

W201 The Individual and the State

Study notes on procedural impropriety in judicial review

1 Breach of statutory rules

Where there is a breach of statutory rules the statute typically does not state the consequence of any breach so the court has to decide if it is serious enough to cause the decision to be quashed. An example is **Bradbury v Enfield** 1967 CA (failure to give statutory notice of school reorganisation resulted in an injunction being granted).

Traditionally the courts have asked whether the procedure breached was:

- a) mandatory - giving the court a discretion whether or not to quash the decision.
- b) directory only - meaning the decision is normally valid.

More recently courts have stressed that categorising rules as mandatory or directory is merely one way of “considering objectively what intention should be imputed to Parliament” Lord Steyn in **R v Soneji** 2006 Lords. In that case Lord Steyn advocated “a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity.”

2 The requirement of fairness

The history

Courts used to apply the requirement of fairness only to bodies with a **judicial** function. After **Ridge v Baldwin** 1964 Lords (The dismissal of the Chief Constable of Brighton without informing him of the grounds or allowing him to attend the hearing. Held - dismissal unlawful.) the requirement of fairness was applied in any situation where the ‘**rights of individuals**’ were in issue. The requirement today covers bias, fair hearing, legitimate expectation and giving reasons.

Bias

- a) Bias leading to automatic disqualification

Financial bias

A pecuniary interest has long been treated differently from other bias. Whether or not there is actual bias the appearance of bias is sufficient to disqualify. **Dimes v Grand Union Canal Co Ltd** 1852 Lords (Lord Chancellor held shares in a canal company involved in litigation before him. Held - the decision had to be set aside.)

Judge a party to the cause

R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet 1999 Lords (Lord Hoffman did not declare he was a Director of Amnesty International Charitable Trust. Amnesty International had been granted leave to intervene and submit evidence. Held - decision had to be set aside.) Lord Browne Wilkinson said “once it was shown that the judge was himself a party to the cause ... he was disqualified without any investigation into whether there was a likelihood or suspicion of bias”.

b) Discretionary disqualification for bias

The test here is set out in **In re Medicaments** 2001 C A (approved in **Porter v Magill** 2002 Lords) would the “fair minded and informed observer ... conclude there was a real possibility...that the tribunal was biased”. This replaces the test - is there a ‘real danger’ of bias? - laid down in **R v Gough** 1993 Lords. The new test approved in **Porter v Magill** is now an **objective** one and has been adopted to bring English law into line with the jurisprudence of the ECHR, Scotland and Commonwealth jurisdictions. It means that it is the public perception of an irregular incident that matters – not the subjective view of the court.

The only exception to the rules on bias is the situation where statute requires eg a minister (and no one else) to make a decision. Whether biased or not up till now the decision would have been upheld on the ground of necessity. In future such a decision would attract a challenge under Article 6 of the ECHR (right to a fair trial) and the outcome would be less certain.

The fair hearing rule

A person affected by a decision **may** be entitled to the following benefits of this rule.

- a) the right to present a case
- b) the opportunity to rebut the opposing case.

These rights in turn may lead on to further rights:

- notice of hearing
- right to be told of adverse evidence
- the right to respond
- the right to an oral hearing
- the right to legal representation
- the right to question witnesses

In any given case the court will decide which rights are appropriate to achieve fairness. The rights will be available on a sliding scale. Judicial - quasi judicial - administrative.

If the decision being made is judicial in nature then all or most of the rights might apply. As the decision becomes more administrative then fewer and fewer rights may apply.

In **Lloyd v McMahon** 1987 Lords (District auditor investigating local council denied councillors an oral hearing. Held - giving them written notification and considering written representations was sufficient.)

Lord Bridge spelt out the factors to consider:

- (1) the character of the decision making body
- (2) the kind of decision it has to make
- (3) the statutory or other framework in which it operates.

Examples

The right to see evidence and question witnesses. There are conflicting cases here:

Cross-examination required

R v Board of Visitors of Hull Prison ex parte St Germain No 2 1979 C A (Prisoners in riot were charged with breaches of prison rules. Hearsay evidence was admitted instead of some prison officers attending the hearing. Held - hearsay evidence may be admissible sometimes but not here where the charges were serious and the prisoners wished to dispute it.)

Cross-examination not required

R v Commission for Racial Equality ex parte Cottrell and Rother 1986 (C and R were estate agents accused of unlawful discrimination. No witnesses were available at the hearing and a notice was issued against them. They relied on the St Germain case in a judicial review challenge. Held - there was no statutory duty to provide a hearing for cross-examination of witnesses and St Germain could be distinguished on its facts.)

Disclosure of evidence and cross-examination required

R v Army Board of the Defence Council ex parte Anderson 1991 Div Ct (Applicant had made allegations of racial discrimination. He requested an oral hearing and disclosure of documents. The Board however considered this by circulating papers without meeting. Held - (applying **Lloyd v McMahon**) the Board had to meet in this case and should have disclosed the documents.)

Legitimate expectation

The first question is always - has the **Ridge v Baldwin** test been met? ie does the decision affect the 'rights of individuals'. If yes then the requirement of fairness applies. If it applies its content can be affected not only by the **Lloyd v McMahon** test but also by any expectation caused by assurances or the existence of a policy or guidance.

1 Assurances

R v Liverpool Corporation ex parte Liverpool Taxi Fleet Operators Ass 1972 Div Ct (Corporation gave undertakings to taxi drivers not to revoke their licences without prior consultation. The corporation then ignored this. Held - there was a duty to comply and provide consultation.)

2 The existence of policies/guidance

This area has been considered under illegality in the **Coughlan** case 2000 and the **Khan** case 1984 where we saw a circular can give rise to both substantive and procedural legitimate expectation. A citizen may be entitled to be consulted before a policy change.

In the **GCHQ** case 1985 had national security not arisen employees would have been entitled to expect their trade union rights would not be removed without consultation.

The duty to give reasons

At common law there was no duty on decision makers to provide reasons although it was held to be desirable by Lord Denning who made his view clear in **Breen v AEU** 1971 where he said:

“giving reasons is one of the fundamentals of good administration”.

The Tribunals and Enquiries Act 1992 requires statutory bodies to give reasons.

Courts have also used the requirement of fairness to shift the balance so that reasons will often now be required.

Examples are:

R v Civil Service App Board ex parte Cunningham 1991 C A (Board determined C's compensation for unfair dismissal at a low figure and gave no reasons. Held - by analogy with statutory tribunals the Board should also give reasons.)

R v Secretary of State for the Home Department ex parte Doody 1993 Lords (The Home Secretary was required to give reasons when setting a mandatory life sentence tariff so that the prisoner could make representations and apply if need be for judicial review. The test is 'is the refusal to give reasons fair?')

The Home Secretary had to give reasons to Mr Al Fayed for refusing a naturalisation application. **R v Secretary of State for the Home Dep't ex parte Fayed** 1997 C A.

There was no requirement to give reasons in **R v Universities Funding Council ex parte Institute of Dental Surgery** 1994 Div Ct (Council did not have to give reasons for

downgrading a research grading as it was a matter of academic judgment!)

There is an additional incentive for the giving of reasons. The Lords have suggested that a decision maker who gives no reasons can not complain if a court 'draws the inference that he has no rational reason for his decision'. **R v Trade Secretary ex parte Lonrho plc** 1989. This means the court will consider a challenge on the grounds of irrationality.