

## Right to Fair Hearing Theory and Practice

By

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"This" said Dickens "is the Court of Chancery which gives to monied might the means abundantly of wearing out the right: which so exhausts finances, patience, courage, hope; so overthrows the brains and breaks the heart that there is not an honourable man among its practitioners, who would not give – who does not often give – the warning. Suffer any wrong that can be done you, rather than come here"

"The law is not about right or wrong but presentation" by a crazy, paranoid, peculiar personality and suffering from paranoid delusions ...to judge by the standards of pure reason is to apply an entirely inappropriate measure to the man " he won because he had money."

LJ Singleton "No one but a lunatic goes to law unless he is compelled to do so – unless there is at stake his life, or reputation, or his wealth, or his honour, or one of those important things for the sake of which a man must think it worth while to litigate"

The fundamental principal of English law clearly gives considerable weight that an appellant has the fundamental right to present his or her case in court and to have unfettered access to a fair hearing by an independent and impartial tribunal. This has been further re-enforced by ECHR 1950 (Article 6 and 13) and re-emphasised in HRA, 1998 (Arts 3, 6, 14 and 17).

The standards defined in European Convention of Human Rights and enshrined in the UK Law under HRA 1998 are minimum standard expected from a court within the EU.

In theory the Judiciary must and should be seen to be independent and impartial and approach each hearing with an open mind. The proper significance of the word judicial bias according to Lord Thankerton: "is to denote a departure from the standard even-handed justice which the law requires from those who occupy a quasi-judicial office, such as arbitrator. The reason for this clearly is that having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute".<sup>1</sup>

Definition of a fair and impartial tribunals or court is arrived at the various hearing on the matter (see Appendix: 1).

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<sup>1</sup> Franklin & Others v. Minister of Town and Country Planning [1948] A.C. 87; [1947] 2 All E.R. 285; [1947] L.J.R. 1440

In theory an applicant is afforded the right to review of the actions of a Public Authority under the Human Rights Act 1998 of the biased and inadequate nature of the decision making process of any Public Authority which includes the Courts.

What the Public is usually unaware of, is that the higher Courts often rely on advisory opinions written by case lawyers which guide the Judge in his Judgement and decision making process, making mockery of the Judicial oath to do justice by mercy and right and the independence of the Judiciary. In some cases, the Judgement is no different from the stated in the Bench memorandum (advisory opinion).

Examples ; In one case that the law centre were involved in Lord Justice Scott Baker stated in Paragraph 20 of his judgment 'The first point taken this morning by the applicant was this, and he had given no prior notice about it whatsoever. His point was, he asked me whether a bench memorandum had been prepared in this case. I told him that a bench memorandum had been prepared. The purpose of it is to assist the court in finding its way through the papers and identifying the issues and the material documents. The applicant applied for the bench memorandum to be disclosed and contends that he could not have a fair hearing without such disclosure. Judge: "I told him that it was not the practice of the court to disclose these memoranda, that as far as I am aware he has no right to disclosure. He (applicant) argues that he has, and I told him that I would not be prepared to explore that matter in any detail without hearing full argument. There simply is no opportunity for full argument today, quite apart from the fact that there is nobody here to put any contrary argument."

Despite reminding the Judge of a precedence set by ECtHR the Judge refused to disclose the advisory opinion. ECtHR case in question is Lobo Machado v. Portugal<sup>2</sup>. Mr Lobo Machado alleged a breach of Article 6 para. 1 (art 6-1) of the Convention, which provides:

"In the determination of his civil rights and obligations..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

He complained, firstly, that he had not been able, before the Supreme Court had given judgment, to obtain a copy of the Attorney-General's department's written opinion or, therefore, to reply to it...

The Court notes, firstly, that the dispute in question related to social rights and was between two clearly defined parties: the applicant, as plaintiff, and Petrogal as defendant. In that context the duty of the Attorney-General's department at the Supreme Court is mainly to assist the court and to help ensure that its case-law is consistent. Given that the rights were social in nature, the department's intervention in the proceedings was more particularly justified for the purposes of upholding the public

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<sup>2</sup> Lobo Machado v Portugal, ECHR report, 1996-1, 195.

interest.

Regard being had, therefore, to what was at stake for the applicant in the proceedings in the Supreme Court and to the nature of the Deputy Attorney-General's opinion, in which it was advocated that the appeal should be dismissed (see paragraph 14 above), the fact that it was impossible for Mr Lobo Machado to obtain a copy of it and reply to it before judgment was given infringed his right to adversarial proceedings. That right means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision.

In the case of *Nideröst-Huber v. Switzerland*<sup>3</sup>

**24. ....the concept of fair trial also implies in principle the right for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed**

In that case the Government argued that this rule applied to cases where,.... an authority had taken the initiative of submitting arguments or observations intended to advise or influence a court. ....The Court noted that **even though the observations in issue ran to only one page they nevertheless constituted a reasoned opinion on the merits of the appeal**, and explicitly called for it to be dismissed. As the Delegate of the Commission observed, **they were therefore manifestly aimed at influencing the Federal Court's decision.**

It is also **of little consequence that the case concerned civil litigation**, where the national authorities, as the Government rightly pointed out, enjoy greater latitude than in the criminal sphere ... According to the Lobo Machado and Vermeulen judgments, on this **point the requirements derived from the right to adversarial proceedings are the same in both civil and criminal cases**

**Nor is the position altered when, in the opinion of the courts concerned, the observations do not present any fact or argument which has not already appeared in the impugned decision. Only the parties to a dispute may properly decide whether this is the case; it is for them to say whether or not a document calls for their comments. What is particularly at stake here is litigants' confidence in the workings of justice, which is based on, inter alia, the knowledge that they have had the opportunity to express their views on every document in the file.**

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<sup>3</sup> 27th January 1997 Case Number 104/1995/610/698.

But the Courts themselves refused to obey the European Convention on Human Rights as is enshrined now in UK law through the Human Rights Act 1998.

In the case of *Magill v Porter*<sup>4</sup> states "it has now been held in *R v Kansal*<sup>5</sup> that it applies to acts of Courts and tribunals in the same way as it applies to acts of other public Authorities.

In *A (FC) and Others (FC) v Secretary of State for Home Dept [2004] UKHL 56*, 16<sup>th</sup> December 2004 in paragraph 41 that "the Court's role under the 1998 Act is as the guardian of human rights. It cannot abdicate this responsibility." And "But judges nowadays have no alternative but to apply the Human Rights Act 1998."

Further it was said in this case at paragraph 42 - "it is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right, has required courts (in section 2) to take account of relevant Strasbourg jurisprudence, has (in section 3) required courts, so far as possible to give effect to Convention rights and has conferred a right of appeal on derogation issues. The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is unaffected (section 4(6) and the remedy lies with the appropriate minister (section 10), who is answerable to Parliament. The 1998 Act gives the courts a very specific, wholly democratic mandate. As Professor Jowell has put it – the courts are charged by Parliament with delineating the boundaries of a rights-based democracy (Judicial Deference<sup>6</sup>).

In paragraph 80 of the same judgement it states that "the duty of the courts is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected."... "The Courts will intervene only when it is apparent that, in balancing the various considerations involved, the primary decision maker must have given insufficient weight to the human rights factor."

Bench memorandum was raised Before Lord Justice Wall on 23.03.2006 and LJ Thorpe on 20.09. On both occasions the Lord Justices stated that they had looked at the documents themselves and sounded mighty displeased at having to work for their money.

In fact when Lord Justice Wall was asked he shouted out 'it's none of your business.'

Lord Justice Thorpe stated that in all the thousands of cases he had dealt with, no lawyer had ever asked him that question before.

The Public could save a great deal of money by dispensing with the Judiciary

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<sup>4</sup> 2001 UKHL 67 paragraph 81

<sup>5</sup> (No 2) [2001] UKHL 62 that section 7(1)(b) of the 1998 Act

<sup>6</sup> servility, civility or institutional capacity [2003] PL 592, 597".

given that they have relinquished their independence.

### **Appdedix : 1**

In *Ocalan v Turkey* 2003 (Application No. 46221/99) the Court reiterated that under the principle of equality and arms one of the features of a fair trial is that "each party must be afforded a reasonable opportunity to present his case under conditions which do not place him under a disadvantage vis a vis his or her opponent."

A Judge cannot enter defence of fact for the other party. **Attention is brought to** *Langborger v Sweden*; **A judge has no locus standi to raise the defence of fact for a party!** In becoming the Defendant he ceases to be a judge! **In other words, he would be, in law, a biased judge.** See: *Langborger v. Sweden* (1990) 12 EHRR 416 at para 32.

A Judge must give notice to any party affected if his intention was to ask the party to litigation to decide whether submission or argument bore any merit or to act on an unpleaded point. See *De Geouffre de la pardelle v France* (A/253-B1992 unreported).

In the case *Mantovanelli v France* (1997) 24 EHRR 370 illustrating an important aspect of fairness for the purposes of article 6. The Court acknowledged (p 383, para [35]) that: "In the present case it was not disputed that the "purely judicial" proceedings had complied with the adversarial principle." It nonetheless held that there had been a breach of article 6, saying (para [36]) that: "while Mr and Mrs Mantovanelli could have made submissions to the Administrative Court on the content and findings of the report after receiving it, **the Court is not convinced that this afforded them a real opportunity to comment effectively on it.**"

Secondly, that where a jointly instructed or other sole expert's report, though not binding on the court is **"likely to have a preponderant influence on the assessment of the facts by [the] court"** **there may be a breach of article 6 if a litigant is denied the opportunity -- before the expert produces his report -** **- (a) to examine and comment on the documents being considered by the expert and (b) to cross-examine witnesses interviewed by the expert and on whose evidence the report is based -- in short to participate effectively in the process by which the report is produced.**

In *Mantovanelli* itself the Court held that the **earlier defects in the procedure were not cured by the litigants' ability to make "submissions to the [trial] court on the content and findings of the report after receiving it"** because that did not afford them **"a real opportunity to comment effectively on it"**. A fortiori, and perhaps hardly surprisingly, in *Buchberger v Austria* (2001) 20 December the Court held (paras [43]-[45], [51]) that there had been breaches of both article 6 and article 8 where, in what we would call public law proceedings,

reliance was placed on a report of the Youth Welfare Office which was never seen by the applicant mother. **It made no difference (para [48]) that the report related to a meeting with the applicant herself and that accordingly it could be said that she knew the facts mentioned in the report.**

In Re: O'Connell and others {CA 22<sup>nd</sup> June 2005} LJ Wall and Thorpe stated [para 28] that **'directions appointments are important occasions, at which important decisions are taken.'** **The same would also apply to interlocutory hearings.**

The Crown as *parens patriae* has the duty and obligation to protect those unable to look after themselves. So what the State is actually doing when it seeks to take a child into care or interfere in family life can usefully be analysed in terms of the State fulfilling the duties cast upon it by Article 8.

Since 2 October 2000 it has been the duty of every public authority (and for this purpose the local authority, CAFCASS and the courts are public authorities ... ) not to act in a way which is incompatible with the citizen's Convention rights. This has always been implicit since 1950 but enforcement and redress of the European Convention of Human Rights could only be enforced in Strasbourg.

It is the duty of the Crown as *parens patriae* to protect children against injury of whatever kind from whatever source": Re F, F v Lambeth London Borough Council at para [41].

T.P. AND K.M. v. THE UNITED KINGDOM 10 May 2001 ECtHR (Application no. 28945/95)

...the failure to disclose relevant documents to parents during the procedures instituted by the authorities in placing and maintaining a child in care meant that the decision-making process determining the custody and access arrangements did not afford the requisite protection of the parents' interests as safeguarded by Article 8 (see the McMichael v. the United Kingdom judgment of 24 February 1995, Series A no. 307-B, p. 57, § 92).

The Court reiterates that the seriousness of measures which separate parent and child requires that they should not last any longer than necessary for the pursuit of the child's rights and that the State should take measures to rehabilitate the child and parent, where possible (see the Hokkanen v. Finland judgment, cited above, p. 20, § 55 and the authorities cited there). During the separation, access between the applicants was severely restricted and there was no contact with the second applicant's wider family. Her grandmother died during this period. Notwithstanding therefore that the initial measure was justified, the Court has examined whether the procedures which followed were compatible with the requirements of Article 8 in ensuring that they protected the interests of the first applicant and second applicant in this respect.

The Court does however consider that it is essential that a parent be placed in a position where he or she may obtain access to information which is relied on by the authorities in taking measures of protective care. A parent may claim an interest in being informed of the nature and extent of the allegations of abuse made by his or her child. This is relevant not only to the parent's ability to put forward those matters militating in favour of his or her capability in providing the child with proper care and protection but also to enable the parent to understand and come to terms with traumatic events effecting the family as a whole.

In *Vernon v Bosley (No 2)* [1997] 3 WLR 683 at 698 E, LJ Stuart-Smith said "It is the duty of every litigant not to mislead the court or his opponent. He will obviously mislead the court if he gives evidence which he knows to be untrue. But he will also do so if, having led the court to believe a fact to be true, he fails to correct it when he discovers it to be false. This duty continues in my opinion until the judge has given judgement".

The Court, in the *Golder* case, held that the procedural guarantees laid down in Article 6 concerning fairness, publicity and expeditiousness, would be meaningless if there was not protection of the pre-condition for enjoyment of those guarantees, namely, access to court. It established this as an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlie much of the Convention (see the *Golder v. the United Kingdom* judgment of 21 February 1975, Series A no. 18, pp. 13-18, §§ 28-36).

Article 6 § 1 "may ... be relied on by anyone who considers that an interference with the exercise of one of his (civil) rights is unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 § 1" (see the *Le Compte, Van Leuven and De Meyere v. Belgium* judgment of 23 June 1981, Series A no. 43, § 44). Where there is a serious and genuine dispute as to the lawfulness of such an interference, going either to the very existence or the scope of the asserted civil right, Article 6 § 1 entitles the individual "to have this question of domestic law determined by a tribunal" (see the *Sporrong and Lönnroth v. Sweden* judgment of 23 September 1982, Series A no. 52, § 81; see also the *Tre Traktörer AB v. Sweden* judgment of 7 July 1989, Series A no. 159, § 40).

The right is not however absolute. It may be subject to legitimate restrictions, for example, statutory time-limits or prescription periods, security for costs orders, regulations concerning minors and persons of unsound mind (see, the *Stubbings and Others v. the United Kingdom* judgment of 22 October 1996, Reports 1996-IV, pp. 1502-3, §§ 51-52; the *Tolstoy Miloslavsky v. the United Kingdom* judgment of 13 July 1995, Series A no. 316-B, pp. 80-81, §§ 62-67; the *Golder* judgment, cited above, p. 19, § 39). Where the individual's access is limited

either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and in particular whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (*Ashingdane v. the United Kingdom* judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57). **If the restriction is compatible with these principles, no violation of Article 6 will arise.**

**In the CASE OF KYPRIANOU v. CYPRUS** (*Application no. 73797/01*) 15 December 2005

Para 118. The Court reiterates at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public ... **Article 6 requires a tribunal falling within its scope to be impartial. Impartiality normally denotes absence of prejudice or bias and its existence or otherwise can be tested in various ways.** The Court has thus distinguished between a subjective approach, that is endeavoring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect (see *Piersack v. Belgium*, judgment of 1 October 1982, Series A no. 53, § 30 and *Grievies v. the United Kingdom* [GC], no. 57067/00, § 69, ECHR 2003-XII). **As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance** (see *Castillo Algar v. Spain*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3116, § 45 and *Morel v. France*, no. 34130/96, § 42, ECHR 2000-VI).

When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. **What is decisive is whether the fear can be held to be objectively justified** (see *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996, *Reports* 1996-III, pp. 951-52, § 58, and *Wettstein v. Switzerland*, no. 33958/96, § 44, CEDH 2000-XII).

In applying the subjective test the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, p. 21, § 47). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill-will or has arranged to have a case assigned to himself for personal reasons (see *De Cubber*, cited above, § 25). **The principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long established in the case-law of the Court** (see, for example, the *Le Compte, Van Leuven and De Meyere v. Belgium* judgment cited above, p. 25, § 58). It reflects an important element of the rule of

law, **namely that the verdicts of a tribunal should be final and binding unless set aside by a superior court on the basis of irregularity or unfairness. This principle must apply equally to all forms of tribunal including juries** (see *Holm v. Sweden*, judgment of 25 November 1993, Series A no. 279-A, p. 14, § 30). Although in some cases, it may be difficult to procure evidence with which to rebut the presumption, **it must be remembered that the requirement of objective impartiality provides a further important guarantee** (see *Pullar v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, p. 793, § 32). In other words, the Court has recognised the difficulty of establishing a breach of Article 6 on account of subjective partiality and for this reason has in the vast majority of cases raising impartiality issues focused on the objective test. However, there is no watertight division between the two notions since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test).

The Court has held for instance that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty (see *Buscemi v. Italy*, no. 29569/95, § 67, ECHR 1999-VI). Thus, where a court president publicly used expressions which implied that he had already formed an unfavourable view of the applicant's case before presiding over the court that had to decide it, his statements were such as to justify objectively the accused's fears as to his impartiality (see *Buscemi v. Italy*, cited above, § 68). On the other hand, in another case, where a judge engaged in public criticism of the defence and publicly expressed surprise that the accused had pleaded not guilty, the Court approached the matter on the basis of the subjective test (*Lavents v. Latvia*, no. 58442/00, §§ 118 and 119, 28 November 2002).

An analysis of the Court's case-law discloses two possible situations in which the question of a lack of judicial impartiality arises. The first is functional in nature: where the judge's personal conduct is not at all impugned, but where for instance the exercise of different functions within the judicial process by the same person (see the *Piersack v. Belgium* case, cited above), or hierarchical or other links with another actor in the proceedings (see court martial cases, for example *Grieves v. the United Kingdom*, cited above, and *Miller and Others v. the United Kingdom*, nos. 45825/99, 45826/99 and 45827/99, 26 October 2004), objectively justify misgivings as to the impartiality of the tribunal, which thus fails to meet the Convention standard under the objective test (see paragraph 118 above). **The second is of a personal character and derives from the conduct of the judges in a given case. In terms of the objective test, such conduct may be sufficient to ground legitimate and objectively justified apprehensions as in the above-mentioned *Buscemi* case, but it may also be of such a nature as to raise an issue under the subjective test (for example the *Lavents* case,**

**cited above) and even disclose personal bias. In this context, therefore, whether a case falls to be dealt with under one test or the other, or both, will depend on the particular facts of the contested conduct.**

In the case of *Locabail (UK) properties Ltd v Bayfield Properties Ltd & Anor* [1999] EWCA Civ 3004 (17 November 1999)

In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention on Human Rights, is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.

Any judge (for convenience, we shall in this judgment use the term "judge" to embrace every judicial decision-maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgment given. Such objections and applications based on what, in the case law, is called "actual bias" are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

In practice, the most effective guarantee of the fundamental right recognised at the outset of this judgment is afforded not (for reasons already given) by the rules which provide for disqualification on grounds of actual bias, nor by those which provide for automatic disqualification, because automatic disqualification on grounds of personal interest is extremely rare and judges routinely take care to disqualify themselves, in advance of any hearing, in any case where a personal interest could be thought to arise. The most effective protection of the right is in practice afforded by a rule which provides for the disqualification of a judge, and the setting aside of a decision, if on examination of all the relevant circumstances the court concludes that there was a real danger (or possibility) of bias. Until 1993 there had been some divergence in the English authorities. Some had expressed the test in terms of a reasonable suspicion or apprehension of bias: see, for example, *Law v. Chartered Institute of Patent Agents* [1919] 2 Ch. 276 at

290; R. v. Sussex Justices, ex parte McCarthy [1924] 1 KB 256 at 259; Metropolitan Properties Co. (FGC) Ltd. v. Lannon [1969] 1 QB 577 at 599, 602, 606; R. v. Liverpool City Justices, ex parte Topping [1983] 1 WLR 119 at 123; R. v. Mulvihill [1990] 1 WLR 438 at 444. This test had found favour in Scotland (Bradford v. McLeod 1986 SLT 244), Australia (R. v. Watson, ex parte Armstrong (1976) 136 CLR 248) and South Africa (BTR Industries, above). Other cases had expressed the test in terms of a real danger or likelihood of bias: R. v. Rand (1866) LR 1 QB 230 at 233; R. v. Sunderland Justices [1901] 2 KB 357 at 371; R. v. Camborne Justices, ex parte Pearce [1955] 1 QB 41 at 51; R. v. Barnsley Licensing Justices, ex parte Barnsley and District Licensed Victuallers' Association [1960] 2 QB 167 at 186; R. v. Spencer [1987] AC 128. Whatever the merits of these competing tests, the law was settled in England and Wales by the House of Lords' decision in R. v. Gough, above. The gist of that decision is to be found in two brief extracts from the leading speech of Lord Goff. The first is at page 668 where he said:

"In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more rigorous criterion should be applied. Furthermore the test as so stated gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose."

The second passage is at page 670:

"In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in

the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ..."

This rule has been applied in a number of English cases and Privy Council appeals. It has not commanded universal approval elsewhere: Scotland (Doherty v. McGlennan 1997 SLT 444), Australia (Webb v. R., above) and South Africa (Moch v. Nedtravel (Pty) Ltd. 1996 (3) SA 1) have adhered to the reasonable suspicion or reasonable apprehension test, which may be more closely in harmony with the jurisprudence of the European Court of Human Rights (see, for example, Piersack v. Belgium (1982) 5 EHRR 169; De Cubber v. Belgium (1984) 7 EHRR 236; Hauschildt v. Denmark (1989) 12 EHRR 266; Langborger v. Sweden (1989) 12 EHRR 416). We need not debate whether the substance of the two tests is different, as suggested in Webb v. R., above. Nor need we consider whether application of the two tests would necessarily lead to the same outcome in all cases. For whatever the merit of the reasonable suspicion or apprehension test, the test of real danger or possibility has been laid down by the House of Lords and is binding on every subordinate court in England and Wales. This test appears to be reflected in section 24 of the Arbitration Act 1996 (see Laker Airways Inc. v. FLS Aerospace Limited [1999] 2 Lloyd's Rep. 45). In the overwhelming majority of cases we judge that application of the two tests would anyway lead to the same outcome. Provided that the court, personifying the reasonable man, takes an approach which is based on broad common sense, without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well-informed member of the public, there should be no risk that the courts will not ensure both that justice is done and that it is perceived by the public to be done.

**Neutral Citation Number: [2006] EWCA Civ 242 PETER SMITH and KVAERNER CEMENTATION FOUNDATIONS LTD- and -THE BAR COUNCIL**

In Para 20 it is stated *Metropolitan Properties v Lannon* [1969] 1 QB 577 at p. 600 Lord Denning stated a proposition which has never been challenged:

**"No man can be an advocate for or against a party in one proceeding, and at the same time sit as a judge** of that party in another proceeding. Everyone would agree that a judge, or a barrister or solicitor (when he sits ad hoc as a member of a tribunal) should not sit on a case to which a near relative or close friend is a party. So also a barrister or solicitor should not sit on a case to which one of his clients is a party. Nor on a case where he is already acting against one of the parties. Inevitably people would think he would be biased. " Paragraph 20.

In Paragraph 28: The court provided the following 'guidance' for a judge who becomes aware of circumstances which might give rise to an appearance of bias:

**"i) If there is any real as opposed to fanciful chance of objection being taken by that fair-minded spectator, the first step is to ascertain whether or not another judge is available to hear the matter. It is obviously better to transfer the matter**

**than risk a complaint of bias.** The judge should make every effort in the time available to clarify what his interest is which gives rise to this conflict so that the full facts can be placed before the parties.

ii) Some time should be taken to prepare whatever explanation is to be given to the parties and if one is really troubled perhaps even to make a note of what one will say.

iii) Because thoughts that the court may have been biased can become festering sores for the disappointed litigants, it is vital that the judge's explanation be mechanically recorded or carefully noted where that facility is not available. That will avoid that kind of controversy about what was or was not said which has bedevilled this case.

iv) A full explanation must be given to the parties. That explanation should detail exactly what matters are within the judge's knowledge which give rise to a possible conflict of interest. The judge must be punctilious in setting out all material matters known to him. Secondly, an explanation should be given as to why the problem had only arisen so late in the day. The parties deserve also to be told whether it would be possible to move the case to another judge that day.

v) The options open to the parties should be explained in detail. Those options are, of course, to consent to the judge hearing the matter, the consequence being that the parties will thereafter be likely to be held to have lost their right to object. The other option is to apply to the judge to recuse himself. The parties should be told it is their right to object, that the court will not take it amiss if the right is exercised and that the judge will decide having heard the submissions. They should be told what will happen next. If the court decides the case can proceed, it will proceed. If on the other hand the judge decides he will have to stand down, the parties should be told in advance of the likely dates on which the matter may be re-listed.

vi) The parties should always be told that time will be afforded to reflect before electing. That should be made clear even where both parties are represented. If there is a litigant in person the better practice may be to rise for five minutes. The litigant in person can be directed to the Citizen's Advice Bureau if that service is available and if he wishes to avail of it. If the litigant feels he needs more help, he can be directed to the chief clerk and/or the listing officer. Since this is a problem created by the court, the court has to do its best to assist in resolving it. "

The Court (ECtHR) further qualified the importance of an independent and impartial judiciary and now requires that judges do not have prejudicial connections to, or views about, any party to a dispute, either because of involvement in a previous stage of the dispute, or because of a personal

pecuniary connection to a party or issues involved in the dispute. [See *Daktaras v Lithuania* (42095/98 of 10 October 2000)]. The Court held that a tribunal must be impartial from an objective view point – that is, it must offer sufficient guarantees to exclude any legitimate doubt as to its impartiality. Judges must similarly be seen to be independent and impartial. [*Delcourt v Belgium* (1970), 1 EHRR 355, paragraph 31].

The standards contained in Article 6 of the Convention and their implications for judicial independence and impartiality, and appointment processes have been considered by the Court itself (ECtHR).

In *Bryan v United Kingdom* the Court set out several principles to be taken into account in establishing the independence of the judiciary, including the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures, and whether the body presents the appearance of independence [ *Bryan v United Kingdom* (1995) 21 EHRR 272, paragraph 37]. The Court distilled these elements from previous judgments in the *Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 EHRR 1, paragraphs 55 and 57; *Piersack v Belgium* (1983) 5 EHRR 169, paragraph 27; *Delcourt v. Belgium* (1970) 1 EHRR 355, paragraph 31.

ECtHR in *Werener v Poland* (Application no. 26760/95) 15 November 2001, recalls that there are two tests for assessing whether a tribunal is impartial within the meaning of Article 6 § 1: the first consists in seeking to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, among other authorities, the *Gautrin and Others v. France* judgment of 20 May 1998, Reports 1998-III, pp. 1030-1031, § 58). When applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts, which may raise doubts as to its impartiality.

In this respect even appearances may be of some importance. It follows that when it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (see the *Gautrin and Others* judgment cited above, loc. cit.; *Morel v. France*, no. 34130/96, §§ 40-42). In my case the court manager was clearly biased and acted without any authority. The judge in endorsing the decision of the Court Manager and refusing me the right to address that Court is a biased judge clearly failing the two tests identified by ECtHR.

In *P, C & S v UK* (56547/2000) the Court stressed the importance of ensuring the appearance of fair administration of justice and further stated that a party in civil proceedings must be able to participate effectively inter alia by being able to put

effective argument in support of his or her claim [see also *McVicar v UK* (2002, §§50 -51)].

### **Sommerfeld v Germany ECtHR 2003 reads:**

42. “it must determine whether, having regard to the particular circumstances of the case and notably the importance of the decisions to be taken, the applicant has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests (see the *W. v. the United Kingdom* judgment of 8 July 1987, Series A no. 121, p. 29, § 64; *Elsholz v. Germany* cited above, § 52; and *T.P. and K.M. v. the United Kingdom* cited above, § 72).

...Correct and complete information on the child’s relationship with the applicant as the parent seeking access to the child is an indispensable prerequisite for establishing a child’s true wishes and thereby striking a fair balance between the interests at stake. The Court further recalls that the Regional Court, which had full power to review all issues relating to the request for access, endorsed the District Court findings on the basis of the file.

In *A & D* and *B & E*, the Court established, requirements of Article 8 of the Human Rights Convention. It is in these terms : "Right to respect for private and family life:Every one has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others...The court may interfere with the rights of both parents and children where to do so is to protect the child. **"The parent with whom a child is living, whether mother or father, does not have greater rights than an absent parent who is entitled to be consulted on major decision in the child's life. But the court does attach importance to the particular bond between a child and the parent with whom they are living and will take care to safeguard and preserve it in the best interests of the child,** (paras. 339 354)".

In the case of *McMichael v. the United Kingdom* Judgement of 24 February 1995, series A No 307-B, p 80 **"Nevertheless, notwithstanding the special characteristics of the adjudication to be made, as a matter of general principle the right to a fair - adversarial - trial "means the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party....."**

In the case of *Margareta and Roger Andersson v. Sweden*. The case is numbered 61/1990/252/323. **"75.....A law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see, amongst many other authorities, the above-mentioned *Kruslin* judgment, Series A no. 176-A, pp. 20-23, paras. 27, 29 and 30)."**

The Common Law derived from the Magna Carta, the great charters of 1215 and 1225 which put the way in which the Crown was to administer our rights has not been repealed in full and therefore is still our law. Chapter 29 was quoted in part, in the US Guantanamo Bay case. This section is our Law and forms the base from which our Common law is derived. Halsbury Statutes Article 29 reads "No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we pass upon him, nor will we condemn him, but by the lawful judgement of his peers, or by the law of the land. **We will sell to no man, we will not deny or defer to any man either justice or right.**"

The Bill of Rights of 1688 is also still Law. In *Bowles v Bank Of England* 1912 Parker J Chancery division "The Bill of Rights still remains unrepealed, no practice or custom, however prolonged, or however acquiesced in or on the part of the subject, can be relied on by the Crown as justifying any infringement of it's provisions.'

### **Basic Principles on the Independence of the Judiciary**

Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985(Abridged);

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate

procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Abridged) Adopted by General Assembly resolution 40/34 of 29 November 1985, state:-B. Victims of Abuse of Power

"Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.

States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate.

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