

Bias and the Code of Conduct¹

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BIAS

1. A decision of a local authority may be ruled unlawful if the decision-maker was motivated by actual bias or where there is an appearance of bias.
2. The test 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”: *Porter v Magill* [2002] 2 AC 357 at [103].
3. The court performs the role of the fair-minded observer, taking into account all the facts capable of being known to the public generally. The question is whether these facts give rise to an appearance of bias. The fair-minded observer is “neither complacent nor unduly sensitive or suspicious”: *R (Persimmon Homes) v Vale of Glamorgan Council* [2010] EWHc 535 (Admin) at [127].
4. The common law identifies two distinct forms of bias. One is where an individual has an interest in a matter. The other situation is that of predetermination, i.e. coming to a decision without any personal interest in the matter but nonetheless with a closed mind.

personal interests

5. A 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.
6. But, as the decision in *Locabail (UK) v Bayfield Properties Ltd* [2000] QB 451 shows, if the pecuniary interest is sufficiently tenuous automatic disqualification will not apply. In that case an apparent bias allegation was made against a deputy High Court Judge who was a member of a firm of solicitors. The claimant was claiming that she was entitled to a share in certain property. If the claimant lost, more money would be available to her husband. The judge’s firm was acting in other litigation against the claimant’s husband. If the firm succeeded in the other litigation against him, the firm’s clients would recover more money from the claimant’s husband if the claimant had lost her claim than if she had succeeded. It was argued that this would increase the firm’s goodwill and reputation and hence its profits, in which the judge would share. The Court of Appeal found that this connection was so tenuous that the automatic disqualification rule did not apply.
7. A family relationship or close friendship between the decision-maker and the beneficiary of the decision 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 claimant).
8. But, even in the case of spouses, disqualification is not automatic. In circumstances where an adviser conducted herself in relation to the Welsh Assembly Government’s policy in a way that was

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adverse to the interests of the company employing her husband, a fair-minded observer would not have concluded that a real possibility of bias existed: *R (Persimmon Homes) v Vale of Glamorgan Council* [2010] EWHC 535 (Admin). The position would have been quite different if her husband might have benefited from the line she had taken.

9. In *R (Morris) v Newport City Council* [2009] EWHC 3051 (Admin) Beatson J considered whether a Councillor's involvement in a decision relating to Hackney Carriages, without disclosing that his brother was a hackney carriage driver and his half-brother was a private hire driver, gave rise to a real possibility of bias. Beatson J considered that the nature of the relationship was such as to put it close to the line. Nevertheless, on the facts as they appeared at the commencement of the hearing, he would have been inclined to conclude that there was no breach of the rule against bias, or of the Code of Conduct. But the disclosure of the Councillor's brother's involvement in meetings between council officials and trade representatives would have led a fair-minded and informed observer to conclude that there was a real possibility of bias.
10. The use of external advisers in decision-making (for example in the assessment of tenders or the award of contracts) 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.
11. In *R (Compton) v Wiltshire Primary Care Trust* [2009] EWHC 1824 Admin the PCT undertook a consultation exercise in respect of the future of a local hospital. It was decided to appoint a company to conduct an independent review of the consultation responses. The tenders for this role were considered at a PCT meeting. The issue that arose was that the director of one of the companies was the partner of the person from the Strategic Health Authority who was responsible for advising on the 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. But on the facts it was not sufficient to invalidate the decision to close the hospital. There was no appearance of bias given the limited nature of the company's report, summarising the consultation responses (including those adverse to the PCT).
12. The extent to which former involvement with the decision-maker may invalidate a decision depends upon the facts. In *R (Secretary of State for Communities) v Ortona Ltd* [2009] EWCA Civ 863 [2010] 1 P & CR 15, 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. Factors to consider include such matters as 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 also 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 to consider them a more reliable source of expert opinions if it was a firm that she wished to be employed by: *In Re Medicaments and Related Classes of Goods (No.2)* [2001] 1 WLR 700.
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., *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 (no appearance of bias, in refusing a Palestinian activist's asylum

claim, by reason of a judge's membership of an association of Jewish lawyers, whose magazine included articles hostile to Palestinian causes). 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 parte Ugarte (No.2)* [2000] 1 AC 119 (in circumstances where Amnesty International had been permitted to intervene, the judge's position as unpaid director and chairman of a wholly owned company, Amnesty International Charity Ltd, created an appearance of bias).

predetermination

15. There has always been a tension between the rule against predetermination and the fact that local authority members stand for office on the basis of manifesto policies which they are expected to implement once elected. Members 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.
16. In *R (Georgiou) v Enfield LBC* [2004] EWHC 779 (Admin) [2004] LGR 497 Richards J held that the same "real possibility" test applied to this form of bias as to that relating to personal interests; *actual* predetermination did not have to be shown. The authority's decision to grant listed building and planning consents was quashed because the voting pattern of three councillors who were members of both the conservation advisory group and the planning committee was held to give rise to a real possibility of predetermination.
17. A similarly strict approach was taken, again by Richards J, in *Ghadami v Harlow District Council* [2004] EWHC 1883 (Admin) [2005] LGR 24, where remarks by the chairman of a local authority's planning committee suggesting a strong predisposition in favour of a planning application, and made during secretly recorded telephone conversations, were held to vitiate the planning decision under challenge.
18. Such decisions gave rise to a concern that the 'real possibility' test would lead to councillors frequently being found to have breached the rule against predetermination where they have sought to speak up on issues of interest to their constituents.
19. More recent decisions have sought to draw a pragmatic line between legitimate predisposition and unlawful predetermination. Elected members are entitled to have, and to have expressed, views on controversial local matters. They are entitled to be pre-disposed to certain views: the requirement is to have an open mind – not an empty one.
20. In *R (Island Farm Development Ltd) v Bridgend County Borough Council* [2006] EWHC 2189 (Admin) [2007] LGR 60, the claimants had been granted planning permission to develop a site adjoining land belonging to the local authority. The development required that the local authority sell its land. Following elections, there was a change of control in the authority. The new administration was led by members of a party which had opposed the development in its manifesto. One cabinet member had been an active member of a pressure group devoted to opposing the development. A decision was subsequently taken not to sell the council's land to the claimants, thereby preventing the development from going ahead. The claimants challenged this decision on grounds of bias and predetermination.
21. Collins J refused the application, stating at [23]:

"In principle, councillors must in making decisions consider all relevant matters and approach their task with no preconceptions. But they are entitled to have regard to and apply policies in

which they believe, particularly if those policies have been part of their manifestos. The present regime believed that the development ... was wrong and they had made it clear that that was their approach. In those circumstances, they were entitled to consider whether the development could lawfully be prevented. The fact that a particular policy is included in a manifesto does not mean that it must be implemented.”

22. Collins J went on to doubt Richards J’s dicta in *Georgiou* suggesting that no significant weight should be attached to members’ own assertions that they approached a matter with an open mind. He noted at [30]-[31]:

“Councillors will inevitably be bound to have views on and may well have expressed them about issues of public interest locally ... It would be quite impossible for decisions to be made by the elected members whom the law requires to make them if their observations could disqualify them because it might appear that they had formed a view in advance... *Porter v Magill* was a very different situation and involved what amounted to a quasi-judicial decision by the auditor. In such a case, it is easy to see why the appearance of bias test should apply to its full extent.

The reality is that councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should ... unless there is possible evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular decision will suffice to persuade a court to quash the decision.”

23. Thus Collins J disagreed with the analysis of Richards J in *Georgiou*, where he applied the *Porter v Magill* test of apparent bias in the context of a challenge to a planning decision based on an allegation of predisposition. In distinguishing the position of an elected councillor from that of a quasi-judicial auditor, Collins J appeared to favour the view expressed by Sedley J in *R v Secretary of State ex parte Kirkstall Valley* [1996] 3 All ER 304 that the rules against predetermination and apparent bias by reason of having an interest in a matter are distinct concepts. Judges and other quasi-judicial decision-makers can properly be expected to appear to have no preconceived view about the decision before them: the same cannot and should not be said about elected councillors.
24. The Court of Appeal’s decision in *Condrón v National Assembly for Wales* [2006] EWCA Civ 1573 [2007] LGR 87 appeared, as the *Island Farm* judgment had done, to give weight to the realities of local politics and the requirement for the democratic accountability of members.
25. The *Condrón* case concerned an application for planning permission to carry out opencast mining. Following a public inquiry, a planning inspector recommended that planning permission should be granted. The Welsh Assembly’s Planning Decision Committee resolved to grant planning permission. A local objector challenged this decision, relying in part on an allegation that there was an appearance of bias because the chair of the committee had remarked during a meeting with an objector the day before the relevant meeting that he was “going to go with the inspector’s report”.
26. At first instance, Lindsay J held on the basis of the chairman’s remark that there had been a predetermination of the issue giving rise to an appearance of bias. The Court of Appeal overturned this decision, Richards LJ observing that an impromptu remark of this nature needed to be treated with considerable caution. But it was common ground in *Condrón* that the “real possibility of bias” test was applicable in the context of an allegation of predetermination.
27. Most importantly, the Court of Appeal took a firmly, pragmatic line in *R (Lewis) v Redcar and Cleveland Borough Council* [2008] EWCA Civ 746 [2009] 1 WLR 83. Pill LJ observed at [62]-[63]

that whilst councillors must have regard to material considerations, and only to material considerations,

“They are not, however, required to cast aside views on planning policy they will have formed when seeking election or when acting as councillors. The test is a very different one from that to be applied to those in a judicial or quasi-judicial position. Councillors are elected to implement, amongst other things, planning policies. They can properly take part in the debates which lead to planning applications made by the council itself. It is common ground that in the case of some applications they are likely to have, and are entitled to have, a disposition in favour of granting permission.”

28. The court rejected the invitation to overrule *Georgiou* and to say that the concession made in *Condron* that the “real possibility” test applied in the context of predetermination, Rix LJ stating that it would be better if a single test applied to the whole spectrum of decision-making.
29. But the Court of Appeal made clear that in this context the importance of appearances is generally more limited than in a judicial context [71 and 98] and the “very different circumstances ... must have an important and possibly decisive bearing on the outcome” [93]. Rix LJ stated that

“Evidence of political affiliation or of the adoption of policies towards a planning proposal will not for these purposes by itself amount to an appearance of the real possibility of predetermination or what counts as bias for these purposes. Something more is required, something which goes to the appearance of a predetermined, closed mind in the decision-making itself.”

30. Longmore LJ explained at [107]

“What is objectionable ... is “predetermination” in the sense I have already stated, namely, that a relevant decision-maker made up his or her mind finally at too early a stage. That is not to say that some arguments cannot be regarded by any individual member of the planning authority as closed before (perhaps well before) the day of the decision, provided that such arguments have been properly considered. But it is important that the minds of members be open to any new argument at all times up to the moment of decision.”

31. Accordingly, he continued at [109], “the test of apparent bias relating to predetermination is an extremely difficult test to satisfy.”
32. Applying this high threshold, allegations of predetermination have also been rejected by Stuart Isaacs QC in *R (Batey) v Boston Borough Council* [2008] EWHC 3516 (Admin) and by Beatson J in *R (Persimmon Homes Ltd) v Vale of Glamorgan Council* [2010] EWHC 535 (Admin).
33. In light of the recent trend in the case-law, it is perhaps somewhat surprising that the Government has suggested that it may legislate to remove the rule against predetermination, but its proposals are currently opaque. Given where the line has been drawn between legitimate predisposition and predetermination, it is hard to see what objection there could be to the rule. A decision will only be vitiated if one or more members refused - or there is positive evidence establishing a real possibility that they refused - to even to consider a relevant new argument.

CODE OF CONDUCT

34. Part III of the Local Government Act 2000 (“the 2000 Act”) deals with the conduct of local authority members. It enacts the regime under which delegated legislation requires local authorities to adopt a model code of conduct binding on serving councillors.

35. The principles governing members' conduct are set out in the Relevant Authorities (General Principles) Order 2001, SI 2001/1401. Section 51 of the 2000 Act obliges local authorities to adopt a code of conduct which contains the mandatory provisions of the Secretary of State's 'model code'. The current model code is contained in the Local Authorities (Model Code of Conduct) Order 2007 (SI 2007/1159).
36. Section 52 imposes an obligation on a member to give a written undertaking that in performing his functions he will observe the code of conduct. Section 183(4) of the Local Government and Public Involvement in Health Act 2007 provides for the omission of the words "in performing his functions", so as to make clear that the undertaking is not confined to a promise to observe the code of conduct in performing functions as a member. But this amendment has not been brought into effect in England; only in Wales: Local Government and Public Involvement in Health Act 2007 (Commencement No.2 and Savings) Order 2008/172, §5. Failure to give this undertaking means that the person ceases to be a member of the local authority.
37. Section 57A enables a person to make a written allegation to the standards committee of a relevant authority in England that a member, former member or co-opted member has, or may have, failed to comply with the code of conduct. The committee then acts as a filter. It may (a) refer the allegation to the monitoring officer, (b) refer the allegation to the Standards Board for England or (c) decide to take no further action. The complainant has the right to seek a review of a decision to take no further action.
38. Under the current system, most complaints of breach of the code of conduct are investigated and determined locally. But where the local standards committee considers appropriate - for example, where the case is complex or members of the standards committee would have a conflict of interest – the complaint may be referred to the national Standards Board for investigation by its Ethical Standards Officers and determination by a Case Tribunal.
39. The Government announced, in the Queen's speech, that "the Standards Board regime" is to be abolished. The changes are to be introduced in the proposed Decentralisation and Localism Bill. But the Government is yet to reveal how far-reaching its proposals will be, or what will take the place of the Standards Board regime.
40. It is possible that root and branch changes could be made to the whole member conduct system, including the code of conduct and local standards committees. But it seems more likely that the code of conduct and local regime will remain in place and only the Standards Board for England will cease to exist. The current system already allows local authorities to deal with complex and serious cases, so standards committees may already have the expertise to investigate such cases. And if the likely penalty exceeds those available to the local standards committee, it already has the power to refer the case to the First –tier Tribunal.
41. But difficulties may arise where a complaint gives rise to a conflict of interest which prevents the standards committee fairly determining it. One option the Government may be considering is transferring the functions of the Standards Board, both in terms of casework and giving guidance, to the Local Government Ombudsman.

Recent cases

42. Two issues that frequently arise in relation to allegations of a breach of the Code of Conduct are whether the councillor was acting his or her 'official capacity' at the material time and whether he or she failed to show 'respect' to another. In *R (Mullaney) v Adjudication Panel for England* [2009]

EWHC 72 (Admin) [2010] LGR 354 Charles J observed in relation to both tests that they are ordinary English words which can have a range of meaning depending on their context. In relation to 'official capacity', he said at [82]-[83] that applying these words is

“inevitably fact-sensitive and so whether or not a person is so acting inevitably calls for informed judgment by reference to the facts of a given case. This also means that there is the potential for two decision-makers, both taking the correct approach, to reach different decisions. In the context of judicial review this brings into play, or reinforces the points that if the statutory decision-makers have taken the correct approach in law their experience and knowledge as the persons chosen to be the decision-makers is relevant to the irrationality argument (and indeed to arguments that they are wrong).

The same approach applies to the construction and application of treating others *with respect* ...”

43. In assessing whether a communication was made, or action was taken, in an official capacity, important factors will be the reasons why, the circumstances in which and the reasons for which it was made or taken. Official capacity would include anything done in dealing with staff, when representing the council, in dealing with constituents' problems and so on.
44. Charles J agreed with Collins J's in *Livingstone v The Adjudication Panel for England* [2006] EWHC 2533 (Admin) [2006] HRLR 45 and Wilkie J in *Sanders v Kingston* [2005] EWHC 1145 (Admin) that in principle the code satisfies Article 10(2) of the European Convention on Human Rights, but that the restraints on freedom of speech should not extend beyond what is necessary to maintain proper standards in public life and that political expression attracts a higher level of protection.
45. In *R (Chegwyn) v Standards Board for England* [2010] EWHC 471 [2010] LGR 614 Collins J overturned the Adjudication Panel's decision to disqualify a local authority cabinet member for two years. The councillor had organised a music festival via a company of which he was the sole director. After the relevant permissions had been obtained from a council committee, a motion with the intention of preventing the festival going ahead had been placed before the full council. At the hearing of that motion Mr Chegwyn had remained in the chamber and failed formally to declare his interest in proceedings – a failure which he later admitted before the panel was a breach of the code.
46. Collins J accepted that he had made a gross error of judgment, but nevertheless found the panel's decision to disqualify him to have been unreasonable. It could not be said that he was entirely unfit for public office and so a penalty of three months' suspension was substituted. Collins J did, however, accept that the panel had been right not to place any real weight on the fact that he had been re-elected. Unlike in *Sanders*, where Wilkie J suggested that it would be rare in the extreme for sanctions to be imposed against a councillor who had been re-elected in circumstances where the matters which had given rise to the reference to the tribunal were before the electorate, the court could not know what effect, if any, the issues which were the subject of the proceedings had on the voters.

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