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The Rule against Bias: The impact of the Judicial Code of Conduct in England and the need for impartiality in European Court rulings

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Abstract: The UK Guide to Judicial Conduct issued in March 2013 sets out the ground rules for judges to refrain from any activity that may give rise to bias. These include specific guidelines that are set out to preclude such behaviour which may lead to the perception of bias by one of the parties to the case.[1] It sets out the six principles known as the Bangalore Principles of Judicial Conduct endorsed at the 59th session of the UN Human Rights Commission at Geneva in April 2003 into its new framework of rules. In 2014 there have several cases reported where the Court of Appeal has had to address the question of apparent bias from judges purporting to exercise their case management directions in a 'robust' manner. The Court has had to warn against judges exceeding their remit while accepting that they there had to a fine line drawn in exercising the rule against bias. This paper is an analysis of the English rule against bias which is based on precedent established by case law. The European Courts judgments have to be noted to determine how the European Treaties have dealt with the right to a fair trial. The argument is for the legal system to maintain a clear separation of powers to preclude the inference of bias from arising when the court is dealing with a legal matter.

[1] http:www.judiciary.gov.uk/Resources/JCO/.../Judicial_Conduct_2013Page10-11

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Introduction

The rule against bias has been subject to reasoning by the courts who have formulated a theory when its appearance can be arise. This prevails in the estimation of the reasonable man who is fair minded and well informed as against a casual observer who is not aware of all the circumstances of the case. It is a rule that has been set out in case law, and the judges authority is regulated by the UK Judicial Code of Conduct. This has to be set in the context of the exercise of discretion by the judge in their case management functions and if that gives any hint of bias in order to ensure the Right to a Fair trial.

This requirement of impartiality of the court is complimentary to the European Convention of Human Rights Convention (ECHR)Article 6.1 that stipulates a Right to a Fair Trial.[2] The principle is also enshrined in Articles 41 and 47 of the EU Charter of Fundamental Rights (EUCFR) 2010. The English courts generally rule in accordance with the ECHR rulings to preclude bias and retain the principle of impartiality.

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 prescribe a different test in these two circumstances.

The judge would be automatically eliminated, or will have to recuse himself if it was proved that he shared a common interest with one of the parties. The rules of natural justice

[2] 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.

require that the judge has no interest in the outcome of the case. If there was a pecuniary interest then the law would automatically assume bias. This is a very strict test and a decision will be vitiated for actual bias if there is an economic benefit that will be derived from a judicial determination that is in favour of one of the parties.

There is a more complex examination when there is apparent bias which arises because of the manner or form of the judges ruling in the decision. It could also be inferred from the contacts or allegiances of the judge. This gives rise to a more abstract reasoning and is based on a hypothetical test which the court determine if the allegation of bias can be sustained. In English law the determination of its likelihood has moved from there being a real danger of bias to when a reasonable man who is informed and fair minded considers it to bias.

This paper is an evaluation of the discretion of the judges in the light of the UK Judicial Code of Conduct 2013. It is a determination of how the rule against bias is effected in the new framework to preclude bias. This is a question that is necessary in the aftermath of judgments in civil trials where the judges have been deemed to be excessively robust. The need for judicial impartiality is explored in the context of the laws and European Court judgments that has deliberated on the trial procedures to decide if it conforms to the Human Rights Convention.

1/***Inference of apparent bias***

The test for apparent bias in English law was set out in Porter v Magill [2002] 2 AC 357 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.

Lord Hope dealt with the issues of bias by the auditor. 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.

While pursuing his investigation the Auditor had applied the test laid down in R v Gough (1993) AC 646 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 test.

Lord Goff's set out the real danger of bias as 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*". [3] 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 (1999) 2 All ER 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.

Lord Bingham held 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*":[4] 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*

[3] Page 670
[4] Para 19

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." [5]

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 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.

In *Porter v Magill* Lord Hope, after evaluating all the variables in the judicial formulations of bias, 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 (No 2) (2001) WLR 700 . This 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*." [6]

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

[5] Para 25
[6] Para 85

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.[7]

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. 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. [8]

There were two major changes in the reasoning of judges that took place 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 notion of what the court implied the reasonable may have concluded is the evidence of bias.

[7] Paras 96-98.

[8] 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:
'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.'

2/Judicial Code of Conduct

The rule against bias has been augmented by the Judicial Code of Conduct that became effective in March 2013. [9] It sets out 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. These 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.[10]

The guide goes on to state in its preamble that "Judicial independence is sometimes mistakenly perceived as a privilege enjoyed by judges, 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 ".[11] It confirms all the precautions that were present before that the judge had to take to recuse himself if bias could be discerned by the reasonable man. [12]

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

[10] Page 7

[11] "The relationship between the judiciary and the other arms [of government] should be one of mutual respect, each recognising the proper role of the others." The problem for judges is that, unlike some members of the Government, cannot answer back when their decisions are misinterpreted. Indeed, they are not supposed to have

The important sections delineate the importance of not presenting an appearance of bias and there is recourse to existing case law : 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 Circumstances will vary infinitely and guidelines can do no more than seek to assist the individual Justice in the judgment to be made, which involves, by virtue of the authorities, considering the perception the fair-minded and informed observer would have.

In *Lesage v Mauritius Commercial Bank Ltd [2012] UKPC 41*, the Privy Council highlighted the importance of looking at the proceedings as a whole and, while looking at the particular facts, questioning whether, overall, the proceedings would have created at least the impression of bias and unfairness. Lord Kerr said:

> "[51] *Whether, in the mind of the informed observer, the failure to consider the propriety of their continuing to hear the case creates a possibility of bias is to be judged both prospectively and retrospectively. The actual conduct of the judges during the trial is to be examined therefore to see whether it supports or detracts from the suggestion that there was the appearance of possible prejudice.'*

The guidelines are quite circumspect and set out what the duty of the judge should be in circumstances where bias may be perceived. R 3.15 states: If circumstances which may give rise to a suggestion of bias, or the appearance of bias, are present, they should be disclosed to the parties well before the hearing, if possible. Otherwise the parties may be placed in a

strong views on any political issue. But in relation to their own decisions, "A judge should refrain from answering public criticism". (Even from the Home Secretary.)

[12] The most important recommendations are contained in the Impartiality section. Page 10
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.

difficult position when deciding whether or not to proceed. Sometimes, however, advance notification may not be possible.

The rule against bias where such a determination has to be made is grounded in the court's notion of when there is a possibility of bias. It becomes a question of significance when the judge has to exercise a discretion at the trial and the parties are in the process of applying for directions. This is when the judge has to seen to be executing his duty in an objective manner.

3/ ***Competence and diligence in exercise of duty***

The Judicial Code of Conduct has a specific requirement in Chapter 6 based on the exercise by the judge to be diligent in the performance of his duties. The section states it " *requires the judge to take reasonable steps to maintain and enhance the judge's knowledge and skills necessary for the proper performance of judicial duties, to devote the judge's professional activity to judicial duties and not to engage in conduct incompatible with the diligent discharge of such duties".*[13]

The changes in the management of civil, family and criminal proceedings which have developed caused the judges to take a far more pro-active role in managing cases as they progress to trial. This requires judges to focus and refine the issues, identify the evidence necessary to resolve the main dispute. It can be done where possible at 'issue resolution hearings', and they can provide a course of action in the legal proceedings.

This is pertinent in the family law hearings where there is a duty to further the overriding objective of dealing with cases with regards to any child's welfare issues. The cases can be actively managed under (FPR 2010, rr 1.1(1) and 1.4(1)). The active case management involves a range of matters set out at FPR 2010, r 1.4(2) which include identifying the issues at the preliminary stage (r 1.4(2)(b)(i)) and deciding immediately which issues need full investigation and hearing and which do not (r 1.4(2)(c)(i)).

[13] Page 18

There are similar duties in the civil cases that fall upon the Court under CPR 1.1(1) and (2) and 1.4(1) and especially 1.4(2)(b), (c) and (d). These powers are further set out at CPR 3.1. In performing their tasks with these regulations the danger exists that the judges will consider issues without the benefit of all the evidence at their disposal. This may stop them from being informed of all the evidence. The judge does have the regulatory framework available to conduct a 'robust case management' and seeming to arrive at the conclusions which may provide the appearance of bias in the case.

In ***Re Q (Fact-Finding Hearing: Apparent Judicial Bias*** **[2014] EWCA Civ 918, [2014] 2 FLR** each party, with the exception of the children's guardian, had issued a Notice of Appeal complaining about one aspect or another of the judge's handling of a fact finding exercise in an application for a care order. There were seven Notices of Appeal issued by the court under the judge's management and it was the preliminary issue of whether the judge should have acceded to the mother's application for him to recuse himself.

The judge, at an early case management hearing confided to the parties that the local authority was going to find it onerous to accept the s 31 was satisfied. The complaint was based on the evidence of the mother's allegations against the father and at the same case management hearing the judge had called for a police file which he then read but did not disclose to the parties. He then expressed his conviction that many of the witnesses would provide in all likelihood credible evidence.

This expression of this opinion was interpreted by the mother as bias.

McFarlane LJ in his leading judgment set out the judge's function as follows:

[47] The task of the family judge in these cases is not an easy one. On the one hand he or she is required to be interventionist in managing the proceedings and in identifying the key issues and relevant evidence, but on the other hand the judge must hold back from making an adjudication at a preliminary stage and should only go on to determine issues in the

proceedings after having conducted a fair judicial process.

[48] There is, therefore, a real and important difference between the judge at a preliminary hearing inviting a party to consider their position on a particular point, which is permissible and to be encouraged, and the judge summarily deciding the point then and there without a fair and balanced hearing, which is not permissible.' In the instant case the Court, having reviewed the observations made by the judge, was clear that a fair-minded and informed observer would have concluded that there was a real possibility that the judge had indeed formed a concluded view on the mother's allegations and her overall veracity.

The CMH was 'seriously flawed', the judge having 'strayed beyond the case management role by engaging in an analysis, which by definition could only have been one-sided, of the veracity of the evidence and of the mother's general credibility. The situation was compounded by the judge giving voice to the result of his analysis in unambiguous and conclusive terms in a manner that can only have established in the mind of a fair-minded and informed observer that there was a real possibility that the judge had formed a concluded and adverse view of the mother and her allegations at a preliminary stage in the trial process.'

The issue in this case which led to a determination of bias was a thin wedge that separated proactive case supervision with the premature adjudication. The role of a family judge was also deemed to be such a balance had to be made and the benefit of the doubt to a judge could be allowed. Those observations made by the judge that in overall court process establish circumstances that would lead a fair-minded and informed observer to conclude that there was a real possibility of bias then it could lead to the assumption that there was bias.

The competence and diligence of the judges has come for scrutiny in an allegation of bias and whether it was procedural case of case management or apparent bias. In ***Re K***

(Return Order: Failure to Comply: Committal) **[2014] EWCA Civ 905, [2014] 2 FLR (forthcoming)** the Court of Appeal had to deal with a father's appeal in contested wardship proceedings. This concerned an instance where a judge had refused to recuse herself from the proceedings and sentenced the father to 18 months imprisonment for contempt (for refusing to arrange the return of his child to the jurisdiction). The appellant argued that in earlier hearings the judge had twice threatened to commit him to prison for an extended period of time and on several occasions had uttered prejudicial statements.

McFarlane LJ invoked the precedent of *Porter v Magill* in implying that the judge, in making the observations was seeking to convey to the father just how important it was to comply with orders of the court, and out of particular concern for the child's welfare. However, the apparent bias existed by the father's complaints when the judge rejected the application for recusal, and had not explained why, notwithstanding her earlier comments. She had already ruled that the father was in deliberate breach of the courts orders and should be sentenced to a considerable span of imprisonment.[14]

There can be an allegation of bias if the judge's action is carried out in a robust manner that gives an appearance of bias even in criminal litigation. *In the* ***Matter of Ian Stuart West*** **[2014] EWCA Crim 1480** a defence barrister was found by the Court of Appeal (Criminal Division) to have been guilty of conduct which 'constituted wilful and deliberate disobedience of an order of the court as an act of defiance'. This was serious misconduct which was a breach of his professional duties and in conflict with his duty to the court and amounted to contempt of court.

The barrister had refused to have a conference with the accused to resolve issues arising from a police interview, failed to attend an adjourned hearing and refused to provide a written explanation for his behaviour. He had instead demanded an apology from the judge. The Court of Appeal allowed his appeal from the finding of contempt on the basis that the judge had followed the wrong procedure under the Criminal Procedure Rules 2013.

[14] At 78

The Court defined one issue of whether Judge Kelson QC should have recused himself from the contempt proceedings.

Sir Brian Leveson P held at para [27]:

> *"Porter v Magill [2002] 2 AC 357 makes it clear that, save where actual bias is established, personal impartiality is to be presumed but the question whether the material facts give rise to a legitimate fear that the judge might not have been impartial must be determined on the basis whether a fair minded observer would consider there to be a real danger of bias. Reflecting the common law, CPR 62.8(5)(b) provides that the court which conducts the enquiry may include the same member of the court that observed the conduct unless that would be unfair.'*

The Court ruled that the bias could not be confirmed under the *Porter v Magill* test because while the appellant had been insulting to the judge it was excessive to deem that he could not carry out an impartial judgment whether there was a contempt of court. The entire transaction had to be considered in this determination between the judge and the barrister and it was the judge who could make the assessment.

This discretion to deal with contempt summarily remained with the judge and this complaint was rejected. This implies that in criminal hearings the justice can still be seen to be done when the judge does not transfer the matter to another judge to adjudicate. It will depend on the particular circumstances and the impression that would be made on the reasonable observer as to the fairness of the process.

The decision in this case was that the judge had no obligation to withdraw himself from the proceedings. The issue can be traced to the case management by the judge and the amount of his discretion. The dispute between the court and the barrister had arisen as a consequence of the judge instructing counsel to discuss with his client the likely grounds of a challenge to a police interview that presented the defence with some difficulty.

The Judicial Conduct guidelines were again the subject of this appeal and they concerned the question of case management and the borders of what is allowable. The issues the Court of Appeal felt the judge was correct upon were , the judge had proceeded with perfect propriety;[15] case management was to be conducted with diligence by evaluating the court time, and in certain circumstances, to make robust orders to ensure that definite progress was made.

The grounds for the decision was convincing for the Appeal Court because the procedures had been carried out diligently. There was a full summary available of the interview and categorically no grounds why the barrister should not be able to identify whether there was a challenge to its admissibility. It would not suffice for the counsel to argue that a defendant was not guilty if the case management had been satisfactory and not over robust.

4/Rule against bias in European Union law

The domestic UK law, which is based on precedent is supplemented by the law of the European Community in preserving the rule against bias. It expressly provides for it by legislation and this impacts on the Member States of the European Union. The incorporation of Article 6 of the ECHR by Article 6(2) of the Treaty, is supported by the EU Charter of Fundamental Rights 2010 for administrative decision-making by the institutions and bodies of the EU and judicial decision-makers.

Articles 41(1) of the Charter provide the Right to good administration :

" Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union".

Article 47 states of the Right to an effective remedy and to a fair trial: T

[15] Chapter 5 at p 15 of the Judicial Code of Conduct

(1)"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article". and (2) "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented". [16]

The Charter places an obligation for legal aid to be made available to those who lack sufficient means in their domestic jurisdiction to ensure effective access to justice. It is noteworthy that the distinction between the provision for administrative and judicial decision-makers, is that in accordance with Article 6 of the ECHR, the judicial decision-makers are required to be both independent and impartial, whereas administrative decision-makers are required 'only' to be impartial.

The European Court of Justice based in Luxembourg has its own Code of Conduct that makes further specific provision in relation to the impartiality of its judges. Article 2 is on 'Integrity' and it states : "Members shall not accept gifts of any kind which might call into question their independence.

Article 3 on Impartiality states as follows: Members shall avoid any situation which may give rise to a conflict of interest.

The development of case law has been sporadic and not in the seminal manner of the English courts who have examined the principles of law in building up the precedence. The issue in the case law of the ECJ and the Court of First Instance ("CFI") has been considered under interpretations of the fundamental EC principles of equal treatment and/or transparency.

[16] 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 defining the compliance of EU acts with the Charter, and the need to take into account fundamental rights in the EU's legislative work. It annulled a Council implementing decision on surveillance of the external sea borders of the EU on the basis that the adoption of rules conferring enforcement powers on border guards entails political choices falling within the responsibilities of the European Union legislature and that these rules were likely to affect personal freedom and fundamental rights to such an extent that the involvement of the European Union legislature is required

Despite that there is precedent that has addressed the application of the requirement for an impartial tribunal in the chambers of the ECJ. This was considered on the facts of the joined Cases C-341/06 P and C-342/06 P Chronopost SA and La Poste v Union française de l'express (UFEX) and Others, [2008] ECR 1-4777, 1 July 2008.

This case concerned the infrastructural assistance provided by La Poste to its subsidiary, Chronopost in France. It was alleged by complainants that this assistance constituted State aid but it was not accepted by the European Commission. The Union initiated proceedings before the national courts, who referred certain questions to the CFI. The CFI determined that the Commission had erred and that there was State aid, but did not give judgment on the entire matter.

La Poste and Chronopost appealed and the ECJ over ruled the CFI and held that its first decision should be set aside. The ECJ remitted the matter for further determination by the CFI and on the second hearing the CFI 's judicial composition was different. However, the same Judge-Rapporteur was retained for the second hearing and the CFI affirmed its first ruling that there was State aid. On appeal to the ECJ and among their grounds of appeal was that the second CFI was not an impartial tribunal because it contained the same Judge-Rapporteur and the decision was tainted with bias. The ECJ dismissed the allegation of bias. The reasons were set out as follows:

" The guarantees of access to an independent and impartial tribunal, and in particular those which determine what constitutes a tribunal and how it is composed, represent the cornerstone of the right to a fair trial. That right means that every court is obliged to check whether, in its composition, it constitutes such an independent and impartial tribunal, where this is disputed on a ground that does not immediately appear to be manifestly devoid of merit." (At 46)

The Court upheld the principle in a decision of the European Court of Human Rights in *Remli v. France*, judgment of 23 April 1996, Reports of Judgments and Decisions 1996-II, p. 574, §48).that stated that the courts must inspire confidence in those subject to their jurisdiction and that the procedural requirement was mandatory and a matter of public policy. The ECJ also

held that, if, by way of an appeal a challenge is made in that respect on a ground that is not manifestly devoid of merit, the Court is obliged to confirm the correctness of the composition in the formation of the CFI which delivered the ruling. (At 47)

The grounds of irregularity had to be raised must be raised by the Court of its own motion as a matter of public policy Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67. At 48 The Court relied upon the failure of the Commission, a principal party at first instance, to raise before the CFI the irregularity complained by Chronopost and La Poste in their argument that, as a result, they were no longer entitled to represent themselves in their appeal. It cannot properly be relied upon in opposing the Court's consideration of such pleadings. (At 50)

It was apparent from the documents submitted to the Court that the duties of the Judge-Rapporteur were entrusted to the member who had delivered adverse judgments in previous cases referred to the CFI. (At 51) However, the ECJ ruled that it had not been established that the Right to a Fair Trial had been breached based on the duty of impartiality by which its members are bound. This was because there were twin requirements of this condition, firstly, the members of the tribunal themselves must be subjectively impartial, that is, none of its members must show bias or personal prejudice.

Secondly, the tribunal must be objectively impartial, that is to say, it must offer sufficient guarantees sufficient to exclude any legitimate doubt in this respect (see, to that effect, in particular, Eur. Court HR, *Fey v. Austria*, judgment of 24 February 1993, Series A no. 255-A, p. 12, §28; *Findlay v. United Kingdom*, judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I, p. 281, §73; and *Forum Maritime S.A. v. Roumanie*, judgment of 4 October 2007, nos. 63610/00 and 38692/05, not yet published in the Reports of Judgments and Decisions). (At 54)

In the circumstances there was no allegation of personal bias in the members of the CFI, and the fact that the same Judge hears the case in two Chambers and determines it on successive occasions cannot, give rise to reasonable suspicion of the impartiality in the absence

of any other objective evidence. The court does not need to hear a case does not need to have a completely different composition. (At 56)

The judgment of the ECJ also referred to the European Court of Human Right's ruling in *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, §97, and *Diennet v. France*, judgment of 26 September 1995, Series A no. 325-A, §37). The Court in these cases held that it cannot be stated as a general rule resulting from the obligation to be impartial that a court overruling an administrative or judicial decision is compelled to remit the case back to a differently constituted judicial authority. (At 58)

The Court further stated that the ECHR Article 27(3) does not require on a referral following its judgment that no Judge from the Chamber which rendered the judgment is to sit in the Grand Chamber of the Strasbourg Court, with the exception of the President of the Chamber and the Judge who sat in respect of the State Party concerned. The Human Rights thus accepts that Judges who heard and determined the case at the first hearing may rehear in another sitting and determining the same case again. This would not infringe the requirements of a fair trial.

This judgment has been followed in the subsequent case of Case C-308/07 P Koldo Gorostiaga Atxalandabaso v European Parliament (2009) in which the ECJ considered its principles in another complaint about the CFI containing the same judges on two occasions. The complaint was that Article 111 (4) of the CFI had been breached. [17]

The ECJ held that the "Rules of Procedure of the Court of First Instance does not in itself prejudice the right to a proper and effective judicial process, since that provision is applicable only where it is clear that the Court of First Instance has no jurisdiction over the action, or where the action is manifestly inadmissible or manifestly lacking any foundation in law". (At 36) The applicant needs to establish that the CFI has incorrectly applied Article 111, on a challenge

[17] "Where it is clear that the Court of First Instance has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible or manifestly lacking any foundation in law, the Court of First Instance may, by reasoned order, after hearing the Advocate General and without taking further steps in the proceedings, give a decision on the action".

that the decision was tainted with bias. This needs the assessment of the court under the conditions governing the application of the Article to be challenged.

The ECJ applies the case law of the ECHR in ascertaining whether there has been a breach of the requirement for impartiality. In particular, it adopts the Strasbourg Court's concepts of subjective and objective impartiality which are , very similar to the UK's domestic law concepts of actual and apparent bias.

Conclusion

The essence of the rule against bias is that justice must be seen to be done. However, the rule against bias states that there may be ostensible bias but the tribunal may still not be biased as to its findings. The possibility of bias is an abstract test and the crux is the notion of the fair minded and informed observer who is a reasonable man will find that the tribunal was biased. This is a hypothetical examination which the court undertakes to make an assessment on the merits of the case.

The question that the court asks itself is whether or not there is a real possibility that the observer might think there was apparent bias. The fact that there is an appearance of bias is not really material to the issue. The principles governing the test to be applied in cases where it is alleged that a judge has manifested apparent bias were set out in *Porter v Magill* [2002] AC 357. The House of Lords approved the test to be applied in such cases in the following terms (at para [102] and [103]:

'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 … that the tribunal was biased.'

This reflected the importance of justice 'being seen to be done' and rejected the previous tests of 'reasonable likelihood' and 'real danger' of apparent bias which tended to concentrate on the court's (actual) assessment of the facts. However, the new test has raised

the questions ie, What characteristics or degree of understanding should be attributed to the 'fair minded observer'? How familiar should she be assumed to be with the judicial or forensic process? Given that the theoretical observer is a member of the public, the perceptions of a participant party will not be directly taken into account, but should they be?

These have now to be set against the framework of the Judicial Code of Conduct 2013 that has set up ' to set up ethical conduct for judges' . The adoption of written codes of conduct accords with international practice and is in line with principles of the UN Human Rights Commission at Geneva of 2003, that in spirit reflects the European Convention of Human Rights.

The result is that the approach in *Lesage v Mauritius Commercial Bank Ltd has become of* practical application when invoking *Porter v Magill*, which means that it will be necessary to look to the particular circumstances of the case, at the overall fairness, prospectively and retrospectively, and apply the test of a notional informed observer's perception of fairness. The outcome if bias is established, are significant cost and administrative inconvenience.

In Lesage the Privy Council that bias had to be prevented and that it overrode the costs that could be incurred in its prevention. Lord Kerr stated that at [59] "In a case where it has been concluded that there is the appearance of bias and unfairness, however, these are consequences which simply have to be accepted. They cannot outweigh the unanswerable need to ensure that a trial which is free from even the appearance of unfairness is the indispensable right of all parties and is fundamental to the proper administration of justice".

The Court of Appeal has had to determine the possibility of bias in recent case law and makes it essential for the judges to be aware of matters at an interlocutory stage, despite the need for the 'robust case management'. They need to be able to distinguish between identifying the relevant issues on the one hand and seeking to reach judgments upon those issues, on the other, before all the evidence is available or before full argument has been heard.

The fundamental principle of justice at both at common law and under Article 6 of the European Convention of Human Rights must be the primary consideration that there must be a

Right to a Fair Trial. The difference in the European Courts of Justice and English courts is in the essence of the challenge of biased decision that arises when the case is remitted for reconsideration.

The judgment in *Chronopost SA and La Poste v Union française de l'express (UFEX)* showed that the CFI should have been composed entirely of different judges and even one judge was sufficient to breach the requirement of impartiality after the case was remitted back for a rehearing. In the English law, this ground of challenge would clearly not have succeeded, since the majority of cases to be reheard following the quashing of a judgment are remitted to the same tribunal. The question of whether a different tribunal is required is a question that comes up for judicial consideration frequently in the course of the initial appeal. The challenge afterwards as the ECJ heard would not be accepted in the UK courts.

The contrast goes further when the ECJ's perspective appears to be that any potential issue with the composition of a Court is a matter for that tribunal to raise, even if, as in the above case, the potential problem was not apparent to the Court. The consequence of the ECJ's view is that the Commission, having failed to bring up the point itself, was prevented from arguing that La Poste and Chronopost were 'too late' to raise the argument on appeal.

In the English courts doctrine of waiver, the opposite result would be reached since it is clear that appellants in the ECJ were aware of the composition of the CFI in advance of the deliberation of their case, but failed to raise the matter then. There would be no allowance in a common law court of appellants being able to argue that the Court or the other party should have raised the issue themselves at the time of the initial hearing.

The rule against bias is a very important factor for the court to be conscious of in determining the case. If, on an assessment of all the relevant circumstances, the conclusion this principle either has been, or will be, breached, the judge should be automatically withdraw from hearing the case. It is not a discretionary matter when a case management decision is based on weighing relevant factors that do not lead to fair hearing.