

OPINION OF THE COURT

**delivered by THE LORD JUSTICE
CLERK**

in

APPEAL

**under Section 6 of the Pension Appeal
Tribunals Act 1943**

by

**THE SECRETARY OF STATE FOR
SOCIAL SECURITY**

Appellant:

against

K.M.

Respondent:

Act

**R. Brodie
(Appellant)**

Woolman, Q. C., Armstrong

Alt

**Erskine MacAskill & Co.
(Respondent)**

Bovey, Q.C. Upton

13 November 1998

**Lord Justice Clerk
Lord McCluskey
Lord Eassie**

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The appellant has appealed, with the leave of the tribunal, against its decision dated 8 April 1998, in which it allowed the respondent's appeal against the appellant's refusal of his claim to a war disablement pension.

The respondent, who was born on 4 May 1962, served in the Royal Air Force from 1 July 1986 until he was discharged on 30 June 1995. In April 1988 he was diagnosed by a civilian health service as being HIV positive, that is to say suffering from the human immunodeficiency virus. Sexual intercourse is well recognised as the most common means of transmission. Prior to enlisting the respondent had been sexually active in both homosexual and heterosexual intercourse. In May 1993 he began to exhibit signs of Kaposi's sarcoma which is one of the common manifestations of acquired immunodeficiency syndrome (AIDS) and was diagnosed as suffering from that condition.

Following his discharge the respondent claimed a war disablement pension. Article 4(1) of the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pension Order 1983 provides that:

"Where, not later than seven years after the termination of the service of a member of the armed forces, a claim is made in respect of a disablement of that member...such disablement...shall be accepted as due to service for the purposes of this Order provided it is certified that –

- (a) the disablement is due to an injury which –
 - (i) is attributable to service; or
 - (ii) existed before or arose during service and has been and remains aggravated thereby;...

Article 4(2) provides, subject to certain qualifications which are not relevant for present purposes, that "in no case shall there be an onus on any claimant under this article to prove the fulfilment of the conditions set out in paragraph (1) and the benefit of any reasonable doubt shall be given to the claimant".

The respondent claimed that his immunodeficiency was due to long hours and difficult working conditions during his service. In the Statement of Case which was prepared for the tribunal in accordance with Rule 5(1) of the Pensions Appeal Tribunals (Scotland) Rules 1981, it was stated:

"The tribunal is asked to decide:-

- a. whether the appellant's acquired immune deficiency syndrome is attributable to service; and if not,
- b. whether it existed before or arose during service and has been and remains aggravated thereby.

If the tribunal allows the appeal on the ground of aggravation, the tribunal is asked to decide whether aggravation remained on 26.11.96 and, if it had then passed away, at what date it had passed away. Notice was sent to the appellant on 26.11.96 that these Terms of Reference would be put to the Tribunal".

The hearing of the appeal by the tribunal was evidently delayed as a result of the need for supplementary advice to be tendered by the medical division of the Department of Social Security. At the hearing of the appeal on 8 April 1998 the tribunal had before it the Statement of Case and appellant's reasons for his decision. It heard the evidence of the respondent, and received a number of documents which were tendered on his behalf. The decision of the tribunal to allow the appeal was on the basis that the respondent's acquired immunodeficiency syndrome was attributable to his service.

Section 6(2), read along with section 13 of the Pensions Appeal Tribunals Act 1943, provides for an appeal to the Court of Session where the appellant before the tribunal or the Minister "is dissatisfied with the decision of the Tribunal as being erroneous in point of law". On 5 June 1998 the appellant applied for leave to appeal upon a number of grounds. The tribunal granted leave and prepared a stated case for the opinion of this court. According to the terms of the stated case the questions for the court are as follows:

"(1) Was the decision of the Pensions Appeal Tribunal a nullity in that it was a majority decision?

(2) Did the tribunal err in law in reaching its majority decision?"

As regards the first of these questions, it was submitted on behalf of the appellant that, standing its failure to agree, it was not competent for the tribunal to decide the appeal and that it should have referred the respondent's appeal for decision by a differently constituted tribunal. As will be seen from a later passage in this opinion, the division of view among the members of the tribunal was in regard to whether the respondent's entitlement to a disablement pension was affected by the fact that he had not reported his HIV positivity to the RAF authorities.

Our attention was drawn to the decisions in *Brain v. Minister of Pensions* [1947] K.B. 625 and *Minister of Pensions v. Horsey* [1949] 2 K.B. 526 in which it was held, respectively, that a claim could not be rejected or allowed by a majority decision of a Pensions Appeal Tribunal. However, it was recognised that these decisions were not binding on this court, despite the desirability of a uniform approach being adopted as between England and Scotland. Moreover, it may be noted that in *Brown and Others v. Minister of Pensions* 1946 S.C.471 this court expressly refrained from stating that it was incompetent for a Pensions Appeal Tribunal to decide by a majority. In *Brain*, Denning J. appears to have been influenced by a number of considerations. One of them was that there was at that time a long-standing requirement of the law that the decision of a jury should be unanimous. Another was that, owing to the risk of error, it was undesirable to recognise the validity of a majority decision on the part of a tribunal which was final in regard to decisions on questions of fact. We do not find either of these considerations to be persuasive. Whether or not the first of them would still carry weight in England, it is plain that it has no relevance in Scotland where a majority verdict of a jury has always been competent in both civil and criminal cases. As regards the second, it hardly squares with the fact that the legislation relating to other similar tribunals, such as Industrial Tribunals, Social Security Tribunals, Disability Appeal Tribunals and Medical Appeal Tribunals allows for a majority decision. The fact that the legislation relating to Pension Appeal Tribunals is silent on this point does not appear to us to indicate an intention to exclude a majority decision. In more recent times the decisions in *Brain* and *Horsey* have been regarded at least as special (*Atkinson v. Brown* [1963] N.Z.L.R. 755 and *Picea Holdings Limited v. London Rent Assessment Panel* [1971] 2 Q.B. 216) and their correctness has been doubted (*Wade and Forsyth on Administrative Law*, seventh edition, page 941).

The principal ground on which it was submitted on behalf of the appellant that a decision by a Pensions Appeal Tribunal was in a special position was by reason of the onus of proof which rested on the appellant in resisting a claim. However, in our view this confuses the question of the competency of the decision with the significance which the members of the tribunal would be expected to attach to

the existence of a difference of view among its members. Thus in *Brown and Others v. Minister of Pensions* the court observed (at page 476):

“Without affirming that it is incompetent for a tribunal to decide by a majority, it appears to us that, when the question is the sufficiency of the evidence to discharge such an onus, and when an express injunction has been laid upon the tribunal to give the claimant the benefit of any reasonable doubt, only the most powerful considerations can justify the medical and service members in outvoting the legal chairman. Such a decision necessarily imports that in the view of the majority the chairman’s dissent is not reasonable. We should have thought that the bare fact that the chairman was in favour of a certificate of entitlement and held his views sufficiently strongly to enter an express dissent would itself have convinced the tribunal as a whole that there must be a reasonable doubt to which it was their simplest duty to concede effect”.

Whether there is a reasonable doubt is, of course, a matter for the tribunal and not a matter of law for this court (*Irving v. Minister of Pensions* 1945 S.C. 21 at page 30).

Counsel for the appellant founded on the fact that in *Brown and Others* the court emphasised (at page 474) that the tribunal “is one and indivisible”. However, the point of that observation is that the responsibility of the tribunal was to deliver a single decision and not a collection of the decisions of each of its members. The court observed:

“As a corollary we may add that in almost every case it is improper in stating a case on a question of law to disclose the private deliberations of the members. What we require is the decision of the tribunal, the evidence on which that decision proceeded, and the reasons for the decision”.

It does not appear to us that these observations provide any support for the view that there cannot be a majority decision.

In these circumstances we are not persuaded that it is incompetent for a tribunal to return a majority decision. Accordingly we will answer the first question in the negative.

In approaching the second question it is convenient at this point to set out the salient parts of the stated case. The findings-of-fact of the tribunal are unfortunately extremely brief and not clearly separated from the reasons for its decision. It is stated in para 2 that

“acquired immunodeficiency syndrome is a manifestation of advanced HIV disease. Personal habits, including sexual intercourse, are the most common causes of HIV positivity”.

In para.4 the tribunal states:

“The tribunal notes the concession by the medical division of 19 December 1997 that the progress of the claimant’s acquired immunodeficiency syndrome could have been affected by stress. The tribunal is satisfied from the evidence presented that the claimant was subjected to stress during service, the main stress being during service in Northern Ireland from February 1991 to February 1994 which was in close time relationship to the development of features of fully active acquired immunodeficiency syndrome including skin conditions and in particular Kaposi’s sarcoma.

We accept from the claimant’s own oral evidence that he was sexually active pre-service both homosexually and heterosexually but the first diagnosis of HIV positivity was in 1988, two years after enlistment. On this basis there must be a reasonable doubt that he first developed the condition HIV after enlistment rather than before”.

Having stated that the tribunal was unanimous in the above findings, the stated case continues as follows:

“The tribunal only received today a letter dated 11 March 1998 from Dr. Alexander FRCOG, Consultant in Genito-Urinary Medicine, Plymouth in which he states that the claimant was in his care at the time of his posting from South Wales to RAF Leuchars. He states that on the basis of advice given and normal practice in genito-urinary medicine he informed the claimant that although a serving member of HM Forces he would be treated in the clinics as a civilian and the advice given to him would be on the basis that he should maintain confidentiality about his status as far as, and as long as, possible. This advice was given to all HIV patients. In the view of the majority this would justify the claimant’s failure to report his condition.

The minority view is that the claimant’s representative stated in oral evidence today that the claimant did not have the opportunity to be treated for this condition during his service in Northern Ireland when he was subject to the greatest stress of his service. This is not borne out by the Statement of Case which details several hospital appointments during that period.

On the basis of the written and oral testimony and, in particular, the letter from Dr. Alexander of 11 March 1998 the majority decision of the tribunal is that the Secretary of State has failed to show by evidence that the claimed disablement is unconnected with service and that the claimant has raised a reasonable doubt in his favour by reliable evidence that the claim condition is attributable to service”.

In *Marshall v. Minister of Pension* [1948] 1 K.B. 106, which was concerned with a claim in respect of a disease, Denning J. at page 108 examined the question whether the disease was attributable to service or was only aggravated by it. He said:

“On this issue there are two questions which must be answered: first, when did the disease arise? Secondly, what were the causes of its arising? If the disease existed before war service, it cannot be attributable to war service, but may be aggravated by it. If it arose during war service, then if war service was one of the causes of its arising it is attributable to war service but if war service was not a cause of its arising it cannot be attributable to war service but may be aggravated by it”.

He also explained that whether a disease was attributable to or aggravated by war service did not affect the amount of the pension but might affect its duration. He said at the same page:

“If the aggravation passes away so the man is no worse than he would have been apart from war service, the pension ceases even though some disablement may remain, because that disablement is not due to war service. In cases where the disease is 'attributable to' war service, however, the pension continues so long as any disablement continues from the disease”.

In the present case, as we have already noted, the tribunal was asked by the appellant to decide whether the respondent's AIDS was attributable to service; and if not, whether it existed before or arose during service and had been and remained aggravated thereby. It is not in dispute that the submission which was made on behalf of the respondent before the tribunal was directed exclusively to aggravation.

However, as can be seen from the passages in the stated case to which we have referred, the tribunal held that his AIDS was attributable to service.

Counsel for the appellant submitted two main arguments in support of the contention that the tribunal had erred in law in reaching its decision. The first was that, in deciding that the respondent's AIDS was attributable to his service in the RAF, the tribunal had misdirected itself or reached a decision which no tribunal properly directing itself could have reached. The tribunal had expressly held that “acquired immunodeficiency syndrome is a manifestation of advanced HIV disease”. Accordingly while it was not in dispute that the respondent was suffering from disablement due to an injury, that injury was constituted by HIV disease. The tribunal had not found that AIDS was a disease which was distinct from HIV positivity. As could be seen from the opinion of the medical division of the Department of Social Security, dated 7 February 1997, which was part of the written material before the tribunal, AIDS was one of a variety of clinical manifestations of HIV infection. It was indicated by one or more of a number of diseases, including Kaposi's sarcoma. It was not possible for a person to suffer from AIDS unless he was HIV positive. However, it was not in dispute, and the tribunal had held, that the respondent's HIV disease was caused by his own sexual conduct. In these circumstances his disease could not be attributable to service. The tribunal had placed reliance on the so-called concession made by the medical division in their further opinion dated 19 December 1997 in which they stated that the progress of the respondent's acquired immunodeficiency syndrome could have been affected by stress. However, the statement made by the tribunal on this point, and the opinion on which it was based, went no further than referring to the progression of a disease in the sense of its advancement or development. It was not a concession that stress caused AIDS. Accordingly the concession could only have relevance in relation to a case of aggravation and not a case of attribution. The tribunal's decision was a startling one. According to the tribunal, stress was a cause of AIDS as much as the common causes of personal habits, including sexual intercourse. Its conclusion was not supported by, but was in conflict with, its findings-in-fact.

We should add that at one point in his submissions junior counsel for the appellant sought to maintain that it had been perverse for the tribunal to conclude that the material relating to stress during service raised a reasonable doubt favourable to the respondent. We considered that, since notice had not been given to the tribunal of this contention when the appellant sought leave to appeal, the appellant should not be permitted to present this argument. Rule 24(2) of the 1981 Rules requires that

the party applying for leave to appeal should state the point of law in respect of which he claims that the decision of the tribunal is erroneous and on which he wishes to appeal. In these circumstances we do not require to consider that contention.

For the respondent, counsel submitted that it was important to bear in mind that the condition with which the tribunal were concerned and which it found attributable to service was AIDS. There was a sufficient basis in the case to treat the progression from HIV positivity to AIDS as being consistent with the onset of a distinct disease. Counsel referred to the terms of the advice from the medical division of the Department of Social Security dated 7 February 1997 in which it was stated:

“HIV infected people present with a variety of clinical manifestations from asymptomatic infection (positive HIV serology only) to severe immunodeficiency (AIDS in its many forms). AIDS is an illness characterised by one or more indicator diseases”.

There was no finding by the tribunal, or evidence before it, that there would necessarily be a progression from HIV positivity to AIDS. Counsel also pointed out that the statement in the stated case that “acquired immunodeficiency syndrome is a manifestation of advanced HIV disease” had been added to the case as a result of the tribunal’s accepting an adjustment proposed by the appellant. It should not be taken as detracting from the decision as to attributability which it had reached. As regards stress, the tribunal had found unanimously that there was a relationship between the stress of the respondent’s service and his development of AIDS. There was therefore a wholly sufficient basis in law for it to decide that the appellant had not excluded reasonable doubt in regard to attributability.

In the light of the findings made by the tribunal we do not consider that it was open to it to find that the respondent’s AIDS was attributable to his service. Its findings are consistent with there being a range within the respondent’s immunodeficiency from no symptoms to a collection of symptoms at the other. If the tribunal had intended to say that the latter represented the onset of a distinct disease it did not make this plain. In the result AIDS appears from the stated case to be attributable to personal conduct on the part of the respondent rather than to his service. Stress would be relevant, if at all, to the aggravation rather than attribution.

The second attack made by the appellant on the decision of the tribunal was directed to the fact that the respondent had failed to inform the RAF authorities of the fact that he was HIV positive. The submission made on the appellant’s behalf was that the prime cause of the respondent’s exposure to stress was his own conduct. Knowing about his HIV disease he had chosen not to disclose it to the RAF throughout his period of service. Because the authorities did not know that he had that disease they were deprived of the opportunity to assess his position and to decide what steps, if any, were appropriate to take. In the circumstances the authorities could not be held responsible for causing AIDS. This argument was presented exclusively as an argument in regard to causation. Thus it was submitted that the respondent’s conduct had interrupted the causal nexus. It was not suggested, for the purpose of this submission, that there had been any negligence on the part of the respondent. In that connection it may be noted that the appellant’s disallowance of a pension was not based on the ground that the injury to the respondent was, in terms of article 6 of the 1983 Order, “caused or contributed to by the serious negligence or misconduct” of the respondent. Accordingly no such issue was placed before the tribunal for it to decide.

Our attention was drawn to a number of decisions, mostly relating to the question of aggravation, where the question was whether a particular factor was due, on the one hand, to service or, on the other hand, constituted a matter which was personal to the claimant and unconnected with his service. Thus, the fact that there had been a delay in the treatment of a claimant for some condition from which he was suffering might or might not, according to the circumstances of the particular case, be due to his service. However, in the present case we are concerned with a factor which was due to the respondent’s service. The appellant’s submission is that the fact that the respondent did not take a step which might have led to him being removed from being exposed to that stress should be regarded as the cause of any ill-effects which he suffered as a result of that exposure. We are unable to regard his conduct as having that effect, which would be necessary for the success of the appellant’s submission. At best for the appellant the fact that the respondent did not report his HIV positivity did not avert the ill-effects of service. In any event the proposition advanced on behalf of the appellant begs a number of questions. Should the respondent have appreciated that the stress of service would be likely to have an adverse effect on his condition? Would the RAF authorities have taken steps to remove him from a stressful situation?

In these circumstances we consider that this submission on behalf of the appellant is ill-founded.

It remains for us to consider what requires to be done in the present case. For the appellant it was submitted that, if the court took the view in regard to either argument that the tribunal had erred in law in reaching its decision, the court should allow the appeal and refer the case for hearing before another tribunal differently constituted. For the respondent it was submitted that there was sufficient material in the unanimous findings of the tribunal to allow the court to determine that the respondent's AIDS had been aggravated by his service.

It is, of course, essential that any decision taken by this court should be restricted to questions of law. It is not for this court to amend or add to the findings-in-fact when responsibility for such findings is entrusted exclusively to the tribunal. It is, however, necessary for us to scrutinise the stated case in order to see whether, as a matter of law, there is only one answer which, in the light of its findings, the tribunal could have given to the question which was in fact presented to in argument, namely whether the respondent's AIDS had been aggravated by his service.

The tribunal was clearly satisfied that during his service, and in particular his service in Northern Ireland from February 1991 to February 1994, the respondent was subjected to stress. Further, it is clear that its conclusion that the appellant had "failed to show by evidence that the claimed disablement is unconnected with service" was based on the advice given by the medical division of 19 December 1997 "that the progress of the claimant's acquired immunodeficiency syndrome could have been affected by stress". The tribunal went on, in expressing its conclusions, to state that "the claimant has raised a reasonable doubt in his favour by reliable evidence that the claimed condition is attributable to service". While that statement cannot be correct, in so far as it states that the condition was attributable to service, we see no good reason why it should be treated as undermining the soundness of the tribunal's conclusion that the appellant had failed to show by evidence that the claimed disablement was unconnected with service. In these circumstances we consider that the necessary conclusion from the findings by the tribunal is that it should be held that the respondent's AIDS was aggravated by service.

In these circumstances we propose to answer question 2 in the affirmative, but subject to the qualifications that in the light of the findings made by the tribunal it would in any event have been bound to decide that the appellant had failed to show that the respondent's AIDS was not aggravated by his service. No question arises in the present case of the aggravation passing away. The respondent's prognosis is poor.

Accordingly we will, in answering the questions as indicated above, sustain the appeal to the extent which we have indicated.

Before parting with this appeal we should add this. It appears to have been expected that it would serve as a test case. Having regard to the sparse and undetailed findings of the tribunal in the present case and the difficulties which have arisen from its deciding the case on a basis other than that which was argued before it, it is clear that the present case cannot be regarded as laying down any general principle or guideline for future cases, other than in relation to the competency of a majority decision.