REGULATORY BODIES, PROFESSIONAL RULES OF CONDUCT AND THE RULE AGAINST BIAS

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ABSTRACT

The Rule against Bias in English law was set out in the case of *Porter v Mcgill* (2002) *2 AC 357* by Lord Hope as resting on the "the question of whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". The difference exists between the actual bias and the ostensible bias and this is particularly poignant where professional are involved in judgment and in disciplinary proceedings. The courts will infer the bias if the objective reasonable man would have inferred bias while assuming to have access to all the facts that are capable of being known by members of the public generally, keeping in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge who is under scrutiny. The issue is the possibility of bias in those hearings where the member of the legal profession is challenging a decision made by the regulatory body that has dis qualified the member at a previous hearing. The test was established in *R (Kaur) v Institute of Legal Executives Appeal Tribunal and Another (2011) EWCA Civ 1168 where* Lord Rix ruled that "the perception of impartiality is to be based on that which is open to view and not on facts which would be hidden from an outside fair- minded observer". This means that bias can be inferred from the appearance of the judge and are not reliant on grounds such as the determination made on information which is not prima facie in the knowledge of the observer in the court.

Key words: Ostensible bias, Reasonable man test, Fair minded and informed observer, regulatory bodies.

INTRODUCTION

The essence of the rule against bias is part of the cardinal principles of law that the justice must be seen to be done.[1] This is a concept that there must be neither express nor implied bias by the judges in conducting the proceedings at court. If there is a finding that the judgment was impartial then the decision will be vitiated for bias. The notion is based on a hypothetical examination which the court undertakes to make a ruling on the merits of the each case and when the allegation of bias has arisen by the appellate function of legal professional bodies who also have disciplinary powers then the appearance of bias has to follow a more stricter test.

The term 'bias' must be seen to arise in different circumstances where it may manifest itself and affect a decision by the court. It can broadly be classified into six categories that may be grouped into personal bias; pecuniary bias; subject matter bias; departmental bias; preconceived bias; or obstinacy led bias. In the legal framework the test of evaluation is between actual bias and presumed bias which prescribes a different test in these two circumstances.

The rules of natural justice require that the judge has no interest in the outcome of the case and if there was a pecuniary or political interest then the law would automatically assume bias. The judge would be automatically eliminated or will have to recuse himself if it was proved that he shared a common objective with one of the parties in the trial.[2] This is a

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very strict test and a decision will be vitiated for actual bias if there is was an interest that leads to a judicial determination that is in favour of one of the parties.

The common law rule against bias that relies on judicial precedence has been supplemented by the European Human Rights Convention Article 6.1 as adopted in the Human Rights Act 1998 that stipulates a Right to a Fair Trial.[3] This principle is also enshrined in Articles 41 and 47 of the EU Charter of Fundamental Rights ("EUCFR") 2010. [4] The English courts adhere to these principles and the rights of the parties in a trial are respected by the rigorous enforcement of these provisions (UNODC, 2007).

The Judicial Code of Conduct 2013 has further strengthened the rule against bias by creating an effective umbrella for a more objective judiciary. [5] This became effective in March 2013 and it incorporates the six core principles known as the ' Bangalore Principles of Judicial Conduct 'recommended at the 59th session of the UN Human Rights Commission at Geneva in April 2003.[6] The preamble to the Code states that in the draft " weight has been given and acknowledgement is due to that statement of these principles " (Courts and Tribunals Judiciary, 2013).[7] They are as follows:

i. Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.
ii. Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.
iii. Integrity is essential to the proper discharge of the judicial office.
iv. Propriety, and the appearance of propriety, are essential to the performance of all of the activities of the judge.
v. Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.
vi. Competence and diligence are prerequisites to the due performance of judicial office.[8]

These salient rules are viewed as a progression from the pre existing principles of judicial rules of impartiality.[9] Rule 2.1 states "Judicial independence is sometimes mistakenly perceived as a privilege enjoyed by judges (Office on Drugs and Crime, 1992), whereas it is in fact a cornerstone of our system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law ". (Page 9)

It affirms the precautions the judge had to take in order to hear the case and to recuse himself if bias could be discerned by the reasonable man.[10] The important sections establish the importance of not presenting an appearance of bias and there is recourse to existing case law : (Rule 3.7) The question whether an appearance of bias or possible conflict of interest is sufficient to disqualify a Justice from taking part in a particular case is the subject of United Kingdom and Strasbourg jurisprudence which will guide the Justices in specific situations. (3.8).

The circumstances will vary infinitely and guidelines can do no more than seek to assist the individual judge in arriving to his judgment to be made, which involves, by virtue of the authorities, considering the perception the fair-minded and informed observer would have. However, the issue of apparent bias has arisen in recent times in the applications by members of professional bodies who have had been disciplined by their regulatory body or had their certificates annulled and are seeking the judicial review of the original decision that the ruling should be set aside for bias (United Nations Office on Drugs and Crime, 2006).

The assertion of bias has been particularly noticeable in those cases where the members of the legal profession have been on the receiving end of a biased decision. The principles that have been established are very important from the administrative law perspective because the *Wednesbury* rules are very strict and will not allow a challenge on the

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'finality' of the judgment not being in the correct exercise of power such as " ignoring the relevant facts or taking such irrelevant facts ", " fettering discretion", " bad faith" etc.

This paper is about the principles that establish the rule against apparent bias, and it takes into consideration the decisions arrived at by judges who have ruled upon the members of the legal profession. It is a question of how the judicial bias is discerned when the regulatory body has been involved in disciplinary proceedings against its own members. The issue has come to the surface when the applications for judicial have been made by claimants against a regulatory body which has also exercised an adjudicatory function. The grounds for raising the issue of bias needs to be set out in these cases in order to understand its scope where legal professionals are effected in these proceedings.

RULE AGAINST BIAS AND PRECEDENCE

The grounds of bias are further ground for challenging a decision and the principle in English law was established in *Porter v Magill* [11] when the House of Lords unanimously confirmed the decision of the District Auditor of misconduct in office of the Westminster City Council's former leader Dame Shirley Porter and her deputy David Weeks. This was for directing a policy of selling homes for electoral advantages and not as prescribed by the Housing Act 1985.

While pursuing his investigation the Auditor had applied the test laid down in *R v Gough* [12] which was based on Lord Goff's judgment that had established that the tribunal had to ascertain the test of bias by asking the question whether there was a real danger of bias in any particular case and it had to be assessed by the court in the light of all the evidence before it. This reasoning was based on the test of a reasonable suspicion of bias as the valid exercise of a determination of bias.

Lord Goff stated that the ' real danger of bias' was the criteria to ascertain if the decision could be vitiated for bias. His Lordship rejected the notion of an objective "*reasonable man, because the court in such cases 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 is not necessarily available to an observer in court at the relevant time*". [13] Thus, the real danger test became a standard test for judicial and administrative proceedings at all levels.

This test of apparent bias was affirmed at the Court of Appeal in *Locabail UK v Bayfield UK Ltd v Bayfield Properties Ltd and another* [14]where it was held that the apparent bias was established on an allegation of a real danger of bias in circumstances where there was a personal friendship or animosity between the judge and any party involved in the case (Court of Appeal, 2002).

Lord Bingham ruled that this will give rise to circumstances where bias can be inferred but "*no attention will be paid to any statement by the judge as to the impact of any knowledge on his or her mind*":[15] His Lordship held that there will be a real danger of bias where *"if for any other reason there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections"* then recusal would be necessary.

However, there was a period of time after which the danger would dissipate and this will depend on the interval between the events and the hearing or trial and it will then be a relevant factor. His Lordship ruled: *"The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."* [16]

The most effective protection afforded by this rule for the disqualification of a judge, and the setting aside of a decision, is if on examination of all the relevant circumstances the

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court concludes that there was a real danger (or possibility) of bias. This case established that if there was a trial that could arguably be said to give rise to a danger of bias for either party then it would generally be desirable that they should be disclosed to the parties in advance of the hearing. The judge must consider all the objections made and, if there are any grounds for doubt about the possibility of bias then he should exclude himself.

Lord Hope after evaluating all the variables in case before him reasoned that the auditor was not biased in acting in the judicial capacity in addition to his other functions. The proper test was not a real danger of bias but the ruling in *Re Medicaments and Related Goods* [17] which was a Court of Appeal judgment that enquired whether there were circumstances that could rise to a reasonable apprehension of bias, and that the onlooker who perceived that bias was an informed and fair minded observer who based his assumption on a real possibility of bias.

Lord Phillips Mr ruled

"*The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased*." [18]

This proposition sets out that the court should first assess all the relevant circumstances which would lead to a fair minded and informed observer to conclude that there was a real possibility of bias. The implication is that apparent bias would not vitiate a decision and that a tribunal's decision could still be valid even if there was an appearance of bias because the reasonable man could still be objectively impartial by the fact that he was well informed and fair minded.

Lord Hope's formulation in *Porter v McGill* was based on the *Medicaments* reasoning of when bias could arise and that the fair minded and informed observer differed from the causal observer because *" the reasonable observer took account of all the relevant circumstances in the case; where as a casual observer would be responding instinctively and without the knowledge of all the facts*" in the context in which the tribunal was assessing the case.[19]

The role of the court his Lordship stated was to "*first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility … that the tribunal was biased.* "[20]

This is a distinction that seems superficial on the surface because a casual observer might have formed a view of bias when the Auditor in his preliminary findings made a public statement on January 13, 1994 to the media about the misconduct in public office of Lady Porter and her colleagues. He ruled that the councillors were protected by Article 6.1 of the HRA and were entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. There was an original investigation by the auditor conducted some years ago which led to provisional findings which also had to be taken into consideration for any apparent bias by him to be established.

The fair-minded and informed observer would have considered the circumstances when these comments were made and may also have concluded that they would necessarily effect the entire investigation and conclusions of the investigation. [21]

There were two major changes in the reasoning of judges that transpired between the old test as set out in *R v Gough* and Lord Hope's exposition in *Porter v Magill,* which were that the matter is to be judged from the perspective of the fair-minded and informed observer, and the threshold is a 'real possibility' and not of the 'danger of bias'. This would be an enquiry based not on any extraneous considerations which may have influenced the judge but on the

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notion of what the court implied the reasonable man may have concluded is the evidence of bias.

However, the transfer from the real danger of bias test has at its core the need for the confidence which must be inspired by the courts and public perception of the possibility of unconscious bias. This is on the surface a highly subjective notion and the judges can interpret the abstract reasonable who is well informed and fair minded into a judicial fiat in order to arrive at their ruling. [22]

The courts have defined the characteristics of the fair minded and reasonable observer who could be a reasonable man in the circumstances of the case where there was an inference of bias (House of Lords, 2003). [23] The reasoning employed by the courts shows a lack of consistency in their judgments and the question posed is to what constitutes a 'fair minded' observer with definable characteristics to the reasonable man who is qualified to make the judgment that the tribunal was unbiased (House of Lords,2007).

In *Helow v Secretary of State for the Home Department* [24]*(2008) I WLR 2416* there was an immigration appeal by a Palestinian asylum seeker who discovered that the Court of Session judge, Lady Cosgove was a founder member of the International Association of Jewish Lawyers and Jurists (IAJLJ). The journal produced by this society had carried many anti Palestinian articles, and the appellant stated that a fair minded and informed observer would infer that there would be a real possibility of bias by the judge in her membership of this association. The House of Lords rejected this argument and in an application of the Porter v Magill ruling was set out as follows:

Lord hope ruled

The observer who is far mined is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is a measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. [25]

This is a subjective interpretation of what a reasonable man would infer who fair minded and informed observer is. The reasonable man was credited by his Lordship to be knowledgeable of the substance of the issues and to place their circumstances into “its overall social, political or geographical context".[26] The implication from this case raises the question which concerns the amount of knowledge is to be imputed to the observer and just how informed is he in reaching a decision when there is an inference of apparent bias. The test infers that in principle the observer should know only what is within “the knowledge of ordinary reasonably well informed members of the public”, but in this instance the court would be stretching the envelope in determining the integrity of the judge on the basis of the correctness of their judgment. [27]

ADMINISTRATIVE BODIES AND REGULATORY SANCTIONS

The associations which act as the professional bodies in regulating the codes of conduct of their members often have to decide the suitability of a person to be member of the profession. This can bring the rule against bias into focus because the regulatory bodies may exercise the function of conducting disciplinary hearings, or determining the qualifications and procedure for admission. The question of bias may arise if these bodies exercise their power both as adjudicatory and as the appellate bodies.

The issue that has come before the courts is if there is a basis for a challenge by way of judicial review for a decision to be vitiated for bias. This is a matter of law rather than fact

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and the subject matter jurisdiction has to be within the competence of the High Court. There are two main reasons upon which it will be invoked which are that the person or body is under a legal duty to act or make a decision in a certain way and is unlawfully refusing or failing to do so; or the decision or action that has been taken is 'beyond the powers' ie 'ultra vires' of the person or body responsible for its enforcement.

These grounds were established in the case of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*[28] which established the standard of unreasonableness of an administrative body's decisions with reference to their validity in law. The discretion that they possessed must be exercised reasonably and in accordance with the general description of how they had to be achieved.

Lord Greene held that this was to be effected by the decision maker "*directing himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority*". [29]

The unreasonableness that had be proven had to amount of irrationality. This was shown by "*taking into consideration extraneous matters". It had to be "so unreasonable that it might almost be described as being done in bad faith".*[30]

The grounds upon which the decision of an administrative body could be voided may were affirmed by the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service*[31] . Lord Diplock held that there were three categories of public law wrongs which are commonly used and these were: (a) Illegality; (b) Fairness; (c) Irrationality and proportionality". The most significant was irrationality that could be defined as "*So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*".[32]

These grounds of review are not distinct and there may be considerable overlap between them. Moreover, as a general principle of law, these grounds are not considered exhaustive. There are issues that will need consideration by the courts when considering proportionality which is a stricter ground of judicial review in English public law, than the *Wednesbury* grounds of review and, it merges elements of legal inquiry with questions that are deemed within the competence of the legislature and the judiciary.

The intensity is greater is likely to be greater when proportionality is the basis of invalidating a decision and is firmly part of the English law when balancing the need and whether the exercise of departmental power is compatible with the provisions of the statute. The issue was how on a proper legal analysis, should that power's proper exercise be regarded and in reference to proportionality whether the exercise of that administrative or regulatory power was balanced and reasonable in the circumstances.

Philip Sales, QC argues that the *Wednesbury* doctrine of unreasonableness should be replaced by the proportionality test. This, he states, will cause the public law to became "bifurcated", with rationality and proportionality review co-existing.[33] It is based on two principal arguments, firstly, it is concerned with the structure of proportionality when for instance, rights and competing public interests are weighed against one another (Law Quarterly Review, 2013).

" The idea of proportionality involves stipulating a relationship between different elements, in some kind of structured way; but the wider the field of application of the concept of proportionality, the greater the likelihood that acceptable, recognised, common standards to provide a determinate structure of analysis will be missing".

Sales's second point is that the constitutional legitimacy explicitly invokes the doctrine of *ultra vires* arguing that it is that doctrine which governs judicial review "*by*

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reference to statutes construed in accordance with a set of presumptions articulated by the judges yet having a form which it may reasonably be assumed Parliament would itself recognise and accept. Statute can override common law, so it is necessary to accommodate the development of the law in relation to judicial review of the exercise of statutory powers within the meaning to be given to statutes".

He interprets as too radical a reconceptualization of Parliament's intention to assume that it was willing when enacting the Human Rights Act 1998 to permit judicial review on the ground of proportionality. That, he argues, would involve a fundamental redistribution of judicial and administrative power:

This means that in cases where there is a regulatory breach alleged then it is the legality of the decision has to be challenged on the basis of irrationality. This is the prima facie ground under which forms the basis of adducing reasonableness as a basis for a challenge that the decision was so unreasonable that no reasonable body could have made it to arrive at the same conclusion. The issue is if this is a sufficient basis for a ruling by that body to be annulled if there was ground upon which it could set aside by the High Court.

Those organisations that have their own membership based on the qualification of the applicants have established codes of practice. They set out the regulations as to how disciplinary matters and appeals from decisions will be dealt with by that body. This also sets out the procedure of how the appeals process will be dealt with when it comes to adjudication from any complaints that arise in the course of the administrative body's functions.

In *Regina -v- Hull University Visitor, Ex parte Page; Regina -v- Lord President of the Privy Council ex Parte Page*[34] in which the House of Lords stated a general principle that the decisions of university Visitors are subject to judicial review in that they exercise a public function. The English law did not draw a distinction between jurisdictional errors of law and non-jurisdictional errors of law.

Lord Browne- Wilkinson evaluated the object and purpose of the judicial review as follows:

'The fundamental principle [of judicial review] is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In all case. This intervention.. is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a Wednesbury sense . . reasonably. If the decision-maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is Wednesbury unreasonable, he is acting ultra vires his powers and therefore unlawfully.' [35]

His Lordship deemed the visitors to a charitable institution were held to be outside the scope of judicial review because he stated: "*The Court had no jurisdiction either to say that he (the visitor) erred in his application of the general law since the general law is not applicable to the decision or to reach a contrary view as to the effect of the domestic law since the visitor is the sole judge of the domestic law*".

These limited grounds were set out in R *v Visitors to the Inns of Court, Ex Parte Calder* [36]which were if "the visitors had acted outside their jurisdiction or had abused their powers or acted in breach of the rules of natural justice".[37] The court is the appropriate body to review this case if the application of the general law or reached a contrary view as to the effect of the domestic law in his capacity as the interpreter of such law. There is a very clear distinction to be made here which is that the defence based upon the reasoning of Calder is that the ' finality ' may not be in accordance with the correct exercise of power. The exercise of power has to go beyond the Wednesbury rules of "ignoring the relevant facts or taking such irrelevant facts", "fettering discretion", "bad faith" etc.

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The assertion of bias has been particularly noticeable in those cases where the members of the legal profession have been on the receiving end of a biased decision. The principles that have been established are very important from the administrative law perspective because the *Wednesbury* rules are very strict and will not allow a challenge on the 'finality' of the judgment not being in the correct exercise of power such as " ignoring the relevant facts or taking such irrelevant facts ", " fettering discretion", " bad faith" etc.

SELF REGULATION AND ADJUDICATING PROCESS

The rule has effected the complaint of rule against bias in the conduct of professional bodies. This is of much importance because the professional bodies are the regulators of professions and they also have the power of discipline over their members. It then becomes significant to address the issue of apparent bias and how that can be inferred and there is case law that needs examination to determine if the test adopted in Porter v Mcgill is a satisfactory process for the inference of bias.

Lord Hope's formulation in *Porter v McGill* of when bias could arise and that the fair minded and informed observer differed from the causal observer was because " the reasonable observer took account of all the relevant circumstances in the case; where as a casual observer would be responding instinctively and without the knowledge of all the facts" in the context in which the tribunal was assessing the case. (At 96-98)

The fair-minded and informed observer would have considered the circumstances when these comments were made and may also have concluded that they would necessarily effect the entire investigation and conclusions of the investigation. The grounds of bias will be evaluated by taking account what procedural fairness required and the standard of review is one of correctness of the decision maker having acted fairly according to their approach in the case. This is a legal test and in *Gillies v Secretary of State for Work and Pensions* [38] Lord Hope stated "Whether a tribunal ... was acting in breach of the principles of natural justice is essentially a question of law".[39]

Further elucidation is provided by his Lordship on this as to determination:
"The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny ".[40]
The decision would be tainted for bias on the grounds and the defendant's submission that it has to be irrational has no bearing in this case.

In *R (Mahfouz) v GMC* [41]Carnwath LJ held "Where is it held that a lower tribunal has acted in breach of the rules of fairness or natural justice the Court is not confined to reviewing the reasoning of the tribunal on *Wednesbury* principles. It must make its own independent judgment ....Furthermore, the question whether there has been a breach of these principles is one of law not of fact". [42]

In assessing the breach of the procedural rights by the way of judicial review there are matters that need to be taken into consideration the Human Rights Act 1998 which entitles me to protections afforded to the Article 6(1), which states "that in the determination of his civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The rights to a fair hearing, to a public hearing and to a hearing within a reasonable time are separate and distinct rights from the right to a hearing before an independent and impartial tribunal established by law. (Lord Hope in Porter at 87).

The implication is that that if the allegation is as in my case that there was not a fair hearing it cannot be met by the defence that there was a hearing it was that it was satisfactory

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in all other respects. The most important factor is that it should have been carried out by an independent or impartial tribunal and that means that it should not have led to an appearance of bias. The European Court of Human Rights has already pronounced on the close relationship of independence and impartiality. In *Findlay v United Kingdom* [43]the Court ruled:

"*The Court recalls that in order to establish whether a tribunal can be considered as 'independent', regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.*

As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.

The concepts of independence and objective impartiality are closely linked…" [44]

The test set down is that the process must be 'truly independent' and free from 'actual bias' ,and while the evidence is onerous for this to be established there must not give an appearance of bias in the objective sense to not attain these essential qualities. The Visitors to the regulatory bodies such as the Inns of Court are structured in such a way that there is an inference of bias because of their close connection to the regulatory body such as the Bar Standards Board. This makes it possible that their conclusions are tainted with bias and it was found to be in my case.

The test for determination whether there was bias is based on several factors and one of them was stated by Lord Bingham in *Locabail UK Ltd v Bayfield Properties* [45]in the following passage:

"…… for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him…"[46] *(At 25)*

The -house lawyer may frequently be required to "clerk" a quasi-judicial body such as a local authority licensing committee and included in this task will be drafting the findings and decision once these are reached. They are not those of the lawyer but of the determining body which has regulatory power.

The issue is could the public body be acting unfairly and unlawfully under these circumstances. This came up for consideration in the Court of Appeal in *Virdi v Law Society of England and Wales and the Solicitors Disciplinary Tribunal* [47]where Mr Virdi, was challenging the decision of the Solicitors Disciplinary Tribunal (the Tribunal) which had found him guilty of professional misconduct and had suspended him from practice for three years. The appellant had discovered from the Tribunal website that that the panel staff were in fact Law Society employees and the clerk and deputy clerks are formally seconded to the Tribunal by the Law Society.

Mr Virdi claimed that it was ultra vires for the clerk to retire with the Tribunal or to assist in drafting its findings upon reaching their judgment. He also argued that the role of the clerk led to the appearance of bias and infringed his right to a fair trial under Art 6 of the European Convention on Human Rights. This was rejected by the Court because in the disclosure of circumstances before it the court found a lawful decision with no bias in the conduct of the tribunal. The court elaborated on the definition of the "fair-minded and informed observer" .

Stanley Burnton LJ in giving the leading judgment (with which Jacob and Lloyd LJJ agreed) held that it had never been implied that the retirement of a clerk or legal adviser with a bench of magistrates was ultra vires or prohibited except when it gave an appearance of bias or unfairness in the particular circumstances as in R (McCarthy) v Sussex Justices

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[1924] 1 KB 256. In that case the clerk conferring with the justices had been a member of the firm of solicitors acting for the person seeking damages from the defendant in relation to the traffic accident that was the subject of the trial. (At 33)

The Law Society in this case had not acted ultra vires, because the court referred to a principle that is applied in administrative law enshrined in s 111 of the 1972 Act. This was ruled by Lord Selborne in *Attorney-General v Great Eastern Railway Company* [48]as a substantive statutory power that also authorises "whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised". This is pending any express prohibition or judicial construction of ultra vires. In the context of the Tribunal, s 46(5A) of the Solicitors Act 1974 provides expressly what had previously been provided implicitly ie powers incidental to the exercise of the Tribunal's jurisdiction.

Burnton LJ held that that the procedure of the Tribunal included withdrawing to consider its decision in private, the clerk's inclusion and the provision of formal written findings was as much part of its procedure as the trial process itself and the determination by the Tribunal. This vested the forum with an implied power as necessary "to permit or to invite their clerk to retire with them and to assist them in the manner she did in this case". [49]

The appellant had also raised the issue of the fair and informed observer in possession of all the facts when deciding whether there appears to be a real risk of bias or whether he is restricted to publicly available information. The basis of the challenge that Tribunal staff including clerks are Law Society employees was discovered only on the internet did not contain any irregularity here. [50]The relevance of the decision in re *Medicaments and Related Classes of Goods (No 2)*[51] was the material facts are not limited to those apparent to the application. They are rather those "ascertained upon investigation by the court" which requires the court firstly to ascertain all the circumstances which have a bearing on the suggestion of bias.

Burnton LJ referred to the observations of Lord Hope in Helow v Home Secretary [2008] UKHL 62 who had described the fair minded and informed observer as "a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively". [52]His Lordship in finding that the Tribunal was impartial and independent and had no apparent bias referred to the constitution of the SRA as not a separate legal body, but as having an effective independence" and ". . .is not in any relevant sense an agent of the Law Society".

The Court in this case rejected the contention that there was any appearance of bias or partiality on the part of the Tribunal and it acknowledged the pragmatic decision-making function in judicial or quasi-judicial bodies such as local authority licensing committees. There was no constitutional separation between clerk and employer authority and the principles that applied were those who are legally competent to take the decision have the right to make the ruling. The principle existed that unless there is evident unfairness or bias then there should be no grounds as to why such advisers could not provide reasonable administrative and professional assistance to the determining body within the legal framework of the body.

In another case involving the determination of ostensible bias of a regulatory body in R *(Kaur) v Institute of Legal Executives Appeal Tribunal and another* [53] the disciplinary findings against the claimant were quashed on the basis that the composition of both the internal disciplinary tribunal and subsequent appeal tribunal gave rise to apparent bias and did not correspond to the requirements of fair process. The facts arose from Mrs Kaur a student member of the Institute of Legal Executives (ILEX) who in 2007 along with others, was charged with various disciplinary offences alleging that she had cheated in recent examinations. These were heard before the ILEX Disciplinary Tribunal and the case was found proven in respect of one examination.

Citation Information: Akhtar Z., (2024). Regulatory bodies, professional rules of conduct and the rule against bias. *Journal of Legal, Ethical and Regulatory Issues*, 27(S2), 1-15.

Mrs Kaur appealed the decision to ILEX's Appeal Tribunal (IAT) but it was rejected, and then she applied for a judicial review. Her claim was made on the grounds that the presence of a Council member and a director of ILEX on the Disciplinary Tribunal, and the Vice-President of ILEX on the Appeal Tribunal, infringed the rule against natural justice that no one may be a judge in his own cause and/or of apparent bias.

The governing code of ILEX states that it is the professional body representing legal executives and it is governed by elected representatives known as the Council. The Council is presided over by a President and Vice President and the members are automatically made directors of the Institute (which is a limited company). In 2008, ILEX formed a subsidiary company, ILEX Professional Standards Limited ("IPSL"), to deal with its professional regulatory responsibilities, with the intention of putting the investigatory and prosecutorial branches of regulation in a body separate from ILEX itself. The IPSL has its own Board of Directors and Council members of ILEX cannot be present on its board of members.

In the hearing against the allegation of cheating, the disciplinary tribunal included a Council member (and Director of ILEX) on its panel, and the IAT included the Vice President of ILEX. The Court of Appeal with Lord Justice Rix giving the judgment for the Court concluded that whilst there was no inference that either the Council member of the Disciplinary Tribunal or the Vice-President sitting on the Appeal Tribunal were proactive in the prosecution of Mrs Kaur, they were actively involved in the total governance of ILEX, and were responsible for its regulatory policies. (at 35)

His Lordship invoked *Re P (A Barrister)*[54], where the issue was whether a lay member of the Visitors to the Inns of Court could participate as a member of a disciplinary tribunal when she was a member, albeit as a lay representative, of the Professional Conduct and Complaints Committee ("PCCC"),

Which was the body responsible for making the decision as to whether to prosecute a member of the Bar against whom a complaint had been made. It was held in that case that she would be a judge in her own cause and should have recused herself, notwithstanding that she had had no prior involvement in her capacity as a member of the PCCC.[55]

The implication was that in ILEX s determination their representatives membership of both these two tribunals breached against the rule against bias. The incorporation of IPSL was to make it an agent of ILEX in prosecuting disciplinary matters and the legal separation of the two bodies did not sever the role of ILEX from its status as a professional regulatory body (House of Lords, 2000). It was ruled that at no time was there any suggestion of actual bias and the allegation was that the decisions by ILEX should be quashed on the basis that the composition of the two panels gave rise to apparent bias.

Lord Justice Rix, the Lord Justice of Appeal stated that it may now be possible to see the doctrine of automatic disqualification as determined in *R v Bow Street Metropolitan Stipendiary Magistrates exp Pinochet Ugarte* (House of Lords,2006) [56]*(No 2)* and the concept doctrine of apparent bias as a single over-arching requirement and therefore it was not necessary to choose between the two doctrines in this case. Applying either test the vice-president of ILEX was disqualified from sitting on either a disciplinary or appeal tribunal by her leading role in ILEX and because of her inevitable interest in ILEX's policy of disciplinary regulation.[57]

Lord Rix highlighted that careful consideration would be needed to decide whether the same conclusion would apply to all council members and directors of ILEX, however, he was of the opinion that it would. Ultimately, the argument submitted on behalf of ILEX, that the regulator is '*as much interested in an acquittal, if there was no cheating, as in a conviction',* gave way to the importance of appearances. His Lordship ruled that "the perception of impartiality is to be based on that which is open to view and not on facts which would be hidden from an outside fair- minded observer". (at 107)

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This judgment implies that procedures adopted by ILEX had the approval of the then Master of the Rolls when introduced and that in the interim, however, many of the professions' regulators had moved to a complete insulation of their regulatory functions from their representative duties. The ILEX procedures have since been amended and while ILEX is not an HEI, it has to abide by the same standards of fairness (OIA, 2011). [58]The HEIs,while not whilst not professional regulators take responsibility for fitness to practice issues, and have a responsibility for the maintenance of academic standards.

The case demonstrates the need for maintaining the confidence of both the parties and the public in the integrity of the judicial process by ensuring the proper separation of the disciplinary panel from those concerned with the overall governance of the organisation. The importance of both the Right to a hearing under Art.6, the Judicial Code of Conduct and the Porter v McGill rule against bias are of significance in maintaining the court free from apparent bias which the hypothetical objective and reasonable observer informed of all the facts of the bias would consider free from the appearance of bias.

CONCLUSION

The rule against bias is based on the natural justice principles that stipulates that there is a right to a fair hearing and that no man must be a judge in his own cause. The test for absolute bias has been fixed in English law and the courts have several indicators that will lead to the implication that the case will be prejudiced. In the instance of apparent bias the test is more difficult to interpret because it has to assume that that there was an inference of bias.

The inference that was appearance of bias has led to the inference based on case law and in English jurisprudence this is about the abstract test devised by Lord Hope in Porter v McGill. This is based on the court's reasoning that it if a reasonable and objective observer who has full knowledge of the facts would have deemed that bias would arise considering all the facts and circumstances in the case then there a likelihood or a possibility of bias. The real danger of bias that was built into the framework in the test adopted by Lord Hope in R v Goff has been jettisoned in the hope of achieving uniformity and simplification.

However, as the ruling in *Helow v Secretary of the Home Department* shows it is a highly subjective test and it places the court in the shoes of the reasonable man. The issue is that of interpretation and the court has a discretion how it reveals the perceptions of the reasonable man. The indication is that the fair-minded and informed observer is not unduly sensitive or suspicious.

The impact on the rule against bias on the regulatory bodies who have powers of regulation and discipline is important because they are public bodies who exercise jurisdiction and they are promulgated by statute. This gives the right to the claimant who has alleged bias to raise judicial review and this has to be framed on the basis that the rule against bias has been infringed as set out in precedence and that has also by implication breached the Art 6 of the HRA.

The right applies to any process which is determinative of a person's civil rights, which include a person's right to practice his chosen profession. It has, therefore, been considered to particularly relevant to proceedings under which students' fitness to practice as lawyers, doctors, teachers etc. is called into doubt and determined by a disciplinary hearing. The tribunal needs to reflects the principles of objectivity and fairness, which Higher Educational Institutions serving as regulatory bodies are obliged in any event to comply with as a matter of public and contract law.

The regulatory bodies also have to facilitate the right to a fair hearing by the right to legal representation in fitness to practice hearings, which does not apply in ordinary internal

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disciplinary proceedings. However, the implication of any post-HRA regime will be that HEIs would no longer be obliged to permit students to be represented by lawyers. It will be up to the regulatory body/ HEIs to permit legal representation in the absence of any obligation to do so.

The impact of the rule against bias against the changing legal environment has to be considered as necessary to maintain by the rule against bias. It is ingrained in the case law and will be invoked by judicial review whenever there is threat that a judgment has been undermined by the conduct of the proceedings of the tribunal. The issues need to be argued on the basis of the principles of the cases and by paying close attention to statutory framework of the regulatory body.

END NOTE

[1]In R v Sussex Justices Ex parte McCarthy (1924) KBD Lord Hewitt ruled "it […] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.**"** (Page 259)

[2]This is an affirmation of the ruling in R v Bow Street Metropolitan Stipendiary Magistrates exp Pinochet Ugarte (No 2) 2000 1 AC 119 where the House of Lords set aside its previous order that had confirmed the Appeal Court ruling that General Pinochet could be extradited. This was because Lord Hoffman who was on the Appellate Committee which made that earlier order was also on the governing committee of a body that was affiliated to Amnesty International.

[3]Article 6.1 states as follows : .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.

[4]Article 41 states there is a Right to Good Administration which prescribes: Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union; Article 47 states there is a Right to an effective remedy and a fair trial. In CJEU, Case C-355/10, European Parliament v. Council of EU, 5.9.2012 the court established a link between the two articles by stating that as far as reasons given by administration are necessary for the person concerned to decide whether to challenge the decision before the relevant courts.

[5]http:www.judiciary.gov.uk/Resources/JCO/.../Judicial_Conduct_2013

[6]The UNHRC Commission unanimously adopted resolution 2003/43 on 29 April 2003 which noted the Bangalore Principles of Judicial Conduct and brought those Principles "to the attention of Member States, the relevant United Nations organs and intergovernmental and non- governmental organizations for their consideration".*www.unodc.org/documents/.../publications_unodc_commentary-e.pdf*

[7]Para 1.5 page 8 Guide to the Judicial Code of Conduct www.judiciary.gov.uk/wp.content/upload/-/judicial_conduct_2013.pdf

[8]Page 7

[9]The 50 th Session of the UN Commission on Crime Prevention and Criminal Justice met in Vienna and unanimously recommended to the Economic and Social Research Council the adoption of the draft resolution entitled ' Strengthening basic principles basic principles of judicial conduct ' . It emphasised that these principles represent " a further development and are complimentary to the Basic Principles in the Independence of the Judiciary ". Commentary on the Bangalore Principles of Judicial Conduct. UN Office on Drugs and Crime. On 27 July 2006 the UN Economic and Social Council adopted resolution 2006/23, entitled "Strengthening basic principles of judicial conduct", without a vote. UN Rule of Law. Commentary on the Bangalore Principles of Judicial Conduct 2007. http://www.unrol.org/docaspx?d=2329

[10]An important recommendations on the Impartiality section is contained on page 10 where R 3.3 states "A judge must forego any kind of political activity and on appointment sever all ties with political parties"; that " may diminish his authority as a judge and create in subsequent cases a perception of bias". This is an affirmation of the ruling in **R v Bow Street Metropolitan Stipendiary Magistrates exp Pinochet Ugarte (No 2) 2000 1 AC 119** where the House of Lords set aside its previous order that had confirmed the Appeal Court ruling that General Pinochet could be extradited. This was because Lord Hoffman who was on the Appellate Committee which made that earlier order was also on the governing committee of a body that was affiliated to Amnesty International.

[11][2002] 2 AC 357

[12][1993] AC 646

[13]Page 670

[14](1999) 2 All ER

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[15]Para 19
[16]Para 25
[17](No 2) (2001) WLR 700
[18]Para 85
[19]Para 96-98
[20]Para 102 and 103
[21]In *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, [2006] 1 WLR 781, at 787 it was held by the House of Lords that: ' The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny.'
[22]In *Taylor & Anor v Lawrence & Anor [2002] EWCA Civ 90 (4th February, 2002*) where the trial judge had at the outset informed the court when the defendants were not present that he had been a client of the claimant's solicitors but had not instructed them for many years. The day before he was to give judgement, the judge and his wife used the same solicitors to amend their wills. The case was decided in the claimant's favour but the above matter was not disclosed until after the defendant had brought an unsuccessful appeal. It then emerged that the judge had not paid for these legal services and as a result the defendants applied for permission to appeal to the Court of Appeal. The ruling by the Appeal Court was implied that it was *"unthinkable"* that apparent bias could arise from the facts that the judge had instructed (and was still instructing) a firm of solicitors representing one of the parties in relation to the preparation of his will and codicil. Para [61]-[63 The implication from this case raises the question which concerns the amount of knowledge is to be imputed to the observer and just how informed is he in reaching a decision if there was apparent bias ?
[23]In *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 In Lord Steyn's approved Kirby J's comment in *Johnson v Johnson* (2000) 201 CLR 488, 509 that 'a reasonable member of the public is neither complacent nor unduly sensitive or suspicious'. In *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, [2006] 1 WLR 781, it was held by the House of Lords that 'fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny.' at 787 In *Brunei Darussalam v Prince Jefri Bolkiah* [2007] UKPC 62) the ruling suggests (perhaps rather unrealistically) that the observer should be aware of the nature of the judicial oath to do right to all manner of people without fear or favour, affection or ill-will.
[24](2008) I WLR 2416
[25]Para 2
[26] Para 3
[27]Medicaments , Para 65
[28]*[1948] 1 KB 223*
[29]At 229
[30]Ibid
[31](1983**)** UKHL 6
[32]At 410
[33]Philip Sales "Rationality, Proportionality and the Development of the Law Quarterly Review (2013) 129 LQR 223, p 223 -242
[34]*[1991] 1 WLR 1277*
[35]Page 701-702
[36](1993) 3 WLR 287
[37]Page 1283-1284
[38]*[2006] UKHL 2, [2006] 1 WLR 781*
[39]At 6
[40]At 17
[41]*(2004) EWCA Civ 233*
[42]At 19
[43]*(1997) 24 EHRR 221*
[44]At 73
[45]*(2000) 1RLR 96*
[46]At 25
[47]*[2010] EWCA Civ 100*
[48](1880) 5 App. Cas. 473
[49]At 34
[50]The Law Society, in 2006 the Society created the body now known as the Solicitors Regulation Authority (SRA). The Tribunal is constituted under s 46 of the Solicitors Act 1974 (the 1974 Act), s 5A of which provides

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that the "Tribunal may do anything calculated to facilitate, or incidental or conducive to, the carrying out of any of its functions". Section 46(9) (b) of the 1974 Act (among other things) enables the Tribunal to make rules "about the procedure and practice to be followed in relation to the making, hearing and determination of applications and complaints. The Solicitors (Disciplinary Proceedings) Rules 2007 provided in r 3(7) for a Tribunal clerk to be a solicitor or barrister of not less than 10 years' standing and in r 3(11) and for the clerk's duties in effect to include: "advising the Tribunal on matters of law or procedure as may be necessary or expedient' and also 'drawing orders and findings...".

[51][2001] 1 WLR 700

[52]At 39

[53]*[2011] EWCA Civ 1168)*

[54][2005] 1 WLR 3019

[55]At 45

[56]*(No 2) 2000 1 AC 119*

[57]At 49

[58]In *R (Sandhar) -v- Office of the Independent Adjudicator for Higher Education* [2011] EWCA Civ 1614, the Court of Appeal has rejected a claim that the funding of the OIA by way of subscription by HEIs created an appearance of bias. This decision deals specifically to the role and establishment of the OIA, and does not affect the issues that arise in regulatory bodies which also act as disciplinary tribunals.

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