

## **BIAS** **Clive Lewis QC**

### INTRODUCTION

1. A decision of a court, tribunal or a public body, such as a local authority, may be invalidated if the decision-maker was motivated by actual bias or where there is an appearance of bias.

### TEST

- 2 The test now is “whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the [decision-maker] was biased”: see *Porter v Magill* [2002] 2 A.C. 357 at para. 103 on p. 494.
- 3 The fair-minded observer is assumed to know all the facts capable of being known to the public generally and it is the appearance that arises from these facts which is the important issue: see *Gilles v Secretary of State for Work and Pensions* [2006] 1 W.L.R. 781 at para. 17 (whether appearance of bias arose from the fact that a member of a medical disability tribunal was a doctor who had previously provided reports for the Benefits Agency); *Condon v National Assembly for Wales* [2007] BLGR 87 at para. 40 (allegation that Minister biased in favour of accepting report – for court to determine words used and context in which they were used).
- 4 In considering bias, a number of factor will be important including in particular the nature of the alleged interest or fact said to give rise to the appearance of bias and the context (what is to be expected of a court may, for example, be different from what is expected of a planning committee) .

## CATEGORIES OR TYPES OF INTEREST

### *Financial or Pecuniary Interest*

- 5 Any direct pecuniary interest in the outcome of a decision will automatically lead to an appearance of bias and the decision will be set aside unless those involved know of and have waived any right to object to the decision-maker playing a part: see *Locabail (U.K.) v Bayfield Properties Ltd.* [2000] Q.B. 451.
  
- 6 The question is whether the outcome of case, or the decision-making process, could realistically affect the decision-maker's interests. In *Locabail (U.K.) v Bayfield Properties Ltd.* [2000] Q.B. 451, a member of a firm of solicitors sat as a deputy High Court judge and his firm were acting in other litigation against the claimant's husband. In this case, the claimant was claiming that she was entitled to a share in certain property. If she lost, more money would be available fact to the husband and hence, if the firm succeeded in the other litigation against him, that that would mean the firm recovered more money from him for its clients in that other litigation. It was argued that this would increase the firm's goodwill and reputation and hence its profits and the judge would share in that was too tenuous to give rise to the sort of financial interest leading to automatic disqualification. Similarly, a judge dealing with a costs application in judicial review proceedings (involving about £5,000) where one of the parties was a tenant of a company in which he had a non-commercial directorship did not give rise to automatic disqualification.
  
- 7 A builder may sit on a planning committee considering an application for planning permission by another rival builder or developer. That fact alone was too tenuous to give rise to a direct financial interest and did not otherwise give rise to an appearance of bias: *R v Holderness BC ex p. James Robert Developments Ltd.* (1993) 99 P. & C.R. 46.

### Family or other Relationship

- 8 A family relationship or close friendship between the decision-maker and the beneficiary of the decision (or a party to proceedings in cases involving courts or tribunals) may, and usually will, give rise to an appearance of bias: *University College of Swansea v Cornelius* [1988] ICR 735 (member of an industrial tribunal was mother-in-law of the claimant).

### Advisers and employees

- 9 The use of external advisers in decision-making (for example in the assessment of tenders or the award of contracts or other contexts) may give rise to the appearance of bias if the adviser has some connection or interest which might affect the outcome. Much will depend on the closeness of the link, the degree of involvement of the adviser and the context in which the advice is given.
- 10 In *R (Compton) v Wiltshire Primary Care Trust* [2009] EWHC 1824 Admin. the PCT was considering the future of a local hospital and undertook a consultation exercise. The Strategic Health Authority was advising on the process of consultation. It was decided to have a company conduct an independent review of the consultation responses. The tenders were considered at a PCT meeting. However, the director of one of the companies was the partner of the woman responsible advising on consultation. The court held that, in principle, it was possible that where the facts concerning the adviser gave rise to an appearance of bias that could ultimately invalidate the decision itself. However, on the facts of that case, there was no appearance of bias given the company was summarising the consultation responses (including those adverse to the PCT), the fair-minded observer would know of the limited links between the roles of the PCT and the Strategic Health Authority and the limited nature of the report – although it was a relevant factor for the PCT to consider it did not include recommendations or advice.

- 11 The extent to which former involvement with the decision-maker may invalidate a decision depends upon the facts. In *Gilles*, the House of Lords was dealing with a medical disability tribunal considering claims for disability living allowance. One member was a doctor who had for a number of years provided reports for the Benefits Agency as an examining medical practitioner. The doctor was, however, an independent expert adviser not an employee and she had been instructed because of her skills. That did not give rise to an appearance of bias.
- 12 By contrast, in *R (Secretary of State for Communities) v Ortona Ltd.* [2009] EWCA Civ. 863, the Court of Appeal held that there was an appearance of bias where a planning inspector had been employed by the county council who had refused planning permission and had been responsible for the very policies that were at the heart of the appeal. The situation might have been different if that degree of connection had not been established. There will be a number of factors to consider, including the level of seniority of the individual involved, the period of time that has elapsed and the extent of involvement with the policies in issue.
- 13 The prospect of future employment may give rise to an appearance of bias. Where a member of a tribunal applied for employment with one of the principal expert witnesses in a case before her, that gave rise to an appearance of bias. A fair-minded observer would consider that she was likely to favour the evidence given by them and consider them a more reliable source of expert opinions if it was a firm that she wished to be employed by. See *In Re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 WLR 700.

*Membership of groups or support for particular causes*

- 14 Mere membership of a particular charity or group will not normally give rise to an appearance of bias on the part of a decision-maker. See, e.g. *Henlow v Secretary of State for the Home Department* [2008] 1 W.L.R. 2416. But active involvement in and

promotion of a particular cause may give rise to an appearance of bias: *R v Bow Street Metropolitan Stipendiary Magistrate ex p. Ugarte (No. 2)* [2000] 1 A.C. 119. Similarly, if a person makes it clear that he will decide in accordance with the views or principles of that society, so that he has predetermined the issue, that would give rise to an appearance of bias.

#### POLICY, PREDISPOSITION AND PREDETERMINATION

- 15 Member of local authorities will frequently have expressed views, often strong views, on issues of controversy such as school closures or planning developments, which then come before them for decision. The position is this.
- 16 First, in applying the principles governing the appearance of bias, regard must be had to the context. Elected members are entitled to have, and to have expressed, views on such matters. They are entitled to be pre-disposed to certain views.
- 17 Secondly, they must not, however, have a closed mind in that they have predetermined the outcome. They must be able to consider all relevant considerations and in deciding what their decision should be.
- 18 Thus, the question, in effect, is whether the court is satisfied that a fair-minded observer would consider that there was a real risk that the committee members had approached that decision with a closed mind: see *R (Lewis) v Redcar & Cleveland BC* [2009] 1 WLR 83 at para. 71, 93-96.
- 19 In that regard, the court will have regard to the realities of local authority life and the fact that councillors have policies, and political allegiances. Furthermore, the mere fact that the committee took the decision on a controversial project during the run-up to local authority elections did not on the facts lead to the inference that they approached the task with closed minds: see *R (Lewis) v Redcar & Cleveland BC* [2009] 1 WLR 83.

- 20 Similarly, a decision to favour a particular sponsor to establish an Academy did not involve an appearance of bias. The councillors were familiar with the issues, they had discussed the issues in their party groups and between themselves. But there was no evidence that they had approached the issue with closed minds. Nor would a reasoned preference for or against church involvement in schools give rise to an appearance of bias. See *Chandler v London Borough of Camden* [2009] LGR 417.
- 21 In *Condon v National Assembly for Wales* [2007] LGR 87, the relevant Assembly Minister deciding on whether to accept an inspector's report said words to an object to the effect of "I am going to go with the report of the inspector". Viewed in context, as a short remark made at the end of a tense encounter, the words indicated no more than a predisposition to follow the report and did not amount to a predetermination of the issue. As such, no appearance of bias arose.

#### WAIVER

- 22 Where a person knows the facts which might be said to give rise to an appearance of bias, but does not object to the person continuing as decision-maker, there may be a waiver of the objection and the decision will not be invalidated because of the appearance of bias. The person must know or be informed of all the relevant facts and must be in a position to be able to make his objection.

#### NECESSITY

- 23 There may be situations where it is inevitable that a person has to take a decision either because the body or committee would not be quorate without his presence or because statute expressly vests the decision in that person and it is not legally possible for any other person to take the decision.

## ARTICLE 6 ECHR

- 24 Article 6 ECHR requires, amongst other things, that a person has a right to an independent and impartial tribunal in the determination of his civil rights and obligations.
- 25 First, for Article 6 to be applicable, the matter has to involve the determination of civil rights. Decisions involving broad evaluative judgments on whether a person should be awarded certain types of social security or housing benefits may not involve determination of rights. Thus, the decision on whether or not a person is owed a duty under the homelessness provisions of the Housing Act 1996 do not involve a determination of civil rights. A system of decision and review by local authority officers is not therefore incompatible with the ECHR. See *Ali v Birmingham City Council* [2010] 2 WLR 471.
- 26 Secondly, where a decision does involve a determination of rights (for example, a decision on a precisely worded entitlement), Article 6 ECHR may apply. Decisions by a local authority may not of itself satisfy Article 6 but what is relevant is entire decision-making process, including any rights of appeal or judicial challenge, and the ability of that process as a whole to ensure an independent and impartial determination of the issue that arises.

**March 2010**