PROCEDURAL FAIRNESS

Introduction

1. The phrase procedural fairness has come to describe those rules of administrative law which are concerned with the procedures for administrative decision making. They therefore have more to do with ensuring the integrity of the decision making process, rather than with the decisions themselves.[1A] DeSmith[1] puts it this way:

> "An important concern of procedural justice is to provide an opportunity for individuals to participate in decisions that affect them. Another is to promote the quality, accuracy and rationality of the decision-making process. Both concerns aim at enhancing the legitimacy of that process."[2]

2. Historically the concept of procedural fairness has its origins in the rules of natural justice and its two main constituent parts, expressed in the maxims **audi alteram partem** and **nemo judex in causa sua**, that is to say, hear the other side and no man should be a judge in his own cause.[3] Although the concepts of natural justice and the right to a fair hearing have a long and much travelled history in the common law,[4] their development was for a long time stymied by a conservative judicial approach that limited their applicability to cases in which there was a duty on the part of the decision maker to act judicially (whether he was in fact acting in a judicial or a quasi-judicial capacity).

1A See Regina v Medical Council, ex parte Dr. Mohammed Baza (1987) 24 JLR 443

1 DeSmith, Woolf & Jowell, Judicial Review of Administrative Action, 5th ed., 1995, page 375

2 ibid, at page 375

3 Recent developments in the law relating to bias as a vitiating factor are dealt with at para 24 et seq.

4 See generally DeSmith, op. cit. ch. 7

3. All of this changed in 1963 with the landmark decision of the House of Lords in **Ridge v. Baldwin,**[5] where the majority held that a chief constable, who was dismissible only for cause prescribed by statute, was impliedly entitled to prior notice of the charge against him and a proper opportunity to meet it before being dismissed for misconduct. Lord Reid's seminal judgment in the case is the modern cornerstone of this branch of administrative law and "opened an era of activism in which the courts have subjected the working of government to a degree of judicial scrutiny, on substantive as well as procedural grounds, which shows little sign yet of diminishing."[6] Thus unfettered, the rules of administrative law have in the nearly forty years since **Ridge v Baldwin** demonstrated a tremendous capacity for growth and flexibility in a variety of circumstances.

4. In **Council of Civil Service Unions v. Minister for the Civil Service**[6A], Lord Diplock, like Lord Reid, one of the key players in the development of the modern law, identified three heads under which administrative action had come to be subject to control by judicial review. These were "illegality", "irrationality" and "procedural impropriety".[6B] This paper is concerned with the third head, which covers the failure to observe basic rules of natural justice or failure to act with procedural fairness towards the citizen who will be affected by administrative decisions though, as Lord Diplock pointed out, this head will also be apt to cover "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."[6C]

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5 [1964] AC 40

6 DeSmith, op. cit. at page 397

6A [1985] 1 AC 374

6B ibid at page 410

6C ibid at page 411

What is natural justice?

5. If asked, most lawyers - and, perhaps, laymen - might be prepared to attempt a definition, though in **Ridge v Baldwin** itself, Lord Reid commented that "opinions have sometimes been expressed that natural justice is so vague as to be practically meaningless."[7] However, that learned judge did go on to observe that he "would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist.[8]

6. In **Norwest Holst v Secretary of State for Trade**,[9] Ormrod LJ observed as follows:

> "The phrase "the requirements of natural juice" seems to be mesmerizing people at the moment. This must, I think, be due to the apposition of the words "natural" and "justice." It has been pointed out many times that the word "natural" adds nothing except perhaps a hint of nostalgia for the good old days when nasty things did not happen. If, instead, we omit it and put the question in the form of *Fisher v Keane* (1878) 11 Ch.D. 353: "Have the ordinary principles of justice been complied with?", it at once becomes much more realistic and even mundane. It is just possible that the pleader in the present case might have hesitated a little longer if he had been deprived of the use of that romantic word "natural".

7. In due course, perhaps to avoid some of the nice distinctions which so disturbed Ormrod LJ, judges begun to resort to the phase "the duty to act fairly" as a substitute for "the rules of natural justice", hence the modern tendency to subsume all the rules under this head under the rubric of procedural fairness. In **In re Pergamon Press Ltd** [10] Lord Denning MR characterised the duty of inspectors for the Board of Trade as being to "act fairly"[11], while

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7 [1964] AC 40, 65

8 chid, at pages 64-65

9 [1978] 1 Ch 201, 226

10 [1971] 1 Ch. 388

11 ibid at page 399

Sachs L.J. spoke of the necessity for "an appropriate measure of natural justice, or as it is often nowadays styled 'fair play in action' ..."[12] In **Breen v A.E.U.**[13], Lord Denning MR stated that "a statutory body, which is entrusted by statute with a discretion, must act fairly"[14] while in **McInnis v Onslow Fane**[15], Megarry V-C referred to the requirements of "natural justice or fairness"[16] and to the fact that "in recent years there has been a marked expansion of the ambit of the requirements of natural justice and fairness, reaching beyond statute and contract"[17]. Megarry V-C concluded on this point in the following terms:[17A]

> "I do not think that much help is to be obtained from discussing whether 'natural justice' or 'fairness' is the more appropriate term. If one accepts that 'natural justice' is a flexible term which imposes different requirements in different cases, it is capable of applying appropriately to the whole range of situations indicated by terms such as 'judicial', 'quasi-judicial' and 'administrative'. Nevertheless, the further the situation is away from anything that resembles a judicial or quasi-judicial situation, and the further the question is removed from what may reasonably be called a justiciable question, the more appropriate it is to reject an expression which includes the word 'justice' and to use instead terms such as 'fairness', or 'the duty to act fairly': see *Re K (H) (an infant)* per Lord Parker CJ; *Re Pergamon Press Ltd* per Denning MR; *Breeen v Amalgamated Engineering Union* per Edmund-Davies LJ ('fairly exercised'); *Pearlberg v Varty*, per Viscount Dilhorne and Lord Pearson. The suitability of the term 'fairness' in such cases is increased by the curiosities of the expression 'natural justice'. Justice is far from being a 'natural' concept. The closer one goes to a state of nature the less justice does one find. Justice, and with it 'natural justice', is in truth an elaborate and artificial product of civilisation which varies with different civilisations: see *Maclean v The Workers' Union* per Maugham J. To Black J, 'natural

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12 ibid at page 403

13 [1971] 2 QB 175

14 ibid at page 190

15 [1978] 3 All ER 211

16 ibid at page 217

17 ibid at page 217

17A ibid at page 219

> justice' understandably meant no more than 'justice' without the adjective: see *Green v. Blake*. However, be that as it may, the question before me is that of the content of 'the duty to act fairly' (or of 'natural justice') in this particular case. What does it entail? In particular, does it require the board to afford the plaintiff not only information of the 'case against him' but also an oral hearing?"

8. Subsequently, in **O'Reilly v Mackman**[18], Lord Diplock described the duty to observe the rules of natural justice in relation to a citizen as meaning "no more than to act fairly towards him in carrying out their decision making process, and I prefer to so put it"[19]. And finally on this point, in the more recent case of **Regina v Secretary of State for the Home Department, Ex parte Doody**[20], Lord Mustill asked the question "What does fairness require in the present case"[21] and proceeded "to begin by looking at the question in the round"[22] to determine the requirements of fairness in the case before the House.

9. The adoption of the single criterion of fairness as the test of compliance with the requirements of natural justice has been a salutary development, thus liberating the law from some of the restrictions which constrained it in the past, by prescribing a standard that is perhaps more readily accessible to the ordinary citizen, in protection of whose rights in this area the law is most concerned.

McInnes v. Onslow Fane - an attempt at a classification

10. In **McInnes v. Onslow Fane**[23] Megarry V-C put forward a classification of the

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18 [1983 2A.C.273

19 ibid at page 275

20 [1994] 1A.C. 331. This decision is of some importance to another aspect of this survey - see para. 39 below.

21 ibid at page 560

22 ibid at page 561

23 [1978] 3 All ER 211

categories of case in which a court might be entitled to intervene "in order to enforce the appropriate requirements of natural justice and fairness ...".[24] That very learned judge suggested that based on the authorities at least these discernible categories could be suggested:[23]

> "First, there are what may be called the forfeiture cases. In these, there is a decision which takes away some existing right or position, as where a member of an organisation is expelled or a licence is revoked. Second, at the other extreme there are what may be called the application cases. These are cases where the decision merely refuses to grant the applicant the right or position that he seeks, such as membership of the organisation, or a licence to do certain acts. Third, there is an intermediate category, which may be called the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted. This head includes cases where an existing licence-holder applies for a renewal of his licence, or a person already elected or appointed to some position seeks confirmation from some confirming authority."

11. While this classification obviously has a lot to commend it and would indeed cover a great many of the cases in which the courts have felt able to intervene, it was not intended to be exhaustive, as Megarry V-C himself pointed out, and if applied as some form of code could result in injustice. So that, for instance, some application cases (such as an application for a passport - see, for instance, **Regina v. Secretary of State For Foreign and Commonwealth Affairs, ex p. Everett**[25], where a passport was described as a "normal expectation of every citizen"[26]), may well require a hearing as an incident of the duty to treat the citizen with fairness. It is as a result of this that DeSmith suggests[27] that "the time has come to recognise that the duty of fairness cannot and should not be restricted by artificial barriers or confined by inflexible categories". The learned authors of that work go on to

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24 ibid at page 218

25 [1989] QB 811

26 ibid at page 820

27 op cit at page 404

suggest that the duty "is a general one, governed by the following propositions:"[28]

"(1) Whenever a public function is being performed there is an inference, in the absence of an express requirement to the contrary, that the function is required to be performed fairly.

(2) The inference will be more compelling in the case of any decision which may adversely affect a person's rights or interests or when a person has a legitimate expectation of being fairly treated.

(3) The requirement of a fair hearing will not apply to all situations of perceived or actual detriment. There are clearly some situations where the interest affected will be too insignificant, or too speculative, or too remote to qualify for a fair hearing. Whether this is so will depend on all the circumstances but a fair hearing ought no longer to be rejected out of hand, for example, simply because the decision-maker is acting in a "legislative" capacity.

(4) Special circumstances may create an exception which negatives the inference of a duty to act fairly. The inference can be rebutted by the needs of national security, or because of other characteristics of the particular function. For example, a decision to allocate scarce resources amongst a large number of contenders which needs to be made with despatch may be inconsistent with an obligation to hold a fair hearing.

The inference may also not be drawn if the protection is to be achieved another way. For example, in the case of a "legislative" decision, at least where participation is built into the decision-making process elsewhere, the safeguard which would be provided by a fair hearing can be achieved by other means; as in cases where the decision is taken by democratically elected representatives accountable to Parliament or to the electorate for the exercise of the relevant power.

(5) What fairness requires will vary according to the circumstances. The question of the content of the fair hearing is considered in Chapter 9 below. We shall see that some decisions, while attracting the duty to be fair, will permit no more to the affected person than a bare right to

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28 op cit at pages 405 - 7

> submit representations. In other cases however there will be a right to an oral hearing with the essential elements of a trial. In between these extremes come a large variety of decisions which, because of the nature of the issues to be determined or the seriousness of their impact upon important interests, require some kind of a hearing (which may not even involve oral representations), but not anything that has all the characteristics of a full trial.
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> (6) Whether fairness is required and what is involved in order to achieve fairness is for the decision of the courts as a matter of law. The issue is not one for the discretion of the decision-maker. The test is not whether no reasonable body would have thought it proper to dispense with a fair hearing. The **Wednesbury** reserve has no place in relation to procedural propriety."

The rule in action - some examples

12. The law reports, particularly in the last twenty years, are replete with examples of the rules in action and, for present purposes, I will confine myself to reference to two regional examples, one having to do with cricket and one with an attempt to discipline a judge.

13. **In Griffith v. Barbados Cricket Association**[29], the facts and the decision were as follows:

> "The Barbados Cricket Association was incorporated by a private Act of Parliament and given wide powers to promote and organise the game of cricket in Barbados. The Act empowered the association to make regulations relating to the game, provided that they were not repugnant to the laws of Barbados. Section 6 of the Act provided that disputes between members of the association should be decided in accordance with rules made by the association and that decisions so reached would be binding and conclusive on all parties, without appeal. Rule 22 of the general rules made by the association under the Act made its board of management the sole authority for the interpretation of the rules and stated that the board's decision on any matter affecting the association would be final and binding (unless overruled by a subsequent decision of the board or at a general meeting of the

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29 (1989) 41 WIR 48

association).

The captains of two cricket clubs, St. Catherine and Police, on finding that a three-day match had been reduced by weather to a one-day match agreed that they should each declare his team's first innings closed after the first over of the innings. This they did, and the match was effectively decided on the second innings of each team. As a result of winning this match, one of the teams won the First Division championship that season. Objections to the manner in which the match had been played were lodged with the association; one of the complainants was E. The complaint was considered by a complaints committee which decided not to consider the complaint; but indicated that they would do so if further evidence were made available. Subsequently, E produced a tape recording and a further hearing was arranged at which both St Catherine and Police were represented. At the conclusion of the hearing, the committee referred the matter to the association's board for decision. When the board met E was present in his capacity as a member of the board, although it seems unlikely that he played any part in its deliberations. No representative from St Catherine or the Police was present. The board, having regard in part (if not wholly) to the first innings arrangement, decided that the match about which the complaint had been made had not been played in the spirit of the competition and declared that the result should be "no-decision" (thus reducing the points awarded to the winner and depriving that team of the championship). In separate proceedings brought against the association (which were consolidated) St Catherine and Police challenged the association's ruling and sought a declaration that the original decision in the match should stand. It was suggested to the court that, if the association's ruling were regarded as void, no declaration to that effect should be made in the absence of a number of persons who would be interested in the court's decision but who were not parties to the proceedings.

Held, declaring that the board's decision was void, (i) that St Catherine and Police should have been made aware that the board was minded to take action against them for agreeing to limit their first innings and should have been given an opportunity to put forward their views to the board (audi alteram partem rule); further, the presence of E, a complainant, at the meeting of the board (even if he took no part in its deliberations) offended against the rule that no-one should be a judge in his own cause.

(2) That section 6 of the private Act did not apply to disputes between members of the association and the association itself; further, the purported exclusion of an appeal from a binding decision under section 6 could not exclude the jurisdiction of the court where an allegation of a breach of natural

justice had been made.

(3) That the jurisdiction of the court was not excluded under rule 22 of the general rules as the dispute related to matters of natural justice which were inherently matters for the court to decide; further, the private Act empowering the association to make its own rules and regulations prohibited it from making any that were repugnant to the laws of Barbados and this prohibition prevented rule 22 from being construed so as to make either the board or the association the final arbiter of matters of law.

(4) That the court should not refuse (as a matter of discretion) to make a declaration in favour of St Catherine and Police on the basis that not all interested parties were before the court; many persons would be interested in the outcome of the dispute without being interested persons for the purposes of determining whether or not a declaration should be made, and no attempt had been made to show that any party not before the court would be prejudiced by not being made a party to the proceedings."

14. The case neatly demonstrates the two limbs of traditional natural justice analysis in action in a modern context, as can be seen from the following passage from Sir Denys Williams CJ's characteristically lucid judgment:

> "The rules of natural justice (i.e. that a man should know what is alleged against him, and be given a reasonable opportunity to rebut the allegations, and that no man should be a judge in his own cause) have been the basis on which the courts have over the years controlled the decisions of statutory and contractual tribunals and bodies exercising judicial or quasi-judicial functions. In recent years as administrative law has developed and the scope of the court's power of review been broadened, the rules of natural justice have tended to become part of a concept of fairness to which bodies that can by their decisions affect the lives of men and women are required to conform."[30]

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30 ibid, at page 59, per Williams CJ

15. **Rees and Others v. Crane**[31] is equally interesting:

"The respondent was the senior puisne judge of the High Court of Trinidad and Tobago. In July 1990, the Chief Justice decided that the respondent would not be listed in the roster of judges for the law term from October 1990 to December 1990.The Judicial and Legal Service Commission was so informed and adopted or agreed to the Chief Justice's decision although the respondent had not been informed. The respondent went abroad from July (i.e. at the end of the previous term) until September. When he returned, some two weeks before the new term started he noticed that he had not been listed. When he raised the matter with the Chief Justice he was advised that a letter had been sent to him in August; he discovered this letter with other unopened mail at his home. The letter advised him that the commission had considered complaints about his performance in court and doubts about his health and agreed with the Chief Justice's decision that he should cease to preside in court until further notice. On three occasions in October the commission considered the respondent's fitness to perform the functions of his office; at its first meeting it sought more detailed and specific evidence of the respondent's unfitness; when this was provided by the Chief Justice on 25th October, the commission adjourned to allow its members time to acquaint themselves with the information. Although the Chief Justice was chairman of the commission, he vacated the chair at the meetings and took no part in the discussions which led to a resolution of the commission under section 137(3) of the Constitution that it should represent to the President of the Republic that the question of removing the respondent from office should be investigated. The commission did not seek the views of the respondent before it reached its decision. In November the respondent learnt from the television that the President had appointed a tribunal to investigate him (he was formally informed a few days later) and on the following day he was handed by a police officer in a public street a formal document suspending him from office. Meanwhile the respondent had sought judicial review of the decision to suspend him. Early in December, the respondent was informed by the President that the investigation of the question of removing him from office was on the grounds of inability to perform the functions of office and/or misbehaviour. Blackman J ruled that the suspension of the respondent had been ultra vires the Chief Justice and the commission, but he refused relief as the event had been overtaken by the President's order suspending the respondent. The Court of Appeal (by a majority) accepted that the suspension had been unlawful and held that there had been a breach of the

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31 (1994) 43 WIR 444

rules of natural justice. The court failed to reach a decision on the allegation of bias made by the respondent. On further appeal,

Held, dismissing the appeal, (i) that the Chief Justice of Trinidad and Tobago had no powers under the Rules of the Supreme Court to impose a period of indefinite suspension on a judge of the High Court, nor did his inherent powers to make administrative arrangements allow him to effect any such suspension.

(2) That, before the commission represented to the President of the Republic that the question of removing a judge of the High Court from office should be investigated under section 137(3) of the Constitution, it must be satisfied that the complaint against the judge had prima facie sufficient basis in fact and was sufficiently serious to warrant such representation; in both such respects, the commission must act fairly; it had not been suggested that the material sought on 25th October could not have been given to the respondent, nor that (had it been given) unacceptable delay would have followed; a number of factors pointed towards the desirability of allowing the respondent an opportunity at that stage to be heard in answer to the allegations (the seriousness of the charges against him; the publicity given to the decision to make representation to the President; the damage done to him from the appointment of a tribunal and his suspension on the basis of infirmity or misbehaviour, which could not necessarily be dissipated by any subsequent revocation of the suspension; the particular attention which needed to be given to the fairness of the proceedings where the complaint was made initially by a person who was both a member of the commission and also a colleague of the respondent's; and the particularly vulnerable position of the respondent as a judge to the raising of such suspicions without foundation); in all the circumstances, the respondent ought to have been informed of the allegations made to the commission and given an opportunity to deal with them."

16. The Privy Council found that the allegation of bias against the Chief Justice had not been made out[32], but remitted the question of damages on the other aspect of the matter to the High Court of Trinidad and Tobago for assessment.[33]

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32 see further on this point para 26 below

33 ibid, at pages 462 - 464

17. Both these cases, and there are many others,[34] illustrate the range of circumstances and situations in which challenges to the fairness of administrative action have been brought successfully and demonstrate the essential vitality of the modern doctrine in action.

The concept of legitimate expectation[35]

18. Legitimate expectation, as a distinct and separate head of entitlement to the protection of procedural fairness, is itself a fairly modern development. It had its origin, as with so many other developments in the common law in the second half of the last century, in a dictum of Lord Denning MR's in **Schmidt v Secretary of State for Home Affairs**[36], a case in which foreign students sought review of the Home Secretary's decision not to grant an extension of their temporary permit to stay in the United Kingdom. The right to a hearing in such a case, Lord Denning thought, would depend on whether a person affected by an administrative decision "has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say".[37]

19. Such an expectation will arise where the decision making body, by action or inaction, has led a citizen to a belief that a benefit that he enjoys will continue to be enjoyed or, at any rate, will not be taken from him without his having an opportunity to make representations (in other words, to be heard) on the matter. In **Attorney-General of Hong Kong v. Ng Yuen Shin**[38], a decision of the Privy Council, Lord Fraser observed that legitimate expectations "are capable of including expectations which go beyond enforceable legal

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34 see, for instance, **Barnwell v. Attorney General and another** (1993) 49 WIR 88, another case involving an attempt to discipline a judge.

35 See generally DeSmith pages 417-42

36 [1969] 2 Ch. 149

37 ibid at page 170

38 [1983] 2 AC 629

rights, provided they have some reasonable basis".[39] This was, as Lord Fraser pointed out, entirely consistent with the view expressed by Lord Diplock in the case of **O'Reilly v. Mackman**[40], decided a few months earlier, that legitimate expectations which gave rise to no private law remedy could nevertheless provide a sufficient interest to support a public law complaint.[41]

20. In the **C.C.S.U. case**[42] Lord Fraser described a legitimate expectation as arising either from an express promise given on behalf of a public authority or from the existence of a regular practice that the citizen "can reasonably expect to continue"[43] Lord Diplock put forward a fuller definition:[44]

> "To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:
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> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
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> (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be

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39 ibid, at page 636. Lord Fraser was, however, subsequently to clarify the implication in this judgment that "reasonable" was a synonym for "legitimate": see the **C.C.S.U. case** [1985] 1 AC 374, 401, where he agreed with Lord Diplock's expressed preference for "legitimate" (ibid at page 408).

40 [1983] 2 AC 237

41 ibid at page 275. The case has a procedural significance, to which I shall return below at para. 43

42 [1985] AC 374

43 ibid at page 401

44 ibid at pages 408 - 9

> withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a "legitimate expectation" rather than a "reasonable expectation," in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a "reasonable" man, would not necessarily have such consequences. The recent decision of this House in *In re Findlay* [1985] A.C. 318 presents an example of the latter kind of expectation. "Reasonable" furthermore bears different meanings according to whether the context in which it is being used is that of private law or of public law. To eliminate confusion it is best avoided in the latter.)"

The concept in action

21. Legitimate expectations have been given effect to in many different circumstances over the last twenty years.[45] Again, a couple examples from our region should suffice. In **Marks v. Minister of Home Affairs**[46], an English consultant psychiatrist had had his work permit renewed annually by the Bermudan government for over six years between 1976 and 1982. In 1982, by which time he had built up a lucrative practice, his work permit application was granted for a further six months only and he was advised that no further renewal would be permitted. He was given no reason for the decision[47] The Court of Appeal of Bermuda held that the appellant was entitled to an order of certiorari quashing the decision of the relevant Minister. The appellant had a legitimate expectation that his work permit would be renewed by reason of the previous automatic renewals; accordingly, he should have been advised of any factors which were likely to influence the decision not to renew the permit and he should have been given an opportunity to make representations; the fact that the Minister was not required to give reasons for his decision did not affect his duty to act fairly in reaching that decision; as the factors adverse to the renewal had not been disclosed

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45 See DeSmith, pages 419 - 20

46 (1984) 35 WIR 106

47 Under the applicable legislation, none were required. There is in fact no general duty to give reasons for an administrative decision - see Ex p. Doody, supra, per Lord Mustill at page 564. But there have been exceptional cases in which it has been held that fairness required the giving of reasons - see, for example, **R. v. Civil Service Appeal Board, ex parte Cunningham** [1991] 4 All ER 310, especially per Lord Donaldson MR at pages 318 - 19.

to the appellant and he had not been given an opportunity to make representations the principle of fairness was absent from the decision which was accordingly a nullity. DaCosta JA observed as follows:[48]

> "For the purposes of natural justice the essential question is not whether the claimant has some legal right but whether legal power is being exercised over him to his disadvantage. It is not a matter of property or vested interests, but simply of the exercise of governmental power in a manner which is fair and considerate ...
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> I entertain no doubt that prima facie this is a case where the appellant would have a legitimate expectation that his work permit would be renewed and was therefore entitled to a fair opportunity for correcting or contradicting what was said against him."

22. In the Guyanese case of **Kent Garment Factory Ltd. v. Attorney-General**[49], the applicant for judicial review ultimately failed because the Court of Appeal held that the procedure adopted was misconceived and that, on the facts, to borrow a notion from another area of the law, the applicant had not come with clean hands[50]. However, the court was in no doubt that the course of dealing between the applicant and the relevant government authorities over a period of time whereby extension of its import licences (the applicant was a clothing manufacturer) had been routinely granted from time to time created a legitimate expectation that an extension would have been granted in the instant case. George C explained the concept of legitimate expectation in this way:[51]

> "It is a concept that is based on the desirability of, and indeed the necessity for, propriety and good faith on the part of a public official or authority towards a citizen, not to depart from a course of action which the latter has been led to believe or expect would be pursued or adopted and

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48 (1984) 35 WIR 106, 154

49 (1991) 46 WIR 177

50 ibid per George C at page 192

51 ibid at page 187

> which departure would adversely affect his property or liberty, without due and adequate notice and, if appropriate, being permitted an opportunity to be heard."

23. Once a legitimate expectation is found to exist, the actual requirements of fairness will vary from case to case, sometimes depending on particular statutory provisions. But in the majority of cases, at the barest minimum adequate prior notice of what is in contemplation by the authorities will be required, as well as an opportunity to be heard or consulted. In addition to notice, disclosure by the authorities of the material being relied upon may also be necessary and there may also be, in an appropriate case, a requirement that the affected citizen be permitted legal representation, as also the right to cross examine witness. In this area, the law is still being developed on a case by case basis and the overriding criterion of fairness will require to be satisfied in different ways from case to case.[52]

Bias

24. It is well established that bias can militate against the requirements of natural justice. Actual bias on the part of the decision maker, if proved, will automatically invalidate the decision[53] . Similarly, any pecuniary or proprietary interest in the outcome of the proceedings always resulted in automatic disqualification of the decisionmaker or invalidation of the decision[54] .

25. Cases of the appearance of bias have proved more difficult and the courts grappled for some considerable time with the question of what was the appropriate test in this regard: ought there to be, for instance, a probability of bias (a more subjective test) or should a possibility of bias (a more objective or "reasonable suspicion" test) suffice, in order to

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52 See generally, DeSmith, pages 431-473

53 R v. Burton, ex p. Young [1897] 2 AB 468, 471

54 Dimes v Proprietors of Grand Junction Canal (1852) 3 H.L. Cas 759,793

disqualify the decisionmaker? In the modern leading case of **R. v. Gough**[55] the House of Lords had to deal with an allegation of bias on the part of a juror in a criminal trial. The appellant and his brother had been charged with conspiracy to rob; the appellant was convicted, but his brother discharged and it was subsequently discovered that one of the jurors was the brother's neighbour. The appellant's appeal was dismissed, the House of Lords holding that the correct test (outside of cases of a direct proprietary or pecuniary interest, which it confirmed always disqualified the decisionmaker) was whether in the circumstances of the case the court considered that there appeared to be a "real danger of bias". After a comprehensive review of the authorities, Lord Goff, with whom the other judges[56] agreed, concluded that "I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias."[57]

26. **Gough** was taken to have settled this aspect - that is, the appearance of bias - of the matter and has since been applied in a number of cases.[58] **In Rees v. Crane**[59] although, as we have seen, Mr. Justice Crane succeeded on the natural justice point[60], his allegation of bias on the part of the Chief Justice and the Judicial and Legal Service Commission failed. Although there was "evidence of an acrimonious relationship between the two men"[61], the Privy Council was not satisfied that, applying the **Gough** test, "a real danger" of bias had been established.

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55 [1993] AC 646

56 Lords Ackner, Mustill, Slynn and Woolf

57 [1993] A C 646, 670

58 See, for instance, R. v. Secretary of State, ex p. Kirkstall [1996] 3 All ER 304 and A.T. & T Corp v. Saudi Cable Co. [2000] All ER (Comm) 201

59 (1994) 43 WIR 444

60 supra, at para. 15

61 per Lord Slynn at page 462

27. **Gough** was also applied in the case of **Berry v Director of Public Prosecutions.**[62] In that case the appellant appealed to the Court of Appeal against his conviction for murder. The court dismissed his appeal and he appealed to the Privy Council, which allowed his appeal and remitted the case to the Court of Appeal on the question of whether the conviction should be quashed or a retrial ordered[63]. I observe parenthetically that that is, of course, itself a decision of seminal importance on the question of disclosure and its impact on fairness in the criminal trial. When the matter came before the Court of Appeal on the reference back, two of the judges who sat on the court had been members of the court against whose decision the appellant had appealed to the Privy Council. The court (applying the appropriate criteria) ordered a retrial, following which the appellant moved the Constitutional Court for redress, alleging a contravention of his constitutional rights (section 20 (1)) by reason of the membership of the Court of Appeal on the reference back. The Constitutional Court and the Court of Appeal dismissed the motion and the appeal respectively and he appealed (again) to the Privy Council. That appeal also failed, the Board holding that there was no real danger of bias in the two judges, who had previously adjudicated on the appellant's guilt as a substantive matter, participating in the different exercise (applying established criteria) of determining whether a retrial should be ordered. Lord Goff himself delivered the reasons of the Board, in the course of which he said the following[64]:

> "The test to be applied is whether there was, in the circumstances, a real danger of bias: se R v Gough [1993] AC 646. Their lordships have no doubt that the courts below were right to conclude that there was no such danger. The fact that two members of the court were previously party to a judgment in which strong views were expressed as to the guilt of the appellant in the light of the evidence then before them does not suggest that there was any danger of bias on their part when they came to perform the balancing operation involved in deciding whether or not to order a new trial. It is not to be forgotten that, in jurisdictions in which the Court of Appeal has power

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62 (1996) 50 WIR 381

63 Berry v. R (1992) 41 WIR 244. See now Marvin Murphy v. R., Privy Council Appeal no. 34 of 2001, judgment delivered 31st January, 2002.

64 (1996) 50 WIR 381, 385-386

> to order a new trial, the court will ordinarily decide whether or not to make such an order at the conclusion of a hearing during which the appellate judges have reviewed the whole course of the trial and may well have formed a view as to the guilt of the defendant; but that does not mean that the court's capacity to exercise an independent and impartial judgment when performing the necessary balancing operation is in any way impaired. Indeed, there must be many cases in which appellate courts have ordered a new trial although not doubting that the defendant was guilty of the crime with which he was charged. The fact that the same court has just heard the appeal against conviction is regarded as advantageous for the purpose of deciding the issue of a new trial if it should arise for decision, rather than disqualifying the court from doing so. Certainly, when the Privy Council remitted the matter to the Court of Appeal in the present case there was no hint that the same judges should not deal with the issue of a new trial. As to the performance of that function by the Court of Appeal, there is not the slightest reason to believe that the judges of the Court of Appeal were not wholly impartial, as is confirmed by their judgment on the issue of a new trial, in which they can be seen to be weighing the relevant considerations with scrupulous care."

28. But bias issues continue to proliferate in the cases, to a perhaps surprising degree and certainly in particularly unusual circumstances. Hardly least so was the case of **R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2) ("the Pinochet case")**[65], the facts of which should by now be well known. The applicant, Senator Augusto Pinochet Ugarte, was the former head of state of Chile. His extradition was sought by the government of Spain so that he could be tried for various crimes against humanity allegedly committed whilst he was head of state. Two provisional warrants for his arrest were issued by a metropolitan stipendiary magistrate. The applicant successfully applied to the Divisional Court to quash those warrants, but quashing of the Second warrant was stayed to enable an appeal to the House of Lords on the question of the proper interpretation and scope of the immunity of a former head of state for, arrest and extradition proceedings in the United Kingdom in respect of acts committed whilst he was head of state. Amnesty International (AI) was granted leave to intervene in the proceedings. On 25th November, 1998 the appeal was allowed by a majority of three to two and the second warrant was

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65 [1999] 1 All ER 577

restored. Subsequently, the applicant discovered that one of the Law Lords in the majority (Lord Hoffman) was a director and chairperson of Amnesty International Charity Ltd, which had been incorporated to carry out AI's charitable purposes and petitioned the House to set aside the order of 25th November.

29. It was held that the principle that a judge was automatically disqualified from hearing a matter in his own cause was not restricted to cases in which he had a pecuniary interest in the outcome, but also applied to cases where the judge's decision would lead to the promotion of a cause in which the judge was involved together with one of the parties. That did not mean that judges could not sit on cases concerning charities in whose work they were involved, and judges would normally be concerned to recuse themselves or disclose the position to the parties only where they had an active role as trustee or director of a charity which was closely allied to and acting with a party to the litigation. In the instant case, the facts were exceptional in that AI was a party to the appeal, it had been joined in order to argue for a particular result and the Law Lord was a director or a charity closely allied to AI and sharing its objects. Accordingly, he was automatically disqualified from hearing the appeal. The petition was therefore granted and the matter referred to another committee of the House for rehearing.

30. However, Lord Browne-Wilkinson was careful to emphasise that "my decision is not that Lord Hoffman has been guilty of bias of any kind: he was disqualified as a matter of law automatically by reason of his directorship of AICL, a company controlled by a party, AI"[66]. **The Pinochet case**, then, is to be seen as an extension of the principle of disqualification for pecuniary or proprietary interest, rather than the creation of any new category of disqualification. The maxim no man should be a judge in his own cause therefore embraces three fact situations: where actual bias is proved, where the judge has an interest (in the extended **Pinochet** sense) and where the known facts suggest a real danger of bias (the **Gough** test, though, as we shall shortly see, this too has received recent

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66 ibid, at page 589

reconsideration[67]).

31. In **Locabail Ltd. v. Bayfield Properties Ltd.**[68], the Court of Appeal heard together and delivered a single judgment on five applications for permission to appeal. The applications were listed and heard together since they raised common questions concerning disqualification of judges on grounds of bias. The issues were considered to be of sufficient importance to warrant the convening of a special panel of the court presided over by Lord Bingham CJ (as he then was), sitting with Lord Woolf MR (as he then was) and Sir Richard Scott V-C (as he then was). In a joint judgment, after a comprehensive review of the authorities, their Lordships approved the following propositions:[69]

> "(1) Where it is alleged that there is a real danger or possibility of bias on the part of a judicial decision-maker, that danger will be eliminated and the possibility dispelled if it is shown that the judge was unaware of the matter relied upon as appearing to undermine his impartiality. Accordingly, in applying the real danger or possibility of bias test, it is often appropriate to inquire whether the judge knew of the matter in question. To that end, a reviewing court may receive a written statement from any judge, lay justice or juror specifying what he knew. Although the court is not necessarily bound to accept such a statement at its face value, there is no question of cross-examining or seeking disclosure from a judge. Furthermore, the reviewing court must disregard any statement by the judge concerning the impact of any knowledge on his mind or decision. Such a statement is of little value in view of the insidious nature of bias, and it is for the reviewing court to assess the risk that some illegitimate extraneous consideration may have influenced the decision.
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> (2) When members of the Bar are appointed to sit judicially, either full or part-time, they may ordinarily be expected to know of any past or continuing professional or personal association which may impair or be thought to impair their judicial impartiality. Although they will know of their own affairs, their independent self-employed status as barristers practising in chambers relieves them of any responsibility for, and usually any detailed

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67 See para 33 below

68 [2000] 1 All ER 65

69 ibid, at pages 65 - 67

knowledge of, the affairs of other members of the same chambers. In contrast, a solicitor who is a partner in a firm of solicitors is legally responsible for the professional acts of his partners and owes a duty as partner to clients of the firm even though he has never acted for them personally and knows nothing of their affairs. Nevertheless, while it is vital to safeguard the integrity of court proceedings, the rules must not be applied in a way which inhibits the increasingly valuable contribution made by solicitors to the discharge of judicial functions. In that respect, problems are more likely to arise when a solicitor is sitting in a part-time capacity, and in civil rather than criminal proceedings, but they can usually be overcome by the solicitor conducting a careful conflict search within his firm before embarking on the trial of any assigned civil case. While such a search will hopefully identify the parties for and against whom the firm has acted, and closely-associated parties, it may not identify individuals involved in such parties or more remotely-associated parties. Where such an association comes to light in the course of a trial properly embarked upon, that association must be disclosed and addressed. However, the discovery of a conflict of interest which would disqualify a solicitor from acting for one or other parties under the Law Society rules does not necessarily bar him from hearing the case as a deputy judge or require the aborting of a hearing already started or the setting aside of a judgment given in the case.

(3) A judge must recuse himself from a case before any objection is made if the circumstances give rise to automatic disqualification or he feels personally embarrassed in hearing the case. If, in any other case, the judge becomes aware of any matter which can arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. Where objection is then made, it will be as wrong for the judge to yield to a tenuous or frivolous objection as it will be to ignore an objection of substance. However, if there is real ground for doubt, that doubt must be resolved in favour of recusal.

(4) In considering whether there is a real danger of bias on the part of a judge, everything depends on the facts, which may include the nature of the issue to be decided. However, a judge's religion, ethnic or national origin, gender, age, class, means or sexual orientation cannot form a sound basis of an objection. Nor, ordinarily, can an objection be soundly based on the judge's social, educational, service or employment background or that of his family; his previous political associations; his membership of social, sporting or charitable bodies; his Masonic associations; his previous judicial decisions; his extra-curricular utterances; his previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or his membership of the same Inn, circuit, local Law Society or chambers.

(5) In contrast, a real danger of bias may well be thought to arise if there is personal friendship or animosity between the judge and any member of the public involved in the case, if the judge is closely acquainted with any member of the public involved in the case, particularly if that person's credibility may be significant in the outcome of the case; if, in a case where the judge has to determine an individual's credibility, he has rejected that person's evidence in a previous case in terms so outspoken that they throw doubt on his ability to approach that person's evidence with an open mind on a later occasion; if the judge has expressed views, particularly in the course of the hearing, on any question at issue in such extreme and unbalanced terms that they cast doubt on his ability to try the issue with an objective judicial mind; or if, for any other reason, there is real ground for doubting the judge's ability to ignore extraneous considerations, prejudices and predilections, and his ability to bring an objective judgment to bear on the issues. However, no sustainable objection can arise merely because, in the same case or a previous case, the judge has commented adversely on a party or witness, or found their evidence to be unreliable. Furthermore, other things being equal, the objection will become progressively weaker with the passage of time between the event which allegedly gives rise to a danger of bias and the case in which the objection is made.

(6) Where, following appropriate disclosure by the judge, a party raises no objection to the judge hearing or continuing to hear a case, the party cannot subsequently complain that the matter disclosed gives rise to a real danger of bias. The level of disclosure appropriate depends in large measure on the stage that the matter has reached. Thus if, before a hearing has begun, the judge is alerted to some matter which, depending on the full facts, may throw doubt on his fitness to sit, he should inquire into the full facts, so far as they are ascertainable, in order to make disclosure in light of those facts. In contrast, where a judge has embarked on a hearing in ignorance of a matter which emerges during the hearing, it is sufficient for the judge to disclose what he then knows. If he does make further inquiry and learns additional facts, he must also disclose those facts. However, it is generally undesirable to abort hearings unless that is required by the reality or the appearance of justice.

32. Against the background of these principles, the court went on to consider each of the five applications and refused permission to appeal in all but one of them. In **Timmins v Gormley**, the matter in which permission to appeal was given, the recorder who had awarded a claimant a substantial amount of damages in a personal injury case was accused of bias. He was a member of the Association of Personal Injury Lawyers, a consultant editor of

Kemp & Kemp and a prolific writer of articles on personal injury matters. In addition, he acted in his practice primarily, though not exclusively, on behalf of claimants seeking damages for personal injuries and his academic writings did "make it clear that the recorder is very sympathetic to the position of claimants who are pursuing claims for personal injuries."[70] Though there was absolutely no suggestion of actual bias on the part of the recorder, nor any imputation made as to his good faith, the Court felt with some diffidence that the application for permission to appeal ought to be granted:

> "We have, however, to ask, taking a broad commonsense approach, whether a person holding the pronounced pro-claimant, anti-insurer views expressed by the recorder in the articles might not unconsciously have leant in favour of the claimant and against the defendant in resolving the factual issues between them. Not without misgiving, we conclude that there was on the facts here a real danger of such a result. We do not think a lay observer with knowledge of the facts could have excluded that possibility, and nor can we."[71]

33. Most recently, in **Porter v. Magill**[72], the House of Lords revisited one aspect of **Gough**. **Porter v. Magill** is a remarkable case in which the leader and deputy leader of a local authority were found guilty of wilful misconduct in gerrymandering or manipulating constituency boundaries for party political advantage. As a result the local authority suffered loss and the leader and deputy leader were found liable to compensate the local authority to the tune of £31.67 million. The judgments in the House of Lords, which together run to 164 numbered paragraphs or 58 pages are a fascinating study of what Lord Scott described in unminced words as "a case about political corruption."[73]

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70 ibid, at page 90. See also **Re Bank of Credit and Commerce International SA (in liquidation) and it former employees** (2001) 151 NLJ 1852

71 ibid at page 92

72 [2002] 1 All ER 465

73 ibid at page 515

34. For present purposes, the aspect of the case that is of direct consequence is to be found in the judgment of Lord Hope, who suggested a "modest adjustment" to the **Gough** test of bias (which had been alleged against the auditor in the instant case), so as to emphasise, if emphasis were needed, the objective nature of the test:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"[74]

35. All of their Lordships appear to have accepted Lord Hope's "modest adjustment", which is probably unlikely to make a difference in practice, but has the advantage of placing greater emphasis on the public perception of the alleged irregularity than on the court's view of the facts. It also has the added advantage of harmonising the test of apparent bias in the United Kingdom with that applied in the rest of the Commonwealth and in the European Court.[75]

36. **Taylor v Lawrence**[76] is an even later case on this issue of apparent bias and Lord Woolf CJ observed that while "before the Pinochet litigation an allegation of bias in the court was a rare event, such complaints are now becoming increasingly prevalent."[77] The facts were that at the trial of a boundary dispute, the judge informed the parties that he had been a client of the claimants' solicitors but that it had been many years since he had instructed them. Nobody objected to his continuing to hear the trial. After judgment was given for the claimants, the defendants appealed on the ground, inter alia, that there was an appearance of bias because of the judge's relationship with the claimants' solicitors. Before the hearing of the appeal, it was disclosed to the defendants that the judge and his wife had

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74 ibid at page 507, per Lord Hope.

75 ibid, see especially per Lord Hope at pages 206-7

76 [2002] 2 All ER 353

77 ibid at page 369

used the services of the solicitors to amend their wills the night before he had delivered judgment. The appeal was dismissed in January 2001. Subsequently, the defendants learned that the judge had not paid for the services of the solicitors. The defendants applied to reopen the appeal on the basis that the judge had received a financial benefit from the solicitors which he had failed to disclose, and that the earlier appeal had been dismissed in ignorance of the fact.

37. The Court of Appeal held that for the purpose of applying the test for apparent bias, namely whether in the all the circumstances a fair-minded and informed observer would be led to conclude that there was a real possibility that the tribunal was biased, the informed observer could be expected to be aware of the legal traditions and culture of the English jurisdiction, and accordingly he would be aware that in the ordinary way contacts between the judiciary and the legal profession should not be regarded as giving rise to a possibility of bias. On the contrary, they promoted an atmosphere that was totally inimical to the existence of bias, and what was true of social relationships was equally true of normal professional relationships between a judge and the lawyers he might instruct in a private capacity. Judges should be circumspect about declaring the existence of a relationship where there was no real possibility of it being regarded by a fair-minded and informed observer as raising a possibility of bias. If such a relationship was disclosed, it necessarily raised an implication that it could affect the judgment and approach of the judge. If that was not the position, no purpose was served by mentioning the relationship. On the other hand, if the situation was one where a fair-minded and informed person might regard the judge as biased, it was important that disclosure should be made. If the position was borderline, disclosure should be made so that the judge could consider, having heard the parties submissions, whether or not he should withdraw. If disclosure was made, it should be full disclosure. The instant case demonstrated the danger of making partial disclosure, but no case of apparent bias had been made out. It was unthinkable that an informed observer would regard it as conceivable that a judge would be influenced to favour a party with whom he had no relationship merely because that party happened to be represented by solicitors who were

acting for the judge in a purely personal matter in connection with a will.

38. The increase in applications on the ground of apparent bias places a special burden on judges to disqualify themselves if there are reasonable grounds on the part of a litigant for apprehending that the judge would not be imparted. It is equally important, however, that judges should discharge their duty to sit on cases by not acceding too readily to frivolous or tenuous objections.

Crime, punishment and procedural fairness

39. As recently as 1996, the Privy Council had held, on an appeal from The Bahamas,[78] that a person sentenced to death had no right to see nor to make representations on the judge's report and other material placed by the appropriate Minister before the Advisory Committee on the prerogative of mercy before they tender their advice. Lord Goff expressed the view that the exercise of his discretion to commute a sentence of death by the Minister is a decision "taken as an act of mercy, or as it used to be said, as an act of grace"[79] Lord Diplock in an earlier case had put it more memorably: "Mercy is not the subject of legal rights. It begins where legal rights end"[80].

40. **In Lewis and others v. Attorney General**[81], an appeal from Jamaica, this position was reversed and the two earlier cases overruled by the Privy Council. The majority, in a judgment read by Lord Slynn, held that while the merits of the Governor-General's decision on a petition for mercy were not open to review by the courts, the procedures followed in processing the petition were open to review by the courts and a person convicted of murder had the right to know what information had been provided to the Privy Council of Jamaica

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78 **Reckley v Minister of Public Safety and Immigration and others** (1995) 47 WIR 9, applying the earlier decision of **de Freitas v. Benny** (1975) 27 WIR 318 (an appeal from Trinidad & Tobago).

79 (1995) 47 WIR 9, 19

80 (1975) 27 WIR 318, 322

81 (2000) 57 WIR 275

and to make representations before that body considered his case. It is important "that the prerogative of mercy should be exercised by procedures which are fair and proper, and to that end are subject to judicial review." [82]

41. Lord Slynn was careful to indicate that while representations to the Jamaican Privy Council should normally be in writing, "their lordships are not satisfied that there was any need for, or right to, an oral hearing in any of the present cases." [83](emphasis mine). He did, however, leave it open to the Privy Council to adopt such a practice if it wished.

42. While there is a temptation, not so obvious, though readily embraced in some quarters, to group the Lewis' decision with **Pratt & Morgan v R.**,[84] it in fact fits more readily, as the authorities cited by Lord Slynn demonstrate, into the line of authority to which **Ridge v. Baldwin** gave birth and in which the C.C.S.U. case was an important watershed. **Lewis** is accordingly not so much a "death penalty" case as it is a case about the duty to demonstrate fairness in process, enhanced, albeit, by the finality of the consequences of failing to do so.[85]

A procedural point

43. In **O'Reilly v Mackman**[86], the House of Lords decided that it was contrary to public policy and an abuse of the process of the court to permit a person who had a public law remedy by way of an application for judicial review of a decision in breach of the rules of natural justice to seek redress by ordinary action. Proceedings begun by writ and originating summons in the Queen's Bench and Chancery Divisions respectively seeking declarations

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82 ibid, at page 296, per Lord Slynn. Lord Hoffman, the only member of the Board who had participated in Reckley, dissented.

83 ibid at page 297

84 (1993) 43 WIR 340

85 See the "compelling reasons" set out by Lord Slynn at (2000) 57 WIR 275, 292.

86 [1983] 2 AC 239

as to breaches of natural justice were accordingly struck out.

44. The decision turned on the fact that since 1977 new rules relating to judicial review (R.S.C. Order 53) had come into force and whether in those circumstances it was an abuse of the process of the court to apply for such declarations otherwise than by means of the then new judicial review procedure[87]. In Jamaica, the Judicature (Civil Procedure Code) (Amendment) (Judicial Review) Rules 1998 achieved significant reforms in the procedure for the application for judicial review and it is certainly strongly arguable that **O'Reilly v Mackman** would apply in these circumstances.

Conclusion

45. In **Ridge v. Baldwin**[88] Lord Reid had commented that "we do not have a developed system of administrative law - perhaps because until fairly recently we did not need it",[89] a situation that Lord Diplock subsequently described as a "reproach to English law..."[90] That that cannot now be said is the result of several decades of unprecedented judicial activism, a development that Lord Diplock once characterised as "the greatest achievement of the English courts in my judicial lifetime."[91] As the recent developments in the law of bias and **Lewis** amply demonstrate, the capacity for growth and change in this extraordinarily

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87 ibid at pages 274-75, per Lord Diplock

88 [1964] AC 40

89 ibid at page 72

90 **O'Reilly v. Mackman** [1983] 2 AC 237, 279

91 **Regina v. Inland Revenue Commissions, Ex parte National Federation of Self-Employed and Small Businesses Ltd.** [1981] 2 WLR 722, 737. See also per Lord Denning MR in **O'Reilly v Mackman** [1983] 2 AC 237, 259 - 60.

important area of the law continues to be tested. If recent history is anything to go by, the law will be equal to the challenge. This is, after all, a matter of high constitutional principle.[92]

June 14, 2002

C. DENNIS MORRISON

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92 See per Lord Denning MR in **Regina v. Greater London Council, Ex parte Blackburn** [1976] 1 WLR 550, 559:

> "I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate."

In the **Inland Revenue Commission case**, Lord Diplock agreed "in substance" with this formulation, though describing it as being "in language more eloquent than it would be my normal style to use" (at page 641).