**THE SHEKU BAYOH INQUIRY**

**Supp. LIST OF AUTHORITIES FOR THE SOLICITOR GENERAL FOR SCOTLAND**

**ON THE MATTER OF APPARENT BIAS AND FAIRNESS**

1. *Errington v Wilson* 1995 SC 550, at pp.554, 555 and 560
2. De Smith, *Judicial Review* 9th edition at §§ 8-042, 9-155, 12-002, 12-027
3. Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016, ss. 1, 19, 20.
4. Act of Sederunt (Fatal Accident Inquiry Rules) 2017/103, rule 2.2

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# ERRINGTON v WILSON

No 56
16 June 1995

FIRST DIVISION
Lord Weir

HUMPHREY ERRINGTON (t/a H J ERRINGTON & Co), Petitioner (Respondent) — *Jones, QC, Tyre*

B MRS ELIZABETH WILSON AND OTHERS, Respondents (Reclaimers) — *No appearance (First Respondent), Sutherland, QC, Milligan (Second and Third Respondents)*

*Administration of justice — Administrative law — Courts of law — Justice of the peace — Hearing before justice of the peace — Natural justice — Duty to allow cross examination — Justice requiring all questions to be put through her — Whether justice erred — Whether breach of natural justice — Food Safety Act 1990 (cap 16), sec 9*[1]

C Under sec 9 of the Food Safety Act 1990 an authorised officer of the food authority is empowered to inspect any food intended for human consumption. If it appears to him that any food fails to comply with food safety requirements, he is empowered under sec 9(3) to seize the food and remove it in order to have it dealt with by a justice of the peace. The person in charge of the food is entitled to attend before the justice of the peace and, if he does so, is entitled to be heard and to call witnesses under sec 9(5)(a). The justice of the peace, on the basis of such evidence as he considers appropriate in the circumstances, D is empowered to make certain orders in respect of the food under sec 9(6).

A sec 9 hearing took place before a justice of the peace in relation to 44 batches of a particular cheese produced by the petitioner, which were allegedly contaminated and unfit for human consumption. In respect of the conduct of proceedings, the justice prohibited cross examination of witnesses and any questions to witnesses were to be put through her. Counsel for the petitioner at the hearing declined to put any questions in that way to the witnesses for E the food authority. The justice decided that the cheese should be disposed of or destroyed. The petitioner thereafter sought judicial review of that decision. The Lord Ordinary (Weir) reduced the decision and held that the justice had been under a duty to exercise her powers in terms of the Act in accordance with the principles of natural justice, especially as she was obliged by the statute to reach her decision on the basis of evidence. His Lordship held that there had been a denial of natural justice as the petitioners' counsel had been denied the opportunity, by cross examining the other side's witnesses, of F testing the strength of their evidence. The food authority and their authorised officer reclaimed.

*Held* (*aff* judgment of Lord Weir) (1) that the principles of natural justice and the duty to act fairly were inseparable, for the principles of natural justice were designed to achieve fairness of procedure so that the concept which

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G [1]The Food Safety Act 1990 enacts, *inter alia*, that: '9.—... (5) Where an authorised officer exercises the powers conferred by subsection (3)(b) or (4)(b) above, he shall inform the person in charge of the food of his intention to have it dealt with by a justice of the peace and — (a) any person who under section 7 or 8 above might be liable to a prosecution in respect of the food shall, if he attends before the justice of the peace by whom the food falls to be dealt with, be entitled to be heard and to call witnesses, and (b) that justice of the peace may, but need not, be a member of the court before which any person is charged H with an offence under that section in relation to that food.

'(6) If it appears to a justice of the peace, on the basis of such evidence as he considers appropriate in the circumstances, that any food falling to be dealt with by him under this section fails to comply with food safety requirements, he shall condemn the food and order — (a) the food to be destroyed or to be so disposed of as to prevent it from being used for human consumption; and (b) any expenses reasonably incurred in connection with the destruction or disposal I to be defrayed by the owner of the food.'

underlay both expressions of duty was the same; (2) that in view of the nature of the proceedings the justice was under a duty to have regard to the principles of natural justice which, in this case, required her to allow cross examination if the proceedings were to be fair and whether or not to allow such cross examination was not a matter for her discretion; and (4) that, in this case, the matter was not a dispute about an isolated incident affecting one piece of food but related to a whole brand of product which would have direct consequences of the gravest importance for the petitioner, his business and workforce and, as there was a difference of opinion between experts on points crucial to a sound determination of the questions which the justice had to decide and the petitioner had been denied the opportunity to test the strength of the experts against him, the prejudice which resulted from the refusal to allow cross examination was self evident; and reclaiming motion *refused*.

*Opinion* that averments of prejudice were not necessary to make a relevant case of breach of natural justice.

*Cigaro (Glasgow) Ltd v City of Glasgow District Licensing Board* 1982 SC 104 *commented upon*.

*Opinion* (*per* the Lord President (Hope)) that the question whether a justice was acting in a judicial or in an administrative capacity might be important for some purposes but no such distinction required to be drawn in this case.

HUMPHREY ERRINGTON (t/a H J ERRINGTON & Co) applied to the Court of Session for a judicial review of a decision of the justice of the peace, Mrs Elizabeth Wilson, dated 3 March 1995, in which she ordered 44 batches of Lanark Blue Cheese produced by the petitioner to be destroyed or otherwise disposed of as they were unfit for human consumption. The justice of the peace, food authority for the district of Clydesdale and the authorised officer of that authority, were called in the petition as respondents.

The application for judicial review called for a first hearing before the Lord Ordinary (Weir).

At advising, on 28 April 1995, the Lord Ordinary sustained the petitioner's first plea in law and pronounced decree of reduction of the justice of the peace's decision.

The food authority and its authorised officer reclaimed.

*Cases referred to:*
*Barrs v British Wool Marketing Board* 1957 SC 72
*Breen v Amalgamated Engineering Union* [1971] 2 QB 175
*Bushell v Secretary of State for the Environment* [1981] AC 75
*Cigaro (Glasgow) Ltd v City of Glasgow District Licensing Board* 1982 SC 104
*Cowe v McDougall* 1909 SC (J) 1
*Furnell v Whangarei High Schools Board* [1973] AC 660
*McInnes v Onslow-Fane* [1978] 1 WLR 1520
*R v Birmingham City Justices, ex parte Chris Foreigh Foods (Wholesalers) Ltd* [1970] 1 WLR 1428
*R v Board of Visitors of Hull Prison, ex parte St Germain (No 2)* [1979] 1 WLR 1401
*R v Cornwall Quarter Sessions, ex parte Kerley* [1956] 1 WLR 906
*R v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456
*Ridge v Baldwin* [1963] 1 QB 539; [1964] AC 40
*Rodenhurst v Chief Constable of Grampian Police* 1992 SC 1

*Textbooks referred to:*
de Smith, *Judicial Review of Administrative Action* (4th edn), p 216
Wade, *Administrative Law* (7th edn), p 511

The reclaiming motion called before the First Division, comprising the Lord President (Hope), Lord Allanbridge and Lord Clyde for a hearing.

At advising, on 16 June 1995 —

A LORD PRESIDENT (Hope).—This is a reclaiming motion by the second and third respondents against an interlocutor which the Lord Ordinary pronounced after the first hearing in a petition for judicial review. The petitioner carries on business near Carnwath under the name H J Errington & Co. His business consists in the manufacture and sale of various products including a blue veined semi-hard cheese known as Lanark Blue. He sought judicial review of a decision by the B first respondent, who is a justice of the peace, that 44 batches of his Lanark Blue cheese were contaminated with listeria monocytogenes, were unfit for human consumption and should be disposed of or destroyed. The second respondents are the food authority for the District of Clydesdale in terms of sec 5 of the Food Safety Act 1990. The third respondent is an authorised officer of the second respondents for the purposes of that Act.

C The decision was issued on 3 March 1995 after a hearing which took place before the justice on 24 February 1995. The petitioner sought its reduction on three grounds. The first was that there had been communings before the hearing between the justice and the solicitor for the second respondents. But nothing was made of this point at the first hearing, as the facts are still in dispute. The second was the refusal by the justice to allow the cross examination of witnesses. The third was that the justice had failed to give reasons for her decision. The D Lord Ordinary held that in refusing senior counsel for the petitioner the opportunity of cross examining the second respondents' witnesses there had been a denial of natural justice. On this ground he sustained the petitioner's first plea in law and pronounced decree of reduction. He was inclined to the view, in regard to the third ground, that the justice should have given proper and adequate reasons for her decision. He also said that it would be highly E desirable, in view of the complex issues involved in this case, that the services of an experienced sheriff should be sought rather than those of a lay person. The second and third respondents have challenged the Lord Ordinary on all these points in this reclaiming motion. But the principal issue is whether the justice was under a duty to allow the petitioner's counsel to cross examine the second respondents' witnesses.

F Among the provisions which the 1990 Act contains in regard to food safety is the power given by sec 9 to an authorised offer of a food authority to inspect any food intended for human consumption. If it appears to him that any food fails to comply with the food safety requirements, he has power under subsec (3) of that section to seize the food and remove it in order to have it dealt with by a justice of the peace. In Scotland the expression 'justice of the peace' includes G a reference to the sheriff and to a magistrate: see sec 9(9)(a). Although these expressions are not further defined in the 1990 Act, it is clear that the references to a justice of the peace and to a magistrate in Scotland are references to a justice of the peace appointed under sec 9 of the District Courts (Scotland) Act 1971 and to a stipendiary magistrate appointed under sec 5 of that Act. The expression 'sheriff' in relation to Scotland includes the sheriff principal: see sec H 5 of and Sched 1 to the Interpretation Act 1978. Thus there is in Scotland a wide choice of persons by whom the matter may be dealt with on the application of the authorised officer.

Subsections (5) and (6) of sec 9 of the 1990 Act are in these terms: [His Lordship quoted the same as set out *supra* and continued:]

When the hearing took place on 24 February 1995 the petitioner was I represented by senior counsel. He had with him as his witness Richard North

of Leeds Metropolitan University, a food safety adviser. The second respondents were represented by a solicitor. She had with her as witnesses the third respondent, Dr J McLauchlin of the Central Public Health Laboratory, London, and Dr Ahmed, a consultant in public health medicine with Lanarkshire Health Board.

The precise sequence of events at the hearing is not agreed. There is a dispute in fact between the parties as to when it was that the justice said that there was to be no cross examination of the witnesses. The petitioner avers that she commenced the proceedings by saying that she would not allow cross examination. The second and third respondents aver that she adjourned to consider the parties' submissions on this point and that, having done this, she intimated that cross examination was not appropriate but that she would ensure that everyone would be given an opportunity to speak and to answer questions through her. It is however agreed that the dispute on this point of detail does not matter if, as the petitioner avers, the justice was obliged to allow both parties to cross examine each other's witnesses. Her decision not to allow cross examination had clearly been taken by the time the second respondents' witnesses gave evidence. It is also agreed that the justice said that any questions to witnesses would have to be put through her. The petitioner's senior counsel declined to put any questions in this way to the second respondents' witnesses. The respondents aver that the solicitor for the second respondents put a few questions to the petitioner's witness Mr North through the justice.

After hearing submissions for both parties the justice reserved her decision. On 3 March 1995 she issued her decision, which was in these terms:

'The following decision has been made after the hearing held on Friday 24 February 1995 and on the basis of relevant evidence presented and in the absence of any statutory provision at the present time, regarding contamination of cheese with listeria monocytogenes.

'I am of the opinion that the contaminated batches of Lanark Blue cheese are potentially hazardous to public health and are therefore unfit for human consumption and should be disposed of or destroyed.

'Any reasonable expenses in connection with the destruction or disposal of the cheese to be defrayed by the owner, H J Errington & Co.'

The Lord Ordinary held that the justice was under a duty to exercise her powers under sec 9(6) of the 1990 Act in accordance with the principles of natural justice, especially as she was obliged by the statute to reach her decision in this case on the basis of evidence. As to whether her refusal to allow cross examination was a breach of these requirements, he was not willing to affirm that failure to allow cross examination would necessarily be unfair in all circumstances. In his opinion regard had to be paid to the scheme of the legislation, to the circumstances of each case and to the extent to which prejudice may have resulted when cross examination has been disallowed. Having examined all these factors, he was of the opinion that there was a denial of natural justice in this case because the petitioner's counsel was denied the opportunity, by cross examining the second respondents' witnesses, of testing the strength of their evidence.

The first question which was debated in the reclaiming motion was whether the hearing which the justice held in this case was administrative or was judicial or quasi-judicial in character. Counsel for the second and third respondents submitted that she was acting in an administrative capacity only and that her

A only duty was to act fairly. It was maintained that she was not bound to act in accordance with the principles of natural justice, as she was not being required to decide an issue between the parties. It was pointed out that the petitioner's case was not pled on the basis that the justice had erred in the exercise of a discretion in deciding not to allow cross examination. Rather it was averred that she was 'obliged' by the principles of natural justice to allow both parties B to be heard and to allow both parties to cross examine each other's witnesses. This was said to be a misconception of her duty in this case. As an administrator her duty was simply to act fairly, in the exercise of her discretion under sec 9(6) to decide the matter on the basis of such evidence she considered appropriate in the circumstances. It was not unfair for her in proceedings which were administrative in character to insist that all questions to the witnesses should be C put through her.

The question whether a justice is acting in a judicial or in an administrative capacity may be important for some purposes, as it was, for example, in *Rodenhurst v Chief Constable of Grampian Police*. But I do not think that this distinction requires to be drawn in the present case, as it was accepted by counsel for the second and third respondents that even on their approach the D justice was under a duty to act fairly. It was submitted that the duty to have regard to the principles of natural justice could be distinguished from the duty to act fairly, and that while these duties might overlap to some extent that was not so in the present case. I think however that it is a misconception to regard these two duties as separable. Of the two, the duty to act fairly is more broadly expressed, but as the principles of natural justice are designed to achieve fairness of procedure the concept which underlies both expressions of duty is the same. E In this context the precise category into which the proceedings may be said to fall is not important.

In *Ridge v Baldwin* Lord Reid at [1964] AC, p 72 described the principles of natural justice as the essentials of all proceedings of a judicial character. It was noted in that case that these principles had a limited application to the wider duties imposed on ministers and other organs of government. But it was held F that they applied to a body such as the Watch committee by whom a power of dismissal for misconduct was being exercised. In my opinion this decision shows that, in their wider application, the principles of natural justice may be invoked in all cases where there is an issue to be decided which affects the rights of the person who is entitled to be heard by the decision maker. This seems to me to be just such a case, as the petitioner, who was a person who might be liable to G prosecution, had the right under sec 9(5) to be heard and to call witnesses. That his rights were liable to be affected by the decision of the justice is clear from the provisions of sec 9(6). If it appeared to her that the cheese failed to comply with food safety standards, it was her duty to order it to be destroyed or otherwise disposed of and to order any expenses reasonably incurred in connection with the destruction or disposal to be defrayed by the petitioner.

H In view of the nature of these proceedings I consider that the justice was under a duty to have regard to the principles of natural justice, and that in the circumstances of this case this is simply another way of expressing the broad proposition that she was under a duty to act fairly. As Harman LJ said in the Court of Appeal in *Ridge v Baldwin* at [1963] 1 QB, p 578, natural justice is after all only fair play in action. In *Furnell v Whangarei High Schools Board* at p 679G I Lord Morris of Borth-y-Gest, delivering the majority judgment of the board,

said that natural justice is but fairness writ large and juridically. He also noted that the conceptions which are indicated when natural justice is invoked or referred to are not to be confined within hard and fast and rigid rules. These observations were anticipated by Lord President Clyde in *Barrs v British Wool Marketing Board* at pp 82–83 when he said that, where a tribunal had not dealt fairly and equally with the parties, its conduct of the proceedings had been at variance with the principles of natural justice. In *Breen v Amalgamated Engineering Union* at p 190G, Lord Denning MR said that even though the functions of a domestic body are not judicial or quasi-judicial, but only administrative, the body must still act fairly. Edmund Davies LJ at p 195B and Megaw LJ at p 200C treated the expressions 'acting unfairly' and 'acting contrary to natural justice' as interchangeable. In my opinion it is sufficient for the purposes of the present case to say that the duty to act fairly, which the second and third respondents admit, and the duty to act in accordance with the principles of natural justice, which the petitioner avers, are different ways of expressing the same thing. The point which is at issue is whether, in the exercise of this duty, the justice was bound to allow the petitioner's counsel to cross examine the second respondents' witnesses.

The argument for the second and third respondents was that it was a matter for the discretion of the justice whether or not cross examination should be allowed. It was said that, as it was for her to decide in terms of sec 9(6) what evidence was appropriate in the circumstances, it was for her to decide how witnesses were to give their evidence, and that as the petitioner did not attack the exercise by her of a discretion, that was an end of the case. Counsel also submitted that her decision was a sound one because cross examination was peculiar to judicial and certain kinds of quasi-judicial proceedings. He said that it was not a normal incident of administrative proceedings such as those on which she was engaged in this case. Any suggestion that there was a presumption in favour of allowing cross examination would be based neither on reason nor on precedent. This argument was forcefully presented, but in my opinion it overlooks the point that the duty to act fairly may include other duties according to the circumstances. Thus if fairness requires that something be done, not to do that thing will be a breach of duty to act fairly. If it is necessary to permit cross examination in order to perform the duty to act fairly, then there is a duty to permit cross examination. It is not a matter of discretion, as the duty to act fairly does not leave it to the discretion of the decision maker to decide what is and what is not fair. That is a matter to be decided in the light of the circumstances, and any view which the decision maker may take on it is subject to review by the court.

Counsel for the second and third respondents relied as support for their argument on *Bushell v Secretary of State for the Environment*. In that case an inspector was presiding over a public local inquiry into two draft schemes for the construction of motorways. He disallowed an objector's request to cross examine the department's witnesses about traffic needs and the method adopted by the department for projecting traffic growth. It was held that this was a matter of Government policy in the sense that it was a topic unsuitable for investigation by individual inspectors at individual local inquiries, so the inspector's refusal to permit cross examination on this issue was not a breach of the rules of natural justice. Lord Diplock said at p 97E that it must be a matter of circumstances whether fairness required an inspector to permit a person

who had made a statement on matters of fact or opinion, whether expert or otherwise, to be cross examined by a party to the inquiry who wished to dispute a particular statement. The facts of that case are, of course, distinguishable from those which are before us here. The issue of Government policy in that case was not one for the inspector to determine, whereas in this case the issue as to whether the cheese failed to comply with food safety requirements was one which the justice required to decide. As for the point that it depends on the circumstances whether fairness required the justice to permit the cross examination of witnesses, I think that Lord Diplock's *dictum* supports the petitioner's argument that the circumstances of this case were such that fairness did require the justice to take this course. On this view it was not a matter for her discretion, as the circumstances required her to allow cross examination if the proceedings were to be fair.

We were referred to a number of cases to illustrate the circumstances in which cross examination might or might not be appropriate. In *Cowe v McDougall* the pursuer had obtained a decree in the small debt court. It was held that there had been oppression within the meaning of sec 31 of the Small Debt (Scotland) Act 1837 because the sheriff substitute had refused to allow the defender to cross examine the pursuer or to lead evidence on the question of damages. Lord Low described the procedure in that case as amounting to a refusal to hear parties, and Lord Ardwall said that there had been a departure from the principles of natural justice. I do not think that that case has any direct bearing on the circumstances with which the justice was faced in the present case. But the observations of Lord Low and Lord Ardwall indicate the importance of allowing cross examination in a case where a party has a right to be heard and where it would be unfair not to permit him to cross examine the other party's witnesses. In *R v Deputy Industrial Injuries Commissioner, ex parte Moore* at p 488A, Diplock LJ said that the rules of natural justice which the deputy commissioner had to observe could be reduced to two, of which the second was that, if a hearing was requested, he must fairly listen to the contentions of all persons who were entitled to be represented at the hearing. At p 490C–F he went on to say this: 'Where, however, there is a hearing, whether requested or not, the second rule requires the deputy commissioner (a) to consider such "evidence" relevant to the question to be decided as any person entitled to be represented wishes to put before him; (b) to inform every person represented of any "evidence" which the deputy commissioner proposes to take into consideration, whether such "evidence" be proferred by another person represented at the hearing, or is discovered by the deputy commissioner as a result of his own investigation; (c) to allow each person represented to comment upon any such "evidence" and, where the "evidence" given orally by witnesses, to put questions to those witnesses; and (d) to allow each person represented to address argument to him on the whole of the case. This in the context of the Act and the regulations fulfils the requirement of the second rule of natural justice to listen fairly to all sides.'

Counsel submitted that the requirement mentioned in head (c) of this passage to allow each person represented 'to put questions to those witnesses' was satisfied in this case, because the justice said that she was willing to allow questions to be put through her to the witnesses. But I understand the requirement which was being described here by Lord Diplock as being to allow each person to put his own questions to the witnesses, by questioning the

witness himself directly, not putting questions through the deputy commissioner or any other intermediary. In my opinion this passage provides strong support for the view that the justice was obliged in the present case to allow the petitioner's counsel to put questions to the second respondents' witnesses — that is, to cross examine them on their evidence.

In *R v Board of Visitors of Hull Prison, ex parte St Germain (No 2)* it was held that the board of visitors were not bound by the technical rules of evidence, but that the admission by them of hearsay evidence was subject to the overriding obligation to provide the accused with a fair hearing. Geoffrey Lane LJ said at p. 1409F that, depending upon the nature of the evidence and the particular circumstances of the case, the sufficient opportunity to deal with the hearsay evidence might well involve the cross examination of the witness whose evidence was initially before the board in the form of hearsay. I do not see this case or the other cases to which we were referred as indicating that there is a presumption that cross examination should be allowed, as junior counsel for the petitioner suggested. But in my opinion they show that a failure to allow cross examination may amount to a failure to give a fair hearing to a party who wishes to challenge the evidence on which the other party seeks to rely.

Counsel for the second and third respondents also sought to find support for their argument in *R v Cornwall Quarter Sessions, ex parte Kerley*. In that case a justice of the peace condemned a carcase of meat as unfit for human consumption and ordered it to be destroyed under sec 10 of the Food and Drugs Act 1938. It was held that there was no appeal against his decision, as he was not sitting as a court of summary jurisdiction but was acting in an executive capacity. Lord Goddard CJ at p 910 gave various reasons for the view that a justice sitting alone was acting administratively and not as a court. Donovan J at p 911 said that the mere fact that there was a dispute and that witnesses might be called and heard did not show that the proceeding was judicial or that there was a *lis* between the parties. Counsel submitted that there was a close analogy between that case and the present one, because there was no material difference between the provisions of sec 10 of the Food and Drugs Act 1938 and sec 9 of the 1990 Act which applies in this case. No issue was raised there as to whether the justice should have permitted the cross examination of witnesses. The case was cited in order to illustrate the nature of the jurisdiction which the justice in the present case was being called upon to exercise.

The provisions of sec 10(2) of the 1938 Act have been re-enacted in sec 9(5)(a) of the 1990 Act, which also provides that the person in whose possession the food was found is entitled to be heard and to call witnesses. The words 'on the basis of such evidence as he considers appropriate in the circumstances' which appear now in sec 9(6), are not to be found in sec 10(3) of the 1938 Act. I do not think that this is an important difference, because in a case where there is a right to call witnesses it must follow that the justice should have regard to the evidence given by those witnesses. But I agree with the Lord Ordinary that the situation which was described in that case was very different from the situation which arose here. The question whether the cheese in this case failed to comply with food safety requirements was not one which could be decided in a summary manner simply by examining it, as in the case of rotten meat or bad fish. Nor does it seem appropriate, in Scotland at least, to attach the same significance to the fact that the justice was acting alone as Lord Goddard saw in that case when he held that the justice was acting administratively. Section 2(2) of the

A District Courts (Scotland) Act 1975 provides that the jurisdiction and powers of the district court shall be exercisable by one or more justices, so the fact that the justice was acting alone here does not of itself point to the conclusion that she was acting otherwise than in a judicial or quasi-judicial capacity.

In *R v Birmingham City Justices, ex parte Chris Foreign Foods (Wholesalers) Ltd* of the Food and Drugs Act 1955, although acting in an administrative or executive B capacity, was obliged to act fairly and impartially. James J said at p 1434C that the exercise of that duty should be seen to be carried out openly, impartially and with fairness. This echoes Donovan' J's observation in *Kerley* at p 911 that the justice has to bring qualities of impartiality and fairness to bear upon the problem. While these *dicta* are helpful to the petitioner, it seems to me that neither of these cases has a direct bearing on the point which is at issue here. C They do not address the crucial question which is whether the refusal to allow cross examination was a breach of the duty to act fairly.

In the present case the prejudice which resulted from the refusal to allow cross examination is self evident. There was a difference of opinion between experts on points which were crucial to a sound determination of the questions which the justice had to decide. The result of her refusal to allow cross examination was that the evidence of the second respondents' witnesses could D not be challenged in the only manner which was likely to be effective in a case of such difficulty. So I consider that the Lord Ordinary was well founded in his decision that by refusing to allow cross examination in these circumstances the justice disabled herself from reaching a fully informed conclusion upon the evidence. This amounted to a denial of natural justice to the petitioner, as her duty to act fairly in this case required her to permit cross examination of the E second respondents' witnesses.

The answer to that question must in the end depend upon the circumstances. In my opinion it is clear from the facts in this case that the justice could not decide whether the cheese failed to comply with food safety requirements without examining the evidence of the expert witnesses. We were not referred in detail to their evidence, but the documents which were shown to us indicate F that important questions were raised by the petitioner's expert about the reliability of the evidence of the second respondents' witnesses. The nature of these questions was such that they could not be answered without a detailed study and understanding of the witnesses' evidence. Counsel for the second and third respondents submitted that the point which was being made by these witnesses was a simple one. There were no statutory guidelines, but they said G that the matter could be decided by the application of the PHLS Guidelines which did not give rise to any questions of difficulty. But the application of those guidelines to this case was disputed, and the justice could not decide that issue fairly between the parties without examining the detail of their evidence.

In a case of this difficulty there was an obvious risk of unfairness if the second respondents' witnesses were not open to cross examination on the detail of H their evidence. There was a risk that defects in that evidence would lie undetected, and that the justice would not be informed about the issues which she had to decide. It is no answer to this point to say that she put both parties on an equal footing by denying to both of them the opportunity of cross examining each other's witnesses. Nor is it an answer to say that the public have an interest in food safety. The consequences for the petitioner and his I business were likely to be very serious if the case went against him, and he had

a right under the statute to attend and to call witnesses. The issues which the petitioner's representative wished to raise in cross examination were issues on which the petitioner wished to be heard. These were issues which he wished to raise by way of challenge to the evidence of the second respondents' expert witnesses. The unfairness to him lay in the denial to him of the opportunity of opening up these issues by putting questions about them directly to the second respondents' expert witnesses.

Counsel for the second and third respondents also submitted that, in order to plead a successful case on an alleged breach of the rules of natural justice, a petitioner had to aver prejudice and that as there were no averments of prejudice in this case the petitioner's averments were irrelevant. This submission appeared to be based on a statement in the rubric in *Cigaro Ltd v City of Glasgow District Licensng Board* at p 105 that it was observed in that case that 'a breach of the rules of natural justice cannot relevantly be averred in the absence of averments of prejudice'. But it is clear from an examination of the opinion at p 112 that this part of the rubric found in *The Scots Law Times* report of the case at 1983 SLT p 553 is inaccurate. Lord President Emslie's observations were directed to the averments in that case only, which he described as speculative. He did not say that an averment of prejudice was required in all cases where a breach of the rules of natural justice was alleged. In *Barrs v British Wool Marketing Board* at p 82 Lord President Clyde said that the question was whether the tribunal had dealt fairly and equally with the parties before it in arriving at its result. It was sufficient in that case that the conduct of the proceedings was at variance with the principles of natural justice, and there was no discussion as to whether the result of that unfairness had been to create prejudice. In most cases it can be assumed that prejudice will result from a failure in the duty to act fairly.

That is sufficient for the decision in this reclaiming motion. Although the Lord Ordinary went on to examine the question whether the justice was under a duty to give reasons and made observations about the desirability of the issue in this case being considered by a sheriff rather than a justice, I do not find it necessary to express any opinion on these matters in this case.

For these reasons I would refuse this reclaiming motion and adhere to the interlocutor of the Lord Ordinary.

LORD ALLANBRIDGE—I have read the opinion of your Lordship in the chair and, for the reasons stated therein, I agree this reclaiming motion should be refused.

LORD CLYDE—The petitioner seeks judicial review of a decision by a justice of the peace dated 3 March 1995 made under sec 9(6) of the Food Safety Act 1990 to the effect that certain batches of cheese manufactured by the petitioner were unfit for human consumption and should be disposed of or destroyed. The decision was issued following on a hearing attended by representatives of the local food authority and of the petitioner. The principal ground of challenge is set out in art 12 of the petition in these terms: 'The first respondent was obliged to have regard to the principles of natural justice in regulating the procedure to be followed at the hearing. In particular she was obliged to allow both parties to be heard, and, as such, to allow both parties to cross examine witnesses called by the other.'

The Lord Ordinary has held that the refusal to allow cross examination was a denial of natural justice and has reduced the decision. The food authority,

A along with the officer authorised by them who had required the cheese to be dealt with by a justice of the peace under the provisions of sec 9 of the Act, have reclaimed against the Lord Ordinary's interlocutor.

It was argued on behalf of the reclaimers that the petitioner's formulation of his challenge was misconceived because the only duty on the justice was to act fairly and that that duty was in some way different from the duty to observe B the principles of natural justice. But that is a fallacious approach. The observation made by Lord Morris of Borth-y-Gest in the case of *Furnell v Whangarei High Schools Board* at p 679 seems to me entirely applicable to the present case. His Lordship there said: 'Natural justice is but fairness writ large and juridically. It has been described as "fair play in action". Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But ... the requirements of natural C justice must depend on the circumstances of each particular case and the subject matter under consideration.'

As I understand it the term 'natural justice' is used where attention is to be directed to those aspects of fairness which apply to what may be described as the constitutional and procedural aspects of the task of decision making. The term 'fairness' may be particularly appropriate where the issue is further D removed from what may reasonably be called a justiciable question (*McInnes v Onslow-Fane* at p 1530). The cross examination of witnesses is a matter falling within the procedural aspects of the decision making and the petitioner was in my view correct in focusing attention on matters of natural justice and not simply raising the point as one of fairness.

The excerpt from the speech of Lord Morris of Borth-y-Gest which I have just quoted is also relevant to another distinction which the reclaimers sought to E raise and found upon before us, namely a distinction between administrative and judicial or quasi-judicial decisions. The purpose of this argument was to enable the proposition to be advanced that any right to cross examination would belong to judicial or quasi-judicial proceedings and not to administrative proceedings, that the proceedings in question in the present case were administrative in character and accordingly that no right to cross examination F should arise in the present case. The first leg of this argument relates in part to the alleged distinction between fairness and the principles of natural justice, but just as those labels are useful in particular contexts to focus attention on particular areas of inquiry but may not be determinative, so also the categorisation of functions as administrative or judicial or quasi-judicial, while often useful as an element in the decision whether particular acts or omissions G were or were not lawful as falling or not falling within the scope of what in the circumstances was required under the general principle of fairness, nevertheless should not be seen as determinative of that issue. As Sir William Wade expressed it (*Administrative Law* (7th edn), p 511) the 'judicial' fallacy was repudiated in *Ridge v Baldwin*. An approach along the lines of such categorisation was held to be unnecessary by Parker LJ in *R v Birmingham City Justices* at p 1432, and the H duty to act fairly in both administrative and judicial decisions was recognised in *Breen v Amalgamated Engineering Union*.

In arguing that the justice in the present case was acting administratively the reclaimers founded on the case of *R v Cornwall Quarter Sessions, ex parte Kerley*. In the course of his decision in that case Lord Goddard CJ observed (at p 910): 'In my opinion the justice is simply acting administratively and it is quite I impossible to say that he is acting as a court of summary jurisdiction.'

The observation was recognised as *obiter*, but in any event, in my view, even within the limits of use of the label 'administrative' which I have already acknowledged, the case does not materially assist the reclaimers. The case was dealing with procedure under sec 10 of the Food and Drugs Act 1938 which was in different terms than those of the Act of 1990. The 1938 Act applied in England and I am not confident that a useful parallel can be drawn between the work of a justice in England and the work of a justice in Scotland, particularly when, in the application of the 1990 Act to Scotland, the reference to a justice of the peace is to be taken as including reference to a sheriff and to a magistrate. As was pointed out, there are differences in the procedural provisions contained in the 1938 Act as compared with those in sec 9 of the Food and Drugs (Scotland) Act 1956 as well as those in sec 9 of the Act of 1990, but it is not easy to treat these as making the decision in *Kerley* distinguishable. Moreover the problem in *Kerley* was solely whether the decision in question was one made by a court of summary jurisdiction for the purpose of the appeal provisions contained in sec 88 of the Act of 1938 and it was in that context and for that purpose that Lord Goddard made the observation which I have quoted. I also note that the propriety of the classification in *Kerley* is questioned in de Smith's work on *Judicial Review of Administrative Action* (4th edn), p 216, fn 14. It is also to be observed that Donovan J recognised in his judgment in the *Kerley* case that even although the justice was acting in an executive capacity he still had to bring qualities of impartiality and fairness to bear upon the parties. In *R v Birmingham City Justices, ex parte Chris Foreign Foods (Wholesalers) Ltd* at p 1433, Lord Parker CJ preferred that way of referring to the matter.

The reclaimers then came to argue that the matter of a right to cross examine was a matter of discretion for the justice in the exercise of her general duty to act fairly. This was linked in argument to the proposition that she was bound only by principles of fairness and not bound by principles of natural justice. But I have already sought to displace the distinction sought to be made between these concepts. It is certainly correct that the petitioner does not present his case as a challenge to the exercise of a discretion and in the submission made on his behalf in the reclaiming motion there was no attempt to argue that the matter was one of discretion. What the respondent argued was that it was a matter of obligation on the justice in the circumstances of the case.

In my view it is evident from the authorities to which we were referred that the existence of a duty to allow cross examination in the context of a statutory hearing such as in the present instance depends upon the circumstances of the case. If there is no duty to allow it there may be circumstances where it may be allowed as a matter of discretion, and then the exercise of that discretion could be a potential matter for review. But that is not the position in the present case. Here the matter is one of a duty in the circumstances. In *Bushell v Secretary of State for the Environment* at p 97 Lord Diplock stated that a refusal to allow cross examination of a witness who had given evidence at a local inquiry was not unfair *per se*. The circumstances there were those of an inquiry attended by many parties who wished to make representations without incurring the cost of legal representation and without the ability to attend throughout the whole length of the proceedings. Lord Diplock regarded it as unfair to 'over-judicialise' such an inquiry by insisting on the observance of court procedures. He stated (at p 97E): 'Whether fairness requires an inspector to permit a person who has made statements on matters of fact or opinion, whether expert or otherwise, to

A be cross-examined by a party to the enquiry who wishes to dispute a particular statement must depend on all the circumstances'

On the other hand, as was noticed in the case of *R v Board of Visitors of Hull Prison* at p 1409, in some circumstances to deprive a party of the opportunity of cross examination would be to deprive him of a fair hearing.

In the circumstances of this case I consider that it was part of the duty of
B affording a fair hearing to the petitioner that he should have been given a right to cross examine. This was in terms of the Act a hearing before either a justice or a sheriff. The person in charge of the food, who may be liable to prosecution under the Act, is entitled under sec 9(5) to be heard and to call witnesses. The justice or sheriff may be the person who is sitting in the court before whom the alleged offender is charged. The justice or sheriff must
C proceed upon such evidence as he considers appropriate, but these words cannot be construed so as to cut across the duty to act fairly or in accordance with natural justice. I also note, although counsel were not concerned to put much weight on the point, that if an order is made it is to be at least sufficient evidence for the purpose of a criminal prosecution (sec 9(9)). The matter in the present case was not a dispute about an isolated incident affecting one
D piece of food but related to a whole brand of product. It had direct consequences of the gravest importance for the petitioner, his business and his workforce. It involved the possible destruction of his property. Furthermore, despite the attempts of counsel for the reclaimers to suggest that the issue was a simple one, it was to my mind one of considerable technical complexity calling for expert witnesses on both sides in an area where no clear guidance was available. To my mind a fair hearing in these circumstances required the
E giving of a right to cross examine the witnesses led on behalf of the food authority. As in the cases of *R v Deputy Industrial Injuries Commissioner, ex parte Moore* and *Cowe v McDougall*, so also here the duty to listen fairly to the contentions of all parties entitled to be represented at the hearing required the justice to allow the petitioner to put questions to the witnesses who gave oral evidence and in this case at least that involved the right to cross examine. The
F ground on which the justice evidently proceeded in refusing cross examination was that she considered it sufficient that the parties should 'set out their positions'. In so understanding what the purpose of the hearing was she failed to appreciate that fairness required that the respective positions of the parties should be tested by cross examination. In my view she erred in law and her decision was rightly quashed by the Lord Ordinary.

G It was suggested that the readiness of the justice in the present case to have questions asked through her was sufficient. Reference here was made to the propriety recognised in the case of *R v Board of Visitors of Hull Prison, ex parte St Germain (No 2)* of requiring questions to be channelled through the chairman where direct questioning could lead to the proceedings becoming out of control. But that situation is far removed from the situation of a cross examination of
H expert witnesses by senior counsel. In the circumstances of this case such channelling was no substitute for cross examination. It was accepted by counsel for the reclaimers that it would give the justice a freedom to decide whether or not any question should be asked and in the circumstances of this case in my view that would amount to denial of a fair hearing. While it was argued that both parties were treated equally in respect that both were denied the right to
I cross examine, the fact was that only the petitioner wished to cross examine.

The deprivation of the right for both parties thus still created an inequality between them.

It was also argued for the reclaimers that the petitioner's case was not relevant in the absence of averments of prejudice to the petitioner. This was sought to be supported by reference to the case of *Cigaro Ltd v City of Glasgow District Licensing Board*. In my view that case is not authority for the proposition that in every case a petitioner seeking judicial review must be able to aver and establish some particular prejudice beyond the fact that the decision of which he complains has been tainted by some breach of the principles of natural justice. The case of *Barrs v British Wool Marketing Board*, which was referred to in the decision in *Cigaro*, is a clear authority to the converse. In my view the decision of the Lord Ordinary was correct on this point and I agree also with his observation that the petitioner was prejudiced by the very fact of being denied the opportunity to test the strength of his opponent's experts.

The Lord Ordinary's decision proceeded solely on the ground of the refusal of cross examination. There was also argument raised before us on the question whether there was any obligation on the justice to give reasons for her decision. I do not find that matter to be a ground for the Lord Ordinary's decision. His remarks under that head only go the length of an inclination towards a view and it is inappropriate to explore that matter further. I would only add that it is not impossible in my view to read the decision letter as containing reasons in that the question before her for decision was whether the food failed to comply with safety requirements. That phrase is defined in sec 8(2) as meaning *inter alia* that it is unfit for human consumption. The justice held that the batches of cheese 'are potentially hazardous to public health and therefore unfit for human consumption'. That view lay behind the decision made under sec 9(6) that the cheese failed to comply with food safety requirements. The question remaining would be whether she was required to go further back in a chain of reasoning.

On the whole matter I agree that the reclaiming motion should be refused.

THE COURT refused the reclaiming motion.

*Morton Fraser Milligan, WS — Bonar Mackenzie, WS*

# Historical Development Since the 1960s

**De Smith's Judicial Review 9th Ed.**

**Mainwork updated to include amendments from First Supplement**

**Part II - Grounds of Judicial Review**

**Chapter 8 - Procedural Fairness: Introduction, History and Comparative Perspectives**

**Historical Development Since the 1960s**

## Revisionism revised

**8-038** By this stage, valedictory addresses to the audi alteram partem rule in English administrative law were becoming almost commonplace. It was nevertheless suggested in the first edition of this work that the time had "not yet arrived to think of pronouncing obsequies or writing obituary notices", and that "the comatose must not be assumed to be moribund" [146] and in the 1960s, the rule recovered much of its former vitality as an implied common-law requirement of fair administrative procedure. Perhaps the state of its debility had been slightly exaggerated. Its revival was indirectly stimulated by a growing awareness among practitioners and judges of old forsaken paths, of more imaginative judicial achievements in other English-speaking countries, and of academic legal literature. Undoubtedly the enactment of the Tribunals and Inquiries Act 1958, which extended the scope of judicial review in other directions, modified the general climate of judicial opinion. Above all, there had been a growth of informed interest in problems of administrative adjudication and judicialised administration generated by the publication of the Franks Report (1957), the establishment of the Council on Tribunals, the proliferation of statutory procedural rules in administrative law and the controversies aroused by the decision-making process in town and country planning. Judges do not inhabit an intellectual vacuum, and they were impelled to do some hard thinking about their own role in administrative law.

**8-039** There were some indications in the first years of the 1960s, both from English courts [147] and the Privy Council, that considerations of the need for fairness in the administrative process had not been entirely eliminated from judicial thinking. Particular mention should be made of Lord Denning who, in a series of cases involving the powers of voluntary associations, was concerned to ensure that these powers were tempered by corresponding responsibilities, of which the duty to hold fair inquiries was one. [148] Characteristically, Lord Denning was not concerned with the formal nature of the decision but with the fact that voluntary associations have monopoly powers and that their decisions in effect deprived individuals of their livelihoods.

**8-040** Then in 1963 the House of Lords restored the law to the path from which it had deviated. For in *Ridge v Baldwin*, [149] it was held by a majority that a chief constable, dismissible only for cause prescribed by statute, [150] was impliedly entitled to prior notice of the charge against him and a proper opportunity of meeting it before being removed by the local police authority for misconduct. In an illuminating review of the authorities, Lord Reid repudiated the notions that the rules of natural justice applied only to the exercise of those functions which were analytically judicial, and that a "superadded" duty to act judicially had to be visible before an obligation to observe natural justice could arise in the exercise of a statutory function affecting the rights of an individual. He emphasised that the duty to act in conformity with natural justice could, in some situations, simply be inferred from a duty to decide "what the rights of an individual should be". [151]

**8-041** This decision gave a powerful impetus to the emergent trend, [152] an impetus which is not yet spent in administrative law. It opened an era of activism in which the courts have subjected the working of government to a degree of judicial scrutiny, on

 

substantive as well as procedural grounds, which shows little sign yet of diminishing; and which has received renewed impetus with the advent of the Human Rights Act 1998. [153]

# The duty to act fairly

**8-042** In the case law since the late 1960s, the courts have demonstrated considerable flexibility in their manipulation of the principal criteria used for determining the circumstances in which a duty to observe the rules of natural justice would be implied. As long as it was remembered that the degree of procedural formality required by the rules was capable of considerable variation according to the context, [154] an extension of the range of situations to which they were applied did not attract the criticism that the courts were "over judicialising" administrative procedures. Since 1967, the courts began to employ the term "duty to act fairly" to denote an implied procedural obligation—the content of which may fall considerably short of the essential elements of a trial or a formal inquiry—accompanying the performance of a function that could not readily be characterised as judicial in nature. [155]

**8-043** Thus, before refusing leave to enter, immigration officers were not required to hold a judicial hearing at which the individual could produce witnesses and evidence to support his claim: this would unduly burden the administration of the system of immigration control in which officers at the ports are required, within a relatively short period of time, to make a large number of decisions. [156] However, they were under a legal obligation to exercise their powers fairly, and this meant that they must inform a person who claims a legal right to enter why they are disposed to refuse and allow them an opportunity to allay their suspicions. [157] Similar obligations were imposed upon inspectors conducting inquiries into allegations of improprieties committed against companies by their officers. [158] While the damage to reputations that might be suffered as a result of the publication of a report containing adverse criticisms required that affected individuals have a prior opportunity to be informed of and to comment upon any serious allegations made against them, to insist on an adjudicative hearing would be inconsistent with the public interest in protecting the confidentiality of evidence given to the inspector, and in ensuring that the inquiry is conducted with reasonable expedition. Moreover, an adverse report does not directly deprive a person of any legal rights in the strict sense. The duty to act fairly also extended the scope of the hearing to situations where a "privilege" rather than a "right" was in issue. For example, an applicant for a renewal of gaming licence cannot be refused on grounds of personal unacceptability unless the board has first intimated to them its concerns in such a way that allows the applicant to respond, but without prejudicing the confidentiality of the board's sources of information. [159]

**8-044** The principal benefit of the introduction of the duty to act fairly into the court's vocabulary was to extend the benefit of basic procedural protections to situations in which it would be inappropriate to describe the decision-maker's functions as judicial, or even quasi-judicial, and inappropriate to insist on a procedure analogous to a trial. [160]

# European influences

## The ECHR

**8-045** The incorporation of the ECHR into English law in 2000 as a result of the Human Rights Act 1998 has proved to be an important stimulus to the evolution of procedural fairness, in particular due to arts 2 and 6 ECHR. [161] In summary, art.6 requires a "fair and public hearing within a reasonable time" by an "independent and impartial tribunal established by law" for the determination of an individual's "civil rights and obligations". [162] As is evident from the wording of the provision

 

and, as is discussed in Ch.9, the entitlement to art.6 protection only arises where "civil rights and obligations" are in issue. [163] The term "civil rights and obligations" is clearly "rooted in a paradigm of private law rights", [164] and the Strasbourg Court has experienced considerable difficulty in determining its scope. [165] Initially interpreted very restrictively, [166] over time art.6 has been given a more generous application. For example, it has been applied to the determination of welfare benefits [167] and the withdrawal of a banking licence. [168] The article is clearly not of unrestricted scope. [169] In this respect, it lacks the flexibility of application of the common law duty to act fairly. [170] The content of the protection provided by art.6 will be considered in detail in Chs 9, 10 and 12, but for present purposes, it is worth noting that the provision's most notable impact has been due to its requirement of an "independent" tribunal, to accompany the common law principle that no one should be a judge in his own cause or "nemo judex in causa sua". [171] The influence of art.6 has resulted in an "independent" tribunal being declared to be a requirement of common law procedural fairness; [172] an important jurisprudence has also evolved regarding the extent to which judicial review can remedy the absence of institutional or structural independence on the part of the decision-maker. [173] Meanwhile, art.2 ECHR imposes an obligation to ensure effective judicial review and to conduct an investigation in circumstances in which the State has breached its substantive art.2 duty to protect life. [174]

### EU law

8-046 EU law has undoubtedly had a very important impact on English administrative law, which is explored in detail in Ch.14. However, its impact has been more notable in the context of substantive review and legitimate expectations, than it has been in the context of procedural fairness. Aside from the example of a duty to give reasons, which applies both in respect of acts of the Union and in respect of national measures which interfere with Union law rights, there is a stronger case for asserting that EU law on procedural fairness has been inspired more by, and borrowed more from, English common law, than vice versa. [175]

## Recent developments

8-047 In the new era of remote hearings and email applications, it has been held that "[t]he essential point is that, whatever form an application takes and whether or not there is a hearing, the same standards of procedural fairness apply". [176]

**Footnotes**

146 S.A. de Smith, Judicial Review of Administrative Action (New York: Oceana Publications, 1959), p.136.

147 *R. v Registrar of Building Societies Ex p. A Building Society [1960] 1 W.L.R. 669; [1960] 2 All E.R. 549 CA*; *Hoggard v Worsbrough Urban DC [1962] 2 Q.B. 93; [1962] 2 W.L.R. 676*. In a number of other cases, proceedings before courts and regularly constituted tribunals were set aside for non-compliance with the audi alteram partem rule: *Ganapathy Chettiar (PN CT) v Periakaruppan Chettiar (PR SP) [1962] 1 W.L.R. 279; [1962] 2 All E.R. 238 PC*; *R. v Birkenhead JJ Ex p Fisher (Practice Note) [1962] 1 W.L.R. 1410; [1962] 3 All E.R. 837 DC*; *Appuhamy v The Queen [1963] A.C. 474; [1963] 2 W.L.R. 375 PC*; *Sheldon v Bromfield JJ [1964] 2 Q.B. 573; [1964] 2 W.L.R. 1066*; *S v S [1965] 1 W.L.R. 21; [1964] 3 All E.R. 915 CA*; *Hodgkins v Hodgkins [1965] 1 W.L.R. 1448; [1965] 3 All E.R. 164 CA*; *R. v Aylesbury JJ Ex p. Wisbey [1965] 1 W.L.R. 339 [1965] 1 All E.R. 602 QB* (courts); *The Seistan [1960] 1 W.L.R. 186; [1960] 1 All E.R. 32*; *R. v Deputy Industrial Injuries Commissioner Ex p. Jones [1962] 2 Q.B. 677; [1962] 2 W.L.R. 1215 DC*; *R. v Industrial Tribunal Ex p. George Green & Thomson Ltd (1967) 2 K.I.R. 259; (1967) 111 S.J. 314 DC* (other statutory tribunals). Decisions on non-statutory arbitrations and domestic tribunals have been omitted.

148 See, e.g. *Abbott v Sullivan [1952] 1 K.B. 189; [1952] 1 All E.R. 226 CA* (dockworker struck off Union's register and therefore could no longer be employed); *Lee v Showmen's Guild of Great Britain [1952] 2 Q.B. 329; [1952] 1 All*

 

*E.R. 1175 CA* (expulsion from a trade association). See generally, J. Jowell, "Administrative Law" in J. Jowell and P. McAuslan (eds), Lord Denning: The Judge and The Law (Sweet & Maxwell, 1984).

149 *Ridge v Baldwin [1964] A.C. 40; [1963] 2 W.L.R. 935 HL*.

150 Negligence or other unfitness (Municipal Corporations Act 1882 s.191(4)), repealed by Police Act 1964 s.64(3) and Sch.10.

151 *Ridge v Baldwin [1964] A.C. 40* at 75–76.

152 PC decisions in the 1960s applying the audi alteram partem rule to set aside administrative action included: *Kanda v Malaya [1962] A.C. 322; [1962] 2 W.L.R. 1153 PC*; *Shareef v Commissioner for Registration of Indian and Pakistani Residents [1966] A.C. 47; [1965] 3 W.L.R. 704 PC*; *Jeffs v New Zealand Dairy Production and Marketing Board [1967] 1 A.C. 551; [1967] 2 W.L.R. 136 PC*. See also *Durayappah v Fernando [1967] 2 A.C. 337; [1967] 3 W.L.R. 289 PC* (implied duty to observe natural justice, but appeal dismissed on a technical point). cf. *University Council of the Vidyodaya University of Ceylon v Silva [1965] 1 W.L.R. 77; | [1964] 3 All E.R. 865 PC*; *Pillai v Singapore City Council [1968] 1 W.L.R. 1278; (1968) 112 S.J. 440 PC*.

153 See Ch.13.

154 Dicta to this effect in *Russell v Duke of Norfolk [1949] 1 All E.R. 109 CA* at 118 were cited with predictable regularity. See *R. (on the application of Lewis) v Redcar and Cleveland BC [2008] EWCA Civ 746; [2009] 1 W.L.R. 83* and *R. (on the application of Fraser) v National Institute for Health and Clinical Excellence [2009] EWHC 452 (Admin); (2009) 107 B.M.L.R. 178*, for examples of the application, post- *Ridge v Baldwin*, of the duty to act fairly to bodies that are not judicial or quasi-judicial, with a modification of content of the duty to suit the context. See also *R. (on the application of Dawes) v Secretary of State for Transport [2024] EWCA Civ 560* at [42] ("[t]he requirements of procedural fairness depend upon a number of factors including the facts, the nature of the decision-making process and the statutory framework").

155 See *P. Craig, "Perspectives on process: common law, statutory and political" [2010] P.L. 275*; P. Craig, English Administrative Law from 1550: Continuity and Change (OUP, 2024). On similar developments in other jurisdictions, see 8-050.

156 Immigration Act 1971 Sch. 2.

157 *Re HK (An Infant) [1967] 2 Q.B. 617; [1967] 2 W.L.R. 962*: applicant had a legal right to enter if he could establish his claim to be the son, under the age of 16, of a Commonwealth citizen settled in the UK. The reason for Lord Parker CJ's doubt over the proper characterisation of the immigration officer's function arose from the exigencies of the administration of immigration control at the ports of entry, rather than from the nature of the decision to be made. Those without a legal entitlement (or, it should now be added, a legitimate expectation) to enter or remain in the UK could be refused without the benefit of any implied procedural rights: *Schmidt v Secretary of State for Home Affairs [1969] 2 Ch. 149; [1969] 2 W.L.R. 337 CA (Civ Div)*. Since 1969, there has been a right to a hearing on an appeal against many immigration decisions to independent tribunals. This is one context in which statutory justice has, to an extent at least, supplied the omission of the common law. However, see: *R. (on the application of Pathan) v Secretary of State for the Home Department [2020] UKSC 41; [2020] 1 W.L.R. 4506* (obligation to notify migrant worker applying for leave to remain if sponsor's licence revoked, but no duty to provide a period of time following such notification to enable worker to make an alternative application); *Re Tahmasebi's Application for Judicial Review [2021] NIQB 99* at [87].

158 Companies Act 1985 Pt 14 and Companies Act 2006 Pt 10; *Re Pergamon Press [1971] Ch. 388; [1970] 3 W.L.R. 792 CA (Civ Div)*; *Maxwell v Department of Trade and Industry [1974] Q.B. 523; [1974] 2 W.L.R. 338 CA (Civ Div)*. cf. *Norwest Holst Ltd v Secretary of State for Trade [1978] Ch. 201; [1978] 3 W.L.R. 73 CA (Civ Div)* (appointment of inspectors).

159 *R. v Gaming Board of Great Britain Ex p. Benaim and Khaida [1970] 2 Q.B. 417*.

160 See 8-027. As will be seen in Ch.9, courts now tend to reason in terms of a general duty to act fairly. See also *Ahmed v HM Treasury [2010] UKSC 5; [2010] 2 A.C. 534* at [80] (Lord Hope); *Bank Mellat v HM Treasury [2011] EWCA Civ 1; [2012] Q.B. 101* at [99] (Elias LJ dissenting in the case and referring to a hearing as "this most basic principle of fairness").

161 For the impact of art.6 ECHR on common law procedural fairness, see 9-033 and 9-158 and for art.2 ECHR see 9-045 and 9-170; *S. Juss, "Constitutionalising Rights without a Constitution: The British Experience under Article 6 of the Human Rights Act 1998" (2006) 27 Statute L. Rev. 29*. See also *R. (on the application of TH (Bangladesh) v Secretary of State for the Home Department [2016] EWCA Civ 815* at [22] (Beatson LJ observing that his "starting point is that the history of procedural fairness shows it to be the result of implying into broadly-phrased powers and procedures the requirements of procedural fairness reflected in the principles of natural justice and, since the enactment of the Human Rights Act 1998, the duty of the court where possible to construe such powers, if necessary by reading them down, as compatible with the Convention rights. It is in that context and in that sense that it can be said that procedural fairness is … a well-established principle ingrained in public administration").

162 See 9-033, 9-158 and 12-080.

 

163 See 9-034; *P. Craig, "The Human Rights Act, Article 6 and Procedural Rights" [2003] P.L. 753*; J. Herberg, A. Le Sueur and J. Mulcahy, "Determining Civil Rights and Obligations" in J. Jowell and J. Cooper (eds), Understanding Human Rights Principles (Hart Publishing, 2001), p.91, at pp.112 and 114–121.

164 *P. Craig, "The Human Rights Act, Article 6 and Procedural Rights" [2003] P.L. 753, 754*.

165 *P. Craig, "The Human Rights Act, Article 6 and Procedural Rights" [2003] P.L. 753*; Lester, Pannick and Herberg (2009).

166 See 9-034; *Ringeisen v Austria (1979–80) 1 E.H.R.R. 455*.

167 See 9-036 and, e.g. *Salesi v Italy (1998) 26 E.H.R.R. 187*; *Tsfayo v UK (60860/00) (2009) 48 E.H.R.R. 18; [2007] H.L.R. 19*.

168 *Capital Bank AD v Bulgaria (2007) 44 E.H.R.R. 48* at [88].

169 See 9-034 and, e.g. *Charalambos v France (49210/99)*, admissibility decision of 8 February 2000 (determination of tax liability); *Maaouia v France (2001) 33 E.H.R.R. 1037* (proceedings to challenge an exclusion order). For domestic case law in which art.6 has not been regarded as engaged, see: *R. (on the application of G) v X School Governors [2011] UKSC 30; [2012] 1 A.C. 167* (school disciplinary hearing where right to practice profession would be determined by a separate authority); *R. (on the application of A) v Croydon LBC [2009] UKSC 8; [2009] 1 W.L.R. 2557* (duty to provide accommodation for a "child"); *R. (on the application of BB (Algeria)) v Special Immigration Appeals Commission [2011] EWHC 2129 (Admin); [2012] 1 All E.R. 229* (bail proceedings before the Special Immigration Appeals Commission); *R. v Richmond LBC Appeal Committee Ex p. JC (A Child) [2001] B.L.G.R. 146; [2001] E.L.R. 21 CA (Civ Div)* (school admission decision). See also *Ali v Birmingham City Council [2010] UKSC 8; [2010] 2 A.C. 39* (accommodation for a homeless applicant did not engage ECHR art.6); *Ali v UK (2016) 63 E.H.R.R. 20* (finding ECHR art.6 engaged); *Poshteh v Kensington and Chelsea RLBC [2017] UKSC 36; [2017] A.C. 624* (not following *Ali*).

170 On occasion, English courts have deliberately avoided the issue altogether, and decided cases on alternative grounds: *Begum v Tower Hamlets LBC [2003] UKHL 5; [2003] 2 A.C. 430*.

171 See 12-088.

172 *R. (on the application of Bewry) v Norwich City Council [2001] EWHC Admin 657; [2002] H.R.L.R. 2*. See also *R. (on the application of British Medical Association) v Secretary of State for Health and Social Care [2020] EWHC 64 (Admin); [2020] Pens. L.R. 10* at [105].

173 See 12-092.

174 See 9-045 and 9-170. Where other rights of the Convention are engaged, there may also be procedural requirements specific to the engagement of that particular right. For example, a discussion of the influence of ECHR art.5(4) on procedural requirements in the context of parole board hearings can be found in *Re Reilly's Application for Judicial Review [2013] UKSC 61; [2013] 3 W.L.R. 1020* at [54]–[63] (noting that Convention law permeates the domestic legal system and that domestic law is interpreted and developed in accordance with the Convention as appropriate).

175 *Transocean Marine Paint Association v Commission (17/74) EU:C:1974:106; [1974] E.C.R. 1063* (AG Warner noting that in English law, the right to be heard was a "rule of natural justice", regardless of whether there was a written obligation to provide a hearing).

176 *Re M (Children) (Applications by Email) [2021] EWCA Civ 806; [2021] 4 W.L.R. 100* at [45].

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# Public Inquiries

**De Smith's Judicial Review 9th Ed.**

**Mainwork updated to include amendments from First Supplement**

**Part II - Grounds of Judicial Review**

**Chapter 9 - Procedural Fairness: Entitlement and Content**

**Public Inquiries**

9-155 As we noted in Ch.1, public inquiries can take a number of forms and may be established in different contexts.[592] Public inquiries engage a duty to act fairly,[593] and the precise procedures to be followed usually depend on the particular circumstances of the inquiry.[594] The chairperson of the inquiry also has discretion to direct the procedure and conduct of the inquiry.[595] The difficulty often lies in "securing an acceptable balance between the thorough investigation of a matter of 'urgent public importance' so as to ascertain the truth, on the one hand, and on the other the need fully to accord implicated individuals a fair procedure".[596]

9-156 Certain public inquiries, over the years illustrate a change of emphasis in the role of the person conducting an inquiry. The traditional approach in the past, much favoured by planning inquiry inspectors, was to let anyone who had an interest appear, call every witness he wished, and be separately represented if he was prepared to meet the expenses involved. Alternatively, a more restrictive approach may be adopted.

9-157 In general, there is an emphasis on an inquisitorial approach,[597] however, as just noted, much will depend on the nature of the inquiry. At the Leveson inquiry into the culture, practice and ethics of the press, core participants were legally represented, while in the unique circumstances of the Bloody Sunday inquiry, where the right to life of witnesses may have been at risk, questions regarding anonymity of witnesses and the location in which evidence would be given, were of paramount importance.[598] The Grenfell Tower Inquiry also issued a Protocol for legal representation.[599]

## Footnotes

592 See 1-111. See J. Beer, Public Inquiries (OUP, 2011).

593 *Bushell v Secretary of State for the Environment [1981] A.C. 75* at 95 (Lord Diplock).

594 See, e.g. *R. Scott, "Procedures at Inquiries: The Duty to be Fair" (1995) 111 L.Q.R. 596*; *Hadfield, "R. v Lord Saville of Newdigate Ex p. Anonymous Soldiers: What is the Purpose of a Tribunal of Inquiry?" [2003] P.L. 663*; *L. Blom-Cooper, "Tribunals under Inquiry" [1999] P.L. 1*; *L. Blom-Cooper, "Public Interest in Public Inquiries" [2003] P.L. 578*.

595 Inquiries Act 2005 s.17.

596 *B. Hadfield, "R. v Lord Saville of Newdigate Ex p. Anonymous Soldiers: What is the Purpose of a Tribunal of Inquiry?" [2003] P.L. 663, 667*. In general also, inquiries should not discuss matters of national policy: *Bushell v Secretary of State for the Environment [1981] A.C. 75*. This is a difficult distinction to maintain in practice: *R. v Secretary of State for Transport Ex p. Gwent CC [1988] Q.B. 429* at 437 (Woolf LJ).

597 *The Rt Hon The Lord Thomas of Cwmgiedd "The future of public inquiries" [2015] P.L. 225*. See *Re Bunting's Application for Judicial Review [2023] NICA 90* at [90] (noting that it is a "familiar, convenient label which has no universally recognised meaning. What it conveys may vary according to the context. It will generally denote that the tribunal or adjudicator concerned will adopt a flexible approach to matters of procedure and will not apply the rules of evidence with strict rigour").

598 *B. Hadfield, "R. v Lord Saville of Newdigate Ex p. Anonymous Soldiers: What is the Purpose of a Tribunal of Inquiry?" [2003] P.L. 663*; see also *R. v Lord Saville of Newdigate Ex p. B (No.2) [2000] 1 W.L.R. 1855; [1999] 4 All E.R. 860 CA (Civ Div)*; *R. (on the application of A) v Lord Saville of Newdigate (Bloody Sunday Inquiry) [2001] EWCA Civ 2048; [2002] 1 W.L.R. 1249*.

599 See Protocol on Legal Representation at Public Expense, 23 August 2017, https://www.grenfelltowerinquiry.org.uk/.

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# Introduction

**De Smith's Judicial Review 9th Ed.**

**Mainwork updated to include amendments from First Supplement**

**Part II - Grounds of Judicial Review**

**Chapter 12 - Procedural Fairness: Bias and Predetermination**

**Introduction**

**12-001** Procedural fairness demands not only that those whose interests may be affected by an act or decision should be given prior notice and an adequate opportunity to be heard, but also requires that the decision-maker must be unbiased. A decision-maker is biased if they have a "predisposition or prejudice against one party's case or evidence on an issue for reasons unconcerned with the merits of the issue". [1]

**12-002** One obvious reason why the common law looks to safeguard against bias is a concern for accuracy in decision-making: if a person is influenced by their private interests or personal predilections, they will not follow, or may be tempted not to follow, the required standards and considerations which ought to guide the decision. However, actual bias is notoriously difficult to prove, not least because prejudice, and its influence, may well be subconscious. The common law, furthermore, is also concerned with protecting and promoting public confidence in decision-making. For these reasons, the law is concerned with not only the possibility of *actual*, but also the presence of the *appearance* of, bias. As Lord Hewart CJ famously said, "justice should not only be done, but should manifestly and undoubtedly be seen to be done". [2]

**12-003** The primary focus of this chapter is on the common law principles which determine when a decision is unlawful due to the decision-maker being biased or appearing to be biased. The early sections of the chapter cover the following:

- the *Porter* test for apparent bias;
- common factors in the application of the *Porter* test;
- predetermination;
- automatic disqualification; and
- waiver.

**12-004** These principles have been developed, and continue to apply, outside of the context of judicial review of administrative action. The courts confront issues of bias, for instance, in the context of criminal trials, [3] civil litigation [4] and arbitration. [5] It is accordingly necessary to engage with case law from a wider range of legal contexts than in other chapters. The primary focus of this chapter is, however, on principles which may be relevant in judicial review against administrative decision-makers.

**12-005** The penultimate section of the chapter considers the relevance of Convention rights. Article 6 of the European Convention on Human Rights provides that:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time *by an independent and impartial tribunal* established by law."

It has been said that nowadays there is "no difference between the common law test of bias and the requirement under art.6 of the Convention of an independent and impartial tribunal." [6] It is certainly true that the common law test of bias has been adjusted

 

to take account of European Court of Human Rights jurisprudence.[7] However, art. 6 has altered the law in other ways. Most fundamentally, art. 6 includes a right to adjudication by an *independent* court or tribunal. As Baroness Hale said "impartiality is not the same as independence, although the two are closely linked. Impartiality is the tribunal's approach to deciding the cases before it. Independence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal but also in the perception of the public."[8] Unlike art.6, the common law does not recognise a freestanding right to an independent decision-maker. The extent to which a decision-maker is independent, rather, is a factor to be considered in determining whether there is bias or an appearance of bias.

## Footnotes

1 *Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117; (2005) 102(37) L.S.G. 31* at [28].

2 *R. v Sussex Justices Ex p. McCarthy [1924] 1 K.B. 256* at 259.

3 e.g. *R. v Gough [1993] A.C. 646 HL* (concerning the circumstances in which a juror will appear biased).

4 e.g. *Serafin v Malkiewicz [2020] UKSC 23; [2020] 1 W.L.R. 2455* (concerning an allegation of bias in relation to a trial judge hearing a defamation claim).

5 e.g. *Halliburton Co v Chubb Bermuda Insurance Ltd [2020] UKSC 48; [2021] A.C. 1083*.

6 *Lawal v Northern Spirit Ltd [2003] UKHL 35; [2004] 1 All E.R. 187* at [14]; *R. v Abdroikov [2007] UKHL 37; [2007] 1 W.L.R. 2679* at [17]; *Thames Water Utilities Ltd v Newbound [2015] EWCA Civ 677* at [91].

7 See 12-008–12-010.

8 *Gillies v Secretary of State for Work and Pensions [2006] UKHL 2; [2006] 1 W.L.R. 781* at [38].

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# The Porter Test for Apparent Bias

**De Smith's Judicial Review 9th Ed.**

**Mainwork updated to include amendments from First Supplement**

**Part II - Grounds of Judicial Review**

**Chapter 12 - Procedural Fairness: Bias and Predetermination**

**The Porter Test for Apparent Bias**

## Development of the test

**12-006** A decision will be unlawful if it can be proved that the decision-maker was actually biased. [9] Where actual bias is alleged, the court has a duty to investigate the available evidence [10] to determine whether the decision-maker in fact had a "prejudice against one party or its case for reasons unconnected with the legal or factual merits". [11] In practice, however, courts are rarely invited by parties to undertake this exercise [12] and have stressed that allegations of actual bias should only be made on a proper basis. [13] Actual bias is notoriously difficult to prove. [14] There will often be no relevant evidence demonstrating the decision-maker's state of mind, not least because a judge is not compellable as a witness in relation to their own decision. [15] Furthermore, in some contexts an investigation into a decision-maker's mindset may undermine the confidential nature of decision-making. [16]

**12-007** Consequently, it is more common for parties to ask a court to invalidate a decision on the basis of an appearance that the decision-maker was biased. Various tests have been applied to establish the limits of apparent bias. Across the different possible approaches there are two variables. The first is the perspective from which the situation is judged. Should, for instance, the court simply ask whether in its view the decision-maker appeared biased? Should the court take the standpoint of a party to the dispute? Or a fictional bystander such as the "reasonable man"? The second is the degree of risk likelihood or probability of bias which will render a decision unlawful. At the one extreme, the courts have treated decisions as unlawful in the presence of a "reasonable suspicion of bias". At the other, courts have asked whether there was a "real likelihood of bias".

**12-008** In *R. v Gough (Robert)*, the House of Lords considered these various tests in the context of an allegation of bias on the part of a juror in a criminal trial. Having carefully considered the authorities, it was held that direct pecuniary or proprietary interest always disqualified the decision-maker. [17] Outside that category, it was held that the correct test was whether, in the circumstances of the case, the court considered that there appeared to be a "real danger of bias". It was made clear that the test focused on the *possibility*—not probability—of bias and that the same test should be applied in all cases of apparent bias (whether concerning justices, members of tribunals, arbitrators, justices' clerks or jurors). It was held too that the "real danger" test should be applied from the point of view of the court, not from that of the "reasonable man", however slim the difference between the two points of view in practice. As Lord Goff said:

> "Since however the court investigates the actual circumstances, knowledge of such circumstances as are found by the court must be imputed to the reasonable man; and in the results it is difficult to see what difference there is between the impression derived by a reasonable man to whom such knowledge has been imputed, and the impression derived by the court, here personifying the reasonable man". [18]

**12-009** Later cases cast doubt on this approach. The *Gough* test received criticism on the bases that it did not sufficiently take account of the perspective of the public (whose confidence is necessary), [19] that it was out of line with the test of "whether a fair-minded

 

and informed person might apprehend or suspect that bias existed" (the "reasonable apprehension" test) preferred in many common law jurisdictions [20] and that it was inconsistent with the "objective" approach taken in Strasbourg jurisprudence. [21] In *Re Medicaments and Related Classes of Goods (No.2)* Lord Phillips of Worth Matravers MR said that both because the test in *Gough* did not command universal approval and because it was at odds with the test under art.6, it should be modified and that, in order to fulfil the confidence of the public, the court should consider the question of bias through the eyes of an "objective onlooker". [22]

**12-010** The House of Lords revisited the test for apparent bias in *Porter v Magill*, where Lord Hope suggested a "modest adjustment" to the test in *Gough*. The reference to "real danger" was removed and the test was held to be whether "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias". [23] The perspective thus shifted from the view of the court to that of an objective and informed observer.

# Nature of the test

**12-011** Whether a decision is unlawful on the basis that a fair-minded and informed observer would conclude there was a real possibility of bias is a question of law for a reviewing or appellate court to decide. [24] Recusal is not a matter of discretion for the decision-maker. If the *Porter* test is made out the decision-maker is disqualified from hearing the case. If it is not, there is no valid objection to the decision-maker sitting. [25]

**12-012** In applying the *Porter* test a court is to consider the circumstances in the round. The fair-minded and informed observer would not view allegations of bias individually and conclude that if there is nothing in them individually there can be nothing in them in combination. [26] Rather, all factors alleged to indicate apparent bias are to be considered collectively.

**12-013** The outcome of a decision-making process is irrelevant to the question of determining whether there was an appearance of bias. If the fair-minded and informed observer would conclude that there was a real possibility of bias, a decision is not lawful simply because it is likely that a different decision-maker would have reached the same conclusion. [27] Correlatively, the fact that a decision-maker reached a conclusion adverse to the complaining party is not a factor pointing to apparent bias. The question is whether the fair-minded and informed observer would have been concerned *before* the outcome of the process was known. [28] Considerations of cost and delay are also irrelevant. [29]

**12-014** Bias has been defined as "prejudice against one party or its case for reasons unconnected with the legal or factual merits." [30] A "real possibility" of bias does not require probability. However, "it is a test which is founded on reality" and demands not only any possibility but a *real* possibility of bias. [31]

## Characteristics of the fair-minded and informed observer

**12-015** The fair-minded and informed observer is a fictional third party to proceedings, and their view is not to be confused with the opinion of the litigant. [32] As the Court of Appeal has said, the *Porter* approach is "an objective test. It ensures that there is a measure of detachment in the assessment of whether there is a real possibility of bias… Litigation is a stressful and expensive business. Most litigants are likely to oppose anything that they perceive might imperil their prospects of success, even if, when viewed objectively, their perception is not well-founded." [33]

 

**12-016** The fair-minded and informed observer is neither unduly suspicious, nor unduly complacent.[34] Rather, they are the sort of person who:

> "… always reserves judgment on every point until she has seen and fully understood the both sides of the argument. She is not unduly sensitive or suspicious… But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially."[35]

**12-017** It can be assumed that the fair-minded and informed observer is "able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant."[36]

## Knowledge to be attributed

**12-018** In determining what knowledge is to be attributed to the fair-minded and informed observer the courts confront something of a tension. On the one hand, a full appreciation of the relevant facts may show an initial suspicion of apparent bias to be ill-founded[37] or, less commonly, may bring to light circumstances which would lead a fair-minded observer to conclude that there was a real possibility of bias.[38] In such circumstances, disregarding the relevant information may produce a result which is difficult to justify on the facts. On the other, as was seen above, part of the courts' rationale in shifting from the *Gough* to the *Porter* test was to better take account of the need to preserve public confidence in decision-making. Arguably, this aim would be better served by confining the fair-minded and informed observer to information readily obtainable by the public.

**12-019** In striking the balance the courts have inclined towards attributing more, rather than less, knowledge to the fair-minded and informed observer. Indeed it has been said that the fair-minded and informed observer is to take account of "all the circumstances which have a bearing on the suggestion that the [decision-maker] was biased".[39] As such, the "concept of apparent bias does not rest on impression based on an incomplete picture but on a fair and reasoned judgment formed as a result of composed and considered appraisal of the relevant facts".[40] The fair-minded and informed observer has, accordingly, been said to:

> "… take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."[41]

**12-020** In applying the *Porter* test the court is not limited to considering only information which is readily available and in the public domain.[42] For instance, *Virdi v Law Society* concerned an allegation that a decision by the Solicitors Disciplinary Tribunal was tainted by apparent bias when a clerk employed by the Law Society retired with the panel members and assisted with the drafting of their findings. The Court of Appeal held that the fair-minded and informed observer would be aware of factual details explained in a witness statement concerning the limited role played by the clerk in proceedings, and the "nominal" nature of their employment by the Law Society, even though these were not readily available to the public.[43]

 

12-021 If it is available, a court applying the *Porter* test may also take account of evidence about what actually happened during deliberations. [44] For instance, *R. (on the application of DM Digital Television Ltd) v Office of Communications* concerned a challenge to a decision to impose financial sanctions in relation to breaches of the Broadcasting Code. The presence of an executive officer who had conducted an earlier investigation into the alleged breaches during the panel's deliberations was argued to have given rise to an appearance of bias. The High Court, in rejecting the challenge, held that it was permissible to have regard to witness statements from those involved in deliberations that no new evidence or points were raised before the panel which had not been addressed at the hearing. [45]

12-022 A court may consider a statement by a decision-maker concerning what they did and did not know at the time of decision-making. However, they are not bound to accept it at face value and should pay no attention to a decision-maker's explanation of how knowledge impacted their thought process. [46]

12-023 The following are examples of the high level of knowledge the courts have attributed to the fair-minded and informed observer:

- Apparent bias was not found where an advisory steering group to a medical body had included in its composition two consultants from medical centres which were being considered by the medical body, as the objective observer would know the following: that the decision to be taken was with respect to which questions to put to public consultation and would not be final; the actual decision was comprised of representatives of all but one of the 152 English primary care trusts; the steering group was a clinically expert body with no decision-making role; the group was chaired by a distinguished neo-natal paediatrician, consisted of 29 experts all of whom knew that they had been appointed to represent their disciplines and professional bodies, not their hospitals; and all the issues would also remain at large in the consultation process. [47]

- Although the Office of the Independent Adjudicator for Higher Education was funded by the higher education institutions against whom complaints on which the Adjudicator was adjudicating were made, apparent bias did not arise as the fair-minded observer would be aware the Adjudicator had to act independently of the board of directors of the office, the higher education institutions and complainants; the board of directors was responsible for preserving the independence of the scheme and there was no evidence that the board had ever failed to live up to that responsibility. [48]

- In the context of a judge sitting in the Grand Court of the Cayman Islands in proceedings related to the winding-up of a company whose economic interests were mainly held by persons connected with Qatar, without disclosure of his position as a supplementary judge of the Qatar Civil and Commercial Court, the fair-minded and informed observer was deemed to be aware of the Qatari background, including the personalities involved, their important positions in Qatar and their relationships with each other as well as the opacity of the position relating to the appointment and renewal of members of the relatively recently created Civil and Commercial Court. This created a real possibility that the judgment of the judge would be influenced, albeit sub-consciously. [49]

- Where the composition of an Appeal Board which had determined that the appellant bank was required to credit the Government of Belize's account with US$10 million was challenged, the fair-minded and informed observer was held to be aware of the following: the general structure of appeal; the statutory obligation on the minister to appoint members of the Board; the limited pool of candidates who might fill the position; the requirement of appointees to take an oath of office; and the inability of ministerial appointees to outvote the chairman. [50]

- The fair-minded and informed observer was deemed to have detailed knowledge of the Public Contract Regulations, the extent to which they were breached and the extent to which relevant companies had the scale, expertise and experience to fulfil the contracts in a challenge to the award of public contracts outside of a procurement process during the coronavirus pandemic. [51]

 

### Academic criticism

12-024 The fair-minded and informed observer has been described as "something of a paragon. Not only is he fair-minded and impartial, but he has diligently educated himself about the circumstances of the case". [52] In *Helow v Secretary of State for the Home Department* Lord Hope remarked that the notional observer "has attributes which many of us might struggle to attain". [53] The characteristics of, and degree of knowledge attributed to, the fair-minded and informed observer give rise to the obvious danger that the judge will simply project on to that fictional character their personal opinions. [54] As Lord Kerr has noted, there is a danger of characterising the observer as "someone who, by dint of his engagement in the system that has generated the challenge, has acquired something of an insider's status". [55] Concerns such as these have led to academic criticism of the *Porter* test. It has been argued that, in its application, the *Porter* test continues to take the perspective of a court rather than an observer [56] and does not adequately reflect the concern to promote the public interest which underlay the shift from the approach in *Gough*. [57]

## Scope of the test

12-025 *Porter v Magill* concerned a challenge to a decision by an auditor that local councillors were guilty of wilful misconduct in the selling off of council houses. As explained above, the test was a refinement of the approach developed in *Gough* in which the House of Lords had unified the test applicable in challenges to decisions by courts, tribunals, jurors and arbitrators. [58] The *Porter* test has since been applied in a broader range of institutional contexts in judicial review proceedings, including decisions by planning authorities. [59]

12-026 The Court of Appeal has, however, expressed doubt that the common law principles of bias, including the *Porter* test, applied in a challenge to the award of a contract to provide services to the Government outside of the Public Contracts Regulations. The court acknowledged that the *Porter* test has been applied outside of the court and tribunal context, but noted that this had been done "always and only in an adjudicative context, such as local authority and planning committee decision-making or a process to determine which of a number of hospitals should conduct specific treatments." In contrast:

> "Unlike in a competitive procurement process, even one conducted outside the Regulations, the Minister was not assessing one or more applications and then making a determination. The Minister was thus not carrying out an adjudication and obviously not a quasi-judicial) function." [60]

12-027 These comments were obiter as the court went on to find that, if the common law principles of bias did apply, they had not been breached. Future courts should be cautious about adopting the suggestion that the *Porter* test applies only to decision-makers exercising "adjudicative" or "quasi-judicial" functions. First, the distinction between adjudicative and non-adjudicative, or quasi-judicial and non-judicial, functions is unclear. Second, it is difficult to see a principled case for permitting apparent bias in cases clearly concerning non-adjudicative functions. It is not clear, for instance, why the *Porter* test should not apply where a decision-maker tasked with formulating general policy gives the appearance of being biased. [61]

**Footnotes**

9 See, e.g. *R. v Burton Ex p. Young [1897] 2 Q.B. 468* at 471; *R. v Tempest (1902) 86 L.T. 585* at 587.
10 *Jackson v Thompsons Solicitors [2015] EWHC 218 (QB)* at [16].
11 *Bubbles & Wine Ltd v Lusha [2018] EWCA Civ 468* at [17].
12 *J. Goudkamp, "Facing up to actual bias" (2008) 27(1) C.J.Q. 32*.
13 *R. (on the application of Allen) v Parole Board of England and Wales [2015] EWHC 2069 (Admin)* at [43].
14 *Broadview Energy Developments Ltd v Secretary of State for Communities and Local Government [2015] EWHC 1743 (Admin)* at [47].
15 *Jackson v Thompsons Solicitors [2015] EWHC 218 (QB)* at [16].
16 *R. v Gough (Robert) [1993] A.C. 646 HL* at 672.
17 See 12-064.
18 *R. v Gough (Robert) [1993] A.C. 646 HL* at 667–668.
19 e.g. *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.2) [2000] 1 A.C. 119; [1999] 2 W.L.R. 272 HL*.
20 See e.g. the Australian case of *Webb v The Queen (1994) 181 C.L.R. 41*. See *Law v Chartered Institute of Patent Agents [1919] 2 Ch. 276*; *Doherty v McGlennan 1997 S.L.T. 444; 1996 S.C.C.R. 591*; *Bradford v McLeod 1986 S.L.T. 244; 1985 S.C.C.R. 379*; *Millar (David Cameron) v Dickson [2001] UKPC D4; 2001 S.L.T. 988* at 1002–1003. For further comparative perspectives, see 12-093–12-107.
21 See, e.g. *Piersack v Belgium (1983) 5 E.H.R.R. 169* at 179–180; *De Cubber v Belgium (1985) 7 E.H.R.R. 236* at 246; *Pullar v UK (1996) 22 E.H.R.R. 391* at 402–403; *Farhi v France (2009) 48 E.H.R.R. 34* at [23].
22 *Re Medicaments and Related Classes of Goods (No.2) [2001] 1 W.L.R. 700* at [67] and [87].
23 *Porter v Magill [2001] UKHL 67; [2002] 2 A.C. 357* at [103].
24 *Gillies v Secretary of State for Work and Pensions [2006] UKHL 2; [2006] 1 W.L.R. 781* at [6].
25 *R. (on the application of Short) v Police Misconduct Tribunal [2020] EWHC 385 (Admin)* at [74] (endorsing the reasoning of Mummery LJ in *AWG Group Ltd (formerly Anglian Water Plc) v Morrison [2006] EWCA Civ 6; [2006] 1 W.L.R. 1163* at [74]).
26 *Zuma's Choice Pet Products Ltd v Azumi Ltd [2017] EWCA Civ 2133* at [43].
27 *Almazeedi v Penner [2018] UKPC 3* at [28]. Note, however, that s.84 of the Criminal Justice and Courts Act 2015 (amending s.31 of the Senior Courts Act 1981) requires leave for judicial review and relief to be refused, in the absence of exceptional circumstances, if it is highly likely that the outcome would have been substantially similar: see 18-057.
28 *R. (on the application of Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472; (2012) 126 B.M.L.R. 134* at [129].
29 *Man O'War Station Ltd v Oakland City Council (No.1) [2002] UKPC 28* at [11]; *R. (on the application of Short) v Police Misconduct Tribunal [2020] EWHC 385 (Admin)* at [82].
30 *Bubbles & Wine Ltd v Lusha [2018] EWCA Civ 468* at [17].
31 *Resolution Chemicals Ltd v H Lundbeck A/S [2013] EWCA Civ 1515; [2014] 1 W.L.R. 1943* at [36].
32 *Helow v Secretary of State for the Home Department [2008] UKHL 62; [2008] 1 W.L.R. 2416* at [2].
33 *Harb v Aziz [2016] EWCA Civ 556* at [69].
34 *Gillies v Secretary of State for Work and Pensions [2006] UKHL 2; [2006] 1 W.L.R. 781* at [5] (citing with approval the dicta of Kirby J in *Johnson v Johnson (2000) 200 C.L.R. 488*).
35 *Helow v Secretary of State for the Home Department [2008] UKHL 62; [2008] 1 W.L.R. 2416* at [2].
36 *Gillies v Secretary of State for Work and Pensions [2006] UKHL 2; [2006] 1 W.L.R. 781* at [17].
37 e.g. *Virdi v Law Society [2010] EWCA Civ 100; [2010] 1 W.L.R. 2840*.
38 e.g. *Almazeedi v Penner [2018] UKPC 3*.
39 *Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117; (2005) 102(37) L.S.G. 31* at [27].
40 *Belize Bank Ltd v Attorney General of Belize [2011] UKPC 36* at [41].
41 *Helow v Secretary of State for the Home Department [2008] UKHL 62; [2008] 1 W.L.R. 2416* at [3].
42 *Harb v Aziz [2016] EWCA Civ 556* at [72].
43 *Virdi v Law Society [2010] EWCA Civ 100; [2010] 1 W.L.R. 2840*.
44 *Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117; (2005) 102(37) L.S.G. 31*.
45 *R. (on the application of DM Digital Television Ltd) v Office of Communications [2014] EWHC 961 (Admin)*.
46 *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] Q.B. 451 CA (Civ Div)* at [19]; *Helow v Secretary of State for the Home Department [2008] UKHL 62; [2008] 1 W.L.R. 2416* at [39].

 

47 *R. (on the application of Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472; (2012) 126 B.M.L.R. 134* at [127]–[132].

48 *R. (on the application of Sandhar) v Office of the Independent Adjudicator for Higher Education [2011] EWCA Civ 1614; [2012] E.L.R. 160* at [30]–[36].

49 *Almazeedi v Penner [2018] UKPC 3* at [32].

50 *Belize Bank Ltd v Attorney General of Belize [2011] UKPC 36*.

51 *R. (on the application of Good Law Project) v Minister for the Cabinet Office [2022] EWCA Civ 21; [2022] P.T.S.R. 933*.

52 *Dar Al Arkan Real Estate Development Co v Majid Al-Sayed Bader Hashim Refai [2014] EWHC 1055 (Comm)* at [37].

53 *Helow v Secretary of State for the Home Department [2008] UKHL 62; [2008] 1 W.L.R. 2416* at [1].

54 *Lanes Group Plc v Galliford Try Infrastructure Ltd (t/a Galliford Try Rail) [2011] EWCA Civ 1617; [2012] Bus. L.R. 1184* at [52].

55 *Belize Bank Ltd v Attorney General of Belize [2011] UKPC 36* at [38].

56 *A.A. Olowofoyeku, "Bias and the informed observer: a call for a return to Gough" (2009) 68 C.L.J. 388*; *S. Atrill, "Who is the 'Fair-Minded and Informed Observer'? Bias after Magill" [2003] P.L. 279*.

57 *M. Elliott, "The appearance of bias, the fair-minded and informed observer, and the 'ordinary person in Queen Square market'" (2012) 71 C.L.J. 247, 250*.

58 *R. v Gough [1993] A.C. 646 HL*.

59 See *R. (on the application of Ortona Ltd) v Secretary of State for Communities and Local Government [2009] EWCA Civ 863; [2010] 1 P. & C.R. 15* and *R. (on the application of CPRE (Somerset)) v South Somerset DC [2022] EWHC 2817 (Admin)* for examples of successful challenges.

60 *R. (on the application of the Good Law Project) v Minister for the Cabinet Office [2022] EWCA Civ 21; [2022] P.T.S.R. 933* at [66]–[69].

61 For an example of a case in which apparent bias arose in the creation of local planning policy see *Bovis Homes Ltd v New Forest DC [2002] EWHC 483 (Admin)*.

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# Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 asp 2 (Scottish Act)
## s. 1 Inquiries under this Act

Law In Force

**Version 1 of 1**

15 June 2017 - Present

**Subjects**
Administrative law

**Keywords**
Fatal accident inquiries; Interpretation; Procurators fiscal; Scotland; Sheriffs

**1 Inquiries under this Act**

(1) Where an inquiry is to be held into the death of a person in accordance with sections 2 to 7, the procurator fiscal must—

(a) investigate the circumstances of the death, and

(b) arrange for the inquiry to be held.

(2) An inquiry is to be conducted by a sheriff.

(3) The purpose of an inquiry is to—

(a) establish the circumstances of the death, and

(b) consider what steps (if any) might be taken to prevent other deaths in similar circumstances.

(4) But it is not the purpose of an inquiry to establish civil or criminal liability.

(5) In this Act, unless the context requires otherwise—

(a) *"inquiry"* means an inquiry held, or to be held, under this Act,

(b) references to a *"sheriff"* in relation to an inquiry are to a sheriff of the sheriffdom in which the inquiry is, or is to be, held.





 

# s. 19 The powers of the sheriff

Law In Force

**Version 1 of 1**

15 June 2017 - Present

**Subjects**
Administrative law

**Keywords**
Fatal accident inquiries; Jurisdiction; Scotland; Sheriffs

**19 The powers of the sheriff**

(1) The sheriff has all such powers in relation to inquiry proceedings as a sheriff, under the law of Scotland, inherently possesses for the purposes of the discharge of the sheriff's jurisdiction and competence and giving full effect to the sheriff's decisions in civil proceedings.

(2) Subsection (1) is subject to—

(a) the other provisions of this Act,

(b) provision made in an act of sederunt under section 36(1).





 

# s. 20 Evidence and witnesses

Law In Force

**Version 1 of 1**

15 June 2017 - Present

**Subjects**
Administrative law; Civil evidence

**Keywords**
Civil evidence; Fatal accident inquiries; Jurisdiction; Procurators fiscal; Scotland; Sheriffs; Witnesses

**20 Evidence and witnesses**

(1) At an inquiry—

(a) the procurator fiscal must bring forward evidence relating to the circumstances of the death to which the inquiry relates,

(b) a participant in the inquiry may bring forward such evidence.

(2) Without limiting subsection (1), the sheriff may require the procurator fiscal or a participant in the inquiry to bring forward evidence about any matter relating to the circumstances of the death.

(3) The rules of evidence which apply in relation to civil proceedings in the sheriff court (other than a simple procedure case) apply in relation to an inquiry.

(4) Subsection (3) is subject to provision made in an act of sederunt under section 36(1).

(5) The examination of a person at an inquiry does not prevent criminal proceedings being taken against the person.

(6) A person is not required at an inquiry to answer a question tending to show that the person is guilty of an offence.

(7) In subsection (3), *"simple procedure case"* has the same meaning as in section 72(9) of the Courts Reform (Scotland) Act 2014.





 

# Act of Sederunt (Fatal Accident Inquiry Rules) 2017/103 (Scottish SI)
# rule 2.2 The inquiry principles

Law In Force

**Version 1 of 1**

15 June 2017 - Present

**Subjects**
Administrative law

**2.2.— The inquiry principles**

(1) An inquiry is inquisitorial not adversarial.

(2) An inquiry is to be progressed expeditiously and efficiently, with as few delays as possible.

(3) Taking into account the nature and complexity of the inquiry—

(a) the procedure at an inquiry is to be as flexible as appropriate; and

(b) the manner in which information is presented is to be as efficient as possible.

(4) All participants are to be able to participate effectively in furthering the purpose of the inquiry.

*Part 2 OVERVIEW > rule 2.2 The inquiry principles*