

**OPINIONS**  
**OF THE LORDS OF APPEAL**  
**FOR JUDGMENT IN THE CAUSE**

**R v. Abdroikof (Appellant) and another (On Appeal from the  
Court of Appeal (Criminal Division))**

**R v. Abdroikof and another (Appellant) (On Appeal from the  
Court of Appeal (Criminal Division))**

**R v. Williamson (Appellant) (On Appeal from the Court of Appeal  
(Criminal Division))  
(Conjoined Appeals)**

**Appellate Committee**

**Lord Bingham of Cornhill**  
**Lord Rodger of Earlsferry**  
**Baroness Hale of Richmond**  
**Lord Carswell**  
**Lord Mance**

**Counsel**

*Appellants:*

Richard Carey-Hughes QC

Michael Maher

Richard Hutchings

Simon Berkson

Instructed by :

Appellant Abdroikof: Hayes Burcombe & Co

Appellant Green: Macauley Smith & Co

Appellant Williamson: Colin Watson & Co

*Respondents:*

David Perry QC

Mark Heywood

(Instructed by Crown Prosecution Service)

*Hearing date:*

26 July 2007

ON

WEDNESDAY 17 OCTOBER 2007



**HOUSE OF LORDS**

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**[2007] UKHL 37**

**LORD BINGHAM OF CORNHILL**

My Lords,

1. These three appellants were tried on indictment in different courts on unrelated charges and were convicted. In the first two cases the trial jury included among its members a serving police officer, and in the third case it included a solicitor employed by the Crown Prosecuting Service. The common question raised by these three conjoined appeals is whether a fair-minded and informed observer, on the facts of the three cases, would conclude that there was a real possibility that the trial jury was biased.

2. The Court of Appeal (Lord Woolf CJ, Richards and Henriques JJ) which also heard the appeals together, held that the observer would not so conclude: [2005] EWCA Crim 1986, [2005] 1 WLR 3538. The appellants challenge that ruling.

3. The first appellant, Nurlon Abdroikof, faced counts of theft (to which he pleaded guilty) and attempted murder (to which he pleaded not guilty, but of which he was convicted). The trial last for six days in August 2004 before the Common Serjeant of London at the Central Criminal Court. There was a minor issue concerning one aspect of the evidence of a police witness. On Friday 27 August, when the jury were in retirement considering their verdicts, the foreman of the jury sent a

note to the judge revealing that he was a serving police officer. He was concerned that if required to report for duty at the Notting Hill Carnival on the following Bank Holiday Monday, when the court was not sitting, he might meet one or more police officers who had been called to give evidence at the trial. With the acquiescence of defending counsel, who had not previously known of the foreman's occupation, the juror was directed not to report for duty on the Monday.

4. The second appellant, Richard John Green, was stopped by police officers on 18 March 2004. He was searched by one of the officers, Sergeant Burgess, and in the course of the search the sergeant put his hand into the appellant's pocket and pricked his finger on a used syringe. The appellant was charged with offences of assault occasioning actual bodily harm and having a bladed or pointed article. He pleaded not guilty and was tried before His Honour Judge Statman and a jury at Woolwich Crown Court. There was a dispute on the evidence between him and the police sergeant concerning the manner in which he was searched and what he and the sergeant respectively said. The appellant was convicted and sentenced. Some time after the trial, by chance, the appellant's solicitor discovered that a police officer, PC Mason, had been a member of the trial jury, a fact not known to the appellant at the time. PC Mason was at the time posted to Eltham Police Station, within an Operational Command Unit which committed its work to Woolwich Crown Court. PC Mason and Sergeant Burgess were both serving in the same borough at the time of the incident and had once served in the same police station at the same time, but the two officers were not known to one another.

5. The third appellant, Kenneth Joseph Williamson, was charged with two very serious offences of rape, of which he was convicted on 3 February 2005 after a trial before His Honour Judge Hale and a jury in the Crown Court at Warrington. The jury included among its members Mr McKay-Smith. Before the trial began he wrote to the court to say he had been summoned to serve as a member of the jury at Warrington. He recorded that he worked for the Crown Prosecution Service and had done so since its inception in 1986. He had previously worked for the Greater Manchester Council as a prosecuting solicitor, having been in private practice for five years before that. He was a Higher Court Advocate and had practised as such in many local courts including that at Warrington on behalf of the Crown, although he had not conducted a trial in the Crown Court. His current job was to advise the police on charging out of hours. He said that as a matter of policy the CPS had asked those summoned to ensure that the judge had all the necessary information to hand in order to exercise discretion as to the feasibility of

an individual CPS employee serving. This letter was passed to defending counsel, who sought to challenge Mr McKay-Smith, contending that the court should not only do what is right but should be seen to have done what is right. He complained of potential bias and relied on the appellant's fair trial right under article 6 of the European Convention on Human Rights. The judge ruled that he had to operate within the law passed by Parliament and he could see no objection to this juror sitting in the light of the current legislation. Mr McKay-Smith duly sat, and became the foreman of the jury.

*The criminal trial jury in England and Wales*

6. The criminal trial jury has now, as it has had for centuries, the immense responsibility of deciding the all-important issue of guilt in the most serious criminal cases coming before the courts of England and Wales. Upon its integrity that of the trial process to a large extent depends. Upon its reputation for independence and impartiality public confidence in the integrity of the system also, to a large extent, depends.

7. Given the central importance of the trial jury in our system, it is not surprising that it has received much parliamentary and judicial attention. Before 1825, it had been the subject of 85 statutes. Since then it has been the subject of many more. Thus very detailed rules have been made governing the qualification and disqualification of jurors; the manner of selection; the right of the crown and the defence to challenge individual jurors, or the array; the procedural conduct of the trial; the evidence which the jury may be permitted to hear, and the evidence which it may not be permitted to hear; the terms in which the judge should (and should not) direct the jury on the law and the facts; the protection of the jury against exposure to extraneous materials which might sway its judgment; the conduct of jurors in and out of court, and even in the retiring room; the cloak of secrecy thrown over the jury's deliberations; the absolution of the jury from the duty, binding on almost other judicial decision makers, to give reasons; the immunity of jurors from all personal liability for their decisions. Most of these rules reflect a familiar truth, that if its metal be flawed a bell will not ring true. It is of the utmost importance that juries should ring true, and be generally recognised to do so.

8. The present questions arise as a result of changes made in the Criminal Justice Act 2003 to the rules formerly governing the qualification and disqualification of jurors. This, among other aspects of

jury service, was earlier reviewed by a very distinguished departmental committee chaired by Lord Morris of Borth-y-Gest, which reported in 1965 (Cmnd 2627). At that time, pursuant to the Juries Act 1870 and a series of later statutes, a number of occupational groups were exempted from jury service, including the elected members of representative assemblies, ministers of religion, officers in the armed services, medical practitioners, various classes of public servants, holders of certain offices related to the sea and all who could not satisfy a threshold property qualification, a provision which continued in practice to debar many women from jury service although by section 1 of the Sex Disqualification (Removal) Act 1919 women were no longer exempt. The Morris Committee made valuable proposals to modernise and rationalise this anomalous patchwork of exemptions, which were given effect in the Juries Act.

9. The Morris Committee, however, considered that two occupational groups, exempt under the old law, should continue to be ineligible: those professionally concerned in the administration of the law, and the police. The committee was concerned that the trial jury should remain a lay tribunal, comprising ordinary, responsible members of the public, not dominated by lawyers; and it recognised problems of partiality, and perceived partiality if those professionally committed to the prosecution side of the adversarial trial process were to sit as members of trial juries. The committee's thinking is clear in paras 103 and 104 of their report:

“103. The present law exempts many of those who practise the law or are concerned with the business of the courts. It seems to us clearly right that such persons, and all others closely connected with the administration of law and justice, should be specifically excluded from juries. At present there is no statutory provision prohibiting a police officer, for example, whose name happens by mistake to be marked on the register as eligible for jury service, from actually serving. This is most unsatisfactory. If juries are to continue to command public confidence it is essential that they should manifestly represent an impartial and lay element in the workings of the courts. It follows that all those whose work is connected with the detection of crime and the enforcement of law and order must be excluded, as must those who professionally practise the law, or whose work is concerned with the functioning of the courts. It is impossible, whether desirable or not, to ensure that jurors have no previous

knowledge of the law before they begin to hear a case. Many persons without formal legal training, for example, know enough about the way our courts function to be able to make a shrewd guess as to whether the accused has a previous criminal record; and one cannot entirely prevent by legislation the use of such knowledge in the jury room.

104. Nevertheless, it seems to us necessary to secure the exclusion from juries of any person who, in the words of one memorandum submitted to us, 'because of occupation or position, has knowledge or experience of a legal or quasi-legal nature which is likely to enable him to exercise undue influence over his fellow jurors'. If justice is not only to be done but to be seen to be done, such persons must not be allowed to serve on juries lest the specialist knowledge and prestige attaching to their occupations might cause them to be what has been described to us as 'built-in leaders'."

The committee accordingly recommended that those in widely-drawn categories of lawyers and police officers should be ineligible. One problem concerned civilian employees of the police, of whom the committee said:

"110. We have suggested that the description of the police who should be ineligible should be drawn rather more widely than under the present law relating to exemptions. The case for doing so is self-evident. A more difficult problem arises over civilian employees of police forces. The Commissioner of Police of the Metropolis expressed the view to us that civilian staff could, where appropriate, be dealt with by excusal as at present. We do not doubt that in practice this is so. But we think there is much force in the contention of the Association of Chief Police Officers that 'all civilian employees in the police service who have been employed for some length of time, no matter in what capacity, become identified with the service through their everyday contact with its members. As such they become influenced by the principles and attitudes of the police, and it would be difficult for them to bring to bear those qualities demanding a completely impartial approach to the problems confronting members of a jury'. We find this convincing, and we have little doubt that civilian employees in the police service, including traffic wardens, should be ineligible.

111. We are aware that any proposals dealing with such matters can be criticised on grounds of inconsistency. There is no wholly satisfactory line which can be drawn between those who in the interests of preserving the jury as an impartial lay element should be ineligible, and those whose connexion as a profession or occupation with the administration of law and order is sufficiently tenuous to justify their not being excluded. But our recommendations have been made after a detailed consideration of the claims of the various occupations concerned.”

10. The issue of jurors’ eligibility was next reviewed by the Rt Hon Lord Justice Auld in his comprehensive “Review of the Criminal Courts of England and Wales” (September 2001). In Chapter 5 he wrote, in para 30:

“30 There is also the anxiety voiced by some that those closely connected with the criminal justice system, for example, a policeman or a prosecutor, would not approach the case with the same openness of mind as someone unconnected with the legal system. I do not know why the undoubted risk of prejudice of that sort should be any greater than in the case of many others who are not excluded from juries and who are trusted to put aside any prejudices they may have. Take, for example shopkeepers or house-owners who may have been burgled, or car owners whose cars may have been vandalised, many government and other employees concerned in one way or another with public welfare and people with strong views on various controversial issues, such as legalisation of drugs or euthanasia. I acknowledge that there may be Article 6 considerations in this. But it would be for the judge in each case to satisfy himself that the potential juror in question was not likely to engender any reasonable suspicion or apprehension of bias so as to distinguish him from other members of the public who would normally be expected to have an interest in upholding the law. Provided that the judge was so satisfied, the over-all fairness of the tribunal and of the trial should not be at risk.”

Thus, acknowledging anxiety about what he recognised as an undoubted risk of prejudice, the Lord Justice recognised that all risk of prejudice or partiality could not be eradicated and appears to have envisaged that any question about the suspicion or apprehension of bias on the part of any particular juror could be resolved by the trial judge on the facts of the particular case. He recommended that everyone should be eligible for jury service save for the mentally ill. This recommendation was given effect by section 321 of and Schedule 33 to the 2003 Act.

11. The Metropolitan Police, by Notices 20-2004 Item 1, informed police officers and staff that they were no longer exempt from jury service. The notice advised that “Where possible, police officers should not attend the court where their Operational Command Unit commits its work”.

12. The CPS notified its staff in June 2004 that in accordance with the Criminal Justice Act 2003 “CPS employees are now eligible to sit on a jury where the CPS is not the prosecuting authority”. Employees summoned to attend court for jury service were required to notify the court in advance, alerting it to the fact that they were CPS employees and ascertaining where there were any cases to sit on where the CPS was not the prosecuting authority. Later guidance on 23 July 2004, following guidance issued by the Department for Constitutional Affairs, endorsed the practice of alerting the court. But it acknowledged that CPS employees were being asked to sit on cases where the CPS was the prosecuting authority. Having sought guidance from the DCA, the CPS advised that decisions on whether a CPS employee could sit where the CPS was the prosecuting authority rested ultimately with the judge, and CPS employees should follow the court’s judgment as to whether it was appropriate to sit as a juror on a particular case. The June 2004 notification was re-published in November 2004.

13. Attention was drawn in argument to the DCA’s publication on “Judicial Appointments in England and Wales”. This addressed applications for part-time judicial employment by lawyers in the Government Legal Service, the CPS and the Serious Fraud Office. It reads:

“Eligibility for judicial appointment of Government Legal Service (GLS), Crown Prosecution Service (CPS) and Serious Fraud Office (SFO) lawyers has been reviewed. In the past CPS, SFO and GLS lawyers were eligible to

apply for appointments only in jurisdictions where the State is not habitually a party. In June 2003, the policy was revised so that:

- a. CPS and SFO lawyers will be eligible to apply to sit in tribunals where the Government is a party.
- b. CPS, SFO and GLS lawyers will be eligible to apply to sit as Recorders in civil work, except in civil matters that involve their own Department.
- c. GLS lawyers will be eligible to apply to sit as Deputy District Judges in the Magistrates' Courts (but not to sit on their own Departmental prosecutions).
- d. The practicalities of listing in the Magistrates' Courts will be considered so that CPS and SFO lawyers will be eligible to apply to sit on criminal matters as Deputy District Judges in cases not involving their own Department."

The rule appears to be that GLS, CPS or SFO lawyers are not to adjudicate in criminal cases where the authority to which they belong is the prosecutor.

### *Appearance of bias*

14. In his extempore judgment in *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, 259, Lord Hewart CJ enunciated one of the best known principles of English law:

“. . . it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”

This principle was quoted with approval by the European Court of Human Rights in one of its very early decisions: *Delcourt v Belgium* (1970) 1 EHRR 355, 369, para 31. There is, as Lord Steyn on behalf of the House ruled in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2003] ICR 856, para 14, now no difference between the common law test of bias and the requirement under article 6 of the European Convention of an independent and impartial tribunal. As Lord Hewart's aphorism recognises and later case law makes clear, justice is not done

if the objective judgment of a judicial decision-maker (whether judge or juror) is shown to be vitiated by actual partiality or prejudice towards any of the parties. But actual bias, hard as it usually is to prove, is rarely alleged, and is not alleged in any of the cases before the House. Neither of the police officers, nor the Crown prosecutor, is alleged by the respective appellants to have leant in favour of the prosecution side for any improper reason. The appellants rely on the second part of Lord Hewart's aphorism: that justice should manifestly and undoubtedly be seen to be done. This condition, the appellants say, is not met where one of those charged to decide whether the appellant was guilty or not, is employed full-time by a body dedicated to promoting the success of one side in the adversarial trial process.

15. The test of apparent bias has been developed through a succession of cases. In *R v Barnsley Licensing Justices, Ex p Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167, 187, Devlin LJ recognised that "Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so". Lord Denning MR, in *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577, 599, said:

"The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand . . ."

Lord Goff of Chieveley, in *R v Gough* [1993] AC 646, formulated the test of apparent bias in terms a little different from those now accepted, but echoed (at p 659) Devlin LJ's observation in the *Barnsley Licensing Justices* case in referring to "the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias . . .". Following the decision of the Court of Appeal in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, the accepted test is that laid down in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, para 103: "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". As the House pointed out in *Lawal v Northern Spirit Ltd*, above, para 14, "Public perception of the possibility of unconscious bias is the key", an observation endorsed by

the Privy Council in *Meerabux v Attorney General of Belize* [2005] UKPC 12, [2005] 2 AC 513, para 22. The characteristics of the fair-minded and informed observer are now well understood: he must adopt a balanced approach and will be taken to be a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious: see *Lawal v Northern Spirit Ltd*, above, para 14; *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53.

16. The analysis of the European Court in Strasbourg has been to distinguish between a subjective test, directed to identification of actual bias, and what it calls an objective test, directed to what in this country would be called apparent bias: see, for instance, *Hauschildt v Denmark* (1989) 12 EHRR 266, 279, paras 46-49. The court has not regarded a defendant's perceptions as decisive, but has required that his suspicions of bias be objectively justified. By this is meant that there must be some demonstrable and rational basis for what he suspects. The court has accepted that appearances are not without importance (see, for instance, *Hauschildt*, above, para 48).

17. Since the Convention test of apparent bias is understood to be the same as the domestic test (see para 14 above), and certainly to impose no more rigorous a test, no detailed review of the Strasbourg case law is called for. But one authority should be mentioned: *Pullar v United Kingdom* (1996) 22 EHRR 391. The applicant P was an elected councillor charged with corruption. He was said to have offered, for reward, to support a planning application made by M, a partner in a firm of architects, and C, a partner in a firm of quantity surveyors. He was tried before a sheriff and a jury in July 1992. M and C were the leading prosecution witnesses. Among the jurors summoned to the trial was F, a junior employee of M's firm who had received notice of dismissal on grounds of redundancy shortly before the trial began. F informed the clerk of the court of his employment in M's firm, but the clerk, having ascertained that F did not know P and was ignorant of the facts, took no action and did not inform the sheriff or the procurator fiscal or defending lawyers. M, on later seeing F sitting as a juror, told the clerk of his connection with F, but the clerk again took no action and informed no one. P was convicted. His lawyers learned of the connection between F and M only after the trial, and appealed to the High Court of Justiciary. That court held that the clerk ought to have informed the sheriff, and if he had F would probably have been excused. But it held (as recorded by the Strasbourg court, para 16) that a mere suspicion of bias was insufficient to justify quashing a verdict, and it was necessary to prove that a miscarriage of justice had actually occurred. So the appeal failed. On application to Strasbourg the

Commission unanimously found a breach of article 6(1) of the Convention: in the circumstances of the case the impartiality of the jury which convicted P was capable of appearing open to doubt and P's fears in this regard could be considered as objectively justified (p 400, para 42). The court, by a bare majority of 5-4, held that there had been no violation. It was pointed out (p 405, para 38) that knowledge of a person did not necessarily lead to prejudice in his favour, and that it had to be decided whether the familiarity in question was of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal. F had not worked on the project giving rise to the prosecution (p 405, para 39), and it was not clear that an objective observer would conclude that F, having just received notice of redundancy, would be more inclined to believe M rather than the witnesses for the defence. This is at best a very borderline decision, perhaps sustainable on its special facts.

#### *The Court of Appeal decision*

18. In its judgment the Court of Appeal [2005] 1 WLR 3538 reviewed most of the materials canvassed in this opinion. It recognised (para 15) that a trial must not only be fair but appear to be so, and recognised the test laid down in *Porter v Magill*. It shared (paras 27, 31) the opinions expressed by Lord Justice Auld in his report, and in paragraph 29 observed:

“We, of course, accept the danger of a juror being unconsciously prejudiced. However, with any juror, there is a danger of having prejudices. The variety of prejudices that jurors can have are almost unlimited.”

In paragraph 30 the court concluded:

“30 The fact that there are 12 members of the jury of which at least ten must be agreed is a real protection against the prejudices of an individual juror resulting in unfairness to a defendant. In addition, it is to be hoped and expected, that those who are employed in the administration of justice will be particularly careful not to act in a manner which is inconsistent with their duty as members of the jury and, in particular, to exercise the independence of mind which is required of all jurors and

to be on their guard to reach their verdict only on the evidence in accordance with the directions from the trial judge. It is our view that a fair minded and informed observer would not conclude that there was a real possibility that a juror was biased merely because his occupation was one which meant that he was involved in some capacity or other in the administration of justice.”

The court acknowledged (para 32) the risk that a juror might depart from his solemn duty, but the system could not work on the basis that that risk could be excluded. Perfect fairness was unattainable. If a juror had special knowledge of a case or individuals involved in it, that should be drawn to the attention of the judge (paras 33-35), and jurors were fully instructed on their duty.

19. Dismissing the appeal of the first appellant, the court said (para 47):

“47 In our judgment there was nothing in the particular circumstances of the case to give rise to any cause for concern with regard to the presence of a police officer on the jury. The case falls squarely within the general issues of principle discussed above. Accordingly, our conclusion that the presence of a police officer on a jury does not in itself offend the principles of fairness leads us to dismiss Mr Abdroikof’s appeal against conviction.”

20. In the case of the second appellant, the court noted (para 65) that, contrary to the practice recommended in Notices 20-2004, PC Mason had attended a court to which his Operational Command Unit committed its work. But having satisfied itself that PC Mason and Sergeant Burgess were not known to each other it fell back on its conclusion already expressed, that the presence of a police officer on a jury does not in itself offend the principles of fairness.

21. In the case of the third appellant, the court found (para 73) no basis upon which to allege objective partiality and no basis upon which to contend that his fears as to impartiality could be objectively justified.

22. In argument for the Crown Mr David Perry QC supported the Court of Appeal's decisions for the reasons which it gave. But he laid more emphasis than the court had done on the institutional safeguards established to protect the independence and impartiality of the jury. He instanced the requirement of random selection; the power to excuse for good reason; the selection of individual jurors by ballot in open court; the power, albeit exercised only exceptionally, to question jurors; the right of challenge; the oath sworn or affirmation made by each juror in the presence of the defendant; the judge's power to discharge an unsuitable juror; the pre-trial guidance given to jurors; the constant reminders and warnings given to jurors during the trial and in the summing-up; the availability of a majority verdict; the right of jurors to report the misconduct of other jurors to the judge; the return of the verdict in open court. These safeguards, it was submitted, do all that can be done to exclude the possibility of actual bias, and to dispel the appearance of it to the fair-minded and informed observer.

### *Conclusion*

23. It must in my view be accepted that most adult human beings, as a result of their background, education and experience, harbour certain prejudices and predilections of which they may be conscious or unconscious. I would also, for my part, accept that the safeguards established to protect the impartiality of the jury, when properly operated, do all that can reasonably be done to neutralise the ordinary prejudices and predilections to which we are all prone. But this does not meet the central thrust of the case made by Mr Richard Carey-Hughes QC for the appellants: that these cases do not involve the ordinary prejudices and predilections to which we are all prone but the possibility of bias (possibly unconscious) which, as he submits, inevitably flows from the presence on a jury of persons professionally committed to one side only of an adversarial trial process, not merely (as the Court of Appeal put it) "involved in some capacity or other in the administration of justice". Lord Justice Auld's expectation that each doubtful case would be resolved by the judge on a case by case basis is not, he pointed out, met if neither the judge nor counsel know of the identity of a police officer or the juror, as appears to be the present practice.

24. This is not an argument I feel able, in principle, to dismiss. It is not a criticism of the police service, but a tribute to its greatest strength, that officers belong to a disciplined force, bound to each other by strong bonds of loyalty, mutual support, shared danger and responsibility, culture and tradition. The Morris Committee thought it self-evident that

officers could not be, or be seen to be, impartial participants in the prosecution process, a disqualification which in the judgment of ACPO (accepted by the committee) extended to civilian employees of the police. The facts revealed in the recent case of *R v Pintori* ([2007] EWCA Crim 1700, 13 July 2007, unreported) perhaps suggest that this is not an out-dated perception. Serving police officers remain ineligible for jury service in Scotland, Northern Ireland, Australia, New Zealand, Canada, Hong Kong, Gibraltar and a number of states in the United States, the remainder of the states providing a procedure to question jurors on their occupations and allegiances. But Parliament has declared that in England and Wales police officers are eligible to sit, perhaps envisaging that their identity would be known and any objection would be the subject of judicial decision.

25. In the case of the first appellant, it was unfortunate that the identity of the officer became known at such a late stage in the trial, and on very short notice to the judge and defence counsel. But had the matter been ventilated at the outset of the trial, it is difficult to see what argument defence counsel could have urged other than the general undesirability of police officers serving on juries, a difficult argument to advance in face of the parliamentary enactment. It was not a case which turned on a contest between the evidence of the police and that of the appellant, and it would have been hard to suggest that the case was one in which unconscious prejudice, even if present, would have been likely to operate to the disadvantage of the appellant, and it makes no difference that the officer was the foreman of the jury. In the event, confronted with this question at very short notice, defence counsel raised no objection. I conclude, not without unease, that having regard to the parliamentary enactment the Court of Appeal reached the right conclusion in this case, and I would dismiss the appeal.

26. The second appellant's case is different. Here, there was a crucial dispute on the evidence between the appellant and the police sergeant, and the sergeant and the juror, although not personally known to each other, shared the same local service background. In this context the instinct (however unconscious) of a police officer on the jury to prefer the evidence of a brother officer to that of a drug-addicted defendant would be judged by the fair-minded and informed observer to be a real and possible source of unfairness, beyond the reach of standard judicial warnings and directions. The second appellant was not tried by a tribunal which was and appeared to be impartial. It cannot be supposed that Parliament intended to infringe the rule in the *Sussex Justices* case, still less to do so without express language. I would allow this appeal, and quash the second appellant's conviction.

27. In the case of the third appellant, no possible criticism is to be made of Mr McKay-Smith, who acted in strict compliance with the guidance given to him and left the matter to the judge. But the judge gave no serious consideration to the objection of defence counsel, who himself had little opportunity to review the law on this subject. It must, perhaps, be doubted whether Lord Justice Auld or Parliament contemplated that employed Crown prosecutors would sit as jurors in prosecutions brought by their own authority. It is in my opinion clear that justice is not seen to be done if one discharging the very important neutral role of juror is a full-time, salaried, long-serving employee of the prosecutor. This is a much stronger case than *Pullar* (see para 17 above): it is as if, on the facts of that case, F had been employed in the department of the procurator fiscal. Had that been so, one may be sure the court would have agreed with the commission. The third appellant was entitled to be tried by a tribunal that was and appeared to be impartial, and in my opinion he was not. The consequence is that his convictions must be quashed. This is a most unfortunate outcome, since the third appellant was accused of very grave crimes, of which he may have been guilty. But even a guilty defendant is entitled to be tried by an impartial tribunal and the consequence is inescapable. I would allow the appeal and remit the case to the Court of Appeal with an invitation to quash the convictions and rule on any application which may be made for a retrial.

## **LORD RODGER OF EARLSFERRY**

My Lords,

28. I would dismiss all three appeals. In explaining my reasons, I gratefully adopt the accounts of the facts and issues given by my noble and learned friends, Lord Bingham of Cornhill and Lord Carswell.

29. In accordance with *Porter v McGill* [2002] 2 AC 357, 494H, para 103, the question for the fair-minded and informed observer in these cases would be: “Having considered the facts, do I consider that there is a real possibility that the jury that included a serving police officer or a lawyer who worked for the Crown Prosecution Service was biased?” That test must be taken to incorporate the well-known idea that justice must not only be done, but should manifestly and undoubtedly be seen to be done: *R v Sussex Justices, Ex pte McCarthy* [1924] 1 KB 256, 259, per Lord Hewart LCJ.

30. The notional observer may well be surprised to discover that, as a result of the Criminal Justice Act 2003, police officers can now serve on juries in England and Wales. His reaction to learning about lawyers in the Crown Prosecution Service (“CPS”) now being able to serve as jurors may be slightly different. Surprise, in the first place, that lawyers can serve at all. Then, when he finds out that CPS lawyers are responsible for decisions to prosecute, the observer will realise that the lawyer employed by the CPS will be sitting on a jury in a case where the decision to prosecute was taken by some other lawyer in the same service. That again may surprise the observer. He may well have assumed that juries were meant to be made up of lay people who had nothing to do with the police or the law. But now he knows that Parliament has decided that police officers and lawyers, including CPS lawyers, are eligible to be jurors.

31. When he digests this information, the observer’s first reaction may well be that it is indeed possible that, consciously or subconsciously, the police officer on the jury would have tended to prefer the evidence of any police witnesses, or indeed of any prosecution witnesses, to the defence evidence. After all, the officer may himself have given evidence for the Crown in a criminal trial and he spends his working life with other police officers fighting crime. Similarly, the observer may suspect that there is a risk that the CPS lawyer, who spends his professional life prosecuting crime, will have proceeded on the basis that the prosecution case was sound. In other words, the observer may think it possible that these members of the jury were not impartial, but were, consciously or subconsciously, biased in favour of the prosecution.

32. But then, being fair-minded and informed, the observer will think a little more about the matter. He will reflect that, up and down the land, day in day out, we take risks when we hand the critical decisions on guilt or innocence to juries. We take the risk that, consciously or subconsciously, men on juries may be unduly sympathetic to a man charged with rape who claims that he and the woman just got carried away by their physical urges. We take the risk that, consciously or subconsciously, a juror who has herself been the victim of sexual abuse may tend to side with the woman who claims that she was sexually assaulted by the defendant. We take the risk that, consciously or subconsciously, a gay juror may tend to believe the gay man who says that he was assaulted by the defendant in a homophobic attack. We take the risk that, consciously or subconsciously, a homophobic juror may just reject the gay man’s evidence. We take the risk that, consciously or subconsciously, a juror who is an undergraduate may sympathise with a

victim who is an undergraduate at the same university. We take the risk that, consciously or subconsciously, a black juror may tend to believe the evidence of a black witness as opposed to the account given by an Asian defendant. We take the risk that, consciously or subconsciously, a juror who was convicted of drug dealing and was sentenced to four years in prison in the early 1990s may sympathise with a defendant accused of supplying drugs. Having reflected on these and similar situations, the observer will realise that, in effect, Parliament has now added two to the long list of situations where there is indeed a risk, where it is indeed possible, that, consciously or subconsciously, a juror may be partial. But he will also realise that Parliament must have considered that in these two situations, like so many others, the risk is manageable within the system of jury trial as we know it.

33. It would, after all, be wrong to pretend that in these various situations there is not a real, as opposed to a fanciful, possibility that the jurors in question may be biased. For instance, there is plainly a real possibility, in the sense of it being something that could well happen, that a homophobic juror may just reject the gay man's evidence. But the law regards that risk as being manageable and, so, acceptable. The law caters for the risk. It takes steps to minimise it by making jurors take an oath or affirm that they will "faithfully try the defendant and give a true verdict according to the evidence". It makes them sit and listen to the evidence in a solemn setting. It requires the judge to give them a direction that they must assess the evidence impartially. Of course, it would be naïve to suppose that these safeguards will always work with every juror. The law is not naïve: it stipulates that there should be 12 men and women on a jury. The assumption is that, among them, the twelve will be able to neutralise any bias on the part of one or more members and so reach an impartial verdict - by a majority, if necessary. If any of the jurors consider that the jury will be unable to do so, then they must tell the judge, who can then deal with the matter - by discharging the jury, if necessary. So the mere fact that there is a real possibility that a juror may be biased does not mean that there is a real possibility that the jury will be incapable of returning an impartial verdict.

34. The reality therefore is that the jury system operates, not because those who serve are free from prejudice, but despite the fact that many of them will harbour prejudices of various kinds when they enter the jury box. In the United States a voir dire is held to try to select jurors who are free from relevant prejudices. In Britain, with its very different history, such a procedure has not been adopted - indeed it has been specifically rejected. If experience had shown that British juries, made

up of people drawn at random from all kinds of backgrounds, could not act impartially, the system would long since have lost all credibility. But Parliament must consider that it works, since it has not abolished it or introduced a new procedure for selecting jurors, even though it has had opportunities to do so. Juries also seem to enjoy the confidence of the general public. The fair-minded and informed observer will be well aware of this.

35. Of course, success is not left to chance. The informed observer would rightly consider that there would be an unacceptable risk of a juror going wrong if he was a friend of the defendant or of the victim or of one of the witnesses. The same would apply if a juror was having an affair with one of the defendants or was related to the victim or to one of the witnesses, or if she worked alongside one of the witnesses, or had signed a petition calling for the defendant to be prosecuted. Adopting the stance of the fair-minded observer, the law would hold that such a person should be discharged from sitting on the jury.

36. Depending on the facts, an appeal court might also consider that the undetected presence of such a person on the jury meant that there was a real possibility that the jury had not reached an impartial verdict. In *Pullar v United Kingdom* 1993 SCCR 514; (1996) 22 EHRR 391, where a juror was employed by the firm in which one of the prosecution witnesses was a partner, the applicant was convicted. His appeal was dismissed and, by a majority, the European Court of Human Rights concluded that there had been no breach of article 6(1). The Court may have given weight to the fact that the juror had been made redundant three days before the trial and so might not have been particularly well disposed towards the witness. By contrast, in *R v Pintori* [2007] EWCA Crim 1700, the Court of Appeal quashed a conviction where a juror had worked alongside three police officers who gave evidence and knew them reasonably well. The court considered that in these circumstances there was a real possibility that the jury's verdict had been affected by bias.

37. In the cases under appeal the jurors had no particular contacts of these kinds. The police officers did not know the police witnesses or work in the same police station or know anything about the cases. Though he had prosecuted in the courts of the area, the CPS lawyer did not know the prosecutor and knew nothing about the case. The objection is simply to the verdict of a jury which included a police officer or CPS lawyer: that alone is said to mean that there is a real possibility that the jury was biased. In my view, while recognising that

there was a possibility of bias on the part of the juror concerned, the informed observer would also realise that the risk was actually no greater than in many of the other situations that occur every day. Like all other jurors, be they clergymen, defence lawyers, butchers, estate agents, prostitutes, petty crooks or judges, police officers and CPS lawyers sit as private individuals. Each brings his or her own particular experience to bear on the case they have to try. They are repeatedly reminded by counsel and the judge both of their solemn undertaking to faithfully try the defendant and give a true verdict according to the evidence and of the need for them to put aside their prejudices. Unless the contrary is shown, the law presumes that the jury will comply with those directions and that their verdict will be impartial.

38. In these circumstances I can see no reason why the fair-minded and informed observer should single out juries with police officers and CPS lawyers as being constitutionally incapable of following the judge's directions and reaching an impartial verdict. It must be assumed, for instance, that the observer considers that there is no real possibility that a jury containing a gay man trying a man accused of a homophobic attack will, for that reason alone, be incapable of reaching an unbiased verdict, even though the juror might readily identify with a fellow gay man. Despite this - if Mr Green's appeal is to be allowed - the observer must be supposed to consider that there is, inevitably, a real possibility that a jury will have been biased in a case involving a significant conflict of evidence between a police witness and the defendant, just because the witness and a police officer juror serve in the same borough or the juror serves in a force which commits its work to the trial court in question. Similarly, if Mr Williamson's appeal is allowed, the observer must be taken to consider that the same applies to any jury containing a CPS lawyer whenever the prosecution is brought by the CPS. In my view, an observer who singled out juries with these two types of members would be applying a different standard from the one that is usually applied.

39. For no good reason, the observer would be virtually ignoring the other 11 jurors. Moreover, he would be ignoring the fact that Parliament must have been just as well aware as this House of the bonds of loyalty and of the esprit de corps uniting police officers on the side of law and order. After all, these were precisely the reasons for the previous bar on them serving as jurors. The fair-minded observer could not disregard the fact that, knowing this, Parliament has none the less judged it proper in today's world to remove the bar and to rely on the officers' commitment to uphold the law, in these circumstances by complying

with their oath or affirmation and following the judge's directions, like any other juror.

40. Equally, if he singled out the jury with the CPS lawyer, the observer would be looking only at that lawyer's formal employment relationship with the large CPS organisation. At the same time he would be choosing to ignore the obvious reality that one of the qualities required of any CPS lawyer is an ability to assess evidence and to take proper decisions based on his assessment of the evidence, regardless of any pressure from the investigating police officers or from the media. Quite routinely, he may have to differ from colleagues in the same service. He will be well aware that in many cases that are prosecuted, for various reasons the evidence turns out to be less cogent than anticipated and an acquittal is the proper verdict. A fair-minded and rational observer might just think that such a person would be capable of bringing his realism, objectivity and skills to bear when acting as a juror. Why, at the very least, should the observer assume that they would desert him?

41. On the other hand, if the observer did take the view that police officers are inherently and irredeemably biased in assessing the evidence of a police witness from the same borough, it is hard indeed to imagine him considering that they could act impartially in weighing the evidence of other prosecution witnesses against someone whom they would regard as the kind of villain they were fighting every day. Drawing distinctions of that kind among the verdicts of the juries in the three cases under appeal strikes me as not very realistic and as being likely to produce fine distinctions which should have no place in this area of the law.

42. In short, the observer who concluded that there was no real possibility that, after giving his high-profile press conference, the auditor in *Porter v Magill* [2002] 2 AC 357 was biased would be straining at a gnat if he found that there was a real possibility of bias just because a jury contained a police officer or CPS lawyer.

43. As Mr Carey-Hughes QC candidly admitted in the course of his careful submissions, your Lordships' decision to allow two of the appeals will drive a coach and horses through Parliament's legislation and will go far to reverse its reform of the law, even though the statutory provisions themselves are not said to be incompatible with Convention rights. Moreover, any requirement for police officers and CPS lawyers

balloted to serve on a jury to identify themselves routinely to the judge would discriminate against them by introducing a process of vetting for them and them alone. Parliament cannot have considered that such a requirement was necessary since it did not impose it. The rational policy of the legislature is to decide who are eligible to serve as jurors and then to treat them all alike.

44. For my part, I consider that, although the fair-minded and informed observer would see that it was possible that a police officer or CPS lawyer would be biased, he would also see that the possibility of the jury's verdict being biased as a result was no greater than in many other cases. In other words, the mere presence of these individuals, without more, would not give rise to a real possibility that the jury had been unable to assess the evidence impartially and reach an unbiased verdict. In respectful agreement with the Court of Appeal and Lord Carswell, I therefore see no reason to conclude that any of the appellants had an unfair trial or that the verdicts should be quashed.

## **BARONESS HALE OF RICHMOND**

My Lords,

45. I agree that, for the reasons given by my noble and learned friend, Lord Bingham of Cornhill, the appeal of Abdroikof should be dismissed and the appeals of Green and Williamson allowed. I add a few words only because I have not found this an easy case. The simple question is whether, on the particular facts of each of these cases, a fair-minded and informed observer would conclude that there was a real possibility that the jury was biased. Like many simple questions, it is by no means easy to answer.

46. There is no attack upon the legislation itself. Such an attack could only be mounted through the Human Rights Act 1998. It is not suggested that allowing police officers or solicitors employed by the Crown Prosecution Service to serve on juries is in itself incompatible with the right of an accused person, under article 6(1) of the European Convention on Human Rights, to a fair trial before an independent and impartial tribunal. It is accepted that there are situations in which these newly qualified jurors will meet the tests of impartiality set out in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, para 103 and *Lawal v*

*Northern Spirit Ltd* [2003] UKHL 35, [2003] ICR 856, para 14. Equally, it is accepted that the fact that there are such situations does not mean that they will always do so. The fact that Parliament has said that they are eligible to serve does not mean that Parliament intended that they should do so in any case to which they were summoned. All the indications are that Parliament appreciated that there were some cases in which they should not serve. There is no indication that Parliament intended to abrogate the common law and Convention rules upon what constitutes a fair trial.

47. The purpose of the legislation was to do away with the large number of blanket exclusions which meant, it was said, that as many as four million people were excluded from jury service. The policy was that everyone should be included unless there was a very good reason why they should not sit in a particular case. The jury would then become a much more representative body, drawn from all sections of society, including those involved in the administration of justice and committed to the rule of law. There is much to be said for such a policy. The whole point of a jury is that 12 different people bring their different backgrounds, experiences and views to the business of deciding the case. Their various individual view-points (or biases as some might call them) are brought to bear upon the discussion of the evidence and out of that discussion a consensus is forged.

48. The question remains, however, in which cases may these newly qualified jurors sit and in which cases may they not? Current guidance requires jurors to disclose any personal acquaintance with the facts or the people involved in a particular case. But, unlike the case of *R v Pintori* [2007] EWCA Crim 1700, 13 July 2007, unreported, where the officers in the case were personally known to the civilian police employee serving on the jury, that does not arise here. Neither of the police officers who served on the juries in the *Abdroikof* and *Green* cases knew the officers involved personally. The CPS solicitor advocate who served on the jury in the *Williamson* case knew none of the people involved in that prosecution personally.

49. But that cannot to my mind be the only criterion by which the impartial and informed observer should judge the issue of apparent bias. We are here concerned, not only with justice being done, but with justice being “manifestly and undoubtedly seen to be done”. There must be circumstances in which an individual should not serve even though he or she has no personal acquaintance with the case or the people involved. A general predilection towards law and order is one thing. A

close personal or professional association with one side in an adversarial trial is quite another. Counsel did not seek to rely upon the decision of this House in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119; but this was because of the observations of Lord Hope of Craighead in *Meerabux v Attorney General of Belize* [2005] UKPC 12, [2005] 2 AC 513. At para 22, Lord Hope commented that, had the House in the *Pinochet* case felt able to apply the “real possibility” test of apparent bias laid down in *Porter v Magill*, rather than the “real danger” test adopted in *R v Gough* [1993] AC 646, they might well have decided the case on that ground rather than on the ground of automatic disqualification as judge in his own cause. In fact that strengthens the appellant’s argument, especially in the Williamson case. The *Pinochet* case turned on the closeness of Lord Hoffmann’s links, as one of two unpaid directors of Amnesty International Charity Ltd, a charity incorporated to undertake those aspects of the work of Amnesty International which are charitable under UK law, with the unincorporated body, Amnesty International, which had intervened in the case in order to support the extradition of Senator Pinochet. Lord Hoffmann was not a member of Amnesty International, had no connection with the decision to intervene in the case, nor was there any suggestion that he was unable to bring his usual judicial mind to the authorities and the arguments in the case; he was nonetheless automatically disqualified because of his involvement “in promoting the same causes in the same organisation” as was a party to the suit (see Lord Browne-Wilkinson, at p 135).

50. The fair-minded and informed observer, in deciding whether there was a real possibility of unconscious bias, would draw a distinction between this and the sort of conscious or unconscious biases to which we are all subject. She would understand that a CPS solicitor has a particular expertise in weighing up the evidence and deciding whether it is sufficient to justify prosecution, let alone conviction. She would understand that a police officer has a particular expertise, among other things, in evaluating the truth and accuracy of what he has been told. But she would also understand why a person cannot be a judge in a case to which he is a party and so she would consider the closeness of the identification between the juror and the prosecutor.

51. It is inconceivable that the Director of Public Prosecutions could sit as a juror in a case prosecuted by the CPS, irrespective of whether or not he had been personally involved in the decision to prosecute. There would be no objection to his sitting in a case prosecuted by some other person or authority. The same must apply to a CPS lawyer, who is employed to decide upon whether or not to prosecute and to conduct the

prosecutions decided upon. Whether the same would apply to other CPS employees, whose role in the prosecution process or whose connection with the organisation is rather more peripheral, is a separate question which does not arise here. One could imagine that it might not apply to temporary or short term employees in junior positions unless the prosecution were brought by the office in which they served. There would, of course, be no objection to CPS lawyers or other employees serving on juries in prosecutions brought by other persons or authorities. This view is consistent with Parliament's lifting the ban upon members of the DPP's staff serving on juries, while leaving intact the common law and Convention rules against bias.

52. Police officers are in a rather different position. Their professional role is the prevention of crime and the apprehension of criminals and persons suspected of crime. They arrest, question and charge people but they do not prosecute. These may seem like technical distinctions when the police are so closely associated in the public mind with the fight against crime. If one asked a member of the public whether he would rather be tried by a jury containing one or more police officers or a jury containing one or more CPS employees, his preference might well be for the CPS over the police. But we are here talking of identification with the prosecution process and the police are further removed from that than are the CPS. Furthermore, while it is consistent with the legislation to distinguish between CPS and other prosecutions the objection to the police is their identification with the fight against crime generally rather than with the prosecution process in particular. Parliament obviously intended that police officers should be eligible to serve on juries in some cases (although they may well have contemplated a rather closer inquiry into the circumstances of each individual police juror than in fact takes place). The difficulty therefore is to identify a criterion by which to judge when they can and when they cannot do so.

53. In the Green case there are two factors which make the connection between the police and prosecution too close for comfort. One is that the victim of the alleged crime was himself a police officer and the case depended to some extent on his evidence of how the accused was searched and what was said at the time. The officers were serving in the same borough at the time of the trial although not in the same police station. Another is that the juror was posted to a police station which committed its cases to the Crown Court where the case was tried. Officers in his station will have had regular dealings with the CPS conducting prosecutions in the same court.

54. The *Abdroikof* case was tried at the Old Bailey, which hears cases from all over London and sometimes further afield. There was no particular link between the court and the station where the police juror served. No important issue turned on a conflict between police and defence evidence and there was no closer link between the police witnesses and the police juror than that they all served in the Metropolitan Police. It would be possible, perhaps, to conclude that Parliament had intended that no police officer should serve on a jury involving police witnesses from the same police force as that in which he served. Given the independence of each police force, that would have the attraction of consistency with the approach adopted earlier in relation to the CPS and other prosecuting bodies. With some hesitation, however, but because of the greater distance between the police and the prosecution process, I feel able to agree with my noble and learned friend, Lord Bingham of Cornhill, that there is not sufficient to raise the appearance of bias in this case. Hence this appeal should be dismissed, while the appeals of Green and Williamson should be allowed and the case of Williamson remitted to the Court of Appeal as Lord Bingham suggests.

#### **LORD CARSWELL**

My Lords,

55. The changes relating to jury service enacted in the Criminal Justice Act 2003 (“the 2003 Act”) reflect the changes in the sophistication of jurors and in the willingness of Parliament to trust in their impartiality and ability to recognise and put aside their prejudices. This is mirrored in the evolution of the style of advocacy in criminal trials from that caricatured in *Pickwick Papers*. It also may be seen in the statutory changes in the admissibility of hearsay evidence. One of the basic reasons underlying the development and maintenance of the rule against hearsay has long been thought to be distrust of the capacity of juries to evaluate it: see the discussion in *R v Hayter* [2005] UKHL 6, [2005] 1 WLR 605, 629-30, para 70. The increased willingness to allow the admission of hearsay evidence is a reflection of the lessening of that distrust.

56. Against this background the appeals now before the House have been brought. The three appellants were all convicted of offences after a jury trials and each has complained that his trial was unfair, because

the jury contained, in two cases a serving police officer and in the third a member of the staff of the Crown Prosecution Service (“CPS”). Each appellant appealed against his conviction to the Court of Appeal, Criminal Division. The appeals were heard together and the court dismissed all three, holding that the presence of these persons on the juries did not make the trials unfair.

57. The history of the selection of jurors was helpfully summarised in the respondent’s written case and may be found *in extenso* in *Forsyth, History of Trial by Jury* (1852). For present purposes it is sufficient to commence with the Juries Act 1825, in which the composition of the jury was first placed on a systematic statutory basis. A property qualification was required for jury service, and Schedule 1 to the Act set out an extensive list of persons exempt from service, which included police officers, practising barristers, attorneys and others concerned with the administration of justice.

58. A comparable list was contained in the Schedule to the Juries Act 1870 and various piecemeal exclusions were incorporated in other enactments. Apart from the inclusion of women in 1919, however, the qualification for jury service remained broadly the same until the passing of the Juries Act 1974. This Act was passed following the report published in 1965 of the Departmental Committee on Jury Service, Cmnd 2627, chaired by Lord Morris of Borth-y-Gest. The committee considered the basis of exemptions from service and stated at para 99 of its report:

“Trial by jury involves a trial by laymen. In order completely to preserve the lay character of jury service, it is essential to avoid having as jurors persons whose work is concerned with the administration of justice or the enforcement of the law. Equally, persons with knowledge or experience of a legal or quasi-legal nature might, if on a jury, exercise undue influence on their fellow jurors ...”

59. The committee went on at paras 103-4:

“103. The present law exempts many of those who practise the law or are concerned with the business of the courts. It seems to us clearly right that such persons, and

all others closely connected with the administration of law and justice, should be specifically excluded from juries. At present, there are no statutory provisions prohibiting a police officer, for example, whose name happens by mistake to be marked on the register as eligible for jury service, from actually serving. This is most unsatisfactory. If juries are to continue to command public confidence it is essential that they should manifestly represent an impartial and lay element in the workings of the courts. It follows that all those whose work is connected with the detection of crime and the enforcement of law and order must be excluded, as must those who professionally practise the law, or whose work is concerned with the functioning of the courts. It is impossible, whether desirable or not, to ensure that jurors have no previous knowledge of the law before they begin to hear a case. Many persons without formal legal training, for example, know enough about the way our courts function to be able to make a shrewd guess as to whether the accused has a previous criminal record; and one cannot prevent by legislation the use of such knowledge in the jury room.

104. Nevertheless, it seems to us necessary to secure the exclusion from juries of any person who, in the words of one memorandum submitted to us, ‘because of occupation or position, has knowledge or experience of a legal or quasi-legal nature which is likely to enable him to exercise undue influence over his fellow jurors ‘. If justice is not only to be done but to be seen to be done, such persons must not be allowed to serve on juries lest the specialist knowledge and prestige attaching to their occupations might cause them to be what has been described to us as ‘built-in leaders’”.

60. It is evident from these passages that the committee’s focus was mainly on the lay nature of juries and the possibly distorting influence which might be exercised on their deliberations by persons acquainted with the legal system, a preoccupation which appears again in paragraphs 112-5, dealing with ineligibility of such persons after retirement. It is right to say, however, that in its discussion of civilian police employees the committee cast doubt upon their ability to be impartial. At para 110 it referred with approval to the submission of the Association of Chief Police Officers that

“all civilian employees in the police service who have been employed for some length of time, no matter in what capacity, become identified with the service through their everyday contact with its members. As such they become influenced by the principles and attitudes of the police, and it would be difficult for them to bring to bear those qualities demanding a completely impartial approach to the problems confronting members of a jury.”

61. The Morris Committee accordingly recommended the exemption of judges and lawyers in general, police officers and civilian employees in police forces. The terms of the 1974 Act followed the recommendations, and a list of this group of persons exempted was included in Schedule 1 to the Act, forming Group B under the heading “*Others concerned with administration of justice*”. A number of additions and amendments to the list of persons exempted was made over the next 30 years, among them the exemption of the Director of Public Prosecutions and his staff.

62. In its report published in 1993 the Royal Commission on Criminal Justice (the Runciman Commission) stated in para 57 that it did not feel that it had any strong basis to recommend any changes concerning eligibility to serve on juries, except in one area, that of clergymen and members of religious orders.

63. The issue then received fuller consideration in chapter 5 of Sir Robin Auld’s *Review of the Criminal Courts in England and Wales*, published in 2001. In para 29 he dismissed the objection commonly advanced that those connected with the courts and the administration of justice would be too well able to deduce when a defendant had previous convictions, for he considered that that was widely known among jurors. Secondly, he placed much less weight on the possibility of such persons influencing the jury. In the same paragraph he said:

“The second main objection -- the one relied upon by the Morris Committee -- that such persons, by reason of their status or position could unduly influence their fellow jurymen, is unlikely today. People no longer defer to professionals or those holding particular office in the way they used to do. Experience in the USA where, in a number of States, judges, lawyers and others holding positions in the criminal justice system have sat as jurors, is that their fellow jurors have not allowed them to

dominate their deliberations. A number of them have also commented on how diffident they would have felt about trying to do so since, despite their familiarity with court procedures, they found the role of a juror much more difficult than they had expected.”

64. Sir Robin went on in para 30 to consider the possibility of bias on the part of such persons:

“30. There is also the anxiety voiced by some that those closely connected with the criminal justice system, for example, a policeman or a prosecutor, would not approach the case with the same openness of mind as someone unconnected with the legal system. I do not know why the undoubted risk of prejudice of that sort should be any greater than in the case of many others who are not excluded from juries and who are trusted to put aside any prejudices they may have. Take, for example shopkeepers or house-owners who may have been burgled, or car owners whose cars may have been vandalised, many government and other employees concerned in one way or another with public welfare and people with strong views on various controversial issues, such as legalisation of drugs or euthanasia. I acknowledge that there may be Article 6 considerations in this. But it would be for the judge in each case to satisfy himself that the potential juror in question was not likely to engender any reasonable suspicion or apprehension of bias so as to distinguish him from other members of the public who would normally be expected to have an interest in upholding the law. Provided that the judge was so satisfied, the over-all fairness of the tribunal and of the trial should not be at risk.”

He accordingly recommended that everyone should be eligible for jury service, save for the mentally ill. The Government accepted his recommendation and the 2003 Act amended section 1 of the 1974 Act, to the effect that every person between 18 and 70 years of age registered as a parliamentary or local government elector is now liable for jury service.

65. Parliament has therefore endorsed the view that universal eligibility for jury service is now to be regarded as appropriate. In reaching this conclusion it must be taken to have been aware of the test

for apparent bias laid down by the House in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, para 103, whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. To that one should add the much-repeated observation of Lord Steyn in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2003] ICR 856, para 14 (the judgment being given before the 2003 Act was passed), that “Public perception of the possibility of unconscious bias is the key.”

66. There was no suggestion in the case of any of the appellants that the person serving on the jury which tried him was actually biased or that there were particular circumstances which could call his impartiality into question. The appellants’ case was based squarely on the proposition that if a police officer or a member of the CPS staff were a member of a jury, that fact in itself would cause such an observer to conclude that there was a real possibility that the tribunal was biased. The foundation for the proposition must be that such a juror will inevitably have a predisposition to resolve disputes of fact in favour of the prosecution or to be more ready than other impartially minded jurors to reach a conclusion of guilt. This brings one back to Lord Steyn’s observation about unconscious bias, for it was accepted on behalf of the appellants that jurors will be instructed to put aside prejudices of which they may be aware and should make a conscious effort to do so. The certified questions referred to the presence of a serving police officer or a member of the CPS staff on a jury.

67. Unconscious prejudices and bias can be insidious in their operation on people’s minds, but the number and diversity of people on a criminal jury constitute a safeguard against such prejudice or bias on the part of any one juror exercising sufficient influence to determine the outcome of the trial. To a certain extent they are inescapable in human society, but it is generally reckoned that they are balanced out in the jury’s deliberation and subsumed in the general attempt to reach a consensus. My noble and learned friend, Lord Rodger of Earlsferry, has drawn attention in paragraphs 32 to 34 of his opinion to the multiplicity of possible causes of bias or partiality and comes to the conclusion, with which I agree, that Parliament has taken the view that the risk is manageable within the system of jury trial.

68. I accordingly consider that the fair-minded and informed observer would not necessarily conclude that the mere presence on a jury of a police officer or CPS staff member would create such a possibility of bias as to deny the defendant a fair trial. Such an observer would in my view wish to know more about the circumstances of the

case, the issues to be decided, the background of the juror in question and the closeness of any connection which he or she might have to the case to be tried. I think that it is for this reason that the Metropolitan Police has instructed its officers that, where possible, they should not serve as jurors in a court where their Operational Command Unit carries out its work. Similarly, the CPS has advised members of its staff called for jury service to inform the court of their employment, so that the judge may decide if it is appropriate that they may sit as jurors on particular cases. These are in my view sensible instructions designed to reduce the possibility that particular circumstances may tip the balance against the individual juror serving on a case. They do not, as the appellants suggest, indicate that the police authority or CPS have misgivings about the presence of their officers on a jury.

69. A final decision in any given case about the fairness of the trial where unfairness consisting of bias is alleged can only be made on examination of the facts of the trial as a whole after its conclusion, the standard approach of the European Court of Human Rights to claims that defendants have not received a fair trial. One must therefore look at the circumstances of each of the cases before the House.

70. Nurlon Abdroikof was convicted on a number of counts on 31 August 2004 after a trial before the Common Serjeant of London, Judge Beaumont, and a jury. The gravest of these charges was the attempted murder of Nicholas Faulkner, for which he was sentenced to eleven years' imprisonment, and a consecutive term of five years was imposed for the attempted choking of Samantha Pettit with intent to enable himself to commit an indecent assault, contrary to section 21 of the Offences Against the Person Act 1861.

71. The presence of a police officer on the jury emerged when the officer in question sent a note to the judge, explaining that he was due to report for duty on the following Monday, which was a bank holiday and on which the court was not sitting. He stated that if he did so he might come into contact with officers who were on the case at hearing and asked the judge for directions. The judge directed that he should not report for duty on that day. Counsel were made aware that the officer was a member of the jury and raised no objection at the time to his serving. Abdroikof subsequently appealed to the Court of Appeal on the ground that the presence of the police officer on the jury meant that he did not receive a fair trial.

72. Counsel for the appellant accepted that the case did not involve any major issue between the appellant and the police. One factual matter was disputed by the appellant, whether he had bound his victim Faulkner's feet as well as his hands, but this appears to have been a peripheral issue with little relevance to those on which the question of guilt turned. There was no evidence that the police officer knew any of the witnesses in the trial or had any knowledge of the case outside the evidence given in court. The Court of Appeal held that there was nothing in the particular circumstances of the case to give rise to any cause for concern with regard to the presence of a police officer on the jury (para 47). The case accordingly fell squarely within the general issues of principle concerning the service of police officers as jurors. In my view the decision of the Court of Appeal was correct and it cannot be said that Abdroikof failed to receive a fair trial.

73. Richard Green was convicted on 5 October 2004 after a trial before Judge Statman and a jury at Woolwich Crown Court on two counts, assault occasioning actual bodily harm and having a bladed or pointed article. He was sentenced to seven weeks' imprisonment on each count, to run concurrently. The offence arose out of an incident in the course of which Police Sergeant Burgess, who suspected that Green might be intending to steal a wheel from a wrecked car, required him to submit to a search of his person. Sgt Burgess asked him if he had anything he should not have on his person. Green handed over a bag containing sterilised needles. Sgt Burgess asked him again if he had anything "he should know about", to which Green replied "no". There was in fact another needle in his pocket and when the sergeant put his hand into the pocket he pricked himself on it. The prosecution case was that Green knew all along of the presence of the needle in his pocket and deliberately or recklessly let Sgt Burgess impale himself on it. Green's defence was that he had the needle for self-injection, as he was a heroin addict, and had forgotten that he had it in his pocket. He claimed that the sergeant had commenced the body search without giving him time to check his pockets, which would have obviated the danger to a searcher. There was accordingly a factual issue for the jury to decide, though it was more one of Green's credibility than a conflict of factual testimony between Sgt Burgess and Green.

74. A police officer named Mason was one of the members of the jury, a fact which did not come to light until several weeks after the trial, when Green's solicitor happened to hear of it on a visit to a police station. Both Sgt Burgess and Pc Mason had served in the Royal Borough of Greenwich, overlapping for a short time. It was accepted that neither had ever met the other or knew of his existence, a point of

distinction from a case such as *R v Pintori* [2007] EWCA Crim 1700. The Court of Appeal held (para 66) that there was nothing in the particular circumstances of the case to give any continuing cause for concern with regard to the presence of Pc Mason on the jury. The case was therefore governed by the general issues of principle. I agree with their conclusion and do not consider that Green was deprived of a fair trial.

75. Kenneth Joseph Williamson was convicted on 3 February 2005 at Warrington Crown Court after a trial before Judge Hale and a jury on two counts of rape. He was sentenced to ten years' detention in a young offender institution. The complainant in the case alleged that the appellant had entered her house at night, having obtained a key, threatened her with a knife and raped her. Williamson at first denied that he had been in the house at all, then when he was confronted with DNA evidence linking him with semen on the complainant's underwear he changed his defence to one of consent, claiming that he had lied earlier because of his shock at being arrested. The issue of fact was accordingly a straight conflict between the complainant and the appellant, and its resolution depended upon whether the jury were sure that the complainant's version was the correct one.

76. One of the members of the jury was a solicitor employed by the CPS named Martin McKay-Smith. In accordance with the CPS policy he wrote to the judge after receiving a summons for jury service, setting out the work which he did, so that the judge could determine if he ought to sit. He had never conducted a trial in the Crown Court and was then engaged in advising police on charging out of office hours. There was no evidence that he knew any of the prosecution witnesses or any of the members of the CPS staff connected with the case. He was not employed in the area which had conduct of the prosecution.

77. When Mr McKay-Smith was called to sit on the jury the judge handed his letter to defence counsel, who on instructions sought to challenge him for cause. The judge rejected the challenge, holding that if a member of the CPS staff with as little connection with a case could not serve, none could ever serve on a case prosecuted by the CPS, which was not what Parliament had clearly intended. The Court of Appeal (para 73) held that on the facts of the case there was no basis on which to contend that fears as to impartiality could be objectively justified.

78. Williamson's appeal is the one about which some of your Lordships feel most concern. My noble and learned friend, Lord Bingham of Cornhill, has expressed the view in paragraph 27 of his opinion that "justice is not seen to be done if one discharging the very important neutral role of juror is a full-time, salaried, long-serving employee of the prosecutor". This is not a concern which one can lightly dismiss. I consider, however, that there is considerable weight in two contrary factors. The first is the point made by the judge, that if the jury service of CPS employees were to be confined to cases other than those prosecuted by the CPS, they would be ruled out of most trials and the intention of Parliament in the 2003 Act would be frustrated. The second is the point trenchantly made by Lord Rodger in paragraphs 39 and 40 of his opinion, that an observer who took the view that the inclusion of a member of the CPS staff would of itself give rise to a real possibility that the tribunal was biased would be looking only at the formal employment of that staff member with the large CPS organisation. Lord Rodger draws attention to the professional qualities of the ability to assess evidence in a realistic fashion possessed by an experienced CPS staff member, which should allay the concerns of the fair-minded and informed observer. In my opinion these factors are sufficient to allay such concerns and such an observer would not conclude that the mere presence on the jury of a CPS staff member, who has no connection with the case or the personnel who prepared or presented it, would not make the trial unfair.

79. I accordingly would dismiss all three appeals.

## **LORD MANCE**

My Lords,

80. I have had the benefit of reading in draft the opinions of all of your Lordships. There is a division of opinion between your Lordships with regard to the appeals of the second and third appellants. The difference turns largely on different perceptions of the view that would be taken by a fair-minded and informed observer, after considering the facts, on the question whether there was a reasonable possibility that the jury was biased by the inclusion among its number of the relevant police officer or Crown Prosecution Service lawyer: see *In re Medicaments and Related Classes of Goods* (No. 2) [2001] 1 WLR 700 and *Porter v. Magill* [2001] UKHL 67; [2002] 2 AC 357 for the principle.

81. As a result of these two cases, the fair-minded and informed observer - a reasonable member of the public neither unduly compliant or naïve nor unduly cynical or suspicious, and adopting a balanced approach - replaced the court, whose view had previously been taken as the relevant test in *R v. Gough* [1993] AC 646. But the fair-minded and informed observer is him or herself in large measure the construct of the court. Individual members of the public, all of whom might claim this description, have widely differing characteristics, experience, attitudes and beliefs which could shape their answers on issues such as those before the court, without their being easily cast as unreasonable. The differences of view in the present case illustrate the difficulties of attributing to the fair-minded and informed observer the appropriate balance between on the one hand complacency and naivety and on the other cynicism and suspicion.

82. In the event, despite my noble and learned friend, Lord Rodger of Earlsferry's observations in paras 38 to 42, I agree with the reasoning and conclusions in the opinions prepared by my noble and learned friends, Lord Bingham of Cornhill and Baroness Hale of Richmond.

83. With regard to the case of the second appellant, as Lord Bingham and Baroness Hale point out in their paragraphs 26 and 53, the police sergeant who was the alleged victim and whose evidence was relevant shared the same local service background as, and was as a result the "brother officer" of, the policeman on the jury. Further, the juror was posted to a station which committed its cases to the Crown Court of trial – a factor which Metropolitan Police Notice 20-2004 Item 1 identified as one to be avoided (see paragraph 11 of Lord Bingham's opinion). Absent such considerations, I do not agree that it follows automatically that a police officer is disqualified as a juror, even in a case of significant conflict of evidence between a police witness and a defendant.