The Committee (Lord Bingham of Cornhill (Chairman), Lord Nicholls of Birkenhead, Lord Steyn, Lord Millett and Lord Rodger of Earlsferry) have met and have considered the cause Lawal *v.* Northern Spirit Limited. We have heard the appellant in person and counsel on behalf of the Lord Chancellor's Department in intervention. We have heard counsel on behalf of Her Majesty's Attorney General as *amicus curi'*. 19th June 2003.

1. This is the considered opinion of the Committee.

***I. The Issue.***

2. The issue in this appeal is whether, in circumstances in which a Queen's Counsel appearing on an appeal before the Employment Appeal Tribunal ("EAT") had sat as a part-time judge in the EAT with one or both of the lay members (called the "wing members") hearing that appeal, the hearing before the EAT was compatible with Article 6 of the European Convention on Human Rights and the common law test of bias. It is not suggested that there was actual bias. The question is whether in the view of a fair-minded and informed observer there was a real possibility of subconscious bias on the part of the lay member or lay members.

3. The question is important because the current practice of the Lord Chancellor's Department is to appoint leading counsel, who are Recorders and who have experience of employment law, to sit as part-time judges in the EAT. They undertake to sit at least 20 days a year. Until called in question in the present case, it was thought that there were no restrictions on the freedom of such individuals to appear as counsel before the Tribunal of which they are part-time members. The challenge before the House, as it was before the EAT and the Court of Appeal, is not tied to the particular circumstances of the case. Indeed, the House has before it only the bare facts as incorporated in the issue outlined. The attack is on the system. If it is well founded the current practice must come to an end.

***II. The case before the Employment Tribunal.***

4. Given the systemic issue involved, it is possible to summarise the background briefly. The appellant brought a claim for racial discrimination on the ground of the failure of his employers to produce a reference following the termination of his employment. The employers put forward a substantive defence. The Employment Tribunal dismissed the case on the grounds that the Race Relations Act 1976 only gives rights to *current* employees. In so deciding the Employment Tribunal followed a decision of the Court of Appeal in ***Adekeye v Post Office (No. 2)*** [1997] IRLR 105, the correctness of which was subsequently the subject of an appeal heard by the House of Lords in ***D'Souza v London Borough of Lambeth*** [2003] UKHL 33.

***III. The case before the EAT.***

5. Initially the appellant raised before the EAT the broader contention that it was objectionable in principle for the EAT to hear argument from one of its own members. Once it became clear that the Recorder had previously sat with one of the wing members the broader question was no longer pursued before the EAT and the Court of Appeal. The issue became confined to the particular systemic challenge described.

6. On 10 October 2001 the appeal came before the EAT. The Recorder, who had previously sat with one of the lay members of the EAT then sitting, appeared as counsel for one of the parties. The appellant raised the so-called Recorder objection. Without ruling on the objection the tribunal adjourned the appeal to be heard before a tribunal differently constituted. On 18 December 2001 a tribunal chaired by Lindsay J heard the appeal. He sat with two wing members with whom the Recorder had not sat. Strictly, the Recorder objection no longer arose. But the tribunal was rightly anxious to determine the point of procedural principle. The tribunal heard the procedural issue first. It reserved its decision on this point. But the tribunal proceeded to hear the substantive appeal. In a reserved decision the EAT dismissed the procedural objection on the ground that in the eyes of a fair-minded observer who had considered the facts *"there is no real possibility that the Employment Appeal Tribunal is biased where the only objection is that either one or both of the lay members hearing an appeal have previously sat with a Recorder who, as counsel, is appearing for a party in that appeal":* [2002] IRLR 228, 235 at para 34. In respect of the substantive appeal the tribunal held that it was bound by the decisions of the Court of Appeal in ***D'Souza*** and ***Adekeye*** and accordingly dismissed the appeal.

***IV. The Court of Appeal.***

7. On appeal to the Court of Appeal it was agreed to hear the Recorder objection first. The reason for this course was that the case of ***D'Souza*** was then pending in the House of Lords: the decision in that case was likely to be determinative of the substantive issue. (The House has recently given its decision in ***D'Souza*** [2003] UKHL 33). By a majority the Court of Appeal dismissed the appeal on the Recorder objection: [2002] EWCA Civ 1218; [2002] ICR 1507. Lord Phillips of Worth Matravers MR and Mummery LJ gave the judgments of the majority. Pill LJ gave a dissenting judgment.

8. The essential thrust of the reasoning in the Court of Appeal must be identified. Giving the first judgment, Mummery LJ concluded (para 20): *"The Recorder objection amounts to no more than an assertion that a lay member might possibly be more disposed to accept the submissions of one party's legal representative than those of the other side, as a result of the professional experience of having sat on the tribunal with him in his capacity as a part-time judge. That is merely a speculative and remote possibility based on an unfounded and, some might think, condescending assumption that a lay member sitting with another judge on the hearing of an appeal cannot tell the difference between the impartial decision-making role played by a tribunal panel of a judge and two lay members and the adversarial role of the partisan advocates appearing for the parties."*

The Master of the Rolls expressed his agreement with this view as follows (para 50): *". . . there are no grounds for doubting the capacity of a lay member of an Employment Appeal Tribunal to reach a decision uninfluenced by the fact that he has, on a previous occasion, sat with the advocate for one of the parties, in a judicial capacity. Lay members normally serve on the Tribunal for many years, once appointed. They will have experience of some of those who appear before them, and they are likely to be those who appear often in that forum, occasionally sitting as judges. They will rightly perceive them as advocates who occasionally sit as judges, not as judges who occasionally stand down to act as advocates. It is not reasonable to apprehend that the lay member will, even subconsciously, react more favourably to such an advocate than to one who does not sit part-time in the Tribunal."*

The Master of the Rolls added a qualification. He said [para 52]: *". . . A recorder agrees to sit at least 20 days in the year. There is no maximum to the days that he can sit, if so requested. I consider that there would be more substance to the concerns raised by Mr Lawal if, in this specialised Tribunal, advocates were requested to sit with a frequency that might lead lay members to view them as judges, appearing part-time as advocates, rather than the reverse."*

9. Pill LJ thought that a part-time judge who subsequently appears as an advocate *"is likely to be treated by lay members with an additional degree of authority"* (para 36). He explained (para 39): *"The fair-minded and informed lay observer will readily perceive, I have no doubt, the collegiate spirit in which the Appeal Tribunal operates and the degree of trust which lay members repose in the presiding judge. It is in my judgment likely to diminish public confidence in the administration of justice if a judge who enjoys that relationship with lay members, with the degree of reliance placed on his view of the law, subsequently appears before them as an advocate. The fair-minded observer might well reasonably perceive that the litigant opposed by an advocate who is a member of the Tribunal and has sat with its lay members is at a disadvantage as a result of that association. A litigant's doubt about impartiality . . . would, for the reasons given, be a legitimate doubt. In my view, the procedure does not inspire public confidence."*

These contrasting views reflect the essential terrain of the debate before the House.

***V. The Appeal to the House.***

10. By leave given by an Appeal Committee the appellant appealed to the House of Lords. As before the EAT (chaired by Lindsay J), and in the Court of Appeal, counsel acting as *amicus curi'* argued the case for the appellant, and counsel for the Lord Chancellor's Department put forward the case for maintaining the status quo. The appellant added brief supplementary observations. The respondent had no interest in the proceedings and was not represented. But in the result the House has had the advantage of full adversarial argument by counsel appearing as *amicus curi'* and counsel for the Lord Chancellor's Department.

***VI. Part-time Judges and Lay Members of the EAT.***

11. In order to make a judgment on the issues the way in which the system operates must be described. In 2000 the Lord Chancellor, pursuant to section 24 of the Employment Tribunals Act 1996, appointed five Queen's Counsel, who were already Recorders, to be part-time judges of the EAT. The present position is that there are nine such part-time judges. They all have experience of employment law. As in the case of full-time judges of the EAT, part-time judges normally sit with two lay members both at preliminary hearings and on full appeals. At present the terms of appointment of part-time judges do not place any restriction on them appearing as counsel in the EAT. No criticism is made, or can be made, of the conduct of the Recorders who relied on the view, supported by the Lord Chancellor's Department, that they were under no restriction. They were all entitled to act on the current understanding.

12. The function of the EAT is to hear appeals on questions of law from Employment Tribunals: section 21(1) of the Employment Tribunals Act 1996. What may amount to a question of law in this context is not narrowly circumscribed. For example, the question whether there was evidence on which an Employment Tribunal could have come to a certain conclusion may depending on the setting be a question of law: *Harvey on Industrial Relations and Employment Law,* Vol. 5, para 1630. On all matters which may properly come before it the EAT acts by a majority: the judge may be outvoted by the two lay members on the question of law involved.

13. The laymen sitting on a particular tribunal are all experienced in industrial relations. The judge, or part-time judge is normally assisted by two lay members: one from a panel drawn from employers and one drawn from a panel drawn from employees: see section 22(2) and section 25 of the Employment Tribunals Act 1996. The wing members are never lawyers and have no legal training. On the other hand, their standing is high: it is currently the highest judicial appointment open to a person who holds no legal qualification.

***VII. The test for bias.***

14. In ***Porter v. Magill*** [2002] 2 AC 357 the House of Lords approved a modification of the common law test of bias enunciated in *R v Gough* [1993] AC 646. This modification was first put forward in *In re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 WLR 700. The purpose and effect of the modification was to bring the common law rule into line with the Strasbourg jurisprudence. In ***Porter v Magill*** Lord Hope of Craighead explained:

*"102. . . . The Court of Appeal took the opportunity in* ***In re Medicaments and Related Classes of Goods (No. 2)*** *[2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 711A-B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in R v Gough had not commanded*

*universal approval. At p 711B-C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review **R v Gough** to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp 726-727:*

*'85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in **R v Gough** is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. 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, or a real danger, the two being the same, that the tribunal was biased.'*

*103. I respectfully suggest that your Lordships should now approve the modest adjustment of the test in R v Gough set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. 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 House unanimously endorsed this proposal. In the result there is now no difference between the common law test of bias and the requirements under Article 6 of the Convention of an independent and impartial tribunal, the latter being the operative requirement in the present context. The small but important shift approved in ***Magill v Porter*** has at its core the need for *"the confidence which must be inspired by the courts in a democratic society"*: ***Belilos v Switzerland*** (1988) 10 EHRR 466, at para 67; ***Wettstein v Switzerland*** (Application No. 33958/96) para. 44; *In Re Medicaments*, at para 83. Public perception of the possibility of unconscious bias is the key. It 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. This idea was succinctly expressed in ***Johnson v Johnson*** (2000) 200 CLR 488, 509, at para 53, by Kirby J when he stated that *"a reasonable member of the public is neither complacent nor unduly sensitive or suspicious"*.

***X. The analogies and their weight.***

15. One does not come to the issue with a clean slate. On the contrary, the issue of unconscious bias has cropped up in various contexts which may arguably throw light on the problem. For present purposes three analogies in ascending order of importance can be considered. First, the current Terms and Conditions governing the appointment of Recorders, published in December 2002, contains the following restriction (para 26): *"A Recorder who is an MP, Parliamentary candidate or local Councillor should not sit as a Recorder within their own constituency or the area covered by the council."*

While such a case is very different from the one before the House, the reason for the restriction is instructive. The rationale must be to protect public confidence in the integrity of the administration of justice. Section 38(1) of the Solicitors Act 1974 is also instructive. It provides that "it shall not be lawful for any solicitor who is one of the justices of the peace for any area . . . to act in connection with proceedings before any of those justices as solicitor . . . of any person concerned in those proceedings." Where the area is divided into petty sessional divisions the restriction does not apply to proceedings before justices acting for a petty sessional division for which the solicitor does not ordinarily act. Again, the purpose must be to guard against the erosion of public confidence in the administration of justice.

16. The second analogy is somewhat closer to what is under consideration in the present case. Paragraph 30 of the Policy, Procedure & Terms and Conditions of Service of Recorders published in April 2002 provides: *". . . In particular, [a barrister or solicitor advocate] should not in any circumstances appear in any court before a jury which includes persons who were members of a jury panel serving at that court when they sat there as a Recorder, or vice versa."*

Paragraph 23 of the Recorder Terms and Conditions published in December 2002 fleshed out this specific restriction into a more general principle. It reads as follows: *"The governing principle is that no person should sit in a judicial capacity in any circumstances, which would lead an objective onlooker with knowledge of all the material facts reasonably to suspect that the person might be biased. As a general rule, therefore, a barrister or solicitor advocate ought not to sit as a Recorder or to appear in a Magistrates' Court, County Court or a High Court or Crown Court centre if he or she is liable to be embarrassed in either capacity by doing so."*

It is, however, not in doubt that the specific prohibition previously published is comprehended under the general principle and remains in full force. This prohibition appears to contemplate the possibility that a member of a jury who has served at a court at which the Recorder was the presiding judge would have looked to him for directions (including directions on the law) and viewed him with a degree of deference and respect, and that that previous relationship may cause such a jury member to accord to the Recorder's submissions, when he subsequently appears before him as an advocate, with an additional degree of influence.

17. The comparison between, on the one hand, a member of the jury and a presiding judge and, on the other hand, a lay member of the EAT and the presiding judge is clearly far from exact. Yet there are similarities between the two, namely, that neither the jury member nor the wing member is legally qualified and that both necessarily look to the judge for guidance on the law when adjudicating on the case before them. The rule of practice applicable in criminal trials is designed to avoid a situation similar to that which exists in the present case, namely that lay individuals participating in the administration of justice should not have the added burden of having individuals whom they have come to regard as judges appear before them as advocates advancing arguments on behalf of a particular party. It is true, of course, that unlike the relationship between the jury member and the presiding judge, the lay member and the judge of the EAT are colleagues sharing a professional relationship. Counsel appearing as *amicus curi'* has, however, pointed out that this factor may cut both ways: whilst it may lessen the impact of the influence exerted by the EAT judge over a wing member it creates a collegiate relationship between them, which is not present in the relationship between the jury member and the presiding judge, and which may be no less worrying in the eyes of the fair-minded observer. Finally, this rule of practice cannot be dismissed as a rule adopted out of an abundance of caution. In ***R v Hoyland-Thornton*** [1984] Crim LR 561 the Court of Appeal Criminal Division (Lord Lane LCJ, Mustill and Otton JJ) treated a breach of the rule as a material irregularity in a criminal trial and declined to apply the proviso. The conviction was quashed. The court took the view that the position where prosecuting counsel was addressing jurors whom in the past he had directed on matters of law in his capacity as a part-time judge must never be allowed to occur.

18. The third analogy is the most important. It relates to the Terms and Conditions of Service and Terms of Appointment of Part-Time Chairmen of Employment Tribunals. The edition of October 2000 provides (para 16):

*". . . in order to ensure that there are no allegations of bias, no part-time Chairman may . . . appear as an advocate before any employment tribunal in the whole of [the] region [to which they have been assigned to sit as a Chairman]."*

A similar restriction appears in the edition of September 2001, at para 16, and the edition of March 2003, at para 15. The restriction applies equally to barristers and solicitors appointed as Chairmen of Employment Tribunals. Counsel for the Lord Chancellor's Department sought to counter the persuasive force of this analogy in two ways. He suggested that the rule was simply adopted out of abundance of caution. This contention is not supported by the language of the documents and the settled general restrictive rule which it imposes. Counsel also relied on an observation of Lindsay J (EAT judgment, at para 33(8)) that the rule was made applicable to barristers because it was thought "*invidious to have different rules for the two branches of the profession*". This is an unconvincing explanation: it is more likely that the general rule was introduced because it was considered necessary.

***XI. Conclusions.***

19. Counsel for the Lord Chancellor's Department argued that the central fallacy in the argument of the *amicus curi'* on unconscious bias is that the wing members are unable to differentiate between the neutral judicial function and the partisan advocacy function. That is, however, to put her argument higher than she in fact put it: the threshold is only a real possibility of unconscious bias. Counsel for the Lord Chancellor's Department acknowledged that a legally qualified judge, when sitting judicially, is likely to have particular influence upon the lay members because the role of the EAT is to determine questions of law. But counsel submitted that it does not mean that the wing member will assume that any submissions made by the part-time judge are necessarily right. Again, that is putting the test higher than it need be put. Counsel emphasised in detail the very high calibre and standing of wing members of the EAT. On this aspect his submissions can readily be accepted. He also submitted that, if the appeal is allowed, Recorders may decline to serve as part-time judges in the EAT, and that the EAT may lose the services of part-time judges who are expert in the field of employment law. This is a realistic possibility. But counsel readily accepted that, if the present practice is in breach of the principle laid down in ***Porter v Magill***, it cannot continue.

20. The correct analysis is as follows. One starts by identifying the circumstances which are said to give rise to bias. In the present case the evidence is limited to the facts set out at the beginning of this opinion, namely that a Queen's Counsel appearing on an appeal before the EAT had sat as a part-time judge in the EAT with one or both lay members hearing the appeal. In such cases there may be substantial variations in the extent to which the part-time judge and the wing members had sat together in the EAT and how recently. These differences are, however, not material. The House must concentrate on a systemic challenge and apply a principled approach to the facts on which it is called to rule.

21. The principle to be applied is that stated in ***Porter v Magill***, namely whether a fair minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the tribunal was biased. Concretely, would such an observer consider that it was reasonably possible that the wing member may be subconsciously biased? The observer is likely to approach the matter on the basis that the lay members look to the judge for guidance on the law, and can be expected to develop a fairly close relationship of trust and confidence with the judge. The observer may also be credited with knowledge that a Recorder, who in a criminal case has sat with jurors, may not subsequently appear as counsel in a case in which one or more of those jurors serve. Despite the differences between the two cases, the observer is likely to attach some relevance to the analogy because in both cases the judge gives guidance on the law to lay men. But the observer is likely to regard the practice forbidding part-time judges in the Employment Tribunal from appearing as counsel before an Employment Tribunal which includes lay members with whom they had previously sat as very much in point. The

Editor of the Industrial Relations Law Review has argued "that a rule to the same effect is even more necessary in the EAT": [2002] IRLR 225. In favour of this view there is the fact that the EAT hears only appeals on questions of law while in the Employment Tribunal the preponderance of disputes involve matters of fact. The observer would not necessarily take this view. But he is likely to take the view that the same principle ought also to apply to the EAT.

22. In the EAT Lindsay J was alive to the possibly that *"some . . . practices will fall prey to increasing sensitivity"* (para 33(10)). What the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago. The informed observer of today can perhaps *"be expected to be aware of the legal traditions and culture of this jurisdiction"* as was said in ***Taylor and Another v Lawrence and Another*** [2003] QB 528, per Lord Woolf CJ, at pp 548-549, at paras 61-64. But he may not be wholly uncritical of this culture. It is more likely that in the words of Kirby J he would be "neither complacent nor unduly sensitive or suspicious": compare also [2002] IRLR 225 (second col.).

23. The current President of the EAT (Lindsay J), a former President of the EAT (Mummery LJ) and the Master of the Rolls, a judge with special knowledge of the judicial system, took a different view. Nevertheless, on this point we find ourselves in agreement with Pill LJ, who also has great experience in the EAT. Like Pill LJ in the Court of Appeal we consider that the present practice in the EAT tends to undermine public confidence in the system. It should be discontinued. It follows that the present practice in the EAT should be assimilated to that in the Employment Tribunal by introducing a restriction on part-time judges appearing as counsel before a panel of the EAT consisting of one or two lay members with whom they had previously sat.

***XI. The outcome.***

*24.* On the facts of the present case the rule was not breached. The EAT presided over by Lindsay J contained no lay members with whom the Queen's Counsel had sat. On the other hand, Mr Lawal has succeeded on the issue of principle raised by the Recorder objection.

***Recommendation***

*25.* In these circumstances we would allow the appeal to the extent of declaring that the appellant was entitled to succeed on the Recorder objection and remit the matter to the Court of Appeal to rule on the substantive issue taking into account the decision of the House **in *D'Souza*** [2003] UKHL 33. We so recommend.