Principles of Public Law

Andrew Le Sueur, LLB, Barrister
Reader in Laws, University College London
Javan Herberg, LLB, BCL, Barrister
Practising Barrister, Blackstone Chambers
Rosalind English, LLM, MA, Barrister

Cavendish
Publishing
Limited

London • Sydney

GROUNDS OF JUDICIAL REVIEW II: FAIR HEARINGS AND THE RULE AGAINST BIAS

13.1 Introduction

The courts may review a public authority's decision on the ground of 'procedural impropriety' if the decision maker has failed to meet required standards of fair procedure. It is difficult to define precisely what is meant by the word 'procedure' in this context, but, in essence, it concerns *the way in which the decision is reached* rather than the *actual decision* itself (in contrast, the grounds of review known as illegality and irrationality both look, in different ways, at the actual decision). Over the years, the courts have built up detailed rules setting out what is required of decision makers in different circumstances – in other words, what procedures they have to follow in order to ensure that their decisions comply with the requirements of 'fairness'.

Different types of decisions, and different decision makers, have to conform to different standards of procedural propriety. At one extreme, almost all decision makers are required not to be biased when taking decisions. On the other hand, only some decision makers are required to offer a person likely to be affected an oral hearing before taking a decision. The crucial skill which one therefore has to develop is to be able to recognise what the courts are likely to require by way of procedural fairness in any given situation. This is not an easy task, because there are few fixed rules to act as a guide. Over the past few years, the courts have increasingly emphasised that what is required of a decision maker is simply what is 'fair in the circumstances' – and they have emphasised that 'fairness' is a flexible concept. This means that, in order to predict what the courts might require in any particular situation with which one is faced, one has to be aware:

(a) of what the courts have done in similar situations in the past; and

(b) of the general principles which the courts follow in applying the 'fairness' concept,

so that one can be alert to differences between this case and past cases, and thus have an idea as to how the courts might react to the particular situation.

13.2 Terminology: a brief history

It is easy to be confused by the different terminology used in this area. As is so often the case in judicial review, the language is far less important than the actual concepts. But some awareness of differences in terminology is necessary, because the labels are of more than merely historical interest. A wide variety of terms is still used today.

Traditionally, the requirements of procedural fairness have been known collectively as 'the rules of natural justice'. This phrase reflects the courts' original explanation of the source of the doctrine: that it was not invented by judges, but reflected 'natural' or even God-given laws of fairness. (In one 18th century case, Fortescue J even traced the doctrine back to Old Testament roots!) The rules of natural justice were traditionally categorised under two headings, each known by a Latin tag:

(a) the principle *audi alteram partem* (meaning 'hear the other side'), encompassed the group of rules that required a decision maker to offer a hearing, either written or oral, to an affected individual before a decision was taken;

(b) the principle *nemo judex in causa sua* (or 'no man a judge in his own cause') covered the rules which ensured that a decision maker was not biased, and should not appear to be biased, in coming to a decision.

These rules were slowly developed by the courts, relying heavily on analogies with court procedures. In other words, the courts looked at the procedural protections which a person would be entitled to in court (such as a right to an oral hearing, a right to call witnesses, a right to be represented by a lawyer, a right to cross-examination, and so on) and applied similar rights to persons affected by decisions of public bodies who were entitled to natural justice.

In the 1970s, this rather rigid approach was softened, as the courts began to state that the rules of natural justice were not necessarily uniform in different situations; that what was required in each case was simply whatever 'fairness' demanded. There was then a long debate in the late 1970s and early 1980s about whether there was any difference between 'natural justice' and 'fairness'. The answer today is, probably not. The best evidence of this is the number of judges who simply talk about 'the requirements of natural justice or fairness' without even attempting to distinguish them. One can still use the language of 'natural justice', as long as one remembers that it is a much more flexible concept than it was 20 years ago.

In the *GCHQ* case (1984), Lord Diplock proposed that, rather than the terms 'natural justice' or 'procedural fairness', we should use the term 'procedural propriety'. He explained that:

> I have described the third head as 'procedural impropriety' rather than failure to observe the basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any failure of natural justice [p 411].

We have adopted Lord Diplock's categorisation here. Under the heading of 'procedural impropriety', therefore, there are three broad areas to be examined. These are:

(a) *the right to a fair hearing*. A fair hearing may be required *either* by statute, *or* by the common law (the latter being what is known as the rules of natural justice or fairness). This is dealt with in the first part of this chapter;

(b) *the rule against bias* (dealt with in 13.7 and following);

(c) *the doctrine of legitimate expectation* (dealt with in Chapter 14). This is the idea that decision makers ought, where possible, to fulfil expectations which they have, by their actions, aroused in affected individuals.

13.3 A framework for thinking about the right to a fair hearing

There are a huge number of cases dealing with the right to a hearing: this is the most litigated area of procedural impropriety. Most of the cases deal with different aspects of the same basic question: in the circumstances of the individual case, has the applicant any entitlement to procedural protection before the decision is taken, and, if so, what protection can he or she demand? We have broken this question down into three separate elements:

(a) *When* is a fair hearing *prima facie* required (see below, 13.4)?

(b) Is there any reason why the *prima facie* entitlement to a hearing should be *limited* or *defeated* (see below, 13.5)?

(c) If a some sort of hearing is required, *what* procedural protection can the applicant actually demand (see below, 13.6)?

13.4 When is a fair hearing required?

This is certainly the most difficult of the three issues. Let us go back to the example which we followed in the last chapter.

Alice applies to the MTLB for a market stallholder's licence. She has never had a licence before. She fills in the short application form, and sends it to the MTLB. Some time later, she gets a letter from the MTLB turning down her application on the ground that the MTLB believes that she is not a fit and proper person. The MTLB states that its decision is final, and that it will not listen to further representations.

Alice wants to know if she can challenge this decision, because the MTLB has not given her an opportunity to make representations. She says she would have liked to make oral representations, or, failing that, to put representations in writing. She would also like to know the grounds on which the MTLB has found that she is not fit and proper. Has she got a good ground of challenge on the basis that the MTLB has failed to give her a fair hearing?

13.4.1 'Judicial/administrative' and 'rights/privileges'

In answering this question, the first golden rule to remember is, don't trust any cases decided before the mid-1960s! Until that time, the courts used to insist that, to be entitled to a fair hearing, it would have to be shown that the decision maker was a 'judicial body' (that is, it had the characteristics of a court or tribunal) rather than an 'administrative body'. It would also have to be shown that the decision in respect of which the hearing was sought was one which concerned legally enforceable rights, rather than merely 'privileges' or 'expectations'.

In Alice's case, although she may be able to show that the MTLB was a 'judicial body' (depending on the MTLB's precise character), she would not be able to show that the decision concerned any legally enforceable 'right'. She has no right to a licence – only a hope of a getting one. So, under the old law, Alice would have had no right to a hearing.

13.4.2 Rigid distinctions swept away

These distinctions have now been swept away. In many ways, the law is now closer to what it was in the mid to late 19th century, before these rigid distinctions arose (so that the old case of *Cooper v Wandsworth Board of Works* (1863) is still (in broad principle) good law). The case that really confirmed the death of these old distinctions between judicial/administrative bodies and rights/privileges was the landmark decision of *Ridge v Baldwin* (1964). Ridge was the chief constable of Brighton, until he was dismissed from his post without a hearing by the local authority (which had the power to dismiss him 'at any time' if, in its opinion, he was 'negligent in the discharge of his duty, or otherwise unfit for the same'). His dismissal followed a corruption trial at which he was acquitted, but where the judge had made various criticisms of him. Ridge challenged his dismissal on the ground that he should have been given an opportunity to make representations to the local authority, defending himself against the allegations made against him. The local authority argued (following the old case law) that, since Ridge had no 'legal right' to his position, he had no entitlement to a hearing before dismissal.

The House of Lords found that Ridge should have been given a hearing before being dismissed. Lord Reid held that whenever a decision by a public authority resulted in a person being deprived of his employment, or resulted in his reputation being significantly diminished, that person ought to be given a chance to make representations before the decision was taken. It was irrelevant whether the person had a 'right' to his position or whether it was merely a 'privilege'. In a case a few years later (*Re HK (An Infant)* (1967)), it was confirmed that the effect of *Ridge v Baldwin* was also to sweep away the judicial/administrative distinction: in other words, Ridge would have been

entitled to a hearing even if the local authority were not acting 'judicially' (this was not clear from the judgments in *Ridge* itself). In *Re HK*, the court for the first time talked of the requirement 'to act fairly'. *Ridge* and *Re HK* together are so important because they opened up for debate the question of whether a hearing was required in any particular situation, irrespective of its formal categorisation. They did not, of course, provide a complete answer to that question, beyond suggesting that a hearing would be required when livelihood or reputation was significantly put at risk by a decision (as in *Ridge v Baldwin*), or where a fundamental right, such as the right to enter the county by immigration was at issue (as in *Re HK*).

Those decisions do not, however, assist us in our example. Alice's existing livelihood has not been put at risk, because we know that she has never traded in the past. It could be argued that a finding that she is not fit and proper does significantly affect her reputation, but if no one else knew of the MTLB's decision, this is doubtful.

To decide, therefore, whether Alice is entitled to a hearing, it is necessary to look for authorities dealing with situations which are more similar. This is the same process which has to be gone through each time one is confronted with a novel situation in which it is not immediately clear whether the requirements of procedural propriety apply.

13.4.3 Fair hearings and licensing decisions

Licensing is an important function of government and self-regulatory organisations. In many areas – whether practising a profession or trade, broadcasting or sport – people are required to obtain a licence before engaging in the activity. A useful case in this area is *McInnes v Onslow-Fane* (1978) (although since the case was decided before Ord 53 was introduced, it does not address the difficult issue of whether such licensing authority is amenable to judicial review: see below, Chapter 17). McInnes sought a boxing manager's licence from the British Boxing Board of Control. He had held a licence in the past, but not for several years before this application. The Board refused to grant him a licence without giving him an oral hearing, and without disclosing to him the basis of their decision. McInnes challenged this decision, claiming that the Board had acted in breach of natural justice and unfairly. In his judgment, Sir Robert Megarry VC divided up licence cases into three categories:

(a) the first category consisted of '*revocation cases*': where someone holding an existing licence has it revoked for some reason. In that type of case, he held, the person should normally be offered a fair hearing before being deprived of the licence;

(b) at the opposite end of the spectrum were '*application cases*' – where a person who doesn't hold an existing licence applies for one. Here, he held,

there would not normally be any obligation on the decision maker to offer a hearing;

(c) thirdly, the judge identified a category which he called '*expectation cases*' but which, for reasons which we will deal with later, it is better to call 'renewal cases', where someone has held a licence which has expired by passage of time, and he or she applies for it to be renewed. The judge did not have to decide on this last category, but suggested that it was 'closer to the revocation cases' – that is, closer to the situation where a hearing would be required.

On the facts, the judge found that McInnes came within the 'application' category, because he did not hold an existing licence, and therefore he was not entitled to a hearing or to know the case against him.

Although *McInnes* is as good a starting point as any in the context of licensing cases, it is not the last word on the subject. It is a little misleading in suggesting that classes of case can be divided up in the abstract, when in fact, as judges have subsequently emphasised, all depends on what is 'fair' in the particular circumstances. Since the *McInnes* decision, it has become clearer that 'renewal cases' are indeed closer to 'revocation cases' – that is, that unless there is a very good reason to the contrary, a person applying to continue a licence which has expired is entitled to a hearing before he or she is refused (see, for example, *R v Assistant Metropolitan Police Commissioner ex p Howell* (1986)). It has also become clearer that even in 'application cases', where the applicant has never held a licence before, there may be a limited right to a fair hearing. After all, a person can be as badly affected by being rejected in a 'first time' application as when losing an existing permit; she may be prevented from following a trade or vocation which she had set her heart on. In *R v Huntingdon DC ex p Cowan* (1984), an applicant was refused an entertainments licence (after a first time application) without being told of various objections which the council had received, and without being given a hearing. The court held that the applicant should, as a minimum, have been informed of the nature of the objections made, and have been given a chance reply in writing. Similar reasoning will apply outside the narrow 'licensing' context. In *R v Secretary of State for the Home Department ex p Fayed* (1997), the Court of Appeal held that applicants for British citizenship were entitled to an opportunity to make representations (and entitled to be informed of matters on which the application might be rejected), on the basis that the refusal of the application would lead to adverse inferences being drawn about the applicants' characters.

On this basis, we might advise Alice as follows: since Alice has not previously held a licence, she falls into the category known as 'application cases' which Megarry VC in *McInnes* suggested would not normally attract an entitlement to a hearing. However, the *Huntingdon* case suggests that, even in this situation, a hearing may sometimes be required. Since the MTLB has

turned Alice down on a very serious ground – that she is not fit and proper – without giving her any opportunity to comment and, moreover, on an issue which is personal to her, and upon which she might well be expected to have something relevant to say, it is likely that a court would find that the MTLB has acted unfairly here. (However, she is probably not entitled to an oral hearing, but only to be told of the objections against her and to have the opportunity of submitting written representations: see *ex p Cowan* (above, and below, 13.6.2).

This is how you might deal with one particular situation; you should try to build up a picture from your lectures and textbooks as to what the courts have done in other factual contexts. What is most important is to try to develop an 'instinct' as to how the courts are likely to react. This is partly a matter of common sense. For example, it is fairly obvious why Megarry VC drew a distinction between application cases and revocation cases in *McInnes*. In a revocation case, an applicant may be losing his or her livelihood (or at least an important right) by being deprived of a licence. A first time applicant, on the other hand, has no existing rights to lose. Further, the class of people in the 'revocation' situation is limited (only those people who already have licences can be deprived of a licence), so the number of people to whom the authority might have to give a hearing is restricted. By contrast, the class of 'first time applicants' is potentially entirely unlimited. What would happen if the courts held that every applicant for a licence had to be given an oral hearing, and then one million people applied? It is important to realise that judges are influenced by practical considerations of this sort.

13.4.4 Summary of entitlement

It is possible to suggest some general principles which the courts employ in assessing entitlement to procedural fairness today (assuming that there is no statutory requirement of a hearing) – always remembering that they are not rules, and that the answer is dependent upon what is fair in each individual case:

(a) as a very general rule, the courts tend to require that a fair hearing be given whenever an applicant's rights or interests are adversely affected in any significant way by a decision, unless there is good reason not to require a hearing;

(b) this general rule does not apply in the 'legislative' context – for example, where an individual may be significantly affected by a proposed statutory instrument. Here, the courts incline against any right to a hearing (*Bates v Lord Hailsham* (1972)), although the position is not so rigid as it once was;

(c) otherwise, if an applicant is deprived of a private law 'right', then a hearing is almost certainly required before the decision is taken;

(d) if an individual is, by reason of the decision, to be deprived of his or her livelihood, or a significant part of it, then a fair hearing is very probably necessary before the decision is taken;

(e) if an individual's reputation will be seriously affected by the decision, or if the individual's interests will otherwise be seriously affected, then a fair hearing is very probably necessary;

(f) more generally, where a decision is made on the basis of considerations which are personal to an applicant, a fair hearing is more likely to be necessary.

13.5 Restrictions on entitlement to a hearing

Even in a case where, by following the above analysis, one might expect an applicant to be entitled to a fair hearing, there are a number of reasons why that entitlement may be excluded. Below, we list some of the more common reasons why this may happen. This list should not be regarded as set of rigid rules; it is simply a collection of some of the reasons that the courts have given for holding that applicants have no entitlement to a fair hearing, even though they might fall into a class which would normally be entitled. In addition, it is important to remember that the court in judicial review cases always has a discretion not to grant a remedy, even where a ground of review, such as failure to grant a fair hearing, is made out. Some of the restrictions on entitlement listed below are sometimes used by the courts in this different way – as reasons why a remedy should not be granted. For present purposes, however, the distinction is not particularly important.

13.5.1 Express statutory exclusion

A statute may expressly exclude the right to a hearing in particular circumstances. Where this happens, the courts must give effect to the statute because, like the rest of the common law, the rules of natural justice are subservient to the will of Parliament. Express statutory exclusion therefore presents no difficulties.

13.5.2 Implied statutory exclusion

In theory, implied exclusion is no different from express exclusion. If the way in which a statute is worded implies that Parliament must have intended that the right to a fair hearing be excluded (even though the statute does not actually say so), then the courts must give effect to that implied intention, and exclude any right to a hearing. However, in practice, the courts are reluctant to interpret a statute in this way, because the right to a fair hearing is regarded as of fundamental importance. The courts are more likely to be persuaded that Parliament intended to exclude natural justice if the legislation provides for

some procedural protection (for example, the right to make written representations); the court may then presume that the words of the Act impliedly intended to exclude greater protection (for example, the right to an oral hearing): see, for example, *Abdi v Secretary of State for the Home Department* (1996) (specific provision in Asylum Rules for disclosure of certain documents impliedly excluded any duty to disclose other documents). But, even where specific rules exist, the courts may supplement the statutory procedures with natural justice, provided that such supplementation is not inconsistent with the scheme of the rules. In *Re Hamilton; Re Forrest* (1981), the court was faced with a decision of magistrates to commit Hamilton to prison, without giving him a hearing (and in his absence), for failing to pay sums due under a court order. The magistrates thought that they did not have to give him a hearing as Hamilton was already in prison for other offences, and the relevant legislation only required a hearing 'unless … the offender is serving a term of imprisonment'. However, the House of Lords found that the legislation only exempted the magistrates from giving prisoners an oral hearing, and held that natural justice required that Hamilton be given an opportunity to make written representations.

13.5.3 Where a hearing, or disclosure of information, would be prejudicial to the public interest

This is an argument which may lead the court to refuse to grant a remedy whatever ground of judicial review is established; that is, illegality or irrationality as well as breach of natural justice. The best example is the *GCHQ* case (1985), where the House of Lords held that the trade unions would have been entitled to consultation, but that, on the facts, this entitlement was defeated by an argument relying on national security: that if the government had consulted the trade unions before instituting the ban on trade unions, this would have risked precipitating the very disruption to essential services protecting national security that the ban was intended to avoid.

Where the government seeks to rely upon national security, there is a difficult question as to the extent to which it has to be established by evidence. Traditionally (as in *GCHQ*), the courts have been willing to accept the assertion of government (provided that there is some evidence to support it); the courts have not ventured into the issue of whether the national security considerations are sufficiently compelling to justify overriding the applicant's procedural rights. However, particularly under the influence of the case law of the European Court of Human Rights, the courts have begun to adopt a slightly more interventionist stance; see *Chahal v UK* (1997), where the European Court unanimously held that the failure of the English courts to carry out or supervise effectively a balancing test (weighing national security considerations) was a breach of Art 5(4) of the Convention (see below, 21.4.1).

13.5.4 In an emergency

This is self-explanatory; if a public authority has to act very urgently, then it may be exempted from offering a hearing beforehand. A good example is *R v Secretary of State for Transport ex p Pegasus Holidays (London) Ltd* (1988), where the court held that the Secretary of State's decision to suspend the licences of Romanian pilots without first giving them a hearing was justified in circumstances in which he feared an immediate threat to air safety (the pilots had failed a Civil Aviation Authority test). Note that there will normally still be a duty on the decision maker to offer the individual a fair hearing as soon as possible after the decision – as and when time permits.

13.5.5 Where it is administratively impracticable to require a hearing

As we have already seen, administrative impossibility may be a reason for the courts finding that there is simply no *prima facie* entitlement to a fair hearing (remember the example of the one million licence applications, above, 13.4.3). But it may also, in rare cases, be a reason for the courts refusing to grant a remedy even where there is a *prima facie* right to a hearing. So, in *R v Secretary of State for Social Services ex p Association of Metropolitan Authorities* (1986), even though the Secretary of State had failed in his statutory duty to consult before making certain regulations, the court would not quash the regulations (although it did grant a declaration) because, by the time of the court's decision, the regulations had been in force for some while, and it would have caused great confusion to revoke them at that stage. The judge also took into account the fact that the regulations were a form of delegated legislation, which the court is always more reluctant to overturn.

It is only in very exceptional circumstances that the court will refuse to quash a decision on this ground. Usually, the maxim 'justice and convenience are not on speaking terms' applies. It may be inconvenient for a decision to be quashed, but this is not a good reason for allowing an *ultra vires* decision to stand.

13.5.6 Where the unfair decision has been 'cured' by a fair appeal

What if an individual is wrongly denied a fair hearing, but there is then an internal appeal to an superior authority, which hears the case properly? Does the fair appeal 'cure' the unfair hearing? This is a difficult issue. On the one hand, it might be said that, if a person is entitled to a hearing and to an appeal, then he or she is entitled to expect each to be fair, not merely the appeal. On the other hand, the individual has at least received one fair hearing (the appeal), and natural justice would not, of itself, normally require that there be more than one hearing.

The general rule is that both the hearing and the appeal must be fair. The reason for this is that a fair appeal may be no substitute for a fair hearing: it is often easier to convince someone of your case first time round, rather than persuading someone to change a decision on appeal; the burden of proof may be different on appeal; the appeal may not re-open issues of fact, etc.

However, where the appeal is a 'full' one (that is, it is effectively a re-hearing of the original hearing), then the appeal may 'cure' the unfair hearing so that the individual cannot challenge the result. In *Lloyd v McMahon* (1987) (see, also, the Privy Council decision in *Calvin v Carr* (1980)), the House of Lords were faced with a situation where a district auditor had surcharged local authority councillors for deliberately failing to set a rate, after a 'hearing' which the councillors alleged was in breach of natural justice (because he had only offered them an opportunity to make written representations rather than an oral hearing). The councillors had made use of a statutory appeal to the High Court, which had rejected their appeal (after hearing oral submissions). The House of Lords held that, in fact, the district auditor had not acted unfairly in not offering an oral hearing, but further held that even if that failure was unfair, it was 'cured' by the statutory appeal to the High Court, because the appeal was a full re-hearing of the matter, rather than simply an appeal; there was 'no question of the court being confined to a review of the evidence which was available to the auditor' (Lord Keith).

13.5.7 Where the decision is only preliminary to a subsequent decision before which a hearing will be given

Although there are a number of confusing cases on this issue, the same basic considerations arise here as in the preceding section. The test is essentially the same as before: has any real unfairness been caused by the fact that the applicant has not been granted a fair hearing at the preliminary stage?

13.5.8 Where the error made 'no difference' to the result, or where a hearing would be futile

On various occasions, courts have suggested that an applicant is not entitled to a fair hearing if the court thinks that the procedural error made 'no difference' to the decision reached, or where, because of the bad conduct of the applicant or for some other reason, the court thinks that it would be 'futile' to grant a remedy because the decision maker would inevitably come to the same decision a second time. Both these lines of reasoning have in common the fact that the court is looking beyond the defect in procedure, and is taking into account the actual merits of the case. This is normally regarded as the cardinal sin of judicial review – the court is not meant to second guess the decision maker, by finding what would have been the result if the decision maker had acted properly. The courts, therefore, normally refuse to accept this

type of argument. To take an example: Alice (in the example above, 13.4.3) takes your advice and seeks judicial review of the decision to refuse her application without a hearing. The MTLB admits that it should have given her an opportunity to make written representations, but puts evidence before the court to show that Alice is a notorious thief and confidence trickster, and therefore would be a completely unsuitable person to hold a licence. The MTLB argues that the court should not quash its decision, because the error (the failure to entertain written representations) did not affect the result since, given her bad character, she could say nothing in her representations which could lead the MTLB to grant her a licence. Making us take the decision again, say the MTLB, would be futile.

The answer to this is that it is not for the court to judge whether or not the MTLB would necessarily come to the same decision. The role of the court is to quash the decision, if a ground of review is made out, and to remit the case back to the MTLB for it to re-take the decision with an open mind. It might be different, however, if Alice admitted the evidence put before the court. In that case, the court might be tempted to hold that, on the basis of such evidence, the MTLB would inevitably have come to the same decision.

There is always a great temptation for the court to find against an unmeritorious applicant by holding that the decision would inevitably have been the same, so that the error made no difference. For example, in *Glynn v Keele University* (1971), the court refused to overturn a disciplinary decision in respect of a university student, even though the court found that the hearing was defective. This was because the offence (nude sunbathing!) merited a severe penalty 'even today', and all that was lost was a chance to plead in mitigation. In *Cinnamond v British Airports Authority* (1980), the Court of Appeal upheld an order excluding six minicab drivers from Heathrow airport, even though BAA had wrongly failed to give the drivers a hearing, because (as Lord Denning put it), the past records of the six were so bad (convictions, unpaid fines, flouting of BAA's regulations) that they could not expect to be consulted over the decision, and there was, therefore, no breach of natural justice. And, more recently, the courts have been prepared to find that cases fall within a 'narrow margin of cases' where it is 'near to certainty' that the flaw made no difference to the result (see, for example, *R v Camden LBC ex p Paddock* (1995); *R v Islington LBC ex p Degnan* (1998)). However, these are unusual cases. More representative of the law is the well known *dictum* of Megarry J in *John v Rees* (1970):

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature ... likely to underestimate the feelings of resentment of those who find that a decision against them has

been made without their being afforded any opportunity to influence the course of events [p 402].

13.6 Content of the fair hearing

So far in this chapter, we have spoken in general terms of 'fair hearings'. We need now to consider what precisely is meant by the phrase. Assuming that an entitlement to a fair hearing does exist, what procedural rights can the applicant actually expect? The answer depends, as always, upon what fairness requires in the individual circumstances of the case. Once again, the best way to get a 'feel' for what is required in different circumstances is to look at what the courts have done in past cases, and to put that together with the principles on which the courts tend to act. What follows is a 'menu' of different procedural protections, starting from the most basic and widespread, and progressing to rights which are certainly not required in every case.

13.6.1 Disclosure to the applicant of the case to be met

Whenever an individual has any right at all to be consulted or heard before a decision is taken, he or she will almost inevitably also have a right to disclosure of the case to be met (assuming that there is a 'case' against the applicant), or the basis upon which the decision maker proposes to act. The courts have recognised that it will often be meaningless to give someone a right to make representations if they do not know the case against them, because they will not know to what issues to direct their representations. As Lord Denning MR put it, 'If the right to be heard is to be a real right which is worth anything ... [an applicant] must know what evidence has been given and what statements have been made affecting him' (*Kanda v Government of Malaya* (1962)).

An example of a case where the decision maker failed to make proper disclosure is *Chief Constable of North Wales v Evans* (1982). Here, a probationer police constable was required to resign by the chief constable following various allegations as to his 'unsuitable' lifestyle, of which he was not informed at the time at which he was effectively dismissed. Most of the allegations turned out to be untrue or very misleading. The House of Lords held that the chief constable had acted in breach of his duty of fairness in not putting to Evans the adverse factors on which he relied.

This duty of disclosure may be an ongoing one. Where a decision maker discovers evidence, or forms views, in the course of his investigation adverse to the applicant upon which he proposes to rely in making his decision, there may be a duty to put such concerns to the individual: see, for example, *R v Secretary of State for the Home Department ex p Fayed* (1997).

There are, however, limits on the right to disclosure. Public decision makers are not normally obliged to disclose every relevant document to an affected individual, as if they were giving disclosure in civil litigation. The test is normally whether the individual had sufficient information and material as to the case against him so that he was able to make informed submissions. Further, in some situations, the material which the applicant wants to see may be confidential or sensitive. In such cases, the applicant may have to make do with rather less than full disclosure. In *R v Gaming Board ex p Benaim and Khaida* (1970), the applicants re-applied for gaming licences. The Board gave them a hearing and indicated the matters which were troubling the Board, but refused their application without indicating the source or precise content of the information upon which the Board relied. The Court of Appeal held that, in the circumstances, it was enough that the applicants were given a general nature of the case against them, sufficient to prepare their representations. The Board did not need to 'quote chapter and verse' against them, nor did it have to disclose information which would put an informer to the Board in peril of discovery, or which would otherwise be contrary to the public interest.

13.6.2 Written representations versus oral hearings

Ordinarily, where a hearing is required, then it will be an oral hearing. But, in some circumstances, the courts have held that the requirements of fairness are satisfied by an opportunity to submit written representations. For example, in *R v Huntingdon District Council ex p Cowan* (1984) (discussed above in relation to licence applications, 13.4.3), it was held that, in considering an application for an entertainments licence, a local authority was not under a duty to give the applicant an oral hearing; it was sufficient to inform him of objections made and to give him an opportunity to reply. Part of the reason for this, as noted above, is the sheer impracticality of insisting on oral hearings in circumstances where there is an entirely open ended category of applicants.

In general, the requirement that a hearing should be oral is only likely to be relaxed where there is no good reason for anything more than written representations. If, therefore, the decision may turn on the applicant's credibility, or on contested evidence of witnesses, then an oral hearing will have to be given. Similarly, where the applicant faces disciplinary charges, or any other decision which will have a serious impact on his or her reputation, the courts are likely to require the decision maker to allow the applicant to address it in person.

13.6.3 Statutory consultation

Many statutes provide that the minister, or other public authority, shall undertake 'consultations' before arriving at a decision, or before delegated legislation is enacted. In general, the courts have interpreted this as requiring

no more than allowing affected parties to submit written representations (see, for example, *R v Secretary of State for Health ex p United States Tobacco International Inc* (1991)). The courts will try to ensure, however, that such consultation is more than a mere formality. Thus, in *R v Secretary of State for Social Services ex p Association of Metropolitan Authorities* (1986), Webster J stressed that 'the essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice'.

13.6.4 The right to call witnesses

Fairness may require that the decision maker allow the persons affected to call witnesses to give evidence to support their case. This tends to be required in more 'formal' proceedings, such as in disciplinary hearings. The courts have held that tribunals and other decision makers have a *discretion* as to whether or not to allow witnesses to be called; however, this discretion must be exercised reasonably, and in good faith. In this context, the courts will be prepared to intervene to strike down a decision not to allow witnesses to be called not only if they think that the decision is *Wednesbury* unreasonable or irrational (see Chapter 15), but on the much narrower ground that they believe that the decision was unfair. Thus, in *R v Board of Visitors of Hull Prison ex p St Germain (No 2)* (1979), the court struck down as contrary to natural justice the decision of a prison board of visitors at a disciplinary hearing (following a prison riot) not to allow a prisoner to call witnesses because of the administrative inconvenience involved in calling the witnesses – who were fellow prisoners, then at different prisons. The court also (not surprisingly) rejected the argument that the witnesses were unnecessary because the tribunal believed that there was ample evidence against the prisoner.

In other circumstances, the courts may be more respectful of the tribunal's decision not to allow witnesses to be called. In *R v Panel on Take-overs and Mergers ex p Guinness plc* (1989), the Court of Appeal stated that it felt the 'greatest anxiety' about the panel's decision not to grant an adjournment to allow witnesses for Guinness to attend. However, the court found it impossible to say that that decision had been wrong, bearing in mind that the panel did not exercise a disciplinary function, and was an 'inquisitorial' rather than 'adversarial' body. The court also, in that case, took into account the 'overwhelming' evidence in favour of the panel's view.

13.6.5 The right to legal representation and to cross-examination of witnesses

Essentially, the same principles apply here as to the entitlement to call witnesses. The entitlement to legal representation or cross-examination is a feature only of the more 'judicialised' forms of decision making. Even then, the tribunal or other decision maker has a discretion as to whether or not to

allow an applicant to be legally represented. However, the courts may intervene to strike down a decision not to allow representation if the decision is unfair. Unfairness will almost certainly exist if the tribunal allows one side to be legally represented and not the other. It may also exist, particularly in formal disciplinary proceedings, if the questions at issue are complex and the applicant is not genuinely capable of representing him or herself. Thus, in *R v Home Secretary ex p Tarrant* (1984), the court quashed a disciplinary decision of a prison board of visitors for unfairness caused by a failure to allow legal representation. The court set out a number of factors which together required that representation be allowed: the seriousness of the charge and penalty which the prisoner faced; the likelihood that points of law would arise; the prisoner's capacity to present his own case, and the need for fairness between prisoners, and between prisoners and prison officers. The House of Lords approved the decision in *Tarrant* in *R v Board of Visitors of HM Prisons, The Maze, ex p Hone* (1988) – but remember that each case must be considered on its merits; there are other prisoners' discipline cases where the opposite conclusion has been reached, where the charges were straightforward (legally and factually), and where the prisoner was articulate (*R v Board of Visitors of Parkhurst Prison ex p Norney* (1989)). The entitlement to legal representation must also be considered in the context of the more general right of access to a lawyer, a right protected under the European Convention: see Art 6(1) and (3), and *Murray v UK* (1996); see below, 21.2.1.

The question of entitlement to cross-examine witnesses produced by the other side normally (although not always) arises where the parties are legally represented. As a general rule, it can be said that if a witness is allowed to testify orally, then the other side should be allowed to confront the witness by cross-examination. But, once again, this is a matter of discretion for the tribunal or adjudicator, and if the tribunal feels that cross-examination will serve no useful purpose, then the court may be slow to disturb that decision. The most important case on this question is *Bushell v Secretary of State for the Environment* (1981), where the House of Lords refused to overturn the decision of an inspector at a public inquiry in relation to a proposed motorway not to allow cross-examination as to the basis of the Department's predictions of future traffic flow. Although the decision can be read as suggesting that cross-examination should not be allowed into 'policy'-type issues, in reality, the crucial point was that the House of Lords (and the inspector) did not regard the issue of future traffic flow as a relevant question for the inquiry to decide; hence, it was reasonable not to allow cross-examination on the point (there is, however, an unanswered question as to why, if this was right, the Secretary of State was allowed to adduce evidence as to traffic flow forecasts at all).

13.6.6 The right to reasons for the decision

The issue of whether or not a person affected by a decision has a right to be provided with reasons explaining or justifying that decision is an important and fast growing one in public law and it is worth considering the subject in some detail. Before looking at the current position in English law, it is worth asking whether an entitlement to be given reasons for a decision of a public authority is really so important, and if so, why. It is clear that eminent contemporary public law writers do regard an entitlement to reasons as important. As Lord Woolf has said (41st Hamlyn Lectures, *Protection of the Public – A New Challenge*, 1990, London: Sweet & Maxwell):

> I regard the giving of satisfactory reasons for a decision as being the hallmark of good administration and if I were to be asked to identify the most beneficial improvement which could be made to English administrative law I would unhesitatingly reply that it would be the introduction of a general requirement that reasons should normally be available, at least on request, for all administrative actions.

Professor Wade has stated that the lack of a general duty to give reasons is an 'outstanding deficiency of administrative law'; and that 'a right to reasons is an indispensable part of a sound system of judicial review' (Wade, HWR and Forsyth, CF, *Administrative Law*, 1994, Oxford: Clarendon, pp 544, 542). And the JUSTICE/All Souls Committee Report, *Administrative Justice, Some Necessary Reforms*, 1988, Oxford: OUP, devoted an entire chapter to the duty to give reasons, and concluded by endorsing the 1971 Justice Committee report *Administration Under Law* that 'no single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions'.

As we shall see, the extent of the duty to give reasons has greatly expanded since the passages quoted above were written, but it is still worth asking why these writers think the duty to give reasons is so important. Note, particularly, that reasons are not only valuable for the individual or individuals who will be affected by the decision; many writers believe that it is also in the interests of the decision maker itself to give reasons. To summarise greatly, one can categorise the advantages of the duty to give reasons as follows.

From the affected individual's point of view:

(a) to satisfy his expectation of just and fair treatment by the decision maker, both in his particular case and as a decision making authority in general;

(b) to enable him to decide whether the decision is open to challenge (by way of appeal, further representations, or judicial review).

From the decision maker's point of view:

(a) to improve the quality of decision making (if someone knows that they have to justify their decision, that fact alone may make them take the decision more responsibly, may improve the articulation of their thought processes, etc; reasons may, therefore, be a check on arbitrariness);

(b) to help 'legitimation' of decision making process: whether the decision maker is generally regarded as a fair and reasonable authority;

(c) to *protect* the administration from hopeless appeals or other challenges (the idea is that if an individual has a decision explained to him, he may be more inclined to accept it and therefore not challenge it).

Finally, courts and other reviewing or appellate bodies may need reasons in order to assess whether or not the original decision was lawful or correct.

Obviously, some of these arguments in favour of a right to reasons are stronger than others; you may think some of them carry little weight or are even insignificant. And, when considering how important it is for English law to include a duty to give reasons, it should be borne in mind that there are also significant disadvantages. The most obvious is the extra administrative burden on public bodies; the sheer time and effort involved in justifying every decision to every affected individual. You will notice that Lord Woolf, quoted above, suggests that reasons should be available 'at least on request'; this suggests one way in which the burden might be cut down – but it still leaves decision makers whose decisions affect a large number of persons potentially exposed to a great administrative burden. Also, some might argue that a duty to give reasons would *increase* the number of challenges against public bodies, since people will want to challenge reasons which they believe are wrong. That might be no bad thing, if the reasons really are wrong, but it might also expose decision makers to large numbers of unmeritorious challenges.

One caution should be noted at this point: it is very important to distinguish the right to reasons for a decision from the right to be informed of the case against the applicant before the decision – of proper disclosure in advance. The latter is, as we have seen above, 13.6.1, a basic requirement of natural justice, and is quite different from the duty to give reasons, because it relates to the provision of information before the decision is taken, rather than after the event. In a nutshell, disclosure is important so that one knows what representations one should make, while reasons are important so that one knows how and why the decision was made. Reasons are, nevertheless, typically viewed as a facet of the right to a fair hearing (even though provided after the decision), in part because the obligation to provide reasons after the event may well have an effect upon the way in which the decision itself is taken.

Ultimately, different people will have different views about the relative strengths of the arguments for and against reasons. Of course, the debate is not simply black and white: either for or against reasons. English law is

increasingly attempting to identify those situations where it would be valuable for reasons to be given, and to distinguish those from others where the decision maker does not have to justify the decision. In considering the case law, it is worth keeping in the back of one's mind the general arguments for and against reasons, and 'measuring' the decisions in the cases against one's views of the strengths of different arguments.

No general duty to give reasons?

The traditional position in English law has always been that there is no general rule of law (or, in particular, rule of natural justice) that reasons should be given for public law decisions (although there have always been a considerable number of situations in which there is a statutory obligation upon the decision maker to provide reasons). This view was reaffirmed in the important House of Lords case of *R v Secretary of State for the Home Department ex p Doody* (1993), and, more recently, by the Lord Chief Justice in *R v Ministry of Defence ex p Murray* (1998). But the case law has been developing at such a speed in this area, and new cases imposing a duty to give reasons have multiplied at such a rate, that it is becoming increasingly difficult to place much weight on the 'general rule'; the rule itself is becoming the exception. If fairness requires it in any particular situation, the courts now insist that decision makers provide reasons for decisions.

Judges have not developed the law in any 'organised' way; they have not laid down a series of clear propositions which set out in the abstract those categories of case in which reasons are required. Instead, they have developed (and are developing) the law on an incremental, case by case basis. Although this development has been to a large extent judge-led, it has been reinforced by (and has, perhaps, itself influenced) the recent Woolf reforms to civil law procedure, which have placed increasing stress upon early disclosure by parties to litigation. You may wish to compare, as examples of judicial creativity, the emergence of a duty to give reasons with the doctrine of legitimate expectation, examined in the next chapter.

Recent cases in which the courts have held that a right to reasons exists include: *R v Civil Service Appeal Board ex p Cunningham* (1992), where the Court of Appeal held that fairness required that a prison officer be given reasons for an (unexpectedly low) award of damages for unfair dismissal by the Civil Service Appeal Board (the Board, unlike the Industrial Tribunals on which it was modelled, was not required by statute or regulation to give reasons); *Doody* (above) (Home Secretary must give reasons for the 'tariff' period to be served by certain life sentence prisoners); *R v Harrow Crown Court ex p Dave* (1994) (Crown Court should give reasons for all its decisions, except possibly some interlocutory and procedural decisions); *R v Lambeth London BC ex p Walters* (1993) (local authority should give reasons for its decision on an individual's application for local authority housing – the judge went so far as to suggest that there is now usually a general duty to give reasons). See, also,

ex p Murray (above; reasons at court martial); *R v Mayor of the City of London ex p Matson* (1996) (reasons for decision not to confirm appointment of Alderman after election); *R v Islington ex p Rixon* (reasons for decision as to community care entitlement).

There are still cases, however, where reasons are not required to be given. In *R v Higher Education Funding Council ex p Institute of Dental Surgery* (1994), the court held that the HEFC was not required to give reasons for its decision to assess the Institute at a relatively low level in its comparative assessment of the research of all higher education establishments. Although the fact that the decision was one of academic judgment, arrived at by a panel of experts, did not of itself mean that reasons could not be required, the court found that given the 'combination of openness in the run-up [to the decision]', and 'the prescriptively oracular character of the critical decision', the HEFC's decision was 'inapt' for the giving of reasons. Even here, however, the court rejected that argument that the duty to give reasons could any longer be seen as an 'exceptional' one.

In general, one can summarise the present position by saying that, while each case depends on what is 'fair' in the circumstances, the following factors may dispose a court in favour of requiring reasons:

(a) the decision affects individuals' fundamental rights (such as liberty);

(b) the decision maker in question must make a 'formal' decision – that is, after a judicialised hearing;

(c) the decision is one for which the person affected needs reasons in order to know whether to appeal or seek judicial review;

(d) it would not be administratively impracticable for the decision maker to give reasons for each decision.

The third reason above is, of course, potentially very wide, and will, in practice, open up a vast range of decision making processes to a requirement of reasons, subject only to the fourth consideration.

Where reasons are required, they may usually be brief; the courts do not readily entertain challenges to the adequacy of reasons. And even where a decision maker fails to give reasons for a decision where it is obliged to do so, the court will not necessarily quash the decision. If it has remedied the error by providing proper reasons in an affidavit sworn in judicial review proceedings (or otherwise later notified the individual of the reasons for the decision), then the court may well, in its discretion, decide not to overturn the decision.

Reasons to the court?

So far, we have examined the circumstances in which the common law requires a public authority to give the person affected reasons for its decision. A different situation exists where an application for judicial review is made on

any of the grounds of review; does the public authority then have to give reasons for its decision to the court? While the court may not compel the decision maker to justify the decision, it may well be more willing to strike down a decision if no reasons are given for it, even though fairness/natural justice does not require that reasons be given. This is really based on common sense: a decision which the decision maker does not justify may well be more vulnerable. In *Padfield v Minister of Agriculture* (1968), the House of Lords went so far as to suggest that if an applicant could establish a *prima facie* case of unlawfulness, then, in the absence of reasons, the court could infer unlawfulness. Another example of this line of reasoning is *Cunningham* (above), where Sir John Donaldson MR was prepared to infer, in circumstances where the Civil Service Appeal Board had not attempted to justify to the court an apparently unusually low award of compensation to a prison officer, that the decision was irrational. Of course, this line of cases is not really an example of 'procedural impropriety' at all; it is merely an example of the court effectively shifting the evidential burden onto the respondent. However, it is worth taking into account in this context, because it provides another route by which decision makers may ultimately be forced to give reasons for their decisions; if not immediately, to the individual, then later, to the court.

13.7 The rule against bias – introduction

A decision may be challenged on grounds of procedural impropriety if it can be established that there was 'bias' on the part of the decision maker. Bias can take many forms. At one extreme, there are blatant cases which break the rule that nobody may be a judge in his or her own cause (*nemo judex in causa sua*) – where, for example, the decision maker knowingly has a financial interest in the outcome of the case. At the other end of the spectrum are cases where people may disagree as to whether 'bias' exists, and if so, whether it matters; where, for example, a decision maker has strong views about the subject matter of the case before him.

In considering what constitutes bias, it is necessary to look not only at public law cases, but also at criminal cases, because here too, the same considerations of 'natural justice' and the need to maintain public confidence in decision making processes apply. The modern leading case on bias is in fact a criminal one, *R v Gough* (1993), and in his judgment, Lord Goff confirmed that it was:

> ... possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators.

13.8 Bias and the appearance of bias

What a court is usually looking for when it reviews a decision for bias is whether the appearance of bias is sufficient to justify intervention, rather than whether there was in fact any bias (although, if it is shown that there was in fact bias, this will also justify intervention). This distinction might appear inconsistent with the notion that the rule against bias is a facet of 'natural justice', which is normally concerned with what the decision maker actually did; it might be argued that the fact that there is an appearance of bias does not mean that a biased decision is inevitable or even likely, because it is perfectly possible for a decision maker with an interest in the outcome of a case to decide purely on the merits of the case. There are, however, sound reasons of policy why the law should ordinarily take apparent bias as a sufficient reason for intervention:

(a) it is often extremely difficult to determine the actual state of mind of an individual who is alleged to be biased;

(b) bias can operate even though the individual concerned is unaware of its effect;

(c) even where no bias has, in fact, occurred, it is important that public confidence in the integrity of a decision making process is maintained, such that, in the often-quoted words of Lord Hewart CJ in *R v Sussex Justices ex p McCarthy* (1924), 'justice should not only be done, but should manifestly and undoubtedly be seen to be done';

(d) if a court was obliged to investigate the actual state of mind of a decision maker, the confidentiality of the decision making process might be prejudiced (*R v Gough*, *per* Lord Woolf, p 672, although you may question how serious this would be in many cases).

Accordingly, a decision may be quashed merely if there is found to be a sufficient degree of possibility of bias, even if there is no suggestion that actual bias occurred. It is rare, therefore, for actual bias to be shown to exist, but if it is proved, relief will, of course, be granted too.

On the other hand, if the court can be satisfied on the facts that there was no possibility of actual bias, then the court may be willing to reject allegations of 'apparent bias'. In a recent case in which relatives of some of the victims of a collision involving *The Marchioness* passenger launch on the River Thames sought to have the coroner at the inquest removed on the ground of apparent bias, the Court of Appeal appeared to set limits on the extent to which courts should consider allegations of apparent bias. It was suggested that, where it has to consider allegations of unconscious bias, the court is not strictly concerned with the appearance of bias, but rather with establishing the possibility that there was actual bias. The term 'apparent bias' was even considered by one of the judges (Sir Thomas Bingham MR) to be an unhelpful term, because:

> ... if despite the appearance of bias the court is able to ... satisfy itself that there was no danger of the alleged bias having in fact caused injustice, the impugned decision will be allowed to stand [*R v Inner West London Coroner ex p Dallaglio* (1994)].

The position today, in summary, is therefore that:

(a) actual bias will almost inevitably provide good grounds for challenging a decision;

(b) apparent bias, if sufficiently serious, will also provide grounds for challenge; unless

(c) it can be proved that, despite the appearance of bias, there was, in fact, no actual bias; in that case, the decision will be allowed to stand (on the authority of *Dallaglio*).

13.9 The test for the appearance of bias

Where it can be shown that a decision was actually affected by bias, then, as we have seen, the court will intervene. In cases where the appearance of bias is alleged, however, the court must determine whether the appearance of partiality is sufficiently serious to justify intervention. Two different tests have traditionally been employed to assess this, and although the confusion this caused has seemingly been resolved by a recent decision of the House of Lords, it is worth considering both approaches briefly, because they are revealing about the kind of apparent bias that the law has set out to prevent.

The first test was whether the facts, as assessed by the court, gave rise to a '*real likelihood*' of bias. This approach was often applied in cases where the possibility that actual bias had occurred seemed remote. Under the second test, the court considered whether a reasonable person would have a 'reasonable suspicion' of bias. This test inevitably begged the question of how much knowledge of the facts the hypothetical reasonable person had. In practice, courts tended to choose whichever terminology best suited the particular case.

In *R v Gough* (1993), the House of Lords decisively came down in favour of the first of the two competing approaches, but preferred the phrase '*real danger*' to 'real likelihood' of bias, so as 'to ensure that the court is thinking in terms of possibility rather than probability of bias'. The requirement for the court to postulate the view of a 'reasonable person' was expressly discarded in favour of the opinion of the court, which 'personifies the reasonable man'. Lord Woolf emphasised the universal nature of this 'real danger' test, stating that it could 'ensure that the purity of justice is maintained across the range of situations where bias may exist'; the recent case of *R v Secretary of State for the Environment ex p Kirkstall Valley Campaign* (1996) has confirmed that the *Gough* test applies to decision makers, whether judicial or administrative. The decision of the Court of Appeal in *R v Inner West London Coroner ex p Dallaglio*

(1994) (the *Marchioness* case) is consistent with *Gough*, although it adds the explanation that 'real danger' can be interpreted as 'not without substance' and as involving 'more than a minimal risk, less than a probability'. On the other hand, decisions in other jurisdictions have declined to follow *Gough* (see, for example, the decision of the High Court of Australia in *Webb v The Queen*, preferring the test of whether the events gave rise to a 'reasonable apprehension on the part of a fairminded and informed member of the public that the judge was not impartial'), and the House of Lords in *R v Bow Street Magistrate ex p Pinochet* (1999), discussed below, hinted that *Gough* may need to be reconsidered in the future (see, for example, *per* Lord Browne-Wilkinson).

13.10 Direct pecuniary interest

Cases where a person acting in a judicial capacity has a financial interest in the outcome of proceedings (where the judge is literally *judex in causa sua*: judge in his own cause) are sometimes regarded as being in a special category. These circumstances are treated as being conclusive of apparent bias and therefore as justifying intervention, regardless of the extent of the interest (unless negligible) and regardless of whether the interest has actually had an effect on the decision in question (see, for example, *Dimes v Proprietors of Grand Junction Canal* (1852). In such situations, there is no need to apply the usual test of whether there was a 'real danger' of bias; instead, the nature of the interest is such that public confidence in the administration of justice requires that the person be disqualified from acting as decision maker in the matter, and that the decision should not stand.

The House of Lords has recently held that this special category of 'automatic' disqualification for apparent bias is not restricted to cases of financial interest. In *R v Bow Street Magistrate ex p Pinochet (No 2)* (1999), the House of Lords had to consider whether Lord Hoffmann's connection with Amnesty International (AI) (he was the unpaid director and chairman of a charity which was wholly owned and controlled by AI, and which carried on that part of AI's work which was charitable) meant that he should have been automatically disqualified from sitting in the House of Lords hearing the appeal of Senator Pinochet on his application to quash extradition warrants issued against him – an appeal on which AI appeared as a party, having been given leave to intervene. The House of Lords, on the second hearing, held that there was no need to consider whether there was a likelihood or suspicion of bias; the judge's interest, although not financial or proprietary, was such that it fell within the category such that he was 'automatically' disqualified as being a judge in his own cause. As Lord Browne-Wilkinson noted, the case was highly unusual, in that AI was party to a criminal cause, although neither the prosecutor nor accused. AI's interest in the litigation was not financial, but was to secure the principle that there is no immunity for ex-Heads of State in relation to crimes against humanity. In such circumstances, Lord Hoffmann's

interest as a director of the AI charity was equivalent to a pecuniary interest in an ordinary civil case.

It is arguable that it is not necessary to place cases such as these in a special category of 'conclusive' apparent bias. It may simply be that, in such a case, the 'real danger' test is almost inevitably made out on the facts. Indeed, in rare cases it might still be that even a direct financial interest would not be sufficient to establish bias; for example, where it is demonstrably clear that a decision maker was not aware at the date of his decision that he possessed the financial interest. On the other hand, Lord Goff in *Gough* and the House of Lords in *ex p Pinochet* restated the traditional view that, where direct pecuniary (or equivalent) interest of a person in a judicial capacity can be shown, it is unnecessary to inquire whether there was any real likelihood of bias.

13.11 Different manifestations of bias

One common cause of objectionable bias is where a decision maker has previously been involved with the case in some other capacity. In one such example, an individual who had already supported a measure in his capacity as a member of the local authority was disqualified from adjudicating on it as a magistrate (*R v Gaisford* (1892)). In another case, a conviction for dangerous driving was invalidated, because the clerk to the justices was also a solicitor in the firm which was acting against the defendant in a civil action (*R v Sussex Justices ex p McCarthy* (1924)). In another example, a decision of a local council to grant planning permission was quashed because one of the councillors was the estate agent of the owner of the property to whom permission was granted (*R v Hendon RDC ex p Chorley* (1933)).

An individual will not necessarily be barred from adjudicating if he is a member of an organisation which is one of the parties in an action, provided he has himself been inactive in the matter. Thus, a magistrate was allowed to hear a prosecution brought by the Council of the Law Society even though he was himself a solicitor (*R v Burton ex p Young* (1897)).

'Bias by predetermination' may occur where it can be shown that a person acting in a judicial capacity has committed himself to one outcome before hearing part or all of a case. For example, bias was established where a magistrate was found to have prepared a statement of the defendant's sentence halfway through a trial (*R v Romsey Justices ex p Green* (1992)). However, the mere fact that an adjudicator is known to have strong personal beliefs or ideas on a relevant matter need not mean that he will be disqualified. In such cases, it is a question of degree as to what extent the decision maker is to be credited with the ability to act impartially despite his or her views, and thus, for example, a licensing magistrate's ruling was

allowed to stand although he was a teetotaller (*R v Nailsworth Licensing Justices ex p Bird* (1953)).

The rule against bias is often enforced very strictly, going well beyond the original principle that what is to be avoided is for a person to decide in their own cause. Sometimes, mere contact between the adjudicator and one of the parties can amount to bias. For example, a disciplinary committee was overruled because it had consulted privately with the chief fire officer who had reported a fireman for lack of discipline (*R v Leicestershire Fire Authority ex p Thompson* (1978)).

13.12 Ministerial bias

It is common for a government department to initiate a particular proposal and for the relevant minister also to be given the power to confirm that proposal after hearing objections to it. A ministerial decision of this kind cannot be objected to on the grounds that the minister was biased simply because the decision was made in accordance with government policy, since the whole purpose of Parliament giving the deciding power to a political body is so that the power may be exercised politically.

In *Franklin v Minister of Town and Country Planning* (1948), it was alleged that the minister's political support for the establishment of a new town had prevented him from an impartial consideration of objections made at a public inquiry, and, therefore, he should be disqualified from ruling on whether or not the proposal should be adopted. However, it was held that, provided that the minister fulfilled his statutory duty of considering the objections, his decision could not be impugned on the ground of bias.

On the other hand, the suggestion in *Franklin* and other early cases that the rule against bias did not apply (or fully apply) to 'administrative cases' has been firmly rejected; as with the right to a fair hearing, the distinction between 'judicial' and 'administrative' functions is no longer part of the test for bias (see above, 13.4.1 and 13.4.2). Thus, the requirement that a decision maker should not be biased applies to all decision makers – unless exceptional circumstances exist.

13.13 Exceptions: where bias will not invalidate a decision

In three types of case, bias has been held not to constitute a vitiating factor:

(a) a party may waive its right to object to a biased adjudicator. This rule can operate harshly; if a party fails to object as soon as the fact of the alleged bias is known, it may be held to have waived its right to do so;

(b) the rule against bias will also cease to take effect in cases of necessity, such as where no replacement is available for an adjudicator who is allegedly

biased. One situation in which this can arise is where the case concerns one or more members of the judiciary – for example, where a Canadian court had to determine the tax status of judges' salaries (*The Judges v AG for Saskatchewan* (1937)). More commonly, if a statute allows only one particular minister or other official to decide on a particular issue, the courts will not allow that decision to be frustrated by disqualifying the individual for bias. However, even in a case where all the available qualified adjudicators could appear to be biased, a decision would probably be quashed if actual bias was proved;

(c) in some cases, Parliament has deliberately acted to prevent the operation of the rule against bias by granting specific exemptions. Statutory dispensation can be effective to exclude the rule, but clear words of enactment must be used, and any ambiguity is likely to be interpreted narrowly, so as to minimise the circumstances in which the decision maker is exempted from disqualification. By statute, for example, a liquor licensing justice is permitted to hear an appeal from a refused application, even if he was also a member of the licensing committee which decided on the original application (see *R v Bristol Crown Court ex p Cooper* (1990)).

GROUNDS OF JUDICIAL REVIEW II: FAIR HEARINGS AND THE RULE AGAINST BIAS

By articulating standards of procedural propriety, the courts control *the way in which* decision makers arrive at their decisions. This is achieved by a number of different techniques, which we have categorised under three headings:

(a) the right to a fair hearing;

(b) the rule against bias;

(c) the doctrine of legitimate expectation.

The *entitlement to a fair hearing* depends, in essence, upon what fairness requires in any given set of circumstances. This can be broken down into three elements.

When is a fair hearing prima facie *required?*

In essence, whenever an applicant's rights or interests are adversely affected in any significant way by a decision, unless there is a good reason not to require a hearing.

Is there any reason why the prima facie *entitlement to a hearing should be limited*?

Some possible reasons are:

(a) express statutory exclusion;

(b) implied statutory exclusion;

(c) where a hearing, or disclosure of information, would be prejudicial to the public interest;

(d) in an emergency;

(e) where it is administratively impracticable to require a hearing;

(f) where the unfair decision has been 'cured' by a fair appeal;

(g) where the decision is only preliminary to a subsequent decision before which a hearing will be given;

(h) where the error made 'no difference' to the result, or where a hearing would be futile.

If some sort of hearing is required, what procedural protection can the applicant actually demand?

A 'menu' of possible procedural rights includes:

(a) disclosure to the applicant of the case to be met;

(b) written or oral representations, or consultation;

(c) the right to call witnesses;

(d) the right to legal representation and to cross examination of witnesses;

(e) the right to reasons for the decision.

What is appropriate in any given case is, once again, a matter of asking what 'fairness' requires. Broadly, the above list is in descending order of importance: while (a) and (b) are fundamental to almost any case in which a fair hearing is required (and within (b), the representations will more usually be required to be oral rather than written), (c) and (d) are more likely to be required only in 'formal' proceedings, such as disciplinary hearings or other hearings of an adversarial nature. Traditionally, (e) has been seen (where it has been recognised at all) as only available in 'exceptional' circumstances, but its rapid development may mean that it must be promoted up the list – we may be seeing the development of a general duty on public bodies to give reasons for decisions.

The rule against bias

A decision may be quashed for bias if it can be shown either:

(a) that the decision maker in fact had an interest in the decision which he reached, either financially or otherwise ('actual bias'); or

(b) even if there is no proof of actual bias, that the facts, as assessed by the court, disclose a 'real danger' of bias (*R v Gough* (1993)) – by which the court means a danger which is more than a minimal risk, if less than a probability (*Dallaglio* (1994)).

This latter test for bias – what has been known as 'apparent bias' – is important, principally because (in Lord Hewart's words) 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.

However, if it can be established that, on the facts, there was no actual bias, then the decision will be allowed to stand even if the facts would otherwise disclose apparent bias (*Dallaglio*). On the other hand, if a person acting in a judicial capacity has a financial interest (or *pace ex p Pinochet* (1999), an equivalent non-pecuniary interest) in the outcome of the case, then this may be treated as conclusive of apparent bias.

Bias may be held not to invalidate a decision if it can be shown:

(a) that a party (with knowledge of the facts) has waived its right to object to a biased adjudicator;

(b) that the situation is one of 'necessity'; in other words, there is no realistic alternative to an adjudicator who appears biased;

(c) that the rule against bias has been excluded, either expressly or (very unusually) impliedly, by legislation (for example, *R v Bristol Crown Court ex p Cooper* (1990)).