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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

APPLICATION BY HAROLD BOTHWELL
FOR JUDICIAL REVIEW (No 2)

WEATHERUP J

The application.

[1] The applicant is a farmer at Tattyknuckle, Fivemiletown, Enniskillen, County Fermanagh and from 1989 had been a breeder of pedigree Holstein cattle. In 2004 a number of animals in the herd tested positive for brucellosis. Further to powers under Article 15 of the Brucellosis Control Order (Northern Ireland) 2004 the Department of Agriculture and Regional Development required the herd to be slaughtered. 350 Holstein cattle were slaughtered on 20 July 2005. The applicant became entitled to compensation in accordance with the statutory scheme under the 2004 Order. A dispute arose between the applicant and the Department as to the value of the slaughtered cattle. The issue of compensation came before a Tuberculosis and Brucellosis Valuation Appeals Panel on 7 October 2005.

[2] This is an application for judicial review of the decisions of the Appeals Panel relating to procedure and further to the composition of the Appeals Panel. Mr O'Hara QC and Mr Sands appeared for the applicant. Mr Maguire QC appeared for the Panel and Mr McCloskey QC and Mr Aldworth appeared for the Department.

Assessment of compensation for slaughtered cattle.

[3] Valuation and compensation are provided for under Article 16 of the 2004 Order and appeals are provided for under Article 17 as follows –

> *Valuation and compensation.*
> 16(1) Where the Department causes an animal to be slaughtered in accordance with Article 15 the compensation payable by the Department shall be-
> (a) in the case of a reactor an amount equal to 75% of either-
> (i) the animal's market value, or
> (ii) a figure calculated in accordance with the provisions of Schedule 1,
> whichever is the less;
> (b) in every other case, an amount equal to its market value.
>
> (2) For the purposes of this Order the market value of an animal means the price which might reasonably have been obtained for it, at the time of valuation in accordance with this Article or Article 17, from a purchaser in the market if it had been free from disease.
>
> (3) Upon service of a notice in respect of an animal under Article 15(2), the Department shall (unless the notice has previously been revoked) make an initial assessment of the market value of the animal for the purposes of paragraph (1) and shall notify the owner of that assessment.
>
> (4) Subject to the following paragraphs and Article 17, the market value of an animal which the Department proposes to cause to be slaughtered shall, for the purposes of compensation under paragraph (1), be determined before slaughter by agreement, between the Department and the owner of the animal, if the agreement is reached within 3 working days of the Department informing the owner of its initial assessment of the market value under paragraph (3).
>
> (5) If the Department and the owner of an animal fail to agree the market value of the animal in accordance with paragraph (4), the Department shall submit a list of independent valuers, approved by it for the purposes of this Article, to the owner and, within 2 working days of receiving this list, the owner shall-
> (a) nominate a valuer (hereinafter referred to as the "nominated valuer") from the list; and

(b) notify the Department of the name and address of the nominated valuer.

(6) Within 8 working days of the owner of the animal notifying the Department of the name and address of the nominated valuer in accordance with paragraph (5)-
(a) the owner shall arrange for the nominated valuer to determine the market value of the animal and shall be liable for any costs, fees or other expenses incurred by the valuer in carrying out the valuation; and
(b) the nominated valuer shall carry out the valuation and shall give to the Department and the owner a certificate in writing of his determination of the market value of the animal.

(7) Where the owner of an animal or the nominated valuer fails to comply with, in the case of the owner, paragraphs (5) or (6)(a) or, in the case of the nominated valuer, paragraph (6)(b), the Department shall determine the market value of the animal.

(8) The calculation of the market value of an animal under this Article or Article 17 shall not take account of any sum to which the owner might have become entitled in respect of the animal under any other statutory or any Community provision.

(9) The amount of compensation payable to the owner of the animal under this Article shall be without prejudice to any entitlement of that person to any payments in respect of the animal under any other statutory or any Community provision.

(10) Notwithstanding any other provisions of this Article the Department may cause an animal, in respect of which a notice under Article 15(2) is in force, to be slaughtered prior to the determination of its market value under this Article or Article 17-
(a) where such slaughter is necessary to prevent the spread of disease;
(b) to establish if there has been interference with any sample taken or test carried out under this Order or Scheme whereby the result of the test is intended to be affected; or
(c) where in the judgement of the Department the keeper has been guilty of an offence tending to prejudice the due control of the disease.

(11) Notwithstanding any other provisions of this Article the market value of an animal to which paragraph (10) applies shall be determined by the Department.

Appeals
17(1) The Department or the owner of an animal may submit an appeal to a tribunal of persons, appointed by the Department for the purpose, if dissatisfied with the determination of the market value of the animal-
(a) in the case of an appeal by the Department, under Article 16(6)(b); or
(b) in the case of an appeal by the owner, under Article 16(6)(b), (7) or (11).

(2) An appeal to a tribunal under this Article shall be submitted in writing within 30 working days of the determination of market value to which it relates and shall be accompanied by-
(a) full details of the grounds upon which the appeal is sought including documentary or other evidence; and
(b) the change sought to the valuation.

(3) Following its consideration of an appeal submitted by the Department or the owner of the animal, the tribunal shall determine the market value of the animal in question and such determination shall be final and binding on the Department and the owner.

[4] Further to Articles 16 and 17 of the 2004 Order the Department made an initial assessment of the value of the slaughtered cattle at £615,000; the applicant did not agree and nominated a valuer, Mr Clive Norbury, of Wright Manley Auctioneers, Cheshire, England; Mr Norbury issued a certificate of his determination of the value of the cattle at £1,000,300; the Department appealed Mr Norbury's valuation to the Appeals Panel.

[5] The applicant and his representatives appeared before the Appeals Panel on 7 October 2005. The Appeals Panel included an employee of the Department and proposed to hear the applicant's case on that day and the Department's case on a later date. Three matters emerged that led to this application for judicial review. First, the Appeals Panel's refusal to hear submissions from the applicant in relation to the procedure to be adopted, secondly, the composition of the Appeals Panel and thirdly the adoption of a procedure that involved the separate hearing of the case for each party.

Applicant's grounds for Judicial Review.

[6] The applicant's grounds for judicial review are as follows –

(a) The decision of the tribunal to refuse to hear submissions on how the case was to proceed was -

(1) A breach of the principle to procedural fairness in that the applicant is a party affected by the decision was denied the opportunity to make submissions.

(2) A disproportionate infringement of the applicant's right to a fair trial under Article 6(1) of the Convention.

(3) Unreasonable in the Wednesbury sense.

(b) The decision to refuse to conduct the hearing so as to allow each party to hear and challenge the evidence of the other is a breach of the applicant's rights under Article 6(1) of the Convention for the following reasons:-

(1) The applicant did not have the opportunity to hear the case against him.

(2) The applicant did not have the opportunity to challenge the case against him.

(3) The applicant did not have sufficient material to effectively challenge the case against him. The applicant received no discovery of the valuation records of DARD for individual animals.

(4) The tribunal failed to strike a fair balance between the parties thereby breaching the principle of equality of arms.

(c) The decision to refuse to conduct the hearings to allow each party to hear and challenge the evidence of the other was procedurally unfair.

(d) The decision to refuse to conduct the hearings to allow each party to hear and challenge the evidence of the other was a disproportionate infringement of the applicant's rights under Article 1 of the first protocol to the Convention. The tribunal failed to consider what impact the quantum of the case would have on the fairness of the procedure to be adopted.

(e) The tribunal failed to consider that the applicant's rights under Article 61 and Article 1 of the first protocol were engaged.

(f) The constitution of the tribunal was a breach of Article 6(1) of the Convention by reason of the fact that a member of the panel was a member of DARD and then was not therefore an independent and impartial tribunal.

(g) The tribunal failed to consider whether there would be a possibility of bias.

[7] The applicant's grounds resolve to the three matters referred to above namely ground (a), the refusal to hear submissions on procedure, grounds (f) and (g), the lack of independence and impartiality of the Appeals Panel and grounds (b) to (e), the procedure proposed to be adopted by the Appeals Panel.

Appeals Panels refusal to hear submissions on procedure.

[8] The first matter, the refusal to hear submissions on procedure, was conceded by the Appeals Panel in advance of the hearing of the application for leave to apply for judicial review. In correspondence the solicitors for the Appeals Panel acknowledged that the Appeals Panel was operating in the belief that it lacked discretion as to the procedure to be followed and hence ruled that it would not hear argument on procedure. The Appeals Panel's solicitor acknowledged that the approach adopted by the Appeals Panel was legally mistaken and had no objection to the decision refusing to hear the applicant's submission on procedure being set aside.

Independence and impartiality of the Appeals Panel.

[9] The application for judicial review proceeded on the second matter namely the independence and impartiality of the Appeals Panel and the issue of apparent bias. Colette McMaster, the head of the Animal Disease Control Branch of the Department stated on affidavit that members of Appeals Panels were appointed by the Department with each panel comprising an independent legally qualified chairman, a member with farming interests and a DARD member. She stated that each member acts in a personal capacity and not as a representative of any other organisation and thus the DARD member does not represent the Department's view; the mix of members of the Appeals Panels is intended to ensure that there is sufficient knowledge and expertise within each Appeals Panel to enable a considered and well founded decision to be made about disputed valuations. In a second affidavit Ms McMaster stated that during 2004 DARD had undertaken a consultation

process in respect of proposals to establish Valuation Appeals Panels; that the proposals were that the Appeals Panels would comprise three members being the legally qualified chairman, a person with farming interests and a person from DARD; that a consultee had raised the issue of the independence of the Appeals Panels in light of the inclusion of a DARD member on the panel; that DARD had taken legal advice and had decided to proceed with the proposed Appeals Panels.

[10] The DARD members of the panel are selected for their expertise in agriculture, both technical and business related. They are each of grade 1 technical level which equates to grade 7 administrative level. They each have technical experience in recording in management systems and have been involved in the education process. They have varied relevant experience and expertise in assessing the attributes of animals and their general husbandry, including industry experience outside DARD. They are up to date with market trends and prices. It is also important to note that they are part of the service delivery group of the department which has an independent management structure quite separate form the valuation unit. The latter belongs to the veterinary service group.

[11] The structure of DARD is shown to involve six sections. There are three service sections being forestry, rivers and veterinary, with valuation being an element of the veterinary section. There are three general sections dealing with finance, policy and delivery, with the delivery section providing the members of the Appeals Panels.

[12] The applicant's challenge draws together two matters, namely Article 6 of the European Convention and the common law concept of apparent bias. Article 6 provides that –

> "In the determination of his civil rights and obligations ….everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The requirements of Article 6 apply to the determination of civil rights. The applicant has satisfied the conditions for a domestic statutory right to compensation and the issue before the Appeals Panel concerns the determination of the extent of his entitlement. Article 6 is engaged.

[13] The tribunal must be independent and impartial. In Bryan v. United Kingdom (1996) 21 EHRR 342 the European Court of Human Rights considered the role of a planning Inspector who was a member of the salaried staff of the Department of the Environment. As the Secretary of State could at any time issue a direction to revoke the power of the Inspector to decide the

appeal the Inspector was deprived of the requisite appearance of independence. On the issue of independence it was stated –

> "In order to establish whether a body can be considered "independent", regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence" (paragraph 37).

[14] In Incal v Turkey [1998] EHRR 449 The ECtHR considered the position of a military Judge as a member of the National Security Court. This gave legitimate cause to doubt the independence and impartiality of the Court. On the issue of impartiality it was stated that there are two tests to be satisfied –

> "…the first consists in trying to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect."

[15] Actual bias is not an issue in the present case. The domestic approach to apparent bias has been influenced by the ECtHR. The modern test for apparent bias was set out by the House of Lords in Porter v Magill. [2002] 1 All ER 465. Having considered the test formulated by the House of Lords in R v Gough [1993] 2 All ER 724, and the more objective approach taken in Scotland and some Commonwealth countries and in the Strasbourg jurisprudence, Lord Hope suggested what he described as a modest adjustment of the test in R v Gough. Accordingly the Court must first ascertain all the circumstances that have a bearing on the suggestion that the decision maker was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the Tribunal was biased. As stated by Lord Hope in Porter v Magill at paragraph 103 -

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased."

[16] Objections were raised to the composition of the Appeals Panels prior to their being established. Brian Walker is a solicitor retained by the main pedigree cattle breed societies in Northern Ireland who made representations to the Department and entered into correspondence in relation to the tuberculosis and brucellosis legislation. Mr Walker questioned the

appointment of a DARD member of the Appeals Panel on the ground that the literature described that person as a representative of the Department which as Mr Walker pointed out indicated that he or she would be acting as a substitute or proxy or authorised delegate or agent for the Department. The primary response from the Department in correspondence was to assert that the independence of Appeals Panels was guaranteed by their consideration of each individual case on it merits. That response was not an answer to Mr Walker's concerns but the affidavit of Ms McMaster sworn in these proceedings confirms that the DARD member is not appointed as a representative of the Department.

[17] In relation to the independence and impartiality of the Appeals Panel regard must be had to the manner of appointment. The members are all appointed by the Department. The applicant does not object to the Department making appointments but rather to a DARD employee being appointed. In any event the power of appointment is granted by the 2004 Order and as stated in Secretary of State for Health v. Personal Representatives of Beeson (2002) EWCA Civ 1812, respect must be accorded to that parliamentary choice.

[18] Further, regard must be had to the term of office. The legal chairman and the non-DARD member are appointed for three year terms of office but there is no such arrangement for the DARD member. A power of removal from an office of indeterminate duration, even if based on exceptional circumstances of uncertain character, amounts to an absence of security of tenure. Further, as to guarantees against outside pressures, the Department asserts the absence of such pressures. There are no indications of any instructions as to decision making or interference with decision making, either directly or through the structural involvement of superiors. However the absence of security of tenure may operate as a pressure. In relation to the appearance of independence, regard must be had to the practical separation of the divisions of a large Department and to the absence of the involvement of the DARD member in any aspect of the claim. In addition, decisions are made by the panel of three members and thus the DARD member will always be in a minority. However, again the absence of security of tenure affects the appearance of independence.

[19] In addressing the issue as one of apparent bias or partiality the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Appeals Panel was biased or whether the Appeals Panel offered guarantees sufficient to exclude any legitimate doubt. The tests are objective. The informed observer would note the specialist nature of these tribunals and the appointment of a specialist from the DARD to reflect the need for such expertise to contribute to decision making, the separation of powers within the Department so that the DARD member is appointed from a different

stream to those engaged in processing claims and the non involvement of the DARD member with any aspect of the matters giving rise to the claim, which matters would of themselves not indicate any real possibility of bias or legitimate doubt. However the status of the DARD member as an appointment attracting no security of tenure must give rise to real concern that he or she will be seen to be vulnerable to summary removal from office by the Department.

[20] Taking account of all the circumstances the conclusion must be that the Appeals Panel is not independent and impartial and is subject to apparent bias by reason of the absence of security of tenure for the DARD member.

[21] Where a first instance tribunal lacks independence and impartiality the incidence of judicial review may render the whole process Article 6 compliant. Consideration will be given to the scope of judicial review in assessing overall Article 6 compliance. In Bryan v. United Kingdom the ECtHR held that there was no violation of Article 6(1) because the scope of judicial review was sufficient to comply with Article 6(1). In order to determine whether the Court hearing the judicial review had "full jurisdiction" or provided "sufficiency of review" to remedy a lack of independence at first instance it was necessary to have regard to such factors as the subject matter of the decision appealed against, the manner in which the decision was arrived at and the content of the dispute, including the desired and actual grounds of appeal.

[22] In a recent review of the impact of judicial review on a first instance tribunal lacking independence and impartiality the European Court of Human Rights in Tsfayo v. United Kingdom (14th November 2006) considered a decision of a local authority housing benefit review board consisting of three councillors from the local authority. This was not an independent tribunal. The ECtHR held that there was no compliance with Article 6(1). The decision making process was significantly different to that in Bryan v UK where the issues to be determined required a measure of professional knowledge or expertise and the existence of administrative discretion pursuant to wider policy aims. In contrast to Bryan v UK, in Tsfayo v UK the review board was deciding a simple question of fact, namely whether there was good cause for the applicant's delay in making a claim. No specialist expertise was required to determine the issue.

[23] In the present case the respective valuers have accorded a specific value to each animal based on comparables that are drawn from the sale of other Holstein cattle. Mr Norbury contends that the comparables adopted by the Department's valuers are not appropriate. Over twelve pages of the appeal papers each of the cattle is identified by an ear tag number and the respective valuations are listed. To take but four examples from the second page of this schedule the applicant's valuations are £9,500, £8,500, £8,500 and

£6,000 and the Department's valuations are respectively £4,000, £5,000, £3,000 and £3,000. On the other hand many valuations are relatively close and in some instances Mr Norbury's valuation is less than that of the Department. Accordingly the dispute centres on the method of valuation, the appropriateness of the comparators and the basis on which there is such a significant deviation between the respective valuations on a significant number of cattle. The Appeals Panel will make a judgment as to the value of each animal. The applicant or the Department may dispute the valuations of the Appeals Panel and apply for judicial review of the valuations. As the nature of judicial review does not extend to consideration of the merits of a decision but rather deals with challenges based on legality, procedural fairness and rationality, it is unsuited to the resolution of such disputes as to individual valuations. To this extent judicial review lacks full jurisdiction to deal with the probable character of any challenges to the decision of the Appeals Panel.

[24] Accordingly, the lack of independence and impartiality of the Appeals Panel is not saved by consideration of the whole process involving the Appeals Panel and the prospect of judicial review. There is an absence of full jurisdiction and the process will not be Article 6 compliant.

[25] In any event consideration may be given to the procedural fairness in the first instance tribunal, even if it has not satisfied the independence ingredient, as that too will be a factor in assessing overall Article 6 compliance. The requirements of Article 6 include not only an entitlement to an independent and impartial tribunal but also to a fair hearing, which imports procedural fairness. In Secretary of State for Health v. Personal Representatives of Beeson (2002) EWCA Civ 1812 the Court of Appeal in England considered a complaints panel comprising one independent member and two local councillors deciding on charges to be levied for residential care. It was common case that the panel lacked the independence and impartiality required by Article 6 of the Convention. Laws LJ stated –

> "…… but in deciding the question of whether the decision making process satisfies the Article 6 standard in light of the availability of judicial review taken as a whole, it is important to have in mind that even though the first decision maker does not independently satisfy Article 6 the quality of his decision is by no means thereby rendered nugatory or valueless (paragraph 29).
>
> In this present case we see no evidence that the panel could not or would not arrive at a fair and reasonable recommendation . . . if there is no reason of substance to question the objective integrity of the first instance

> process (what ever might be said about its *appearance*), it seems to us that the added safeguard of judicial review will very likely satisfy the Article 6 standard unless there is some special feature of the case to show to the contrary" (paragraph 30)

[26] In Beeson there was no evidence that the first instance tribunal could not or would not arrive at a fair and reasonable decision. There was no reason of substance to question the objective integrity of the tribunal process. The added safeguard of judicial review satisfied the Article 6 standard as there was no special feature of the case to show the contrary. Even if I am wrong about the absence of full jurisdiction in judicial review in the present case I am not satisfied as to the procedural integrity of the Appeals Panel process in the circumstances set out below and accordingly could not call in aid this factor in determining whether the process was Article 6 compliant.

Procedural unfairness.

[27] The applicant complains of procedural unfairness in the proposed process to be adopted by the Appeals Panel. The applicant attended the hearing with Mr Norbury on 10 October 2005. At that time it transpired that the Appeals Panel intended to hear evidence from the applicant on that day and to hear the evidence of the Department on the Friday of the following week. The applicant contends that he should have been entitled to hear everything that the Department's representatives said to the Appeal Panel and should have the right to question the Department valuers. Mr Norbury felt that the proposed procedure left the applicant and his representatives in the dark about how different views had been formed by the Department's representatives. Ms McMaster on behalf of the Department contended that the proposed procedure to be adopted by the Appeals Panel accorded substantial fairness to the applicant taking into account that he was given appropriate and reasonable notice of the hearing; was legally represented; was provided in advance with copies of all the written evidence upon which the Department intended to rely; had his independent valuer, Mr Norbury, in attendance at the hearing; would have been provided with an opportunity to make representations on the Department's evidence and to introduce any additional evidence he or his legal representatives thought fit; would have been given a written decision by the Appeals Panel; if dissatisfied with the decision or the manner in which the procedures operated would have recourse to judicial review.

[28] The requirements of procedural fairness in a hearing before an agricultural panel were discussed in Tiernan's Application (2003) NIQB 60. There is a general duty to act fairly. This general requirement for procedural fairness, or the rules of natural justice as they were originally described,

applies to an adjudication affecting the rights of individuals. Fairness is a flexible principle depending upon "the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates." In any scheme of statutory decision-making the courts will imply "so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness." Lord Bridge in Lloyd v McMahon [1987] AC 625.702.

[29] Of particular relevance to the present case is the central requirement of procedural fairness that a party has the right to know the case against him and the right to respond to that case. The right to know and to respond requires the disclosure of material facts to the party affected, such disclosure being within a reasonable time to allow the opportunity to respond. The right to know and to respond has traditionally recognised that the statutory context may allow disclosure of the substance of material facts and may not require the details or the sources of those facts; that the right of challenge need not include the right of a party to cross-examine witnesses; that it may not be necessary to observe the legal rules of evidence, for example in relation to hearsay evidence. See the examples provided by Re Pergam & Press Ltd [1971] Ch 388, R v Deputy Industrial Injuries Commissioner ex parte Moore [1965] 1 QB 456.490 and R v Commission for Racial Equality ex parte Cottrell & Rothon [1980] 1 WLR 1580.

[30] The starting point is that each party has the right to know the opposing case and the right to make representations on the opposing case. The traditional approach in the court setting provides for the right to know and to respond by the presence of both parties during the hearing and for the right of each representative to cross examine the witnesses for the other. However the traditional approach need not be the only approach to satisfy the right to know and to respond. It is not essential for procedural fairness that the parties be present with each other or that each has a right to cross examine the other.

[31] However when one party is not present at an oral hearing there must exist a mechanism by which the absent party becomes acquainted with the opposing case. This may be achieved by the written evidence and representations of one party being made available to the other. Whether that is sufficient for the purpose in every case depends on the nature of the dispute. The nature of the present dispute concerns the valuation of cattle by reference to comparators, the grounds for distinction between proposed comparators and knowledge of the market. The respondent asserts that the proposed procedure achieves substantial fairness as the applicant has advance copies of the written evidence of the Department and the opportunity to make representations on the Department's evidence and to introduce any additional evidence. What is overlooked in this outline is the manner in which the applicant becomes acquainted with, and has the

opportunity to respond to, such representations as may be made on behalf of the Department when its representatives appear before the Appeals Panel. The papers lodged with the Appeals Panel do not disclose, for example, the basis on which the Department has arrived at such strikingly different valuations, of which there are but four instances referred to above. The proposed process does not admit of any scheme by which the applicant would become acquainted with the counter arguments that will be advanced before the Appeals Panel. Nor will the Appeals Panel be acquainted with the counter arguments until it hears the Department a week after it hears the applicant. Given the nature of the present dispute it is difficult to understand how the right to know and to respond would be accorded to the applicant under the proposal for separate hearings. It is not for the Court to devise the procedure but rather to determine the fairness of the proposed procedure. The present dispute is of such a nature that the proposal for separate hearings on the basis of the written material available to the applicant is not such as to satisfy the applicant's right to know and to respond.

[32] The issue of cross examination is a different matter. The Appeals Panel may devise a procedure that involves such an exchange of written material in advance of separate hearings and imposes such limits on the scope of representations by each party at the hearings as would satisfy the right to know and to respond. In such a case the issue of cross examination would not arise. On the other hand if the Appeals Panel adopted a joint hearing it would not necessarily involve cross examination as the right to know and to respond can be achieved by other means. In Tiernan's Application for example an inquisitorial approach was adopted and was found to operate in a manner that accorded procedural fairness.

[33] The respondent contends that if there are any procedural shortcomings in the proposed process then the applicant will be able to apply for judicial review of the decision of the Appeals Panel. I am in a position in this judicial review to determine, in advance of the hearing before the Appeals Panel, the issue of procedural impropriety and it is unnecessary to await the outcome of the hearing or a judicial review of the decision.

[34] In summary, the Appeals Panel is not independent and impartial and is subject to apparent bias by reason of the lack of security of tenure of the DARD member; the nature of the dispute is such that the hearing of a judicial review of a decision of the Appeals Panel would lack full jurisdiction to address the matters in dispute and thus the process is not compliant with Article 6 of the Convention; the proposal for separate hearings by the Appeals Panel of the applicant and the Department, on the basis of the written materials presently available and in the absence of any basis being disclosed for the applicant becoming acquainted with the case made at the Department's hearing, will not satisfy the requirement that the applicant should know the opposing case and should have the opportunity to respond.