannot be a judge in his own cause so a direct pecuniary or proprietary interest or commitment to a cause generally requires judges to recuse themselves. In *Locabail* the Court of Appeal commented that it was undesirable for the rule to be extended unless such extension was plainly required to give effect to the important underlying principles upon which the rule was based. There is no personal interest identified. Simply undertaking non-legal research clearly does not fall within the class of cases to which automatic disqualification applies.

23. The fair-minded and informed observer would adopt a balanced approach, consider all the facts that are relevant to the claim of bias, be aware of a judge's training and professional

[2] Section 20A of the Juries Act 1974 (inserted by Criminal Justice and Courts Act 2015) provides research of the case by jurors during the trial period is a criminal offence
[3] This, as a sperate issue, is discussed below in respect of ground iv)

experience (even if not uncritical) and be neither complacent nor unduly sensitive or suspicious. There needs to be something of substance to conclude that there is a real possibility that the judge will not bring an open mind and objective judgment to bear. The informed observer might well take a more questioning view of the degree to which a judge's training and professional objectivity operates where a judge has, at least, acted unwisely in carrying out independent non-legal research. However, I consider that the informed observer would conclude that doing such research would not, of itself, suggest that the judge might not have an open mind or has adopted an animus towards a party or favours a party. There must be some link between either the subject matter of the research or the behaviour of the judge to give rise to an apprehension of a real possibility of bias. It cannot be sufficient that a judge has simply accessed information/evidence. That information/evidence may be entirely irrelevant to the case and may not have the potential to affect or influence the judge's ability to decide the case impartially. In my view, the simple fact of having undertaken non-legal research, without more, cannot establish a real possibility of bias.

24. I am fortified in my view by the fact that there are cases[4] in which a judge has undertaken non-legal research into matters connected with a case. There is no authority of which I am aware (and none was cited to me) where it has been held that undertaking such research, of itself, leads to an apprehension of a real possibility of bias. That is, of course, not to suggest that it is not a matter of concern or that the judges' actions in those cases were condoned.

Ground ii) The Court of Appeal judgment contained prejudicial material

25. When reaching a conclusion on an allegation of bias I must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased and then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased.

26. The context is very important. The background to the appellant's detention is set out in detail in the case papers in a report prepared by Dr [M] for the First-tier Tribunal. Full and specific details of the offence that the appellant was (jointly) charged with is set out including the DNA evidence against him. Dr [M] set out the appellant's progress in prison and his transfer to hospital for assessment and treatment. Details of his court appearances and

[4] For example *East of England Ambulance Service NHS Trust v Sanders (Practice and Procedure)* [2014] UKEAT 0217/14/RN

aspects of the court case are set out including the appellant's responses to his court appearances. There is a brief mention of the decision of the trial judge and that of the Court of Appeal. It was not argued that there was anything in the case papers before the First-tier Tribunal that would lead the fair-minded observer to conclude that the Tribunal could not bring an open mind to bear on the case.

27. The Tribunal summarised the facts of the criminal case under the heading 'psychiatric history' very briefly in paragraph 4 of its reasons for its decision as [my redactions]:

> '*On [x.x.x] he was remanded in custody and transferred to the Trevor Gibbons Unit on [x.x.x] He was charged with the murder of a homeless man in [xxxxx], the offence taking place on [x.x.x.] He was tried for this offence. On [x.x.x.] the trial judge, at the close of the prosecution case, accepted the submission made…that there was no case to answer. The Crown decided to appeal against the ruling. The appeal was heard by the Court of Appeal on [x.x.x.], the court decided that the trial judge's ruling was a reasonable decision, dismissed the case…. and directed that both defendants be acquitted'.*

28. At the oral hearing Ms Wolton submitted that the Court of Appeal judgment contained potentially prejudicial material. At that stage I had not been provided with a copy of the judgment. When asked about the specific nature of the prejudice alleged she indicated that she wished only to rely on the potential for it to be prejudicial in general terms as it concerned the details of the offence and evidence.

29. As set out above I gave directions for the judgment to be provided or for arguments to be advanced in support of non-disclosure. I have now read the Court of Appeal judgment. The Crown's appeal against the trial judge's ruling of no case to answer was dismissed and the court directed the acquittal of the appellant. The information contained in both the judgment and in the detailed report of Dr [M] is of a potentially prejudicial character. Ms Wolton did not draw my attention to anything specific in the Court of Appeal judgment in support of her arguments.

30. The question then is whether there were grounds for thinking that the judge was likely to be unconsciously biased as a result of reading the judgment so that he could not bring an open mind to bear when considering the appellant's case. I accept that research of this kind may affect a judge's decision, whether consciously or unconsciously. There is of course an issue regarding accessing evidence that is not before the parties and other members of a Tribunal. I deal with this below under the procedural issue ground. The judge has not been asked to provide comments regarding the effect of having considered the Court of Appeal

judgment. In *R v Gough* [1993] AC 646 it was said that It is not useful to inquire into the judge's state of mind as bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect.

31. The evidence before the Tribunal already contained very specific details about the offence the appellant was charged with and the evidence against him. In this context I therefore need to consider if there was anything that could be considered to give rise to potential prejudice beyond what was already in the papers. Without the benefit of anything specific being drawn to my attention, in my view, the only aspect of the Court of Appeal judgment that might go beyond what was in the First-tier Tribunal case papers in terms of prejudice is a comment '*clearly there were highly suspicious circumstances here'*. However, when read in context of the judgment as a whole (which concerned two defendants) it is clear that the court considered that there was very little evidence in relation to the appellant and that this was purely circumstantial - if anything it made clear the lack of substance in the Crown's case against the appellant. My view is that the fair-minded and informed observer would conclude that the judgment does not contain anything of a more potentially prejudicial character than the reports in the First-tier Tribunal bundle.

32. Even if it were of a potentially prejudicial character it would not necessarily result in a conclusion that judge cannot bring an open mind to bear. When assessing whether there is a real possibility of bias the fair-minded observer would be aware of a judge's training and professional objectivity, although it would not be viewed uncritically. Judges (and judicial decision makers) regularly see and hear irrelevant or prejudicial material/evidence and it is their duty to put it out of their mind. In *Locabail* the court approved the lower court's statement that it is the duty of a judge to put out of his mind irrelevant or immaterial matters particularly those of a prejudicial character. The court held that knowledge by a judge of such matters goes nowhere towards establishing a real danger of bias at [61]. I do not suggest that there cannot be cases where the prejudicial character of the evidence is such that there may be a real risk that the appearance of the matter requires a judge to recuse himself/herself. On the facts of this case the fair-minded observer would be likely to conclude that there is no real possibility of bias arising from the judge having accessed the Court of Appeal judgment.

<u>Ground iii) There is a strong presumption of bias as a result of the judge's action in independently seeking out evidence</u>

33. The arguments on this ground, if accepted, suggest that the judge had impermissibly 'entered into the arena' by seeking evidence to bolster the respondent's case. The appellant's arguments are that the judge had no reason to access the judgment because all the information required was contained in the reports that were before the Tribunal, so an imputed motive is suggested. The way the argument was put was that:

i) the judge probably researched on the internet using Google,

ii) the case turned on risk assessment of the appellant committing offences in the future, if he was not guilty of the offence charged this was irrelevant to an assessment of risk,

iii) there was nothing in the Court of Appeal judgment that was relevant to the chronology,

iv) it was impossible to see what further information he could have been seeking,

v) the only explanation was that the judge had a feeling that the appellant had more involvement in the offence.

vi) A fair minded and impartial observer would therefore conclude that it was likely that:

a) The judge thought the evidence presented by the respondent in relation to risk (and therefore the Tribunal's statutory duty to discharge) was inadequate

b) He used an internet search to investigate and bolster that evidence in his own mind

c) By seeking out further evidence potentially detrimental to the appellant's interests the judge was no longer impartial

34. Before turning to these arguments, I deal with the submission that it was notable that the wing members were sufficiently worried about the judge's conduct as to require him to tell the appellant's solicitor. When pressed at the oral hearing Ms Wolton could not support her argument that the wing members were 'sufficiently worried'. This was an inference rather than a fact.

35. According to the application for permission to appeal the judge informed the appellant and his representative, before the start of the hearing, that he had accessed the judgment because he wanted to ascertain the sequence of events prior to the appellant's detention under the Mental Health Act. The appellant invites me to disbelieve this explanation.

36. There is a fact that is not disputed, namely that the judge accessed the Court of Appeal judgment. To reach the conclusion argued for by the appellant requires, what in my view is, an enormous leap. On one side we have a bare fact, on the other a conclusion that the judge was not impartial because his motive in accessing the judgment was that he was seeking to bolster the respondent's inadequate evidence to show the appellant was of greater risk. There is a wide chasm, in terms of evidence, to cross to reach that conclusion. The bridge to cross the chasm is constructed from the above imputed motive. In order to construct the bridge, the appellant's arguments on the imputed motive build on conjecture and suppositions.

37. The first part of the argument is that the judge probably used the internet and read the judgment via the top result on Google. There was no evidence as to how the judge accessed the judgment and the relevance (if this was the case) of the use of the internet or a Google search as the means of obtaining the judgment when determining apparent bias was not set out. In my view this is an irrelevant factor.

38. It is argued that the case turned on an assessment of risk in the future so if he was not guilty of the offence charged this could not be relevant to an assessment of risk. Whilst as a statement this is correct, as an argument it does not go anywhere on its own. It could only be relevant if the judge accessed the judgment in order to assess or bolster evidence of risk.

39. It is argued that there was nothing in the Court of Appeal judgment relevant to the chronology. Until the judge read the judgment he would not know that there was nothing in it relevant to chronology. This argument also goes nowhere.

40. It is argued that it was impossible to see what further information the judge could have been seeking from the Court of Appeal judgment and that all the relevant information relating to chronology was in the papers. It is contended that the **only** explanation, therefore, was that the judge had a feeling that the appellant had more involvement in the alleged offence. The appellant is, in effect, arguing that the judge's explanation is suspect or even untrue and should be disregarded or disbelieved. The appellant has not specifically set out where in the papers all the relevant information is and the clarity that is contended for. I do not suggest (and the cases do not support) an approach where a judge's account should be accepted without testing but I would be very reluctant to reject an explanation given at the time to the appellant without something of substance to cast doubt on that explanation. I do not consider that there is the clarity the appellant contends. The report from Dr [M] does set out in some detail the chronology but I note that there is a gap of approximately one month between the date Dr [M] assessed the appellant in prison as requiring transfer to hospital and his eventual

transfer. It is not clear why there was such a delay. Even if there was absolute clarity in the papers the alternative explanation as to the judge's motive is entirely speculative and has no discernible basis. No evidence has been adduced in support.

41. Building from the above it is argued that the fair-minded observer would conclude that the judge thought the evidence presented by the respondent in relation to risk was inadequate. This requires another sizeable leap, from the highly speculative explanation that the judge felt that the appellant was more involved in the offence, to a conclusion about the judge's view of the respondent's evidence. The purpose of the internet search, it is said, must have been to investigate and bolster evidence in his own mind. This is all entirely speculative. There is no proper basis from which to draw such inferences.

42. I appreciate that the appellant's arguments are intended to be cumulative rather than looked at in isolation. Adopting the mantle of the well-informed observer I consider the arguments are simply not sustainable - they have little or no foundation and are of such little substance even when taken together to come anywhere near bearing the weight required to bridge the chasm for the informed observer to arrive at a conclusion that there was a real possibility the judge was biased.

Procedural irregularity

43. The appellant's arguments are that:

i) The hearing was not fair as the evidence seen by the judge was not submitted to the parties and Tribunal.

ii) If the judge thought further evidence was required, then he should have issued directions – this could have been done prior to the hearing

iii) If directions had been issued the parties would have had an opportunity to make submissions as to admissibility/relevance, give advice and take instructions

Discussion

44. In *East of England Ambulance Service NHS Trust v Sanders (Practice and Procedure)* [2014] UKEAT 0217 the Employment Appeal Tribunal considered a case where the First-tier Tribunal had undertaken internet research and obtained its own evidence. This is not binding on the Upper Tribunal and there are considerable differences between that case and the instant case, but I have found the approach to procedural irregularity helpful. I do not

consider that I need to address any differences that might arise as a result of an inquisitorial function of a Tribunal – the nature of the First-tier Tribunal's function was an issue in the *East of England* case and much of the argument concerned this issue.

45. The facts in the instant case are simple. I have rejected the appellant's arguments that the material accessed was of such a prejudicial character to lead to a real possibility of bias or that the judge impermissibly 'entered into the arena' or leading to an appearance of bias. What we are left with is the judge accessing independently the Court of Appeal judgment. This is a procedural irregularity and has the potential to give rise to unfairness. This does not automatically lead to the conclusion that the hearing was unfair. I agree with the analysis in the *East of England* case. The Employment Appeal Tribunal held that:

> '35 An irregularity such as this may (just) be remediable…Whereas part of the vice in a criminal case is that the parties will simply not know what a jury has heard or read…The Tribunal, quite properly, told the parties what it had done almost immediately after it had accessed the Internet. The danger, therefore of reaching a decision without the parties having had an opportunity to address the issue was avoided. Accordingly this, in our view, was at the outset a procedural irregularity which might have been retrievable…I would not wish in the least to encourage a Tribunal in other cases to proceed, thinking the matter could be retrieved: if it thinks it has not been informed of important evidence it should ask the parties about it…the resolution of this case depends largely on what happened after the Tribunal revealed the irregularity'

46. The Employment appeal Tribunal found in that case that the Tribunal fell into the error of demonstrating that it would place improper weight on the material it had obtained. The Tribunal had asked the witness leading questions regarding the material and appeared to adjudicate on the evidence it had itself put forward.

47. In this case it was improper for the judge to independently seek information by undertaking his own research into a non-legal issue. The proper course is to raise the matter with the parties. An answer to his query about chronology is very likely to have been easily provided or he may have been persuaded that it was irrelevant to the Tribunal's task.

48. The accessing of the material was made known to the appellant and his representative just before the start of the hearing. This did not give the appellant much time to make representations but if there were concerns these could and should have been raised at that point even if that would have resulted in an adjournment. The material accessed was not put before the Tribunal, but the information accessed was, as I set out above, already to a very

large extent in the papers. This is not a case where it is suggested the judge placed any weight let alone improper weight on the information he had accessed. The fact that the information contained in the judgment was largely already in the papers (and in the absence of anything specific being cited from the judgment) diminishes the concern that the judge may have been influenced when reaching a decision by information not before the parties and other members of the Tribunal. I have dismissed the arguments on bias. There is no criticism of the conduct of the judge during the hearing. Taking all these factors into account, although the judge acted very unwisely and what he did was clearly procedurally irregular, I consider that the irregularity was remedied (albeit only just) by informing the appellant and his representative at the outset of the hearing. For all the above reasons I do not consider it rendered the hearing unfair.

49. For the above reasons the appeal is dismissed on grounds i) – iv).

50. As I have dismissed the appeal on grounds i) – iv) I do not need to consider the waiver issue, ground v).

Signed on original
on 11 June 2019 **Upper Tribunal Judge Ramshaw**